

AGREEMENT

between

THE YORKHILL NATIONAL HEALTH SERVICE TRUST

and

DATA GENERAL LIMITED

1996

CLO Ref: GT2/17 LT/GN



SCOTTISH HEALTH SERVICE
CENTRAL LEGAL OFFICE
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AGREEMENT

between

THE YORKHILL NATIONAL
HEALTH SERVICE TRUST
constituted pursuant to the National Health
Service and Community Care Act 1990
and having its headquarters at Royal
Hospital for Sick Children, Yorkhill,
Glasgow G3 8SJ
("the Trust")

and

DATA GENERAL LIMITED []
("the Contractor")

WHEREAS

The parties have agreed and do hereby agree as follows:-

1. DEFINITIONS

In this Agreement the following expressions shall have the following meanings:-

"Acceptance Certificate" means the certificate be issued by the Trust to the Contractor following successful completion of an Acceptance Test in respect of the Services;

"Acceptance Criteria" means the criteria for acceptance specified for each Service specified in Part F of the Schedule;

"Acceptance Date" means the last day of the Acceptance Test Period;

"Acceptance Test Period" means the periods in Part F of the Schedule of which the Acceptance Tests should be performed as specified within the Schedule for each Service;

"Acceptance Tests" means the inspections, functionality and output tests as specified within Part F of the Schedule for the Services which shall be designed by agreement of both parties to ascertain that the relevant Service meet the Services Specification;

"Achieve Acceptance" means to have successfully completed the Acceptance Test Procedures by no later than the relevant Service Item Acceptance Date;

"Agreement" means this Agreement and the Schedule hereto including all specifications, plans, drawings and other documents which are relative to and expressly incorporated herein and such variations in writing as shall subsequently be agreed between the Trust and the Contractor;

"Authorised Officer" shall mean the person or persons for the time being or from time to time duly appointed by the Trust and notified in writing to the Contractor to act as the Trust representative for the purpose of the Agreement or, in default of such notification, the Trust;

"Change Control Procedure" means the method provided in Part H of the Schedule for variation to the Agreement;

"Charges" means the charges detailed in the Part G of the Schedule to be levied by the Contractor for the provision of the Services;

"Clause" means a clause of the Agreement;

"Commencement Date" means the date of last execution of the Agreement by both parties hereto;

"Confidential Information" means (i) all information designated as such by either party in writing; (ii) all information relating to the identity, condition or medical history of a Patient of the Trust; and (iii) all information which relates to the business, affairs, prospects, proposals, financial position, trade secrets, know-how, personnel, customers and suppliers of either party except any such information which is made available from one party to the other without restriction;

"Contractor" means Data General Limited;

"Contractor's Response" means the Contractor's response to the Trust's Operational Requirements;

"Contractor's Software" shall mean all Software in which the Intellectual Property Rights are owned by the Contractor and used by the Contractor in the provision of the Services in which the Intellectual Property Rights are owned by the Contractor;

"Data" means all Data and information including Input and Output and computer records stored on the system in machine readable form and information arising from or in connection with the provision of the Services;

"Default" shall have the meaning ascribed to it in Clause 18.1;

"Delivery Stream Payments" means that proportion of the Charges defined as Delivery Stream Payments in Schedule G;

"Employees" means employees of the Contractor engaged in the provision of the Services (whether at an operational or managerial level) from time to time;

"Equipment" means all equipment (excluding Software but including firmware) and other items used by the Contractor in providing the Services as specified in Part B of the Schedule;

First Date of Acceptance” means the date of successful completion of the first Acceptance Tests undertaken by the parties pursuant to the Agreement

“GPD Deflator” means the Gross Domestic Product Deflator Index published by the Office for National Statistics;

“Handover” means the cessation of the provision of the Services by the Contractor and the commencement of the provision of services equivalent to the Services by a New Contractor;

“Implementation Plan A” means the high level plan agreed between the Trust and the Contractor for implementation of the Services as contained in Appendix 4 of the Schedule;

“Input” means the data (in eye readable or machine readable form) from time to time submitted to the Contractor by the Trust for inputting on the System;

“Intellectual Property Rights” means United Kingdom and foreign patents, registered and unregistered design rights, applications for any of the foregoing and trade or business names, copyright and other similar rights;

“Interest” means interest at the rate of two per centum (2%) above the base lending rate of Barclays Bank plc

“Key Personnel” means those personnel of the Contractor identified in the management organisation chart for the Contractor contained in Part L of the Schedule or specific personnel of the Contractor agreed between the Contractor and the Trust as being Key Personnel;

“New Contractor” means any person or entity who is awarded a Agreement to provide services equivalent to the Services in place of the Contractor (including the Trust or other National Health Service Entity in the case of the provision of such services being provided in-house);

“NHSiS” means National Health Service in Scotland;

"NHSiS Property" means all tangible property of the Trust which may be used by the Contractor in accordance with the provisions of this Agreement;

"Normal Business Hours" means Monday to Thursday between the hours of 9.00am and 5.00pm and Friday between the hours of 9.00am and 3.00pm;

"Operational Requirement" means the Trust's Operational Requirement issued to the Contractor on Thirteenth December Nineteen hundred and ninetyfive;

"Output" means the computer output on whatever medium resulting from processing the Data on the System;

"Parent Company" means any company which is the ultimate Holding Company of the Contractor or any other company of which the ultimate Holding Company of the Contractor is also the ultimate Holding Company and which is either responsible directly or indirectly for the business activities of the Contractor or which is engaged in the same or similar business to the Contractor. The term "Holding Company" shall have the meaning ascribed by Section 736 of the Companies Act 1985 or any statutory re-enactment or amendment thereto;

"Payment Profile" means the profile of payment by the Trust to the Contractor contained in Part G of the Schedule;

"Performance Stream Payments" means that proportion of the Charges defined as Performance Steam Payments in Schedule G;

"Schedule" means the Schedule annexed and subscribed as relative hereto;

"Scottish Mandatory Requirements" means any existing mandatory data requirements or any other mandatory data requirements which may from time to time be issued by the Information and Statistics Division of the Common Services Agency as applicable to the National Health Service in Scotland (for example COPPISH);

"Security Requirements" means the security requirements for the System detailed in the Specification;

"Services" means the Services to be provided by the Contractor detailed in Parts B, K and L of the Schedule;

"Service Levels" means the service levels set out in Parts G and K of the Schedule;

"Specification" means the Trust's Operational Requirement, the Contractor's Response and any clarifications thereto all as contained in Part A of the Schedule;

"Site" means the Sites at which the Services shall be performed as specified in Part D of the Schedule;;

"Software" means all software (including Contractor's Software and Third Party Software), operating systems, data base management system, compilers, utilities and other programmes and associated documentation, but excluding source programmes, used by the Contractor in providing the Services;

"Source Code" means software in eye-readable form and in such form that it can be automatically compiled or interpreted without manual intervention into equivalent object code together with all technical information and documentation necessary for the use, reproduction, modification and enhancement of such software;

"Sub-Agreement" shall mean any Agreement or agreement or proposed Agreement or agreement between the Contractor and any third party whereby that third party agrees to provide to the Contractor the Services or any part thereof or facilities or services necessary for the provision of the Services or any part thereof or necessary for the management, direction or control of the Services or any part thereof. For the avoidance of doubt the term "Sub-Agreement" shall not be regarded as including any Agreement or agreement between the Contractor and any third party for the provision of equipment,

facilities or services necessary for the general discharge of the Contractor's business;

"Sub-Contractor" means any third party listed in Part C of the Schedule;

"System" means the Equipment and Software operating together used by the Contractor in provision of the Services;

"Tender" means the tender submitted by the Contractor contained in Part T of the Schedule;

"Termination Payment" means a payment calculated in accordance with the provisions of Section G7 of Part G of the Schedule payable by either party to the other at termination of the Agreement;

"Third Party" means any person, firm, company or entity other than the Contractor;

"Third Party Software" means all Software used by the Contractor in provision of the Services in which Intellectual Property Rights are owned by a Third Party;

"Transfer Payment" shall have the meaning ascribed to it in Section G4 of Part G of the Schedule

"Trust" means Yorkhill National Health Service Trust, its permitted assignees and its statutory successors whomsoever;

"Trust Data" means all Data provided by or on behalf of the Trust to the Contractor;

"Trust Property" means any moveable property owned by the Trust and used by the Contractor in the provision of the Services;

"Trust Responsibilities" means the responsibilities of the Trust detailed in Part D of the Schedule;

"TUPE" means the Transfer of Undertakings (Protection of Employment) Regulations 1982 (as amended);

"UK" means the United Kingdom;

“Undertaking” means the undertaking incorporating the provision of the Services;
 “Use” means the right of the Trust to load, execute, store, transmit, display, develop, copy (for the purposes of loading, execution, storage, transmission or display) or otherwise to utilise the Software and the Source Code for purposes of providing the Services;

“VAT” means Value Added Tax.

2. INTERPRETATION

2.1 In the Agreement, unless there is something in the subjects or context inconsistent therewith:-

- (a) words importing the masculine include the feminine and words importing the neuter include the masculine and feminine;
- (b) words importing the singular include the plural and vice versa;
- (c) Any reference to an Act of Parliament includes any modification, extension or re-enactment thereof for the time being in force.

2.2 Headings are included in this Agreement for ease of reference only and shall not affect the interpretation or construction of this Agreement.

2.3 References to Clauses, the Schedule and Annexes are, unless otherwise provided, references to clauses, schedules and annexes to this Agreement.

2.4 In the event and to the extent only of any conflict between the Clauses and the Schedule, the Clauses shall prevail.

3. POWER TO AGREE

3.1 The Contractor warrants and represents to the Trust that it has requisite power to enter into and perform this Agreement and that all requisite consents and approvals therefor have been obtained and there are no

statutory provisions as at the date of the Agreement which would conflict with the terms herein-contained.

- 3.2 The Contractor hereby warrants that it has full capacity to grant the rights and licences in favour of the Trust herein-contained.
- 3.3 The Contractor hereby warrants and represents that it currently has or shall, prior to the commencement of the Acceptance Period for each Service, obtain all and any agreements (including licences) as may be required with Third Parties, both for its own and for the benefit of the Trust to perform the obligations incumbent upon it as herein-contained and in particular to permit and enable the System to link into any system supplied by any Third Party to enable the System to comply with the Specification.
- 3.4 The Contractor shall use all reasonable endeavours to procure for the benefit of the Trust, implementation and enforcement of any rights available to the Trust in respect of agreements (whether formally constituted or not) in existing network and services as may be necessary to ensure that the Contractor is able to implement the obligations incumbent upon it pursuant to this Agreement provided that nothing herein contained shall confer any obligation upon the Contractor in regard to payment due under any agreement with such third parties or require the Contractor to enforce any rights available to the Trust thereunder. For the avoidance of doubt nothing contained in this Clause 3.4 shall release the Trust from its obligations detailed in the Trust Responsibilities for concluding such agreements with Third Parties as may be required to permit the Contractor to perform this Agreement.
- 3.5 The Trust undertakes and represents that:-

- (a) it has full authority and capacity and shall, prior to Commencement Date, obtain all necessary licences, permits and consents (including but not limited to, where its circumstances and procedures so require, the consents of the Management Executive of the National Health Service in Scotland and Treasury) to enter into and perform this Agreement; and
- (b) the Agreement is executed by duly authorised representatives of the Trust.

4. TERM

- 4.1 This Agreement shall come into effect upon the Commencement Date and unless otherwise terminated in accordance with the provisions of this Agreement or otherwise at law shall expire nine (9) years after the First Date of Acceptance pursuant to the Agreement ("the Initial Term").
- 4.2 The Agreement shall continue beyond the Initial Term unless and until the Trust shall give six months' written notice, expiring at the end of the Initial Term or any three month period thereafter ("Extension Quarter").
- 4.3 In the event that the Trust exercises the entitlement to extend the Initial Term as provided in Clause 4.2 the Charges payable by the Trust during each Extension Quarter shall be as specified in the Part G (Section 94.2) of the Schedule or as otherwise agreed between the parties.

5. THE SERVICES

- 5.1 Subject to the terms of the Agreement the Contractor shall perform all of the obligations incumbent upon it in implementation and provision of the Services to the Specification and in accordance with the Service Levels;
- 5.2 the Trust shall purchase the Services subject to the terms of the Agreement;
- 5.3 The Trust shall perform the Trust's Responsibilities.
- 5.4 For the period of the Agreement the Trust shall be entitled to make use of Software provided by the Contractor as is required for receipt of the Services.

6. IMPLEMENTATION OF SERVICES

- 6.1 Each party shall perform all of their obligations under this Agreement in accordance with the Implementation Plan A for the provision and acceptance of the Services and each part thereof.
- 6.2 The Contractor shall be entitled to use the LAN in implementation and provision of the Services;
- 6.3 Implementation Plans B shall be agreed in detail between the parties in respect of implementation of each Service prior to implementation of each Service;
- 6.4 In the event that the Contractor fails to fulfil an obligation by the date specified in the Implementation Plan A for such fulfilment the Contractor shall, at the request of the Trust and without prejudice to the Trust's other rights and remedies, arrange all such additional resources as are necessary to fulfil the said obligation as early as practicable thereafter at no additional Charge to the Trust.

6.5 Notwithstanding any of the provisions of the Implementation Plan A the Trust shall provide such reasonable resources (which shall include staff and accommodation) as the Trust and the Contractor shall agree after the Commencement Date are reasonably required to effect successful completion of the Implementation of the Services. In the event that the Implementation Plan A purports to confer an obligation upon the Trust in regard to the provision of specified numbers of Trust staff or the extent of accommodation to be made available by the Trust no such purported obligation shall be binding upon the Trust and shall be indicative only and shall be subject to the provisions of this Clause 6.5.

6.6 Both parties undertake to commence the Implementation Period for the Services at the relevant dates specified in each plan.

7. DELIVERY TO SITE

7.1 No Equipment or Software shall be delivered to the Site (or any part thereof) without the prior written permission of the Authorised Officer. The Contractor shall be obliged to give the Trust a minimum of seven calendar days written notice (or such other period as may be agreed in writing between the parties for specified Equipment or Software) of the Contractor's intention to deliver any items of Equipment or Software.

7.2 The Contractor shall be responsible for delivery of any Equipment and Software to the Site and shall provide any labour, material and plant required for the off-loading and placing in position of the Equipment and Software. The Contractor shall promptly remove at its own expense from the Premises any packaging used for Equipment or Software save for containers for consumable stores.

8. PREPARATION OF THE SITE AND THE LAN

- 8.1 Whilst attending at or within the Site, the Contractor undertakes to comply with the Trust's appropriate on-site rules and regulations (including security arrangements), details or copies of which shall be made available to the Contractor on request prior to the Contractor attending at the Premises for any reason pursuant to the Agreement.
- 8.2 The Contractor hereby confirms that it has had or shall have an opportunity to inspect the Site and has:-
- (a) satisfied itself that the Site is suitable for implementation and provision of the Services in a secure physical environment;
 - (b) advised the Trust in writing prior to the Commencement Date of any matter or aspect of the Site which is inadequate or not suitable for implementation and provision of the Services; or
 - (c) agreed with the Trust what works are reasonably required to render the Site suitable for installation or operation of the System and such works shall be as specified in Part D of the Schedule.
- 8.3 The Trust shall be obliged to prepare the Site for implementation and provision of the Services in accordance with the Trust Responsibilities provided always that the Contractor shall be obliged in good time to provide such information as may be required by the Trust relating to preparation of the Site, at no cost to the Trust, to allow the Trust to meet its obligations with regard to preparation of the Site.
- 8.4 The Contractor hereby confirms that it has had prior to the Commencement Date an opportunity to inspect the LAN and has:-
- (a) satisfied itself that the LAN is suitable for implementation and provision of the Services; and

- (b) detailed in Part D of the Schedule any work which the Trust shall be required to effect to the LAN for implementation and provision of the Services.

8.5 The Contractor shall be responsible for any cost incurred by the Trust or the Contractor in carrying out any work required to the Site or the LAN not identified by the Contractor and notified to the Trust by the Contractor in terms of Clause 8.2 or detailed in Part D of the Schedule and which is required for implementation and provision of the Services other than changes identified as required as a consequence of any changes to the Services implemented by the Change Control Procedure.

9. **ACCEPTANCE TESTS**

- 9.1 Each Service shall be subject to Acceptance Testing in accordance with the Acceptance Test Procedures.
- 9.2 Each party shall bear its own costs incurred in undertaking any Acceptance Tests.
- 9.3 The Trust shall be responsible for carrying out Acceptance Tests with the assistance as appropriate from the Contractor if, in the opinion of the Contractor, any Acceptance Tests are being unreasonably delayed as a result of the Trust's actions and through no fault of the Contractor the Contractor may, by notice in writing, require the Trust to implement the obligations incumbent upon it with regard to the Acceptance Tests in respect of the relevant Service within fourteen (14) days. If the Trust fails to comply with the requirements of said notice within the said fourteen (14) day period . Acceptance of that Service shall be deemed to have occurred for payment purposes only and the Service shall still be subjected to Acceptance Testing in accordance with this Clause 9. If that

Service shall subsequently fail its Acceptance Tests then any and all monies paid by the Trust upon deemed acceptance in terms aforesaid together with Interest thereon at the rate of two per centum (2%) above the base rate of the Governor and Company of the Bank of Scotland shall be credited by the Contractor against any amounts subsequently due by the Trust and payment in respect of that Service shall be due in accordance with Part G of the Schedule upon acceptance of the Service.

- 9.4 The Trust shall issue Acceptance Certificates in respect of Service as soon as practicable after the dates upon which Acceptance Tests are successfully completed in respect of the same and the Date of Acceptance shall be the earlier of (i) seven (7) days from the actual date of successful completion of the Acceptance Tests or (ii) the date of the Acceptance Certificate.

10. CONSEQUENCES OF FAILURE TO ACHIEVE ACCEPTANCE

- 10.1 In the event that an Acceptance Test is not successfully completed within the Acceptance Test Period in respect of any phase ("Phase" as described in the Implementation Plan) the Trust shall be entitled to the financial remedies detailed in Schedule G as a consequence of such failure and in addition the Trust shall extend the Acceptance Test Period in respect of such phase for such reasonable period as the Trust may determine during which the Contractor shall correct the fault which caused the Phase to fail to meet its Acceptance Criteria following which further Acceptance Tests shall be carried out in accordance with Clause 10. In the event that Acceptance Tests are not subsequently successfully completed during such extended Acceptance Test Period, the Trust may at its option (such options not being exclusive):-

- (a) extend the relevant Acceptance Test Period for a period or periods specified by the Trust during which the Contractor shall arrange all such additional resources as are necessary to correct the fault which caused the same to fail to meet its Acceptance Criteria following which further Acceptance Tests shall be carried out in respect of that phase subject to this Clause 10;
- (b) require the Contractor to take all such action as is necessary to ensure that the phase is capable of meeting the Acceptance Criteria for the same;
- (c) terminate the Agreement in the circumstances described in Clause 18.1 (d);

10.2 In the event that the Trust extends the Acceptance Test Period for a period pursuant to Clause 10.1 and the phase in respect of which the Acceptance Test Period is so extended fails to meet its Acceptance Criteria by the end of that period the provisions of Clause 10.1 shall apply mutatis mutandis.

11. SERVICE LEVELS AND FINANCIAL REMEDIES

- 11.1 From the Date of Acceptance in respect of Services the Contractor shall commence provision of and shall thereafter continue to provide the Services in accordance with the Service Levels.
- 11.2 If at any time after the Acceptance Date for the Services the Services are not supplied in accordance with the Service Levels, then the Contractor shall at the written request of the Trust and without prejudice to the Trust's other rights and remedies arrange all such additional resources as are necessary and take all necessary remedial action to remedy such

failure as soon as practicable thereafter (and in any event within any reasonable time-scale set by the Trust) and at no additional charge to the Trust provided always that the Trust has performed the Trust Responsibilities.

- 11.3 Without prejudice to Clause 11.2 if at any time after the Acceptance Date for the Services the Services are not supplied in accordance with the Service Levels the Trust shall be entitled to the financial remedies detailed in Part G of the Schedule ("Remedies") . Each party shall notify the other of any failure to meet the Service Levels in writing which comes to its notice provided that such notification shall not be a condition precedent to a Trust's entitlement to the Remedies. The Remedies shall (except as provided in Clauses 11.2 and 18) be an exclusive remedy.

12. TITLE AND RISK

Title to and risk in all equipment and other tangible property used by the Contractor for the performance of the Services shall remain with the Contractor.

13. CHARGES

- 13.1 In consideration of the supply to the Trust of the Services in accordance with the terms of this Agreement, the Trust shall make payment of the appropriate Charges to the Contractor in accordance with the provisions of Part G of the Schedule.
- 13.2 The Charges may only be varied by the application of the provision detailed in Part G of the Schedule.
- 13.3 The Charges are exclusive of Value Added Tax which shall be payable by the Trust at the rate and in the manner prescribed by law from time to time and applicable as at the time payment is due.

13.4 In the event that the Trust fails to make payment of any Delivery Stream Payment by the due date for payment of the same, the Contractor shall be entitled to charge Interest from the date any payments are due and payable until the date of actual payment. Any such Interest shall be subject to invoices being submitted by the Contractor in respect thereof. No Interest shall be chargeable by the Contractor in any circumstance of late payment of the Performance Stream Payment.

14. WARRANTIES UNDERTAKINGS AND REPRESENTATIONS

14.1 The Contractor warrant, undertakes and represents that:-

- (a) it has full capacity and authority and shall prior to the Commencement Date obtain all necessary licences, permits and consents (including but not limited to, where its circumstances and procedures so require, the consent of its Parent Company) to enter into and to perform this Agreement;
- (b) this Agreement is executed by duly authorised representatives of the Contractor;
- (c) it will perform all of its obligations and undertakings under the Agreement;
- (d) to the best of the Contractor's knowledge and belief the provision of the Services and the Trust's use thereof shall not infringe any Intellectual Property Rights of any third party.
- (e) the Services shall be supplied and rendered by appropriate experienced, qualified and trained personnel with all due skill, care and diligence;

- (f) the Services shall be performed in compliance with all applicable laws, enactments, orders, regulations and other similar instruments;
- (g) the Services shall conform to the Specification;
- (h) it shall discharge its obligations hereunder with all due skill, care and diligence including, but not limited to, good industry practice;
- (i) the provision of the Services shall not cause electrical interference beyond the limits laid down in the relevant standards specified in Part Q of the Schedule, provided that for the purpose of this Clause 14.1 (j) the Services shall be deemed to include the operation of any testing and monitoring instruments used in connection with the provision of the Services;
- (j) in the event of the exercise of the Trust's rights under Clause 18.6(b), the Trust shall acquire title to any equipment sold to the Trust free from all encumbrances and the Trust shall have the right to quiet possession of such equipment;
- (k) it will use all reasonable endeavours to ensure that all sub-contracts, equipment rental or lease agreements, licences of Intellectual Property Rights and all other (non-employment) contracts which are necessary to the performance of the Services are assignable to the Trust (without any transfer charge) upon the occurrence of any of the events described in Clause 18.1 or in the event of termination of this Agreement and the Contractor shall, prior to the Commencement Date, report the results of its efforts pursuant to this Clause 14.1 (k) to the Trust;

- (l) all statements and representations made to the Trust in the Contractor's Response and those letters specifically annexed and signed as relative hereto are, to the best of its knowledge, information and belief, true, accurate and not misleading and that it will advise the Trust of any fact, matter or circumstance of which it may become aware which would render any such statement or representation to be false or misleading;
- (m) it is expressly hereby agreed that the Trust is relying upon the expertise, specialised knowledge, skill and judgement of the Contractor in the performance of this Agreement and on any advice which the Contractor may at any time during the Period of the Agreement offer to the Trust in writing in connection with the subject matter of this Agreement;
- (n) the provision of the Services by the Contractor shall not cause any interruption nor interference with services to the Trust which are outside the scope of this Agreement except as identified to and agreed with the Trust which agreement shall not be unreasonably withheld or delayed;
- (o) the Services shall at all times comply with the Scottish Mandatory Requirements provided the Contractor is given reasonable notification of changes to the same.

14.2 Notwithstanding any rule of law to the contrary and without prejudice to any other rights which the Trust has or may have, the Trust shall be entitled (without being required to resile from or rescind this Agreement) to claim damages from the Contractor in respect of any breach of the undertakings and representations specified in Clause 14.1 and the

Contractor shall indemnify the Trust against any loss, claims, charges, demands, liabilities and reasonable costs and expenses incurred by the Trust which arise out of or in connection with breach of any of the undertakings or representations specified in Clause 14.1 provided that such indemnity shall be subject to the limits contained in Clause 19.

- 14.3 Except as expressly stated in this Agreement, all undertakings and conditions, whether expressed or implied by statute, common law or otherwise (including but not limited to fitness for purpose) are hereby excluded to the extent permitted by law.

15. INTELLECTUAL PROPERTY RIGHTS INDEMNITY

- 15.1 Subject always to the Trust's proper observance of its obligations under this Clause 15, the Contractor shall indemnify the Trust against all claims, demands, actions, costs, expenses (including but not limited to reasonable legal costs and disbursements on a solicitor and client basis), losses and damages arising from or incurred by reason of any infringement or alleged infringement (including but not limited to the defence of such alleged infringement in the United Kingdom) of any Intellectual Property Rights in any item (Hardware or Software) supplied or owned by the Contractor in the provision of the Services.
- 15.2 The Contractor shall forthwith notify the Trust if any claim or demand is made or action brought against the Contractor for infringement or alleged infringement of any Intellectual Property Rights which may affect the Services.
- 15.3 The Trust shall forthwith notify the Contractor if any claim or demand is made or action brought against the Trust for infringement or alleged infringement of any Intellectual Property Rights supplied or owned by the

Contractor in the provision of the Services. The Contractor shall at its own expense conduct any litigation arising therefrom and all negotiations in connection therewith and the Trust hereby agrees to grant to the Contractor exclusive control of any such litigation and such negotiations.

- 15.4 The Trust shall at the request of the Contractor afford the Contractor all reasonable assistance for the purpose of contesting any claim or demand made or action brought against the Trust or the Contractor for infringement or alleged infringement of any Intellectual Property Rights supplied or owned by the Contractor in the provision of the Services and shall be repaid all costs and expenses incurred in providing such assistance (including but not limited to reasonable legal costs and disbursements on a solicitor and client basis). The Trust shall itself bear the expense of any legal agent it employs to act on its behalf.
- 15.5 The Trust shall not make any admissions which may be prejudicial to the defence or settlement of any claim, demand or action for infringement or alleged infringement of any Intellectual Property Rights nor settle any claim without the prior written consent of the Contractor.
- 15.6 If a claim, demand or action for infringement or alleged infringement is made of any Intellectual Property Rights supplied or owned by the Contractor in the provision of the Services or in the reasonable opinion of the Contractor is likely to be made, the Contractor may at its own expense either:-
- (a) modify any or all of the Services without reducing the performance and functionality of the same, or substitute alternative services of equivalent performance and functionality for any or all of the Services, so as to avoid the infringement or the alleged

infringement, provided that the terms herein shall apply mutatis mutandis to such modified Services or to the substitute services; or

- (b) procure a licence to use and provide the Services on terms which permit the Contractor to comply with the obligations incumbent upon it in terms of this Agreement.

15.7 The foregoing provisions of this Clause 15 shall not apply insofar as any claim or demand or action is in respect of:-

- (a) any use by or on behalf of the Trust of the Intellectual Property Rights in combination with any item not so supplied where such use of the Intellectual Property Rights directly gives rise to the claim, demand or action unless the service is provided specifically under a combined use arrangement agreed by the Contractor; or
- (b) the use by the Trust of the Services in a manner not reasonably to be inferred from the specification or requirements of the Trust; or
- (c) the Trust's unreasonable refusal to accept modified Services or substitute services pursuant to Clause 15.6 (a).
- (d) any modification, adaptation or enhancement of the subject of Intellectual Property Rights by the Trust or any third party engaged by it.

15.8 If the Contractor has availed itself of its rights to modify the Services or supply substitute services pursuant to Clause 15.6 (a) or to procure a licence under Clause 15.6 (b) and such exercise of the said rights has avoided any claim, demand or action for infringement or alleged infringement, then the Contractor shall have no further liability thereafter under this Clause 15 in respect of the said claim, demand or action.

- 15.9 If a modification or substitution in accordance with Clause 15.6 (a) above is not possible so as to avoid the infringement or the Contractor has been unable to procure a licence in accordance with Clause 15.6 (b), the Contractor shall be liable for all reasonable costs incurred in procuring and implementing replacement services or facilities together with the additional costs (if any) of such substitute services or facilities during the period of this Agreement.
- 15.10 The Trust hereby undertakes that any instructions given in relation to the Contractor's use of any third party item supplied directly or indirectly by the Trust shall not cause the Contractor to infringe any third party's Intellectual Property Rights in such item and the Trust shall indemnify the Contractor against all reasonable loss incurred by the Contractor as a direct consequence of breach of the foregoing undertaking.
- 15.11 The foregoing states the entire liability of the Contractor with regard to the infringement of any Intellectual Property Rights supplied or owned by the Contractor in the provision of the Services.

16. **CONFIDENTIALITY**

- 16.1 In further consideration of the Trust executing this Agreement with the Contractor, the Contractor hereby undertakes that:-
- (a) the Contractor (and any person employed or engaged by the Contractor in connection with the Agreement) shall only use Confidential Information for the purposes of this Agreement;
 - (b) the Contractor (and any person employed or engaged by the Contractor in connection with this Agreement) shall not disclose any Confidential Information other than as required to any Sub-

Contractors to any third party without the prior written consent of the Trust;

- (c) without prejudice to Clauses 16.1 (a) and 16.2 (b) the Contractor shall take all necessary precautions to ensure that named patient data is not passed to persons or organisations that are not covered by the provisions of the Data Protection Act and other legislation on confidentiality and security other than those to whom the Trust instructs disclosure should be made;
- (d) the Contractor shall take all necessary precautions to ensure that all Confidential Information is treated as confidential and not disclosed (save as aforesaid) or used other than for the purposes of this Agreement by the Contractor's employees, servants, agents or sub-contractors; and
- (e) without prejudice to the generality of the foregoing neither the Contractor nor any person engaged by it whether as a servant or a consultant or otherwise shall use the Confidential Information for the solicitation of business from the Trust or another part of the Crown by the Contractor or by such servant or consultant or by any third party.

16.2 It is expressly stated that any and all information relating to patients of the Trust is confidential and shall not be disclosed by the Contractor under any circumstances and unauthorised disclosure by the Contractor or any of the Contractor's personnel shall constitute a Default. The Contractor shall comply with the requirements of the following two NHSiS Circulars, namely:-

- (a) NHS MEL (1992)42;

(b) NHS MEL (1994) 100.

16.3 The Contractor shall ensure that all its employees who have access to or handle personal health information sign a statement in which they undertake to keep all such information confidential. The Contractor shall inform such employees in writing of the importance of the confidentiality of personal health information, the principles of protecting confidentiality and that breach of any confidentiality shall be a serious disciplinary matter. Employees of the Contractor shall be required to give written acknowledgement of the foregoing in a form approved by the Trust which may include the Contractor's standard terms of employment.

16.4 The Trust:-

- (a) shall treat as confidential all Confidential Information, obtained from the Contractor, including but not limited to any Source Code in any Software; and
- (b) shall not subject to Clause 16.6 disclose to any third party without the prior written consent of the Contractor any Confidential Information obtained from the Contractor.

16.5 The provisions of this Clause 16 shall not apply to any information which:-

- (a) is or becomes public knowledge other than by breach of this Clause 16;
- (b) is in the possession of the receiving party without restriction in relation to disclosure before the date of receipt from the disclosing party;
- (c) is received from a third party who lawfully acquired it and who is under no obligation restricting its disclosure;

(d) is independently developed without access to the Confidential Information.

16.6 Nothing contained in this Clause 16 shall prevent the Trust from disclosing any Confidential Information wherever disclosure is required by virtue of the Trust's status as a National Health Service Entity to a department, office or agency of Her Majesty's Government or to any other National Health Service Entity to a department, office or agency of Her Majesty's Government or to any other National Health Service Entity nor to any consultant, contractor or other person engaged by the Trust in connection herewith PROVIDED THAT the Trust shall have obtained from such consultant, contractor or other person engaged by the Trust to whom Confidential Information is so disclosed, a confidentiality undertaking substantially in the same terms as contained in this Clause 16.

16.7 Nothing in this Clause 16 shall prevent the Contractor or the Trust from using data processing techniques, ideas and know-how gained during the performance of this Agreement in the furtherance of its normal business, to the extent that this does not relate to a disclosure of Confidential Information or an infringement by the Trust or the Contractor of any Intellectual Property Rights.

17. **SECURITY REQUIREMENTS**

The Contractor shall comply with the Security Requirements.

18. **DEFAULT**

18.1 "Default"

(a) in the case of the Trust means:-

- (i) failure to pay the Charges within thirty days (30) of the same being due and payable, or
 - (ii) material or substantial infringement of the Intellectual Property Rights of the Contractor, and
- (b) in the case of the Contractor means:-
- (i) gross or persistent breaches by the Contractor or the Contractor's Personnel of the provisions of Clause 16 insofar as they relate to Patient Information;
 - (ii) failure by the Contractor to achieve payment of Fifty per cent (50%) or less of the Performance Stream Payments in any four (4) consecutive quarters of the Agreement;
 - (iii) failure by the Contractor to achieve payment of Five per cent (5%) or less of the Performance Stream Payments in any two quarters in any twelve (12) consecutive months period of the Agreement;
 - (iv) failure by the Contractor to achieve acceptance in respect of Phase 1 of Implementation of the Services (as defined in the Implementation Plan) with a six months period after the Planned Acceptance Date for Phase 1 (other than where such failure is due to an event of Force Majeure).

18.2 The Trust may at any time by notice in writing terminate this Agreement as from the date of service of such notice in the event that the Contractor:-

- (a) being an individual, or where the Contractor is a firm, any partner or director in that firm who together are able to exercise direct or indirect control, as defined by Section 416 of the Income and Corporation taxes Act 1988, shall at any time become bankrupt or shall have a receiving order or administration order against him or shall make any composition or arrangement with or for the benefit of his creditors, or shall make any conveyance or assignment for the benefit of his creditors, or shall purport to do so, or appears unable to pay, or to have no reasonable prospect of being unable to pay, a debt within the meaning of Section 268 of the Insolvency Act 1986, or he shall become apparently insolvent within the meaning of the Bankruptcy (Scotland) Act 1985 as amended by the Bankruptcy (Scotland) Act 1993, or any application shall be made under the Bankruptcy or Insolvency Act for the time being in force for sequestration of his estate or a trust deed shall be granted by him for behoof of his creditors, or any similar event occurs under the law of any other jurisdiction; or
- (b) being a company passes a resolution, or the Court makes an Order that the Contractor be wound up otherwise than for the purpose of a bona fide reconstruction or amalgamation, or a receiver, manager or administrator on behalf of a creditor is appointed in respect of the Contractor's business or any part thereof, or circumstances arise which entitle the Court or a creditor to appoint a receiver, manager or administrator or which entitle the Court, otherwise than for the purposes of a bona fide reconstruction or amalgamation, to make a winding up Order or

the Contractor is unable to pay its debts within the meaning of Section 123 of the Insolvency Act 1986.

18.3 (i) The Contractor shall be entitled to terminate the Agreement as from the date of service of notice to that effect ("Termination Notice") in circumstances only where damages would not be an adequate remedy if the Trust shall Default as expressly specified in Clause 18.1(a) in performance of the Agreement and provided that if the Default is capable of remedy the Contractor shall first have served the Trust with a notice in writing specifying the Default and afforded the Trust a period of two calendar months (or such longer period as is reasonable given the nature of the breach and is specified in the notice) in which to remedy the Default but the Trust has failed to remedy the Default.

(ii) In the event of proper and lawful termination of the Agreement by the Contractor pursuant to Clause 18.3(i) the Trust shall make payment to the Contractor of a Termination Payment. Payment of any Termination Payment shall:-

- (a) be in full and final settlement of all claims exigible by the Contractor against the Trust for Default by the Trust; and
- (b) shall become payable ninety (90) days after the date of the lawful and valid Termination Notice PROVIDED THAT Interest shall accrue upon the Delivery Stream Payment element of the Termination Payment as from the date of the lawful and valid Termination Notice and Interest shall accrue on all remaining elements from the expiry of the said ninety (90) days period.

18.4 In the event of termination of the Agreement by the Contractor pursuant to Clause 18.3 the Trust shall be entitled at no charge and subject to no payment being due to the Contractor PROVIDED ALWAYS that the Trust has made payment of the Termination Payment in accordance with Clause 18.3 to require the Contractor to or to procure transfer, to the Trust (or any Third Party nominated by the Trust) of the System which shall comprise transfer, assignments or novation (as reasonably determined by the Trust) of:-

- (a) Title in the Equipment;
- (b) all Licences in any Software used in the Service provision;
- (c) rights as reasonably required by the Trust to use any documentation manuals relating to the System;
- (d) any and all other equipment (excluding spare parts), agreements, licences or rights (relevant to the Services) as may reasonably be required by the Trust in order to continue (or require a Third Party on its behalf) to use the System.

18.5 The Trust shall be entitled to terminate the Agreement as from the date of service of notice to that effect if the Contractor shall commit an act of Default as expressly provided in Clause 18.1(b) in performance of the Agreement and provided that if the Default is capable of remedy the Trust shall have served the Contractor with a notice in writing specifying the Default and afforded the Contractor a period of two calendar months in which to remedy the Default but the Contractor has failed to remedy the Default the Trust may at its sole option:-

- (a) terminate the Agreement forthwith; or

- (b) withhold payment of a proportion (reasonably determined by the Trust having regard to the nature of the Default) of the Performance Stream Payments from the date of service of notice by the Trust in terms aforesaid until the Trust shall be reasonably satisfied that the Default has been remedied.

18.6 In the event of lawful termination of the Agreement by the Trust pursuant to Clauses 18.2 and/or 18.5 the Trust shall be entitled at its option to

- (a) continue use of the System or
- (b) require transfer of the System to the Trust (as provided in Clause 18.4) save that the calculation of the Termination Payment payable in such circumstances will be subject to the following provisions of this Clause 18.6 to achieve the cost neutral arrangement after described.

18.7 Any use by the Trust or transfer to the Trust of the System in terms aforesaid shall be effected in such manner as to be cost neutral to the Trust by which it is meant that the total cost to the Trust of use of the System and reprovision of the Services either by the Trust itself or by any party appointed by the Trust, shall not exceed, during the balance of the term of the Agreement, the total Contract Charges which the Trust would have paid to the Contractor had the Contractor continued to perform its obligations under the Agreement. The Trust shall at its absolute discretion determine whether the foregoing provisions shall be implemented by the Trust continuing to make payments of the Charges to the Contractor in accordance with Schedule G (or its liquidators, receivers, agent or nominee) or making payment of a Termination Payment (subject to the foregoing provisions of this Clause 18.6) and

recovering such monies from the Contractor as may be required to effect the cost neutral arrangement referred to in this Clause 18.6.

(a) The Contractor shall fully and effectively indemnify the Trust against:-

(i) all costs and expenses reasonably and properly incurred by the Trust in relation to transfer (howsoever effected) of the System pursuant to Clause 18.6 (including the time of the Trust's personnel); and

(ii) any increased cost to the Trust of procuring the System or a replacement system and/or services equivalent to the Services from any third party for the remainder of the term of the Agreement.

(b) The indemnities referred to in Clause 18.7 (a) shall be assessed and taken into account in calculating any Termination Payment payable by the Trust pursuant to Clause 18.6.

(c) The Trust shall account to the Contractor in a reasonable manner for any betterment enjoyed by the Trust as a result of its continued use of the System. In relation to any termination in accordance with this Clause 18 the Contractor shall use all reasonable endeavours to assign the Agreement (always subject to Clause 33) and/or relevant sub-contracts to a suitable person or shall assign the Agreement as the Trust shall direct (but without obligation on the Trust so to direct) if the Trust wishes to continue to use the System, which option shall be at the Trust's discretion. The Trust may require use of the System after termination of the

Agreement on a temporary or permanent basis. In any event the parties shall seek to agree a course of action which is most likely to achieve for the Trust the level and nature of Services required by this Agreement with the minimum disruption to the Trust which is reasonably possible. The Contractor shall ensure that the benefits of all sub-contracts are capable of being enjoyed by the Trust to meet these requirements.

18.8 In the event of any dispute as to the amount payable from time to time by the Trust or the Contractor as the case may be following termination of the Agreement pursuant to this Clause 18 or as to the reasonable action to be taken by either party in implementation of Clause 18.7, either party may refer this matter to an independent and appropriately qualified expert ("Expert") who shall act as an Expert and not an arbiter and who shall be appointed in default of agreement between the parties by application of either party to the President of the Royal Institute of Arbiters and:-

- (a) the cost of the Expert shall be borne by the parties equally unless the Expert otherwise directs;
- (b) each party shall be entitled to make one set of initial representations and one set of cross representations referring to the initial representations of the other;
- (c) the Expert's decision shall be reached within two months of referral provided that if he shall die or otherwise be unable to act or reach his decision he may be replaced at the request of either party;

- (d) the Expert shall set the timescale for representations and may hear the parties so long as both are represented at such hearing; and
- (e) the Expert's decision shall be delivered to the parties in writing and with reasons but save in the case of manifest error shall be final and binding on both parties.

18.9 Subject always to Clause 18.3(ii) termination in accordance with this Clause 18 shall not prejudice or affect any right of action or remedy which shall have accrued or shall thereafter accrue to either party or any continuing rights of either party in relation to its Intellectual Property Rights.

18.10 If upon termination of this Agreement the Trust shall require the Contractor to deliver up to any of the Trust Data on magnetic media then the Contractor shall:-

- (a) supply to the Trust within forty eight (48) hours of request by the Trust free of charge all Trust Data on magnetic media in an industry standard format.
- (b) co-operate in all reasonable respects with the Trust or its employees in arranging for the orderly transfer of the Trust Data, and software on magnetic media in an industry standard format to such other party as may be identified by the Trust and in such manner as may be necessary to ensure that any interruption in the services available to the Trust and its employees is minimised.
- (c) Return or deliver to the Trust all eye readable material and procedures manuals of the Trust relating to the Services in the

possession of the Contractor save where prevented from so doing under any third party licence or agreement.

18.11 On termination for any reason or expiry of the Agreement:-

(a) the Contractor will cease to use for any purpose and will return or deliver to the Trust within 48 hours of termination or expiry of the Agreement:-

(i) all Data belonging to the Trust and related documentation in a form capable of being read by the Trust;

(ii) all eye readable material and procedures manuals of the Trust relating to the Services in the possession of the Contractor save where prevented from so doing under any third party licence or agreement.

(b) The Contractor will be obliged to satisfy the Trust that it has erased all its copies of Trust Data used in connection with the provision of the Services.

(c) the Trust will return to the Contractor all licence materials except where the Trust exercises its option pursuant to this Agreement to continue to use the System.

18.12 Termination of this Agreement (howsoever occasioned) shall not affect the coming into force or continuance in force of any provision hereof which is expressly or by implication intended to come into or continue in force on or after such termination.

19. **LIMIT OF LIABILITY**

- 19.1 Except as provided in this Clause 19, nothing herein contained shall limit the remedies available to either party in terms of the Agreement.
- 19.2 The aggregate liability of either party for all defaults resulting in direct loss or damage to the tangible property or premises of the other under this Agreement shall be limited to damages which in no event shall exceed TWO MILLION POUNDS (£2,000,000) STERLING.
- 19.3 The aggregate limit of liability of either party for all loss or damage suffered by either party as a consequence of fault of the other (including but not in addition to the limit of liability specified in Clause 19.2 but excluding any liability of the Contractor arising pursuant to Clauses 18.1 and 18.7) shall not exceed the total annual Charges payable by the Trust to the Contractor except in respect of death or personal injury to which there shall be no limit of liability. For the avoidance of doubt, it is expressly stated that the indemnity granted by the Contractor to the Trust pursuant to Clause [15] of the Agreement shall not be subject to the limit of liability contained within this Clause 19.3.
- 19.4 In no circumstances under this Agreement including Default by either party shall either party be liable to the other for (a) loss of profits, business, revenue or goodwill and/or (b) indirect or consequential loss or damage.

20. RECOVERY OF SUMS DUE

Whenever under the Agreement any sum of money shall be recoverable from or payable by the Contractor to the Trust the same may be deducted from any sum then due or which at any time thereafter may become due to the Contractor under the Agreement or any Agreement between the Contractor and the Trust. Exercise by the Trust of its rights under this Clause shall be without prejudice to

any other rights or remedies available to the Trust under the Agreement or otherwise at law.

21. AUDIT ACCESS

21.1 The Trust has a duty to account for the disbursement of public funds. The Contractor shall keep proper records in respect to the Contract Price and all Contract Charges due to it under the Agreement. The Contractor shall allow inspection of such records at all reasonable times by the Trust's duly authorised representatives for the sole purpose of verifying the Contractor's fulfilment of its obligations under the Agreement and amounts due to the Contractor therefor. The Contractor shall make available such facilities and give such assistance, including the provision of copies or extracts of such records as the Trust may reasonably request in connection with the performance of such audit and shall afford the Trust's authorised representatives all reasonable access to all other information, reports, documents, records and data, whether in human or machine readable form, solely relevant to the performance of its obligations.

21.2 Representatives of the Trust who are authorised to perform such inspection shall:-

- (a) be acceptable on all reasonable grounds, to the Contractor;
- (b) enter into a confidentiality undertaking in such reasonable form as the Contractor may properly and reasonably require prior to such inspection.

21.3 All confidential information of the Contractor made available to the Trust under this Clause 21 shall be treated by the Trust in accordance with Clause 16.

21.4 The Contractor shall take all reasonable steps to place similar obligations on its sub-contractors in all sub-contracts entered into in relation to the Agreement to ensure access by the Trust, where appropriate, to relevant information of such sub-contractors.

22. DISASTER RECOVERY USE AND LOSS OF DATA

22.1 The Contractor shall adopt at no additional expense to the Trust such appropriate Disaster Recovery Plan as agreed between the parties in existence at the Commencement Date.

22.2 The Contractor shall make no use whatsoever of the Trust's Data, other than as may be required to provide the Services. Any unauthorised use of the Trust's Data by the Contractor shall constitute a Default by the Contractor.

22.3 The Contractor acknowledges that the Trust's Data is the Property of the Trust and the Trust hereby reserves all Intellectual Property Rights which may subsist in the Trust's Data. The Contractor shall not delete or remove any copyright notices contained within or relating to the Trust's Data.

22.4 The Contractor and the Trust shall each take reasonable precautions (having regard to the nature of their other respective obligations under this Agreement) to preserve the integrity of the Trust's Data and to prevent any corruption or loss of the Trust's Data.

22.5 As part of the Services the Contractor shall:-

- (a) if the Input or any part thereof shall be lost, destroyed or damaged prior to the inputting thereof whilst in the Contractor's possession then the Contractor shall forthwith notify the Trust and the Trust shall supply the Contractor with a copy of the Input at the cost of the Contractor. The Contractor shall thereupon use such copy for inputting the Input. The cost of preparing and delivering such copy of the Input shall be borne by the Contractor unless such loss, damage or destruction of the Input is caused by any negligent act or omission or wilful misconduct of the Trust or its employees.
- (b) If the Output or any part thereof shall be lost, damaged or destroyed prior to the delivery thereof to the Trust then the Contractor shall produce a further copy forthwith. The cost of producing such further copy shall be borne by the Contractor.

22.6 The Contractor shall be obliged:-

- (a) to take all steps as are necessary to ensure that in the event of any corruption or loss of Trust Data, howsoever caused, it is in a position to procure the restoration of such Data to a reconstituted state suitable for continued access and use by the Trust; and
- (b) at the request of the Trust and consequent upon any loss or corruption of the Trust Data to procure the restoration of the Trust Data to a reconstituted state suitable for continued access and use by the Trust.

22.7 The Contractor shall implement the obligation detailed in Clause 22.5 and Clause 22.6 at no cost to the Trust except where any corruption or loss of the Trust's Data is caused by the fault or negligence of the Trust in which event any steps taken by the Contractor to restore the Trust's Data shall

be subject to such reasonable charge as shall be agreed between the parties subject to the Contractor providing such information as it may reasonably require to verify any such proposed charge is reasonable. In the event of loss of Trust's Data through an event of Force Majeure the parties shall equally share restoration costs.

- 22.8 Without limiting the generality of the Contractor's obligation under Clause 22.4, the Contractor shall ensure that a backup copy of the Trust's Data is provided in accordance with the requirement set out in Part A of the Schedule.

23. TRUST PROPERTY

- 23.1 Nothing in this Agreement shall be taken as affecting the Trust's proprietary rights in Trust Property and such Trust Property shall be used in the performance of this Agreement and for no other purpose without the prior approval in writing of the Trust.
- 23.2 Any Trust Property made available to or otherwise received by the Contractor shall be deemed to be in good condition when received by or on behalf of the Contractor unless the Contractor notifies the Trust in writing to the contrary within fourteen days of any Trust Property being made available to the Contractor or otherwise received by it detailing any fault or damage in the Trust Property.
- 23.3 The Contractor undertakes the safe custody of and due return of all Trust Property made available to or otherwise received by the Contractor and the Contractor shall be responsible for all loss of any such Trust Property and shall indemnify the Trust against such loss.
- 23.4 The Contractor shall be responsible for any deterioration in the Trust Property where the Contractor has the responsibility for maintenance save

for any deterioration resulting from its normal and proper use for the purposes of this Agreement provided that such deterioration resulting from normal and proper use is not contributed to by any want of due maintenance and repair.

- 23.5 Neither the Contractor, nor any sub-contractor, nor any other person, shall have a lien on any Trust Property for any sum due to the Contractor, sub-contractor or other person and the Contractor shall take all reasonable steps to ensure that the title of the Trust and the exclusion of any such lien are brought to the notice of all sub-contractors and other persons dealing with Trust Property.

24. TRUST'S RESPONSIBILITIES

The Trust undertakes to provide to the Contractor, all information services, facilities and responses designated as the Trust's Responsibilities.

25. SERVICE MANAGEMENT AND PROGRESS REPORTS

- 25.1 The parties shall manage the provision of Services by the Contractor in accordance with the provisions of Part K of the Schedule.
- 25.2 Where progress reports are to be submitted under this Agreement, the Contractor shall render such reports as to the progress of the mutual obligations under this Agreement at the time and in such form as may be specified or as otherwise agreed between the Trust and the Contractor.
- 25.3 Submission and receipt of these reports shall not prejudice the rights of either party under this Contract.

26. HEALTH AND SAFETY HAZARDS

- 26.1 The Contractor shall notify the Trust of any health and safety hazards which may arise in connection with the performance of this Agreement.

- 26.2 The Trust shall notify the Contractor of any health and safety hazards which may exist or arise at the Site and which may affect the Contractor. The Contractor shall draw these hazards to the attention of its employees and sub-contractors or any persons engaged by the Contractor in the performance of this Agreement at the Site.
- 26.3 The Contractor shall use all reasonable endeavours to make itself aware of any health and safety hazards which are a normal part of the Trust's operations.
- 26.4 The Contractor shall inform all persons engaged in the performance of this Agreement at the Site of all such hazards and shall instruct such persons in connection with any necessary associated safety measures.

27. PROTECTION OF PERSONAL DATA

- 27.1 The Contractor's attention is hereby drawn to the Data Protection Act 1984 and the Computer Misuse Act 1990.
- 27.2 Both parties warrant that they will duly observe all their obligations under the Data Protection Act 1984 which arise in connection with this Agreement.
- 27.3 The Contractor shall indemnify the Trust against any penalty incurred by the Trust as a consequence of breach by the Contractor of its obligations to the Data Protection Act 1984 and the Computer Misuse Act 1990.

28. PUBLICITY

- 28.1 Except with the written consent of the other party which shall not be unreasonably withheld or delayed, neither party shall make any press announcements or publicise this Agreement in any way.

28.2 Both parties shall take all reasonable steps to ensure the observance of the provisions of Clause 28.1 by all their servants, employees, agents and consultants. The Contractor shall take all reasonable steps to ensure the observance of the provisions of Clause 29.1 by its sub-contractors.

28.3 Notwithstanding the provisions of Clause 28.1, the Trust shall be entitled to publicise this Agreement in accordance with any legal or quasi-legal obligations upon the Trust, including, but without limitation to, obligations under the Government Agreement on Tariffs and Trade.

29. CORRUPT GIFTS AND PAYMENTS OF COMMISSION

29.1 The Contractor shall neither:-

- (a) offer or give or agree to give any gift or consideration of any kind as an inducement or reward for doing or forbearing to do or for having done or forborne to do any act in relation to the obtaining or performance of this Agreement or for showing or forbearing to show favour or disfavour to any person in relation to this Agreement; nor
- (b) enter into this Agreement if in connection with it, commission has been paid or agreed to be paid to any employee or agent of the Trust by the Contractor or on the Contractor's behalf or to the Contractor's knowledge, unless before this Agreement is made particulars of any such commission and of the terms and conditions of any agreement for the payment thereof have been disclosed in writing to the Trust.

29.2 In the event of any breach of this Clause 29 by the Contractor or by anyone employed by the Contractor or acting on the Contractor's behalf (whether with or without the knowledge of the Contractor) or the

commission of any offence by the Contractor or by anyone employed by the Contractor or acting on behalf of the Contractor under the Prevention of Corruption Acts 1889 to 1916 in relation to this or any other Agreement with the Trust, the Trust may summarily terminate this Agreement by notice in writing to the Contractor. PROVIDED ALWAYS that such termination shall not prejudice or affect any right of action or remedy which shall have accrued or shall accrue thereafter to the Authority and provided always that the Trust may recover from the Contractor the amount or value of any such gifts, consideration or commission.

29.3 The decision of the Trust shall be final and conclusive in any dispute, difference or question arising in respect of:-

- (a) the interpretation of this Clause (except so far as the same may relate to the amount recoverable from the Contractor under Clause 29.2 in respect of any loss resulting from such termination of the Agreement); or
- (b) the right of the Trust under this Clause 29 to terminate this Agreement; or
- (c) the amount or value of any such gift, consideration or commission.

30. **CONTRACTOR'S PERSONNEL**

30.1 The Contractor shall make no changes to its Key Personnel during the period this Agreement remains in force without the prior written consent of the Trust except where any change is for reasons outwith the Contractor's control.

30.2 In the event that changes in Key Personnel are required for any reason the Contractor shall:-

- (a) obtain the written approval of the Trust (who shall be required to act reasonably) to any proposed replacement;
 - (b) ensure that any replacement shall be suitably qualified and experienced.
- 30.3 Any objection made by the Trust to a proposed replacement shall have no effect upon the Contractor's obligations under this Contract.
- 30.4 The Trust reserves the right (which shall not be unreasonably exercised) under this Agreement to refuse to admit to any Premises any person employed or engaged by the Contractor, or by a sub-contractor, whose admission would be, in the opinion of the Trust, undesirable.
- 30.5 If and when directed by the Trust, the Contractor shall provide a list of the names and addresses of all persons who it is expected may require access to Trust Data, Systems or Premises in connection with the performance of this Agreement, specifying the capacities in which they are concerned with this Agreement and giving such other particulars as the Trust may reasonably require.
- 30.6 Whilst attending at the Premises the Contractor's representatives shall comply with the Trust's on-Site rules, regulations and requirements (including those relating to security arrangements) for the conduct of personnel. The Trust shall make available to the Contractor the latest version of such rules, regulations and requirements.
- 30.7 The decision of the Trust (acting reasonably) as to whether any person is to be refused admission to any Premises occupied by or on behalf of the Trust and as to whether the Contractor has failed to comply with Clause 30.1 shall be final and conclusive provided that the Trust shall, if requested by the Contractor, advise the Contractor of the reasons for its

decision except in circumstances where the Trust regards such reasons as confidential and provided further that no liability shall attach to the Trust in relation to such information. The Contractor agrees that it shall not disclose such information to any person including the relevant member of its personnel without the prior written consent of the Trust.

31. RACIAL DISCRIMINATION

31.1 The Contractor shall not unlawfully discriminate within the meaning and scope of the Race Relations Act 1976 or any statutory modification or re-enactment thereof relating to discrimination in employment.

31.2 The Contractor shall take all reasonable steps to ensure the observance of the provisions of Clauses 31.1 by all servants, employees, agents and consultants of the Contractor and all sub-contractors.

32. FORCE MAJEURE

32.1 For the purposes of this Agreement the expression "Force Majeure" shall mean any cause affecting the performance by a party of its obligations arising from acts, events, omissions, happenings or non-happenings beyond its reasonable control including (but without limiting the generality thereof) governmental regulations, fire, flood, or any disaster or an industrial dispute affecting a third party for which a substitute third party is not reasonably available (but not industrial dispute by the Contractor's staff). Such cause will only be considered Force Majeure if it is not attributable to the wilful act, neglect or failure to take reasonable precautions of the party relying on the cause, its servants, agents or employees.

32.2 Neither party shall in any circumstances be liable to the other for any loss of any kind whatsoever including but not limited to any damages or

abatement of Charges whether directly or indirectly caused to or incurred by the other party by reason of any failure or delay in the performance of its obligations hereunder which is due to Force Majeure.

32.3 If either of the parties shall become aware of circumstances of Force Majeure which give rise to any such failure or delay on its part it shall forthwith notify the other in writing by the most expeditious method then available and shall inform the other of the period which it is estimated that such failure or delay shall continue.

32.4 It is expressly agreed that any failure by the Contractor to perform or any delay by the Contractor in performing its obligations under this Agreement which results from any failure or delay in the performance of its obligations by any person, firm or company with which the Contractor shall have entered into any such Contract, supply arrangement or sub-Agreement or otherwise, shall be regarded as a failure or delay due to Force Majeure only in the event that such person, firm or company shall itself be prevented from or delayed in complying with its obligations under such Contract, supply arrangement or sub-Agreement or otherwise as a result of circumstances of Force Majeure.

32.5 The following shall apply during any period or periods during which either party is prevented from performance of its obligations under the Agreement as a consequence of any event of Force Majeure, namely:-

- (a) the Trust shall continue to make payment of Delivery Steam Payments and there shall be no suspension of the same.
- (b) the Trust shall be entitled to suspend payment of Performance Steam Payments (or any reasonably appropriate part thereof having regard to the level of suspension of performance).

(c) the term of the Agreement shall be extended for a period equivalent to the period or periods of non-performance and during any such extended period of the Agreement:-

- (i) the Contractor shall perform the Services in accordance with the terms of Agreement;
- (ii) subject to the provisions of Schedule G, the Trust shall make payment to the Contractor of the Performance Steam Payments; and
- (iii) no Delivery Steam Payment shall be due by the Trust to the Contractor.

32.6 For the avoidance of doubt it is hereby expressly declared that the only events which shall afford relief from liability for failure or delay shall be any event qualifying for Force Majeure hereunder.

33. TRANSFER AND SUB-CONTRACTING

33.1 This Agreement is personal to the Contractor. The Contractor shall not assign, novate, Sub-Agreement or otherwise dispose of this Agreement or any part thereof without previous consent in writing of the Trust which shall not be unreasonably withheld or delayed.

33.2 The Trust hereby consents to the Contractor's Sub-Contracting obligations specified in Part C of the Schedule to the respective Sub-Contractors specified in Part C of the Schedule. Notwithstanding any sub-contracting permitted hereunder, the Contractor shall remain primarily responsible for the acts and omissions of its Sub-Contractors as though they were its own.

33.3 Save as may be provided in Clause 33.5 and/or Clause 33.6 the Trust shall be entitled to assign, novate, sub-Agreement or otherwise dispose of its rights and obligations under this Agreement or any part thereof to:-

- (a) any contracting Trust (as defined in Regulation 3(i) of the Public Services Contracts Regulations 1993) (a "Contracting Trust"); or
- (b) any other body (including but not limited to any private sector body)

Where either party identified in (a) or (b) substantially performs any of the functions that previously had been performed by any Contracting Trust.

33.4 Any change in the legal status of the Trust such that it ceases to be a Contracting Trust shall not, subject to Clause 33.5, affect the validity of this Contract. In such circumstances, this Agreement shall bind and inure to the benefit of any successor body to the Trust.

33.5 The Trust shall be entitled to disclose to any body to whom this Agreement may be transferred pursuant to the foregoing provisions any Confidential Information of the Contractor which relates to the performance of the Services by the Contractor. In such circumstances, the Trust shall authorise the said transferee to use such Confidential Information only for purposes relating to the performance of the Services and for no other purposes and shall take all reasonable steps to ensure that such body accepts an obligation of confidence in terms similar to Clause 26.

34. **AMENDMENTS TO THE SERVICES**

34.1 The Trust shall be entitled to require the Contractor to make changes to the Services and the Contractor shall be entitled to request that the Trust accepts changes to the Services ("Changes").

34.2 All Changes shall be subject to the Change Control Procedure but without prejudice thereto the Contractor shall ensure that any Change required by the Trust is made on a timetable as may be agreed between the parties after any alteration (if any) to the Charges are agreed in accordance with the provisions of this Clause 34.

34.3 If the parties are unable to agree the alteration to the Charges pursuant to any Change the party so entitled in terms of this Clause 34 shall be entitled to refer the matter to a firm of accountants agreed by the parties or failing agreement a firm of chartered accountants selected by the then President of the Institute of Chartered Accountants in Scotland ("the Accountants"). The Accountants shall act as experts and not as arbiters. The Accountants shall be entitled to require any supporting evidence in support of a submission by either party as they may deem appropriate and shall be entitled to take expert advice in relation to the Change as they may deem appropriate. The Accountant's decision shall be final and binding. Each party shall bear their own costs in connection with the preparation of their submissions or gathering of evidence. The Trust and the Contractor shall bear the Accountant's charges and expenses equally.

35. **COMMUNICATIONS**

35.1 Except as otherwise expressly provided no communication from one party to the other shall have any validity under this Agreement unless made in writing by or on behalf of the Trust or as the case may be by or on behalf of the Contractor.

35.2 Any notice or other communication whatsoever which either party hereto is required or authorised by this Agreement to give or make to the other shall be given or made by post in a prepaid letter, confirmed by post in a

pre-paid letter, addressed to the other party in the manner referred to in Clause 35.3 below and if that letter is not returned as being undelivered that notice or communication shall be deemed for the purposes of this Agreement to have been given or made after two days, for letter,

35.3 For the purposes of Clause 35.2 above the address of each party shall be:-

(a) For the Trust:-

For the attention of The Chief Executive
Yorkhill NHS Trust
Royal Hospital for Sick Children
Yorkhill
Glasgow, G3 8SJ

Tel No: 0141 201 0000

Fax No: 0141 201 0836

(b) For the Contractor:-

For the attention of The Managing Director
Data General Corporation
Data General Tower
Great West Road
Brentford
Middlesex, TW8 9AN

Tel No: 0181 758 6000

Fax No: 0181 758 6758

35.4 Either party may change its address for service by notice as provided in this Clause 35.

36. **SEVERABILITY**

If any provisions of this Agreement is held invalid, illegal or unenforceable for any reason by any court of competent jurisdiction, such provision shall be severed and the remainder of the provisions hereof shall continue in full force and effect as if this Agreement had been executed with the invalid, illegal or unenforceable provision eliminated. In the event of a holding of invalidity so fundamental as to prevent the accomplishment of the purpose of this Contract, the Trust and the

Contractor shall immediately commence good faith negotiations to remedy such invalidity.

37. WAIVER

37.1 The failure of either party to insist upon strict performance of any provision of this Contract, or the failure of either party to exercise any right or remedy to which it is entitled hereunder, shall not constitute a waiver thereof and shall not cause a diminution of the obligations established by this Contract.

37.2 A waiver of any Default shall not constitute a waiver of any subsequent Default.

37.3 No waiver of any of the provisions of this Agreement shall be effective unless it is expressly stated to be a waiver and communicated to the other party in writing in accordance with the provisions of Clause 34.

38. ACCESS TO SOURCE CODE

38.1 The Contractor undertakes that all Software used in provision of the Services in which the Intellectual Property Rights are owned by Medical Information Technology, Inc ("Meditec Software") incorporates the Source Code for such Software. The Trust shall be entitled to Use Source Code in Meditec Software in circumstances detailed in Clause 38.2.]

38.2 The Trust shall be entitled to Use the Source Code in Meditec Software for continued provision and/or implementation of the Services in the event that the Trust terminates the Agreement pursuant to Clause 18.1 or 18.3 and such entitlement shall subsist:-

- (a) as from the expiry of the two calendar month period specified in Clause 18.3; or

(b) as from the date the Trust serves notice terminating the Agreement in terms of Clause 18.1.

38.3 The Contractor shall within thirty days of the Commencement Date procure that an agreement ("an Escrow Agreement") in terms of that contained in Part I of the Schedule is concluded with the National Computing Centre in Birmingham ("NCC") Software used in provision of the Services (other than Meditec Software). Such Agreement shall be concluded between the NCC, the Third Party and the Trust and shall provide for deposit of the latest/original version of the Source Code of all such Software used in provision of the Services. The Contractor shall be obliged to procure that the Source Code lodged under the Escrow Agreement is updated upon no less than a three monthly basis throughout the period of the Agreement, except in any instance where the Trust makes a specific request to the Contractor to update the Source Code in which event the Contractor shall comply with the same.

38.4 The Trust or any Third Party appointed by it shall be entitled to Use any Source Code obtained pursuant to this Clause 38 only for the purpose of continued provision and/or implementation of the Services.

38.5 It is expressly agreed between the parties that the provision of this Clause 38 shall survive termination of the Agreement.

39. **HANDOVER**

39.1 For the purpose of this Clause 39:-

(a) "Employees" shall mean employees of the Contractor engaged in the provision of the Services (whether an at operational or managerial level) from time to time; and

- (b) "Transferring Employees" shall mean any Employees who shall transfer to the Trust upon the application of TUPE.

39.2 On termination for any reason or expiry of this Agreement, the Contractor, without prejudice to the Trust's other rights and remedies, will liaise with the Trust and render to the Trust or a New Contractor all such assistance as the Trust may reasonably require to provide for the provision of facilities and/or services equivalent to the Services by the Trust itself or a New Contractor. Such assistance shall include, without limitation, making available suitable liaison staff as the Trust may reasonably require. Such assistance shall be provided at no cost to the Trust unless it falls outwith the scope of the provision of the Services. The period of liaison will commence as soon as notice has been given of termination of this Agreement or at the time at the discretion of the Trust within three months prior to expiry of this Agreement. Upon the Trust's written request assistance in converting file conversions to a new operating system and/or a new Contractor and additional liaison outwith the scope of the provision of the Services shall be provided by the Contractor:-

- (a) at expiry of the Agreement or in any circumstance where the Agreement is terminated by the Contractor as a consequence of Default on the part of the Trust at the Contractor's then current time and materials rates;
- (b) in circumstances of termination of the Agreement by the Trust as a consequence of Default by the Contractor at no expense to the Trust.

39.3 If the Trust so requires, the Contractor will use all reasonable endeavours to procure the transfer at the Trust's expense to the Trust or to a New

Contractor of any software owned by a third party and licensed by the Contractor in its own name in order to provide the Services.

39.4 The Contractor shall not within two (2) months prior to expiry of this Agreement or after receiving notice of the Trust's intention to terminate this Agreement (i) transfer any Key Personnel to a post in another part of its business; (ii) offer any Key Personnel a post in another part of its business; (iii) create a new post in the Undertaking; and (iv) dismiss Employees in the Undertaking by reason of a prospective Handover without the prior consent in writing of the Trust such consent not to be unreasonably withheld or delayed.

39.5 The Contractor shall (subject to any obligations of confidentiality) disclose to the Trust at the written request of the Trust all material facts and matters relating to or concerning the employment of any Transferring Employee including:-

- (a) their respective names and ages, experience, gender and job description;
- (b) length of service;
- (c) notice period;
- (d) all terms and conditions of employment or benefits policies;
- (e) all other agreements or arrangements or understandings in respect of each of them relating to their employment;
- (f) any existing or threatened or pending litigation relating to or concerning all or any of them.

39.6 The Contractor shall disclose to the Trust at the written request of the Trust:-

- (a) all material facts and matters relating to any collective agreements, arrangements or other understandings which it has with any trade union, staff association or other body representing Transferring Employees including, without limitation, any outstanding or unresolved dispute or current negotiation with any such union, association or body;
- (b) all persons previously working in the Undertaking who are on maternity leave, absent on grounds of disability or other leave of absence and have or may have a statutory or contractual right to return to work in the Undertaking;
- (c) all outstanding offers of employment in the Undertaking; and
- (d) all offers, promises or agreements relating to any variation of the terms and conditions of employment of Transferring Employees or any of them which have not been effected as at the Date of Handover or relating to payments in connection with actual or proposed terminations or suspensions of employment of Transferring Employees.

39.7 The Contractor undertakes to discharge fully its obligations:-

- (a) to pay all salaries, wages, commissions, bonuses, overtime pay, holiday pay, sick pay and other benefits of employment in respect of Transferring Employees up to the Date of Handover; and

- (b) to pay all sums due to the Inland Revenue under the PAYE system, national insurance contributions and other taxes and levies in respect of Transferring Employees up to the Date of Handover.

39.8 The Contractor shall not dismiss any person for a reason connected with the Handover upon the application of TUPE which is not an “economic, technical or organisational reason entailing changes in the workforce” of the Contractor, such expression having the meaning prescribed by regulation 8(2) of TUPE.

39.9 Any information (“Information”) disclosed by the Contractor under Clauses 39.5 and 39.6 shall to the best of the Contractor’s knowledge and belief be true, accurate and up to date as at the time of disclosure. The Trust shall treat Information as confidential but shall be entitled to disclose any or all Information to any prospective New Contractor(s) without restrictions, but subject to similar obligations of confidentiality as contained in this Contract. The Trust may request any or all Information to be updated as it sees fit.

40. **EMPLOYEE CONSULTATION**

The provisions of Clause 39 shall subsist where TUPE applies and the Trust and the Contractor each undertake to comply with its obligations under TUPE and its other statutory obligations to inform and/or consult with any trade union, staff association or other body representing employees of the Trust or any other National Health Service Entity engaged primarily in providing services equivalent to the Services.

41. **SPECIFIC PERFORMANCE**

The parties acknowledge and agree that in the event of a Default by the Contractor in performance of its obligations under the Agreement, the loss or damage incurred by the Trust by reason of such default will be such that damages may not be an adequate remedy. Accordingly, the Trust shall have the right to specific performance of the Contractor's obligations under the Agreement. Such remedy shall be in addition to and not in lieu or limitation of other remedies provided to the Trust hereunder or otherwise at law or in equity.

42. INSURANCE

42.1 The Contractor shall effect insurance with a reputable insurer or underwriter in respect of all matters which are the subject of indemnities under the Agreement and such insurance shall include, without prejudice to the limit of liability contained in Clause 19 the following insurances:-

- (a) public and occupiers' liability insurance in not less than the sum of Two Million Pounds Sterling (£2,000,000) in respect of any one incident;
- (b) employer liability insurance in not less than the sum of Four Million Pounds Sterling (£4,000,000) in respect of the any one incident.

42.2 The Contractor shall procure that the insurers shall waive any subrogation rights against the Trust.

43. DISPUTE RESOLUTION

43.1 In the event of any dispute or difference between the parties arising pursuant to this Agreement the parties shall use all reasonable endeavours to resolve the same between themselves failing which either party shall be entitled to exercise any remedy available to it in terms of this Agreement or at law or otherwise.

44. **ENTIRE AGREEMENT**

This Agreement (together with agreements entered into pursuant to this Agreement and the Schedule, Appendices and Annexes attached hereto) constitute the entire understanding between the parties relating to the subject matter of this Agreement and save as may be expressly referred to or referenced herein, supersedes all prior representations, writings, negotiations or understandings with respect thereto.

45. **APPOINTMENT OF EXPERT**

In the event of any difference of dispute between the parties of a technical nature relating to the Services or the implementation or performance thereof the same shall be referred by mutual agreement to an expert agreed by the parties and failing agreement appointed by referral by either party to the President of the British Computer Society. Such person shall act as an expert and not as an arbiter and the expert's decision shall be final and binding upon both parties. The expense of any referral to such expert shall be borne equally between the parties unless otherwise directed by the experts.

46. **GUARANTEE BY GUARANTOR**

Within three months of the date of execution of this Agreement by both parties, the Contractor shall procure that a Parent Company Guarantee in terms of the Deed of Guarantee contained within Part M of the Schedule is duly executed by the Contractor's Parent Company.

47. **LAW AND JURISDICTION**

47.1 This Agreement shall be governed and construed in accordance with the Law of Scotland and both parties hereby submit to the non-exclusive jurisdiction of the Scottish Courts.

47.2 This Agreement is binding on the Trust and its successors and assignees and the Contractor and the Contractor's successors and permitted assignees. IN WITNESS WHEREOF these presents typewritten on this and the preceding sixty seven pages together with the Schedule annexed are executed as follows:-.

Signed for and on behalf of the Trust

Place of Execution _____

Date _____

Signed by _____

Print Name _____

Title _____

Place of Execution _____

Date _____

Signed by _____

Print Name _____

Title _____

Signed for and on behalf of the Contractor

Place of Execution _____

Date _____

Signed by _____

Print Name _____

Title _____

Place of Execution _____

Date _____

Signed by _____

Print Name _____

Title _____

Signed for and on behalf of the Guarantor

Place of Execution _____

Date _____

Signed by _____

Print Name _____

Title _____

Place of Execution _____

Date _____

Signed by _____

Print Name _____

Title _____