

PFI CONTRACT

between

**THE HAIRMYRES AND STONEHOUSE HOSPITALS
NATIONAL HEALTH SERVICE TRUST**

and

H DGH LIMITED

relating to the
design, building, financing and
provision of non clinical services at the
new Hairmyres District General Hospital

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PFI CONTRACT

between

THE HAIRMYRES AND STONEHOUSE HOSPITALS NATIONAL HEALTH SERVICE TRUST a body corporate established under Section 12A of the National Health Service (Scotland) Act 1978 and having its principal place of business at Hairmyres Hospital, East Kilbride G75 8RG (hereinafter called "the Trust")

and

H DGH LIMITED, a body corporate incorporated under the Companies Acts in England with number 3508096 and having its registered office at Tempsford Hall, Sandy, Bedfordshire, SG19 2BD (hereinafter called "the SPC")

WHEREAS:

- A The Trust wishes to procure a new District General Hospital at Hairmyres and to this end has advertised for expressions of interest for the provision of amongst other things various construction works and management services by private sector parties under the Private Finance Initiative.
- B After detailed negotiation the SPC has been selected by the Trust as its preferred provider of such works and services.
- C By entering into the PFI Documents the Trust has agreed to grant to the SPC the Ground Lease of the New Build Hospital and the SPC has, subject to the provisions thereof, agreed to integrate certain existing buildings with newly constructed buildings at the New Build Hospital and to grant the Occupational Sublease of the completed facilities on the New Build Hospital to the Trust and thereafter provide services to the Trust.
- D The Trust intends to carry on the provision of health and other services from the Hospital.
- E The SPC is willing to enter into this Agreement with the Trust, the terms of which, together with other agreements referred to in this Agreement, will secure the required Hospital and services for the Trust.
- F Whilst this Agreement provides for the commencement of the Managed Services from the Hospital Operations Date, the Trust wishes to procure through the SPC, and the SPC (through the Principal Service Provider) wishes to provide certain Managed Services in the Existing Hospital prior to this time, subject to agreeing terms in respect thereof.



SECTION 1: INTERPRETATION

1 Interpretation and Definitions

In this Agreement unless there be something in the subject or context inconsistent therewith:

1.1 Interpretation

- 1.1.1 words importing the masculine include the feminine and words importing the neuter include the masculine and feminine
- 1.1.2 words importing persons include corporations and vice versa, national health service trusts, local authorities, health boards, states, government agencies
- 1.1.3 subject always to the provisions of Clause 51 (Changes of Law) any reference to an Act of Parliament includes any modification, extension or re-enactment thereof for the time being in force and all instruments, orders, regulations, permissions and directions for the time being made or given thereunder or deriving validity therefrom
- 1.1.4 reference to a calendar month shall mean a period beginning on (and including) a particular date and ending on (and including) the day before the corresponding date in the immediately succeeding month or, if there is no such day, the last day in such month
- 1.1.5 the headings in this Agreement are inserted for convenience of reference and shall not form part of these presents nor shall they affect the construction of this Agreement
- 1.1.6 the Schedule and Parts of the Schedule and annexations to this Agreement form part of this Agreement and shall, subject to Clause 1.1.7 below, have the same force and effect as if set out in the main body of this Agreement
- 1.1.7 the documents forming the PFI Documents are to be taken as mutually explanatory of one another. If there is an ambiguity or discrepancy among the documents, the priority of the documents shall be in the order set out in Part 3, and if there is an ambiguity or discrepancy in a document (including this Agreement), the body of the document shall have priority over any schedule or annexation (with the exception of the Contaminated land proposal contained in Part 13C which shall take precedence over the body of the document) and in the event of any conflict between the output service specifications set out in Parts 22 and 23 and the Trust Procedures, the output specifications will prevail
- 1.1.8 reference to any instrument or agreement includes (where the context requires) such instrument or agreement as at any time and from time to time amended, supplemented, varied or novated
- 1.1.9 reference to any party to this Agreement, or any other person referred to herein, or any other agreement, includes any assignee or successor in title permitted by such agreement (or agreed by the parties thereto) save where the context otherwise requires
- 1.1.10 reference to any obligation of SPC shall permit the carrying out of such obligation by SPC, the Contractor, the Principal Services Provider, or any

Service Provider or any of their respective sub-contractors as appropriate, to the extent this Agreement does not prohibit the carrying out of such obligation by such person.

1.2 Definitions

The following expressions shall have the meanings now ascribed to them:

Access Policy means the policy setting out the SPC's access rights for carrying out construction and maintenance of the Facilities as set out in Part 26.

Accommodation Service means the making Available of the Facilities in accordance with the Trust's Requirements for use by the Trust on a continuous basis throughout the Term following the Hospital Operations Date.

Adjustment Date has the meaning given to it in Part 1A, paragraph 4.2.

Agent means the Facility Agent from time to time under the Financing Documents.

Agreed Form means in a form agreed in writing between the Trust and the SPC, a copy of which has been endorsed as such.

Agreed Insurances shall be those insurances required to be kept in force by the SPC pursuant to Clause 59 (Insurance) and Part 9.

Alienation Criteria are satisfied only in accordance with the provisions of Part 5.

Approved Design means the Basic Design and the Stage D Design (insofar as the Stage D Design or part thereof forms part of the Trust Requirements as set down in Part 13A,) together with such Design Documentation as has been produced and approved in accordance with Clause 14 (Design Obligations).

Architect means HLM Architects Limited incorporated in England under the Companies Acts with registered number 2424914 and having its registered office at 1 Old Lodge Place, St Margarets, Twickenham, Middlesex TW1 1RQ.

Area Description Forms means the data sheets for each room and area of the New Build Hospital as set out in Parts 13B and 13C.

Assignment of Performance Guarantees means an assignment in favour of the Trust of the guarantees given by ISS UK Limited and Kier Group plc to the SPC in the Agreed Form.

Availability Deduction means in respect of any Monthly Reporting Period or part thereof the adjustment to the Unitary Charge for lack of Availability in such Monthly Reporting Period or part thereof calculated in accordance with Part 1A and Part 2.

Availability Model means Part 2 Table 1 comprising the basis of calculation of Availability Deductions.

Availability Regime means the regime governing Availability, as set down in Part 2.

Availability Report means in respect of any Monthly Reporting Period, or part thereof a report prepared by the SPC setting out the Availability or otherwise of each Component

Unit during such Monthly Reporting Period or Part thereof in the form set out in Part 1A Table 3b or as amended with the prior agreement of the Trust.

Available shall be construed in accordance with Part 2 and **non Available, Availability** and **non Availability** construed accordingly.

Band A means in relation to each Component Unit, days 1 to 3 inclusive of the Measurable Period.

Band A Day means a day during part of which the relevant Component Unit is not Available falling within Band A.

Band A Deduction means, in relation to each Component Unit, the daily reduction in payment to the SPC for days 1 to 3 of any Measurable Period as set down in the Availability Model under the heading "Band A Daily Deduction".

Band B means, in relation to each Component Unit, days 4 to 5 inclusive of the Measurable Period.

Band B Day means a day during part of which the relevant Component Unit is not Available falling within Band B.

Band B Deduction means, in relation to each Component Unit, the daily reduction in payment to the SPC for days 4 and 5 of any Measurable Period as set down in the Availability Model under the heading "Band B Daily Deduction".

Band C means, in relation to each Component Unit, days 6 to 7 inclusive of the Measurable Period.

Band C Day means a day during part of which the relevant Component Unit is not Available falling within Band C.

Band C Deduction means, in relation to each Component Unit, the daily reduction in payment to the SPC for days 6 and 7 of any Measurable Period as set down in the Availability Model under the heading "Band C Daily Deduction".

Band D means, in relation to each Component Unit, days 8 to 9 of the Measurable Period.

Band D Day means a day during part of which the relevant Component Unit is not Available falling within Band D.

Band D Deduction means, in relation to each Component Unit, the daily reduction in payment to the SPC for days 8 and 9 of any Measurable Period as set down in the Availability Model under the heading "Band D Daily Deduction".

Band E means, in relation to each Component Unit, day 10 of the Measurable Period and any day thereafter.

Band E Day means a day during part of which the relevant Component Unit is not Available falling within Band E.

Band E Deduction means, in relation to each Component Unit, the daily reduction in payment to the SPC for Band E Days as set down in the Availability Model under the heading "Band E Daily Deduction".

Basic Design means the drawings and others detailed in Part 13B prepared by or on behalf of the SPC all of which is in Agreed Form.

Basis of Adjustment has the meaning ascribed to it in paragraph 9, Part 1A.

Bed means an inpatient Bed at the Hospital.

Bed Capacity means the number of Beds in the Hospital from time to time.

Benchmark means to compare the movement in the price of the relevant Tested Service with movement in the costs/prices of providing equivalent services in other establishments in the NHS as described in Clause 42 (Market Testing/Benchmarking Services) and **Benchmarking** shall be construed accordingly.

Benchmark Pool means service costs in respect of each of the services comprised within the Tested Services, from a comparable pool of district general hospitals in Scotland as identified by the Trust acting reasonably. Where the SPC do not agree with the pool identified by the Trust, SPC may refer the matter to the Dispute Resolution Procedure on the question of the reasonableness of the Trust (but for the avoidance of doubt not any other matter).

Benchmark Price means the aggregate average cost for all Services of the same type as the Tested Services comprised within the Benchmark Pool.

Benchmark Price Movement means the movement (expressed as a percentage) in the Benchmark Price in the period since the preceding Testing (or, in respect of the first Benchmark since 1 April 1997).

Break Costs means the properly and necessarily incurred costs of early payment to Funders under the Financing Documents (or other compensating payment of equivalent effect) on the basis that the funding is broken 5 Business Days after the date of termination of the Term or to equipment lessors under any lease of equipment reasonably necessary for the provision of the Services to SPC or any Service Provider: the party to whom or for whom Break Costs are paid shall be under obligation to use all reasonable endeavours to mitigate the amount of such costs.

Building Contract means the design and build contract in the Agreed Form to be entered into between the SPC and the Contractor pursuant to which the Development is to be carried out and any variation thereto and any building contract entered into by the SPC in addition to or in substitution for any such contract.

Business Day means all days (excluding Saturdays and Sundays) upon which banks are open for normal banking business in Edinburgh and London.

Category 1 Obligation means an obligation contained in the relevant Specification and graded '1' (carrying with it one Performance Failure Point).

Category 2 Obligation means an obligation contained in the relevant Specification and graded '2' (carrying with it two Performance Failure Points).

Category 3 Obligation means an obligation contained in the relevant Specification and graded '3' (carrying with it three Performance Failure Points).

Category 1 Service Failure means a Service Failure which relates to a Category 1 Obligation.

Category 2 Service Failure means a Service Failure which relates to a Category 2 Obligation.

Category 3 Service Failure means a Service Failure which relates to a Category 3 Obligation.

CCN means a change control note submitted pursuant to Clause 50 (Service Changes and Facilities Changes) and Part 6.

CDM Regulations means the Construction (Design & Management) Regulations 1994.

Change means a Facilities Change or a Service Change or a Change pursuant to Clause 51 (Change of Law) and **Changes** means Facilities Changes and Service Changes or a Change pursuant to Clause 51 (Change of Law) but not any other changes to the terms of the PFI Documents or the circumstances of or affecting the parties.

Change Capital Costs means the reasonable non recurring costs (including any construction and/or associated costs) incurred by the SPC together with the reasonable amount of any legal, accounting and other professional fees, funders or arrangers or other such fees, design and/or technical adviser fees, administrative costs and out of pocket expenses incurred in connection with the Change and any rolled up interest under the Financing Documents arising as a result of the Change and any interest on the financing arranged to implement and finance the Change (in each case without double counting any Change Financing Cost).

Change Capital Savings means the reasonable non recurring savings (including any construction and/or associated savings) and any rolled up interest under the Financing Documents avoidable by the SPC, less the reasonable amount of any legal, accounting or other professional fees, funders or arrangers or other such fees, design and/or technical adviser fees, administrative costs and out of pocket expenses incurred in connection with the Change arising as a result of the Change.

Change Control Procedure means the procedure set out in Part 6.

Change Failure has the meaning given to it in Clause 50.2.5 (Facilities Changes).

Change Financing Cost means the costs to be incurred by the SPC of servicing the funds required for financing the Change Capital Cost which shall be:

- (i) for Changes at or above the Change Threshold, the lowest cost reasonably available to the SPC from reputable bankers and the cost of servicing new equity and/or subordinated debt at the Equity Rate of Return and
- (ii) for Changes below the Change Threshold, the lower of those costs set out in (i) above (if the Funders consent to financing the Change on the basis of (i) above) and the sum of:
 - (a) up to an aggregate Change Capital Cost of £4,000,000, the aggregate of (A) not more than the cost of the Standby Loan Facility described in the Financing Documents as if drawn according to its terms, and available for drawing, whether or not utilised by or available for the SPC, in respect of not less than 90% of such Change Capital Cost (or such higher percentage as may be permitted to the SPC under the Financing Documents), and (B) the Equity Rate of Return in respect of the balance, plus
 - (b) in excess of an aggregate Change Capital Cost of £4,000,000, at the Equity Rate of Return provided that unless the funding is



provided by way of equity or subordinated debt, the consent of the Funders will be required.

Change Notice means a notice in writing from the Trust to the SPC requiring the SPC to implement a Change and setting out details of the Change required.

Change of Control means any allotment or transfer of any shares or any interest in shares or option to subscribe for or purchase shares in the capital of SPC or the entering into or amendment of any agreement, contract or other arrangement or the amendment of the Articles of Association in each case in respect of SPC or the appointment, resignation or removal of any director of the SPC which, if it occurs, would result in any person or persons other than the existing shareholders in the SPC as at the Execution Date who exercise Control, obtaining or acquiring Control, but does not, subject to Clause 54.1.3 (Change of Control of SPC) include any allotment or transfer of shares to a member of the Kier Group or a member of the Innisfree Group or (ii) include any transfer of shares in the SPC or any shareholder of the SPC (or any shareholder of such shareholder) by one bona fide institutional investor to another or (iii) include the transfer of shares in Kier Group plc.

Change of Law means:

- (i) the introduction, amendment, modification or repeal of any Legal Provision:
 - a) having First Effect after Financial Closing and
 - b) affecting all or any of the Facilities or Services or their provision and
 - c) either (i) giving rise to a requirement for a change to the Facilities or Services or (ii) increasing the cost of provision of the Facilities or Services

and which either:

- (1) affect hospitals alone or are Health Related
 - (2) to the extent giving rise to a requirement for a change to the Facilities, or an increase in the cost of provision of the Facilities (i) have First Effect later than the Guarantee Period or (ii) have First Effect during the Guarantee Period and with retrospective effect after all Relevant Permissions for the Development have been obtained, unless Known at 1 January 1998
- (ii) the introduction, amendment, modification or repeal of any Relevant Tax Law
 - (iii) the introduction of selective employment tax after Financial Closing
 - (iv) the introduction after Financial Closing, but not later than the third anniversary of the Time for Hospital Completion, of a minimum wage applicable to all persons employed in the United Kingdom in excess of £3.75 per hour, RPI Indexed from 1 January 1997
 - (v) the introduction of any Legal Provision which adversely and directly discriminates against the SPC (or the SPC and other companies who are



responsible for designing building and financing and/or operating hospitals) or against projects procured under the UK Government's private finance initiative save that:

- (a) no Change in Law shall occur solely on the basis that its effect on the SPC is greater than its effect on other companies and
- (b) a change in taxes (other than as described in (ii) above), or the introduction of a tax, affecting companies generally shall not be a Change in Law in any circumstances

but excludes all other changes in Legal Provision and the effects thereof.

Change Threshold means (i) the aggregate sum of £6,000,000 in respect of Change Capital Cost during a period of fifteen years following the Hospital Operations Date, and (ii) zero thereafter

Claim means any claim, demand, proceeding or action made or brought by or against any party to this Agreement or any SPC Staff (but shall not include any claim for consequential loss, loss of profit or loss of revenue except in respect of any claim from any individual in respect of employment or personal injury or death).

Clinical Area means those parts of the Hospital where surgical and medical treatment is carried out by the Trust Staff.

Comfort Letters means the letters issued by the Secretary of State for Scotland and addressed to the SPC and to the Funders in the Agreed Form.

Competent Person means a minister, ministry, national or supranational agency, official or public or statutory person of, or the Government of Scotland, the United Kingdom or of the European Union (but not any individual member state of the European Union) which has jurisdiction over the SPC (in respect of matters relating to the SPC) or the Trust (in respect of matters relating to the Trust).

Completion Certificate means a certificate associated with the Development issued by the Local Authority confirming completion of all relevant works in compliance with all relevant building warrants for the Development.

Component Unit means a part of the Hospital identified as such in the Availability Model and which is identified as (i) Trust accommodation-new buildings and (ii) Trust accommodation-existing buildings, as such Availability Model is amended from time to time in accordance with Clause 50 (Change).

Confidential Information means:

- (a) all information designated as such by either party in writing, save that the SPC may not so designate any Project Document to which the Trust is a party (other than in respect of numerical and financial information) or the Financial Model.
- (b) all information relating to the identity, condition or medical history of a patient of the Trust or at the Hospital



- (c) all information which relates to the business, affairs, activities, financial position, prices, prospects, trade secrets, know how, personnel or suppliers of either party
- (d) all information which relates the proposals or plans of either party including draft business plans of the Trust and its directorates or departments

except to the extent that the same is lawfully in the public domain or is required to be disclosed by a party by operation of law or for registration.

Connected Party means any company which is in the same Group as the SPC.

Constructive Total Loss means damage to or destruction of the New Build Hospital where the cost of demolition and reinstatement including professional fees and VAT would exceed £30,000,000 RPI Indexed.

Contamination means anything which if left unremedied would be reasonably likely to give rise at any time thereafter to an Environmental Claim and Contaminated shall be construed accordingly.

Continuing Period means the period beginning on the day following the Primary Period Expiry Date, as such period is determined from time to time pursuant to Clause 4.3 (Duration) and together with (a) the number of days during which a Force Majeure Event exists in accordance with the provisions of Clause 70 (Force Majeure) hereof during the relevant part of the Continuing Period and (b) any extension thereof pursuant to Clause 4.2 (Duration).

Contractor means Kier Build Limited appointed as contractors for the Development by the SPC.

Contractor Collateral Warranty means the document described as such entered into by Kier Build Limited and the Trust which the SPC is to procure pursuant to Clause 17.2.5 (Contracts with Third Parties) and the form of which is set out in Part 14.

Control means all or any of:

- (a) shares or the right to acquire shares conferring in aggregate more than 50% of the total voting rights conferred by all the shares for the time being in issue in the capital of SPC normally conferring the right to vote at general meetings
- (b) the power to exercise voting rights conferring in the aggregate more than 50% of the total voting rights conferred by all the shares for the time being in issue in the capital of SPC normally conferring the right to vote at general meetings
- (c) the ability to control the composition of SPC's board of directors or committees or equivalent body or the decisions of such board, committees or equivalent body, whether through ownership of share capital, by contract or otherwise.

COSHH means Control of Substances Hazardous to Health Regulations 1994.



Creditor means each and any of the liquidator of, receiver or, statutory administrator appointed to the SPC or creditor entering into possession of all or any of the assets of the SPC or the Agent or the Bank's Nominee (as defined in the Trust Direct Agreement).

Date of Expiry means the date of expiry or sooner termination of this Agreement (however the same may be terminated) in accordance with the provisions of this Agreement.

Dealing has the meaning given to it in Clause 30 (Surplus Clawback).

Decision means a decision of the Expert given pursuant to Clause 69 (Dispute Resolution Procedure).

Deed of Variation of Ground Lease means the deed named as such set out in Part 30.

Deed of Variation of Occupational Sublease means the deed named as such set out in Part 31.

Default Point shall have the meaning given to it in paragraph 5 of Part 10.

Defects Liability Period means the defects liability period under the Building Contract.

Design Documentation means (i) the Basic Design (ii) Stage D Design and (iii) all site plans, plans, drawings, specifications, designs, layouts, room data sheets, (whether on paper or stored in electronic format) prepared or submitted by the SPC after the Execution Date, relating to the design and construction of the Hospital.

Design Liaison Procedure means the procedure set out in Part 17.

Detailed Planning Consent means the conditional planning permission dated 30 May 1997 (EK97/037) granted by South Lanarkshire Council for the erection of the New Build Hospital and 36 staff residences.

Developed Design means the Design Documentation necessary for the Development, or as the context requires, such parts of it as are then in existence.

Development means the demolition and/or alteration of existing buildings and the erection construction and installation of the works contemplated by the Approved Design and the Relevant Permissions.

Development Phase means the date commencing on Financial Closing and ending on the Hospital Operations Date.

Disputed Amount means any sum which may be due for payment to the SPC hereunder, but entitlement to which is in good faith disputed by the Trust, and of which dispute the Trust has given notice to the SPC pursuant to Clause 8.6 (Disputed Invoices) before making a deduction of or withholding such sum.

Dispute Resolution Procedure means the dispute resolution procedure set out in Clause 69 (Dispute Resolution Procedure).

Environment includes reference to land, air and water.

Environment Laws means any law relating to or pertaining to the Environment or the health and safety of the public and/or workers and includes references to common law,

nuisance, The Public Health Acts, The Control of Pollution Act 1974, The Health and Safety at Work etc Act 1974, The Environmental Protection Act 1990, The Environmental Act 1995, The Sewerage (Scotland) Act 1968, The Water (Scotland) Act 1980, The Alkali Works Regulations Act 1906, The Clean Air Act 1993 and all codes of practice issued thereunder or in connection therewith and all EC Regulations, Decisions and Directives relating to the Environment having force from time to time in Scotland.

Environmental Claims means all claims, demands, actions, proceedings, prosecutions or other enforcement action made or brought against or requirement imposed upon the SPC (and without double counting SPC Staff) by any Competent Person and/or any third party pursuant to Environmental Laws in respect of the New Build Hospital.

Equipment means New Equipment and Transfer Equipment.

Equipment Commissioning Program means the timetable and detailed program of tests to be carried out by the SPC in order to demonstrate compliance with the specified performance criteria as specified in Part 18 and pursuant to Clause 21.1.1 (Commissioning, Completion and Taking Over).

Equity Investment means the initial paid up subscription price of all the shares in the share capital of the SPC (being at Financial Close £100) and increased by the subscription price of additional shares issued by the SPC with the consent of the Trust provided that in each case such amounts have been expended solely for the purposes of fulfilling the SPC's obligations under this Agreement.

Equity Rate of Return means the rate of return on investment to Investors agreed for the purpose of the PFI Contract being 17.30 % real (irrespective of the actual rate of return from time to time).

Event of Default means an event described as such in any part of the PFI Documents.

Execution Date means the date on which this Agreement is presumed under section 3 of the Requirements of Writing (Scotland) Act 1995 to have been granted by the Trust and the SPC.

Existing Buildings means the land delineated in orange and hatched red on the Plan numbered 1 but excluding the LHC Building and such part of the New Build Hospital which falls within the orange delineated area.

Existing Buildings Certification Date means the date on which a certificate in relation to the Existing Buildings is issued pursuant to Clause 27.12.

Existing Hospital means the land delineated red on the Plan numbered 4 and including the buildings thereon.

Expert means the person appointed pursuant to Clause 69.2 (Reference to an Expert).

Extension of Time means a permitted extension of time under Clause 25 (Extension of Time for Hospital Completion).

Facilities means the facilities to be made available by the SPC to the Trust as a consequence of the design, construction, financing, equipping and Commissioning of the Development and New Equipment in accordance with the obligations of the SPC under the PFI Documents.

Facilities Change means a change made pursuant to Clause 50 (Service Changes and Facilities Changes) to the Facilities (including without limitation changes to the New Equipment required at the Hospital) occurring at any time during the Term.

Financial Closing means the last date upon which each of the Trust and the SPC issues written confirmation that their respective conditions precedent to this Agreement has been satisfied or waived in accordance with Clause 3 (PreConditions) and the Agent issues written confirmation to the SPC and the Trust that the conditions precedent to the provision of finance under its Financing Documents have been satisfied.

Financial Default in relation to any party means the appointment of a liquidator, receiver (over a material part of the assets of the relevant company) or statutory administrator, or in relation to the SPC alone, upon a Creditor entering into possession of the Ground Lease.

Financial Indebtedness means any indebtedness in respect of:

- (a) monies borrowed or raised
- (b) any liability under any debenture, bond, note, loan stock, documentary credit or acceptance or other security
- (c) the amount payable in respect of any asset acquired by a person where such payment is deferred for more than 90 days after the date on which the person obtained possession of the asset concerned
- (d) a liability arising under any interest or currency exchange agreement, forward interest rate or forward currency exchange rate agreement or other hedging instrument
- (e) any guarantee, indemnity or similar deed or agreement relating to financial loss of any person arising in respect of any of the matters described above and within this definition; and
- (f) liabilities under leases categorised as finance leases under applicable UK accounting standards.

Financial Model means the financial model for the Project as contained in Part 1C.

Financing Documents means the loan agreements, swaps, hedging agreements, security agreements, guarantees, shareholder and subscription agreements and all other documents related to the construction and financing of the Hospital all in the Agreed Form at Financial Close as the same may be amended pursuant to a Change. After the Hospital Operations Date the Financing Documents shall be all such agreements and other documents relating to the construction and financing as amended or replaced pursuant to Clause 54.2.2 or pursuant to a Change.

First Effect means in respect of any Legal Provision the date upon which such Legal Provision first comes into force.

FM Service means the service, more particularly described in Part 22, of procuring the provision of and managing the provision of the Managed Services.

Force Majeure Event means any of:

- (a) war, hostilities (whether declared or undeclared), invasion, armed conflict or act of a foreign enemy, mobilisation, requisition or embargo
- (b) rebellion, revolution, insurrection, military or usurped power or civil war
- (c) ionising radiation or contamination unless the source or cause of the contamination or radiation is brought to or near the New Build Hospital by or on behalf of the SPC or any other person for whom the SPC is responsible
- (d) riot, commotion or civil disorder except where restricted to employees of the SPC or its sub contractors
- (e) pressure waves caused by aircraft or other aerial devices
- (f) general strike, being a strike of substantially the whole workforce in the United Kingdom, beyond the second complete day of such strike

but only to the extent that after Financial Closing the same shall be beyond the reasonable control of a Party, and shall materially and adversely affect the performance by such affected Party of its obligations pursuant to this Agreement, and such material and adverse effect could not have been overcome by the exercise of diligence and reasonable care (which shall include acts and activities to prevent a Party's facilities from a casualty event which are reasonable in the light of the likelihood of such event, the probable effect of it if it should occur and the likely efficacy of the protection measures).

Funder means any institution or incorporated body providing funds or swap or hedging instruments to the SPC for the purpose of carrying out the Development.

Funder Payments shall bear the meaning given to them in Clause 68 (Payments Following Early Termination).

Good Industry Practice means the exercise of that degree of skill, diligence, prudence, foresight and operating practice which would reasonably and ordinarily be expected from a skilled and experienced operator engaged in the same type of undertaking as that of the SPC or Service Provider or Contractor. (as relevant) under the same or similar circumstances.

Ground Lease means the ground lease of the New Build Hospital, being the document, part of the PFI Documents of even date herewith, described as such entered into by the Trust and the SPC in the Agreed Form.

Group has the meaning ascribed to it in Section 229 of the Income and Corporation Taxes Act 1988.

Guarantee Period means the period from Financial Closing to the aggregate of (i) the date seven years thereafter and (ii) any period during which liquidated damages are payable pursuant to Clause 16.2 (Construction Obligations).

Hard FM Services means those Managed Services specified in Part 23 and grouped under the heading "Hard FM Services".

Health Related means relating only to health care or the providers or provision of health care.

Health Service Body has the meaning ascribed to it by Section 4 of the National Health Service and Community Care Act 1990.

Hospital means the New Build Hospital together with, from the Existing Buildings Certification Date, the Existing Buildings.

Hospital Buildings Commissioning Program means the timetable and detailed program of tests to be carried out by the SPC to enable completion of the Development to be achieved as specified in Part 18 and pursuant to Clause 21.1.1 (Commissioning, Completion and Taking Over).

Hospital Commissioning means the series of tests to be carried out in relation to the Hospital buildings, New Equipment and operating systems in accordance with the Hospital Commissioning Procedure to enable completion of the Development to be achieved as specified in Part 18 and pursuant to Clause 21.1.1 (Commissioning, Completion and Taking Over).

Hospital Commissioning Certificate means a certificate issued by the Independent Certifier pursuant to Clause 21.3 (Commissioning, Completion and Taking Over).

Hospital Commissioning Procedure means the procedures as outlined in Part 18.

Hospital Commissioning Program means any or all of the following:

- (i) the Hospital Buildings Commissioning Program
- (ii) the Operating Systems Commissioning Program
- (iii) the Equipment Commissioning Program.

Hospital Cover Exclusion means any of the Insured Risks to the extent to which the SPC is unable to obtain insurance cover, solely by reason of such cover ceasing to be available to hospitals or Health Related buildings.

Hospital Operations Date means the date of issue of the Hospital Commissioning Certificate.

Income Generation Scheme shall bear the meaning given to it in Clause 9 (Income Generation Schemes).

Increased Operating Cost means the reasonable extra costs (other than Change Capital Costs) necessarily incurred by the SPC or the Principal Service Provider or Service Provider (without any double counting) in providing any Service as a consequence of any Change on the basis that the Service Provider shall be entitled to the profit margin obtained on the provision of the Services as at the time of the Execution Date.

Indemnity Amount means any sum which is immediately due and payable by the SPC to the Trust pursuant to (i) any indemnity given in this Agreement, or (ii) any award of damages by any competent court or pursuant to Clause 69 (Dispute Resolution Procedure), and of which sum the Trust has given notice to the SPC pursuant to Clause 8.6 (Disputed Invoices) before making a deduction or withholding such sum.

Independent Certifier means the person appointed on terms which are in the Agreed Form pursuant to Clause 21.2A (Commissioning, Completion and Taking Over), for the purpose of Hospital Commissioning.



Innisfree Group means Innisfree Partners Limited, Innisfree Limited or any of their respective subsidiary undertakings or parent undertakings or any subsidiary undertaking of such parent undertaking or any partnership (or any partners of such partnership) of which any of them is the general partner, manager or adviser, or any unit trust, investment fund, partnership or other fund of which any of them is trustee, manager or adviser or any unit trust, investment fund, partnership or other fund, the managers of which are advised by any of them (the "Defined Group") or any nominee or trustee for any member of the Defined Group (whether on a change of nominee or trustee or otherwise) or the holders of units in, or partners in or members of or investors in any unit trust, investment trust or fund referred to in this definition.

Insurance Threshold shall have the meaning given to it in Clause 59.9.

Insured Risks means those risks against which the SPC is required to keep insurance in force pursuant to Clause 59 (Insurance) and Part 9.

Insurers means (i) the Insurers specified in Part 9 or (ii) such insurance office or underwriter of repute selected by the SPC and approved by the Trust, whose approval shall not be unreasonably withheld or delayed.

Intellectual Property Rights means patents, trademarks, service marks, design rights (whether registerable or otherwise), applications for any of the foregoing, copyright, knowhow, trade or business names or other similar rights or obligations (whether registerable or not) in any country (including but not limited to the United Kingdom).

Interest Rate means the base lending rate of Barclays Bank plc from time to time in force.

Interim Period means, in relation to each Service, the period between the Execution Date and the relevant Service Start Date.

Intermediate Maintenance Program means the program agreed from time to time, and in any event reviewed at monthly intervals between the SPC and the Trust (acting reasonably) to accommodate preventative and ongoing maintenance of the Hospital on an ongoing basis, provided that such maintenance is not maintenance which a competent contractor under obligation to make the Hospital continuously Available would have carried out in accordance with the Planned Maintenance Program. In the event that the Trust withholds its agreement to a proposed program, it must give notice of this and of its reasons for withholding consent within 5 Business Days of receiving the proposed program. In the event that the Trust unreasonably withholds its agreement to a proposed program, no Availability Deductions shall apply in respect of any non Availability which would not have arisen had the proposed program been adopted.

Investors means Kier Limited registered number 1611136 and Innisfree Partners Limited registered number 3078744 in its capacity as general partner of the Innisfree PFI Fund, as shareholders and providers of Subordinated Debt in the SPC together with any transferee or other shareholder or holder of Subordinated Debt from time to time of the SPC (other than any shareholder or holder of Subordinated Debt who has obtained his shareholding on Subordinated Debt in breach of the terms of this Agreement).

Known means that at the relevant date the Legal Provision or any similar Legal Provision has been publicly proposed whether in any green paper, white paper, draft legislation, subordinate legislation, treaty, regulation, directive or decision in each case published by HM Government and/or European Commission and that building contractors building hospital projects of a similar scale and complexity would be expected to be aware of it.

Legal Provision means any (i) law, statute, statutory instrument, order, byelaw, or other enforceable legislation and (ii) any regulation, directly applicable directive, decision or other legislation of the European Union (or its predecessor organisations) having the force of law in Scotland from time to time or otherwise applying to the SPC or the New Build Hospital provided that any guidance or practice issued from NISiSME (including without limitation health technical memoranda hospital building notes and Scottish health building notes) shall not be binding on the SPC unless instructed as a Change after Financial Close.

LHC Building means the land delineated in black and hatched red on the Plan numbered 2.

Liaison Group means the group described as such established by the parties pursuant to Clause 47 (Liaison Group).

Linked Organisation means any person or firm or other body in which the SPC has a direct or indirect interest or in which any person firm or body which has a direct or indirect interest in the SPC has any such interest.

Local Authority means South Lanarkshire Council, or any successor as local authority within the meaning of the Local Government etc (Scotland) Act 1994.

Losses means any liabilities, damages, losses, penalties, costs and/or expenses (including all legal expenses calculated on a client solicitor basis) incurred by a party to this Agreement but not consequential loss, loss of profit or loss of revenue.

Managed Services means the services described in Clause 33 (Managed and FM Services) and in Part 23 and **Managed Service** shall be any one of them.

Marginal Unit Price means £2.63 in aggregate (comprising in respect of the following Managed Services: Catering (patients) £2.25, Housekeeping £0.32 and Portering £0.06) which cost is part of the cost of a Service.

Market Test means to invite competitive tenders for the Tested Services in accordance with Clause 42.7 (Market Testing Procedures) and **Market Testing** shall be construed accordingly.

Market Test Price means the cost of a relevant Tested Service as offered by the party whose bid is selected pursuant to Clause 42.

Measurable Period means any continuous period of non Availability of any Component Unit.

Member of the Kier Group means Kier Group plc (registered number 02708030) or any company which is a Subsidiary of Kier Group plc.

Monthly Reporting Period means a period of 1 calendar month (or part thereof in respect of the first and last period of the Term as may be appropriate) during which Performance Failure Points will be measured.

Monthly Score means in relation to a Managed Service the total number of Performance Failure Points allocated to the SPC in respect of such Managed Service in a Monthly Reporting Period in accordance with Part 10.

Net Profit Before Tax shall have the meaning given to it in Clause 9.4 (Target Revenue & Recoverable Revenue).

New Build Hospital means the areas of ground delineated in red on the Plan numbered 3 together with everything therein and thereon.

New Equipment means Groups 1 and 2 equipment as required by the Approved Design for the use of the Trust staff excluding Transfer Equipment supplied or installed at the Hospital at any time during the Term.

NHS means the National Health Service.

NHSiSME means the National Health Service in Scotland Management Executive.

Non Clinical Areas means all parts of the Hospital which are not Clinical Areas.

Occupancy Report means a report prepared by the SPC setting out the number of Occupied Bed Days at the Hospital in a Monthly Reporting Period in the form set out in Part 1A Table 3a or as amended with the prior agreement of the Trust.

Occupancy Variation means the adjustment to the Unitary Charge for a variance in Occupied Bed Days from the assumed level of 339 Occupied Bed Days per day calculated in accordance with Part 1A.

Occupancy Variance shall have the meaning ascribed to it in Part 1A.

Occupied Bed Day means a day on which a Bed is occupied by a Patient at 00.00hrs (midnight).

Occupational Sublease means the document described as such, part of the PFI Documents, of even date herewith entered into between the Trust and the SPC in the Agreed Form.

Open Market Value has the meaning given to it in Clause 30 (Surplus Clawback).

Operating Systems Commissioning Program means the timetable and detailed program of tests to be carried out by or on behalf of the SPC in order to demonstrate compliance with the specified performance criteria as specified in Part 18 and pursuant to Clause 21.1.1 (Commissioning, Completion and Taking Over).

Operational Saving means the costs (other than Change Capital Savings) reasonably avoidable by the SPC or the Principal Service Provider or Service Provider in providing any Service as a consequence of any Change calculated on the basis that the Service Provider be entitled to the profit margin obtained on the provision of the Services as at the time of the Execution Date.

Outline Program means the timetable and program for providing the Facilities set out in Part 16.

Overdue Interest Rate means 3% above the Interest Rate.

Part means a Part of the Schedule.

Party means a party to this Agreement.

Patient means any patient at the Hospital.

Patients Charter means the document described as such, contained in Part 26.

Payment Year means a period of one year starting on 1 April and ending on 31 March in the following calendar year.

Performance Deduction means in respect of any Monthly Reporting Period the deduction from the Unitary Charge for performance failure in such Monthly Reporting Period calculated in accordance with Part 1A which shall equal the total number of Performance Failure Points for the relevant Managed Service multiplied by the Performance Failure Point Value for such Managed Service provided always that the Performance Deduction for any Managed Service shall not for any Monthly Reporting Period exceed 50% of the Service Cost of such Managed Service.

Performance Failure Point means a point allocated to the SPC for performance failure under the Performance Monitoring System.

Performance Failure Point Value in relation to a Managed Service is calculated as:

$$v = \frac{1}{2} \left(\frac{p}{o} \right)$$

where:

v is the Performance Failure Point Value

p is the Service Cost of the Managed Service (disregarding the Occupancy Variation) from time to time

o is the total number of Category 1 Obligations, Category 2 Obligations and Category 3 Obligations in that Managed Service from time to time

such Performance Failure Point Value as at the Execution Date being set out in Part 23 in respect of each Managed Service.

Performance Monitoring Report means a report prepared by or on behalf of the SPC in accordance with paragraph 6.1 of Part 10 and including a schedule in the form set out in Part 1A Tables 3c and 3d or as amended with the prior agreement of the Trust.

Performance Monitoring System means the system for monitoring each of the Managed Services set out in Part 10.

Performance Regime means the regime agreed between the parties governing performance of Managed Services, as set down in Part 10 and in the Specifications set out in Part 23.

Permitted Deduction means any Disputed Amount, any Indemnity Amount, the increase in cost to the Trust of procuring (or itself providing) a Service arising on the re-tendering of a Service by the Trust after it has exercised its rights under Clause 44 (Replacement of Service Provider), and those sums so described in Clauses 8.2, 23A, 23.2, 24.3, 44.7, 50.2.8, 59.5 and 70.5.

Permitted Use means use as a hospital and/or for the provision of any form of healthcare or social care, and for all purposes ancillary thereto.

PFI Contract means this Agreement.

PFI Documents means the PFI Contract and the documents, each in the Agreed Form, detailed in Part 3 and where the context requires shall mean only those documents which remain in force at the relevant time.

Plan means each plan annexed and executed as relative hereto and numbered 1, 2, 3, 4, and 5 respectively.

Planned Maintenance Program means the indicative program for planned maintenance of the Facilities as set out for information in Part 28

Planning Acts means the Town and Country Planning (Scotland) Acts 1972 to 1997 and any local or public statutes re-enacting or modifying or replacing the same and all statutory instruments rules orders notices directions and regulations made thereunder.

Planning Agreement means an agreement effected pursuant to section 75 of the Town and Country Planning (Scotland) Act 1997.

Planning Authority means any Relevant Authority in relation to an application for Detailed Planning Consent.

Planning Decision means a decision (including a deemed refusal) of a Relevant Authority in relation to an application for Detailed Planning Consent.

Pre-existing Contamination means the cause of any Environmental Claim or Remediation Work to the extent such cause arose or existed prior to Financial Closing but only to the extent that such Pre-existing Contamination (i) would not reasonably have been expected to have been discovered prior to the Hospital Operations Date by a building contractor, involved in the construction of the New Build Hospital, who had exercised reasonable skill and care in the performance of his construction obligations and (ii) of which the SPC or the Contractor were not in fact aware at Financial Closing.

Pricing Schedule means Table 2 of Part 1A

Primary Period means the aggregate of (i) a period of thirty (30) years from the Hospital Operations Date and (ii) the number of days during which a Force Majeure Event existed during that period, determined by Clause 70 (Force Majeure).

Primary Period Expiry Date occurs on the expiry of the Primary Period.

Principal Contracts means (i) the Building Contract (ii) the Principal Services Contract and (iii) the appointments of each of the Architect and the consulting mechanical and electrical engineer related to the Development, in Agreed Form.

Principal Services Contract means the contract described as such between the SPC and ISS Mediclean Limited in the Agreed Form.

Principal Service Provider means ISS Mediclean Ltd (registered number 1659837) and any successor permitted by the provisions of this Agreement.

Proceeds means the net sale proceeds and share of uplift (in the amount and due at the time stated therein) due to the Trust pursuant to Clauses 29 (Transfer of Surplus Land at Hairmyres) and Clause 30 (Surplus Clawback).

Professional Team means the Architect and any consulting structural engineers, consulting mechanical and electrical engineers employed by the Contractor providing services in connection with the Development.

Professional Team Collateral Warranties means the documents described as such entered into by certain members of the Professional Team and the Trust which the SPC is to procure pursuant to Clause 17.2.6 (Contracts with Third Parties) and the forms of which are set out in Part 15.

Program means the detailed program for providing the Facilities based on the Outline Program and as drawn up in accordance with Clause 12 (Project Duties and Program).

Prohibited Materials means any of the materials listed in Part 27.

Project means provision of the Facilities and Services in accordance with all the terms of the PFI Documents.

Project Documents means the documents comprising the PFI Documents, the Financing Documents, the Trust Direct Agreement, the Services Direct Agreement, the Contractor Collateral Warranty, the Professional Team Collateral Warranties, the Assignment of Performance Guarantees and any sub contracts entered into by the SPC in respect of its obligations under the PFI Documents and any other document which the SPC and the Trust agree in writing shall be a Project Document.

Protected Period means the period commencing on termination of the Term in accordance with Clause 64.1 (The Trust's Right to Terminate) and ending on the later of (i) the date which would have been the Primary Period Expiry Date, but for such termination, as anticipated at the date of such termination and (ii) if any notice has been given pursuant to Clause 4.2 (Duration) at or before the date of such termination, the then anticipated date upon which the Term would have expired, but for termination pursuant to Clause 64.1 (The Trust's Right to Terminate).

Provider Service Manager means a person appointed pursuant to Clause 46.2 (Authorisation - Provider Services Managers) and **Provider Service Managers** shall be construed accordingly.

Records means the records which constitute Part 11.

Recoverable Revenue means an 8% share (or such other percentage as the parties may agree) of Total Revenue above the Target Revenue in relation to a Scheme, which amount is to be received by the Trust, under Clause 9.4 (Target Revenue & Recoverable Revenue).

Relevant Appointor has the meaning ascribed to it by Clause 69.4 (Relevant Appointor).

Relevant Authority means the Secretary of State for Scotland or as he may specify any public or local authority or any other statutory or non statutory organisation or body whose approval may be required for the carrying out of the Development or any part thereof.

Relevant Equipment bears the meaning given to it in Clause 40.5 (Relevant Equipment).

Relevant Permissions means the Detailed Planning Consent and such further planning permissions, building warrants and other necessary consents, excluding the Trust's Consents, as shall be required in connection therewith and as shall have been approved.



by the Trust such approval not to be unreasonably withheld having regard to the value of the Trust's interest in the Development.

Relevant Monitoring Period has the meaning ascribed to it in Part 10, paragraph 1.3.

Relevant Standards means the standards set out in Part 19.

Relevant Tax Law means all Tax Law but excluding Tax Rates.

Relief Event means a strike by the Trust or its employees but only to the extent that after Financial Closing the same shall materially and adversely affect, or increase the cost of, the performance by the SPC of its obligations pursuant to this Agreement, and such material and adverse effect could not have been overcome by the exercise of diligence and reasonable care (which shall include acts and activities to prevent a Party's facilities from a casualty event which are reasonable in the light of the likelihood of such event, the probable effect of it if it should occur and the likely efficacy of the protection measures).

Remediation Works means such work (including investigative works) as need to be carried out to the Hospital and, solely as a consequence thereof, to the Development:

- (i) to comply with any conditions in any Relevant Permission concerning Pre-existing Contamination or Contaminated Land
- (ii) to ensure that there is no reasonable prospect that any Environmental Claim in respect of any substances in on or under the Hospital could successfully be brought against the SPC in respect of the Hospital.

Remedy Periods means in relation to a Service Failure Category 1, a period of 24 hours and in relation to a Service Failure Category 2, a period of 12 hours or, if there is a different Remedy Period set against the relevant Category of a Managed Service in Part 23, such different Remedy Period; there is no Remedy Period for a Service Failure Category 3, or for a Service Failure which is a breach of a Legal Provision. A Remedy Period begins on the occurrence of the relevant event except in the case of an event which a competent Service Provider would not have detected in which case the Remedy Period begins when the relevant event is reported.

Reports means the reports specified in Part 11.

Residual Value means the assumed £5m at the Primary Period Expiry Date.

RPI means the general index of retail prices (all items) (currently known as RPI) compiled by the Office for National Statistics and published by HMSO or, following any adjustment to the basis of which, or non publication of the same, an alternative index which, in the reasonable opinion of the Trust, most closely approximates thereto.

RPI Indexed means that the relevant amount shall be adjusted by the movement in RPI between the Execution Date (unless another date is stated) and the relevant date from time to time at which any calculation is made using that relevant amount.

Schedule means the Schedule in 31 Parts annexed and signed as relative hereto.

Schedules of Accommodation means those schedules as set out in Part 13A.

Scheme means an Income Generation Scheme carried out in accordance with Clause 9 (Income Generating Scheme).

Scheme Accounts means in respect of any Scheme the accounts which relate to the financial operation of such Scheme.

Section means a group of Clauses in this Agreement, so described by reference to the subject of the Section.

Senior Debt means the amount payable by the SPC in accordance with Table 4 to Part 1A as amended pursuant to any Change (including accrued interest to redeem the loan facility of £75,000,000 under the Financing Documents (or where the Financing Documents have been amended or replaced pursuant to Clause 54 of this Agreement the equivalent which would have been outstanding at such date had the Financing Documents not been amended or replaced) to the extent that such amounts have been (i) properly disbursed pursuant to Clauses 5 and 27 of the Credit Agreement forming part of the Financing Documents, and (ii) have not arisen directly or indirectly as a result of the breach by the SPC of any provisions of the Financing Documents other than a breach arising as a result of a Trust Event of Default or Force Majeure Event.

Serious Breach means a breach of Clause 75 where (i) a forbidden act results in a material financial loss to the Trust which cannot be recovered or (ii) the forbidden act results in a loss of confidence by the Trust in the management of the SPC in that it knew (or ought to have known) of the corrupt act and did not immediately act to prevent it and inform the Trust: and in all other cases the occurrence of a forbidden act shall not be sufficiently serious to entitle the Trust to terminate this Agreement.

Service means the Accommodation Service, the FM Service and the Managed Services or where the context requires, an individual Managed Service.

Services Audit Procedure means the audit procedure referred to in Clause 34.4 designed to achieve auditing of the operation of the Performance Monitoring System by the SPC.

Service Change means a change, made pursuant to Clause 50 (Service Changes and Facilities Changes) in the duties comprised in an existing Managed Service.

Service Cost means in respect of a Managed Service that part of the Unitary Charge which comprises the component cost of such Managed Service.

Service Default has the meaning ascribed to it in Clauses 43 (Service Default).

Services Direct Agreement means the document in the form appearing at Part 12C described as such to be entered into by the Trust, the SPC and the Principal Services Provider of even date herewith.

Service Failure means, subject to applicable Remedy Periods, a failure on the part of the SPC or a Service Provider to perform any task or duty comprised within or necessary for the performance of a Managed Service to the relevant standards set out below, as follows:

- | | |
|--------------------|---|
| Category 1: | failures which detract from the quality of the Managed Services provided for the operating environment of the Trust |
| Category 2: | failures which impede the normal operating efficiency of the Trust |
| Category 3: | failures which inhibit the Trust's or other Service Provider's ability to deliver services which place the well being of patients, staff or visitors to the Hospital in danger. |

Service Period means, in relation to a Managed Service, the initial period during which the Service Provider is contracted to provide that Managed Service until the Managed Service is to be Tested in accordance with Clause 42 (Market Testing/Benchmarking Services) and each seven year period as specified in Part 23 during which a Managed Service is to be provided between Market Testing or Benchmarking and in relation to the Hard FM Services, means the Term.

Service Provider means, in relation to a Managed Service, the SPC and any sub contractor authorised for the time being to provide that Managed Service and in relation to the FM Service, the Principal Service Provider.

Service Standards means in respect of a Service each and every requirement and standard relating to a Service set out in the relevant Specification, the PFI Documents, the Patients' Charter insofar as it relates to the Services (to the extent required under the relevant Specification) and more generally in accordance with Good Industry Practice.

Service Start Date means in relation to any Service the date on which the SPC or a Service Provider commences the performance of activities comprised within that Service.

SPC means the said H DGH Limited and its permitted successors and assignees.

SPC Contract Manager means the person appointed by the SPC pursuant to Clause 46.1 (Authorisation - SPC Contract Manager).

SPC Events of Default means the events specified in Clause 63 (Events of Default).

SPC Infection Risk means the existence of an infection or medical condition affecting Patients, Trust Staff, SPC Staff or third parties who have entered the Hospital, the occurrence of which is a result of (i) a breach by the SPC of any requirement of a Specification, or (ii) any breach by the SPC or SPC Staff of any Environmental Laws; the risk and responsibility associated with any circumstance or breach so described, and the consequences flowing from it, shall rest with the SPC such that (a) it shall have no entitlement to payment of any sum pursuant to Clause 35.2.4 (Outbreak) and (b) Availability and Performance Deductions may be made in accordance with the Availability Regime and Performance Regime.

SPC Staff means the employees, consultants, independent contractors and agents of the SPC, the Contractor, the Principal Service Provider and the Service Providers and includes the employees, consultants, agents and independent contractors of permitted sub-contractors.

Specification means each output specification for the Services appearing in Part 23, and Specifications shall be construed accordingly.

Stage D Design means the drawings and other documents detailed in Part 13C to be prepared by or on behalf of the SPC.

Sterling and £ means the lawful currency of the United Kingdom from time to time.

Subordinated Debt means the outstanding subordinated debt invested in the SPC in accordance with the subordinated Financing Documents, part of the Financing Documents being (subject to any amendment pursuant to Clause 54) not more than the amount set out in Table 5 of Part 1A together with any further Subordinated Debt advanced to the SPC with the approval of the Trust or pursuant to any Change or Trust Default or Force-Majeure.

Subsidiary has the meaning given to it in Section 736 of the Companies Act 1985 as amended by Section 144 of the Companies Act 1989.

Surplus Land Note means a document in the form of the note being part of Part 21 delivered pursuant to Clause 29.

Surplus Land Guarantee means the guarantee granted by Kier Group plc in favour of the Trust, a copy of which is attached in Part 21.

Surplus Site means that area of land delineated in green on the Plan numbered 5.

Target Revenue means, in respect of any Scheme, the total estimated aggregate incomings (exclusive of VAT) to be received by the SPC in respect of such Scheme, described as such and as agreed between the Trust and the SPC under Clause 9.4.2 (Target Revenue & Recoverable Revenue).

Tax Law means all Legal Provision relating to the imposition of Value Added Tax, sales, purchase, turnover or any other indirect tax.

Tax Rates means all Tax Laws insofar as they set or implement (i) the rate at which a tax is levied or (ii) the rate at which an allowance, deduction, credit or exemption relating to a tax is granted (including a rate of zero or 100 per cent), but in each case excluding an outright exemption of any services provided by the SPC.

Term means (without prejudice to the survival provisions of Clause 68.1 (Preservation of Funders' Rights) which shall not be construed so as to extend the Term) the period during which this Agreement remains in force.

Termination Notice means a notice given by the Trust pursuant to Clause 64 (Termination by Reason of Default) or by the SPC pursuant to Clause 66.

Termination Warning means a notice so described in this Agreement given by the Trust or by the SPC pursuant to Clause 66.

Tested Service Price means from time to time that part of the Total Service Price which relates to the Tested Services.

Tested Service Price Movement means the increase in the Tested Service Price (expressed as a percentage) pursuant to the inflation adjustment provisions contained in Part 1A of the Schedule in the period since the preceding Testing (or, in the case of the initial testing, since 1 April 1997) (or if no price adjustment pursuant to Clause 42.6.1 took place at such preceding Testing, the period shall commence from the date of the last Testing at which a price adjustment pursuant to Clause 42.6.1 did take place).

Tested Services means the Managed Services excluding the Hard FM Services and the provision of Utilities.

Testing means Benchmarking and/or Market Testing.

Time for Hospital Completion means 1 June 2001 as modified by any Extension of Time provided that if any event occurs after the Time for Hospital Completion but before the Hospital Operations Date, which would have entitled the SPC to an Extension of Time, such Extension of Time will be added to the Time for Hospital Completion.

Total Equity means the aggregate of Equity Investment and the Subordinated Debt.



Total Revenue means, in respect of any Scheme, the total aggregate incomings (exclusive of VAT) received by the SPC as specified in the Scheme Accounts.

Total Service Price means the price set out in Part 1A Table 1 as amended in accordance with the provisions of this Agreement.

Transfer Employees means in relation to a Service those employees (of the Trust or others) whose details are set out in Part 8 as updated from time to time pursuant to Clauses 58.2 (Employee Information) and 58.7 (Interim Period).

Transfer Equipment means the equipment owned or used by the Trust and to be used within the Hospital, details of which appear in Part 20 subject to additions and deletions made by the Trust pursuant to Clause 19 (Transfer Equipment).

Triennium means each period of 36 months commencing on the Hospital Operations Date and each and every third anniversary thereof.

Trust means the said The Hairmyres and Stonehouse Hospitals National Health Service Trust or its successors.

Trust's Consents means those consents detailed in Part 13D.

Trust Direct Agreement means the document in Agreed Form to be entered into by the Trust, the SPC and the Agent on behalf of the Funders of even date herewith.

Trust Event of Default means those events specified in Clause 66.1 (Trust's Default).

Trust Infection Risk means the existence of any infection or medical condition affecting Patients or Trust Staff or third parties who have entered the Hospital which is not an SPC Infection Risk, but for the avoidance of doubt not any infection or medical condition affecting the SPC Staff.

Trust Procedures means any procedures or policies of the Trust as may be in force, and any of its standing orders or standing financial instructions as may be in force as set out or referred to in Part 26 (as at the Execution Date) provided always that any amendment to Trust Procedures from those applying at the Execution Date shall only be binding on the SPC to the extent implemented through a Change.

Trust Representative means the duly authorised person appointed by the Trust pursuant to Clause 45.1 (Authorisation - Trust Representative).

Trust Requirements means the documents and others detailed in Part 13A.

Trust Service Representative means a duly authorised person appointed by the Trust pursuant to Clause 45.2 (Authorisation - Trust Service Representative) and **Trust Service Representatives** shall be construed accordingly.

Trust Staff means the employees, consultants, independent contractors and agents of the Trust and includes the employees, consultants, agents and independent contractors of such sub contractors.

Trust Works Representative means such firm or person as the Trust may from time to time appoint pursuant to Clause 18 (Trust Works Representative) for the purpose of this Agreement and notified in writing to the SPC.

Trust's Enforcement Costs means all legal professional and other fees and outlays and all other costs properly and reasonably incurred by or on behalf of the Trust following from or otherwise connected with the failure of the SPC to implement any undertaking obligation or other condition imposed on the SPC in this Agreement together with any VAT thereon.

Trust's Solicitors means McClure Naismith, Solicitors, 49 Queen Street, Edinburgh and Beachcroft Stanleys, Solicitors, 20 Funnival Street, London.

TUPE means the Transfer of Undertakings (Protection of Employment) Regulations 1981 (as amended).

Unitary Charge means the charge payable by the Trust to the SPC for the Services which shall be ascertained (i) during the Primary Period in accordance with Part 1A and (ii) during any Continuing Period in accordance with Part 1B, in each case as the same may from time to time be adjusted pursuant to Clause 8 (Price, Payment and Billing) and subject to the provisions of Clause 76.

Utility Costs are the actual costs incurred in the supply to the Hospital of gas, electricity, water, sewerage and trade effluent (and such other supplies as may be included by reason of a Change) for which provisional allowances are set as Energy/Services in Part 1A, Table 1.

Value of the Dealing has the meaning given to it in Clause 30 (Surplus Clawback).

VAT means value added tax chargeable under the Value Added Tax Act 1994 or any Legal Provision amending or replacing the same.

Visitors means any person entering the New Build Hospital other than the SPC Staff, Trust Staff or Patients.

Warranties means the representations and warranties set out in Clauses 5 (SPC Warranties) and 6 (Trust Warranties and Undertakings).

Whole Hospital Policies means those policies referred to in Part 26, item (iv) and which are in the Agreed Form.

Written Down Value means in respect of any asset at any time the written down value of that asset, on the basis that the capital cost of the relevant equipment together with its costs of installation and design and any borrowing costs, are written down on a straight line basis to zero over the period of 10 (or in the case of supplies, 7 years).

Year means a period of 12 calendar months.

SECTION 2: AWARD OF CONCESSION

2 Award

2.1 Appointment

The Trust:

- 2.1.1 relying on the SPC Warranties pursuant to Clause 5
- 2.1.2 in consideration of the obligations and duties assumed by the SPC under the PFI Documents
- 2.1.3 on and subject to the terms and conditions of the PFI Documents

appoints the SPC to provide or procure the provision of the Service to the Trust and to design, construct, fit out, equip, commission, finance and operate the Project (or procure the same) in accordance with all the terms of the PFI Documents.

2.2 Acceptance

The SPC:

- 2.2.1 relying on the Trust Warranties pursuant to Clause 6
- 2.2.2 in consideration of the obligations and duties assumed by the Trust under the PFI Documents
- 2.2.3 on and subject to the terms and conditions of the PFI Documents

accepts the appointment made under Clause 2.1 and undertakes to provide or procure the provision of the Service and to design, construct, fit out, equip, commission, finance and operate the Project (or procure the same) in accordance with all the terms of the PFI Documents.

3 PreConditions

3.1 Conditions Precedent

This Agreement, with the exception of Clause 2, the obligations in Clause 3.2, the Warranties and Clause 74 (Confidentiality), shall not come into effect until:

- 3.1.1 the parties to them execute and deliver:
 - 3.1.1.1 the agreements constituting the PFI Documents
 - 3.1.1.2 the Building Contract
 - 3.1.1.3 the Principal Services Contract
 - 3.1.1.4 the Financing Documents
 - 3.1.1.5 the Assignment of the Performance Guarantees
 - 3.1.1.6 the Trust Direct Agreement



- 3.1.1.7 the Services Direct Agreement
 - 3.1.1.8 Contractor Collateral Warranty
 - 3.1.1.9 Professional Team Collateral Warranties
 - 3.1.1.10 the Surplus Land Guarantee
- and a copy of each of the documents listed in this Clause 3.1.1 to which the Trust is not a party, duly certified as a true complete and up-to-date copy by a director of the SPC, has been delivered to the Trust
- 3.1.2 the Trust has received a certificate signed by a director of SPC and in respect of Clause 3.1.2.1 only a certificate signed by the Agent stating:
 - 3.1.2.1 that all conditions to the availability of debt funding for the SPC under the Financing Documents have been fulfilled or waived, other than any that will be fulfilled by the execution of the PFI Documents by the Trust
 - 3.1.2.2 the name of each beneficial owner of each share in the SPC
 - 3.1.3 the SPC has delivered to the Trust, in form and substance acceptable to the Trust:
 - 3.1.3.1 a copy, certified a true copy by its company secretary, of the minutes of a meeting of its board of directors, duly convened and held, authorising the SPC to undertake the Project and to execute and deliver the Project Documents
 - 3.1.3.2 copies, certified as true copies by its company secretary, of the SPC's certificate of incorporation and memorandum and articles of association
 - 3.1.3.3 a certificate, dated the day on which the last of the conditions precedent in Clause 3.1 (other than this Clause 3.1.3.3) are fulfilled or waived by the Trust, executed by two directors of the SPC confirming that SPC's Warranties are true, correct and not misleading as at that date
 - 3.1.4 the Trust has received written approval of the Secretary of State for Scotland for the Trust's full business case for the Project dated 3 September 1997
 - 3.1.5 the SPC has received in a form and substance acceptable to the SPC:
 - 3.1.5.1 the approval referred to in Clause 3.1.4
 - 3.1.5.2 resolutions of the Trust authorising the Trust to enter into the Project and to execute and deliver the Project Documents to which it is a party and perform each of its obligations thereunder
 - 3.1.5.3 that part of the current contract between the Trust and Lanarkshire Health Board for the purchase of Trust services which the Trust has approval from Lanarkshire Health Board to deliver to the SPC

- 3.1.5.4 a certificate, dated the day on which the last conditions precedent in Clause 3.1 (other than this Clause 3.1.5.4 are) fulfilled or waived, signed by the Trust confirming that the Trust's Warranties given under Clause 6 are true, correct and not misleading as at that date
- 3.1.5.5 the Comfort Letters
- 3.1.5.6 a copy of the standing orders and standing financial instructions of the Trust.
- 3.1.6 The Secretary of State for Scotland has certified this Agreement and the Project Documents to which the Trust is a party to be an externally financed development agreement pursuant to and for the purposes of the National Health Service (Private Finance) Act 1997.
- 3.1.7 The SPC has confirmed that it is satisfied with the arrangements put in place by the Trust for the survey to be carried out in accordance with Clause 27.10 of the Existing Buildings.

3.2 Fulfilment of Conditions Precedent

Each party shall use its best endeavours to procure that the conditions set out in Clause 3.1 for which it is responsible are satisfied as soon as possible after the Execution Date. If any of those conditions are not satisfied by close of business on the seventh day following the Execution Date (unless temporarily or permanently waived by the person in whose favour the condition is granted in writing at its absolute discretion), this Agreement and the other documents constituting the Project Documents shall cease to have effect from that date.

3.3 Further Conditions

The SPC shall procure the fulfilment of any condition temporarily waived by the Trust under Clause 3.2 within such time as may be specified in the relevant waiver and, in any event, promptly to the Trust's satisfaction.

4 Duration

- 4.1 This Agreement and the Term shall, subject to Clause 3.1, come into force on the Execution Date and shall subsist thereafter until terminated in accordance with the following provisions of Clause 4 but subject to a lawful exercise of any early termination rights set out or referred to in this Agreement.
- 4.2 The Trust alone shall have the option to extend the Term beyond the Primary Period by a maximum of two Continuing Periods of fifteen (15) years each (as extended pursuant to Clause 70.7 (Consequences of a Force Majeure Event), but subject to a lawful exercise of any early termination rights set out or referred to in this Agreement) the first of such periods beginning on the day following the Primary Period Expiry Date and any second such period beginning on the day following the expiry of the preceding period, in each case by notice given in accordance with Clause 4.3.
- 4.3 Any exercise by the Trust of its rights under Clause 4.2 shall:
 - 4.3.1 be made not later than the day falling 5 years prior to (i) in respect of the first exercise of its rights under Clause 4.2, the Primary Period Expiry Date,

- and (ii) in respect of a further exercise of its rights under Clause 4.2, the date falling on the fifteenth anniversary of the Primary Period Expiry Date
- 4.3.2 be irrevocable without the written consent of the SPC; and
- 4.3.3 be made by notice in writing to the SPC.
- 4.4 If the Trust does not exercise its option under Clause 4.3 on or before the relevant date, the Term shall expire at the end of the Primary Period or if applicable at the end of the Continuing Period.

5 SPC Warranties

The SPC warrants to the Trust that:

- 5.1 the SPC:
- 5.1.1 is validly incorporated
- 5.1.2 has the power and capacity to execute each of the Project Documents to which it is a party and perform its obligations and exercise its rights under them
- 5.1.3 has not traded at any time since its incorporation other than for the purposes of the Project and the Project Documents
- 5.2 except for liabilities that have arisen in connection with the SPC preparing to enter and/or entering into this Agreement and the other Project Documents and arrangements ancillary thereto the SPC has no material obligations
- 5.3 the information on the SPC in Part 4 is true correct and not misleading and (other than any charge granted pursuant to the Financing Documents) no offer or other arrangement is outstanding other than in favour of any existing shareholder of SPC by which any person is at the Execution Date entitled to or obliged to subscribe for or take, by means of transfer or by conversion of any other form of instrument or bond, any interest in any share capital in the SPC (including any such entitlement or obligation that may arise in exercise of an option exercisable by or against the SPC or any Sponsor)
- 5.4 the information on the board of directors of the SPC in Part 4 is true and accurate and (other than any charge or security granted pursuant to the Financing Documents) no offer or other arrangement by which any alteration to the constitution of the board of directors of the SPC may take effect is outstanding
- 5.5 so far as it is aware, the copy of the memorandum and articles of association of the SPC certified by the company secretary of the SPC and delivered to the Trust under Clause 3.1.3 is true, complete and accurate and that no proposals are outstanding to amend any of those documents
- 5.6 the SPC is entitled to grant the licence granted in Clause 52.1 (Licence of Intellectual Property)
- 5.7 the SPC is not in breach of any of the material terms of the PFI Documents which have not been disclosed to and waived as such by the Trust and will not by entering into or performing its obligations or exercising its rights under the Project Documents be in

breach of or cause to be breached any restriction (whether arising in contract or otherwise) binding on the SPC or any of its assets or undertakings

5.8 to the best of the SPC's knowledge, based on diligent enquiry, (other than any charge or security granted pursuant to the Financing Documents) none of the authorised share capital (issued or unissued) of the SPC is subject to any encumbrance or security interest of the kind described in Clause 57.3 (Restrictions on SPC)

5.9 the SPC has no Subsidiaries or subsidiary undertakings.

6 Trust Warranties and Undertakings

6.1 The Trust warrants to the SPC that:

- 6.1.1 the Trust has obtained all necessary consents and approvals to enter into this Agreement and the Project Documents to which it is a party and to perform each of its obligations thereunder
- 6.1.2 the Trust has the power and capacity to execute each of the Project Documents to which it is a party and to perform each of its obligations thereunder, and each such document, and the Trust's signatory thereto, has been duly approved in accordance with all relevant constitutional and regulatory requirements
- 6.1.3 the Trust has complied in all material respects with all relevant Legal Provision in procuring the Services from SPC
- 6.1.4 the Trust is validly established as an NHS Trust pursuant to The Hairmyres and Stonehouse Hospitals National Health Service Trust (Establishment) Order 1993 as amended by The Hairmyres and Stonehouse Hospitals National Health Service Trust (Establishment) (Amendment) Order 1998 (together "the Order") pursuant to which it was established as an NHS Trust (as defined in the National Health Service Scotland Act 1978) and, pursuant to paragraph 2 of such Order is called The Hairmyres and Stonehouse Hospitals National Health Service Trust
- 6.1.5 the copy of the standing orders and standing financial instructions of the Trust delivered to the SPC pursuant to Clause 3.1.5.6 is true, complete and accurate and not misleading and no proposals are outstanding to amend either of those documents which would have an effect on the Trust's powers and obligations to enter into or carry out or any of its obligations under this Agreement or any of the other Project Documents to which it is expressed to be a party
- 6.1.6 all necessary action has been taken or will be taken to authorise the execution, delivery and performance of each of the Project Documents to which it is expressed to be a party and no limitation of its powers will be exceeded as a result of the performance of the transactions contemplated by such documents
- 6.1.7 the Project Documents, and any other document or instrument executed or to be delivered or to be executed or delivered by the Trust thereunder constitute or, as the case may be, will constitute valid and legally binding obligations of the Trust

- 6.1.8 the execution and delivery of each of the Project Documents and any other document or instrument executed or delivered or to be executed or delivered thereunder by the Trust and the performance of its obligations thereunder on compliance with their respective provisions will not:
- (i) contravene any existing applicable law, statute, rule or regulation or any judgment, decree or permit to which the Trust is subject, conflict with, or result in any breach of any of the terms of, or constitute a default under, any agreement or instrument to which the Trust is expressed to be a party or is subject to or by which it, or any of its property is bound in a manner which is reasonably likely to result in any liability on the part of the SPC or the Funders (or any of them) to any third party by reason of any such conflict,
 - (ii) contravene or conflict with any provision of the Order referred to in Clause 6.1.4
- 6.1.9 all material authorisations, approvals, consents, licences, exemptions, filings, registrations and other matters required by law for or in consequence of the entry into and performance by the Trust or and/or (so far as it relates to the Trust) the validity of this Agreement or any of the Project Documents to which the Trust is expressed to be party or the transactions to be implemented pursuant thereto and/or the carrying on of the business of the Trust in the ordinary course have been obtained or effected or will be obtained or effected prior to the date required by law
- 6.1.10 the information specified in Part 25 (Trust Disclosed Data) is true, complete and accurate and not misleading in any material respect and there were no material liabilities of the Trust which were not disclosed by or shown as been provided for in such data
- 6.1.11 there has been no material adverse change in the business, operations, assets, prospects or financial condition of the Trust since 31 March 1997
- 6.1.12 all financial and other information provided in writing by, or on behalf of, the Trust in connection with this Agreement or any of the other Project Documents after the date of this Agreement was true and accurate in all material respects when given and there are no other facts or matters, the admission of which would have made any such statement or information provided misleading or a materially inaccurate representation of the situation described therein and all opinions, projections and forecasts given or made have been honestly made and based upon reasonable assumptions
- 6.1.13 no proceedings have been taken and not discharged or to the best of the Trust's knowledge, information and belief threatened for its winding-up or dissolution
- 6.2 The Trust shall use all reasonable endeavours to ensure its compliance with its obligations pursuant to all contracts made from time to time between the Trust and all purchasers of the Trust's services.
- 6.3 The Trust and Trust Staff shall co-operate in good faith with the SPC and SPC Staff to enable the parties to carry out their obligations in terms of this Agreement and the other Project Documents to which they are a party.

- 6.4 The Trust and Trust Staff shall not (whether by act or omission) obstruct or prevent the SPC, the Contractor or any Service Provider or SPC Staff from carrying out any of their obligations under this Agreement or any Project Document to which they are a party.
- 6.5 The Trust will use reasonable endeavours to ensure that the Trust Staff and persons authorised by the Trust will not interfere with the carrying out of the Development by the SPC.

7 **Not Used**

8 **Price, Payment and Billing**

8.1 8.1.1 **Unitary Charge**

Subject to Clause 8.1.3 and the other provisions of this Clause 8 and Clause 70, in consideration of the provision of the Service, the Trust shall pay to the SPC the Unitary Charge as determined by Clause 8 and Part 1A Table 1 (or Part 1B as appropriate) with effect from and including the Hospital Operations Date throughout the remainder of the Term.

8.1.2 **General Adjustments to Unitary Charge**

The Unitary Charge shall be adjusted if appropriate from time to time pursuant to inter alia the following provisions of this Agreement:

Clause 8.10 (Inflation Adjustment)
 Clause 9 (Income Generation Schemes)
 Clause 16.5 (Contamination)
 Clause 16.8 (Archaeological Discovery)
 Clause 22 (Phased Completion)
 Clause 33.6A (Provisional Service Cost)
 Clause 42 (Benchmarking and Market Testing)
 Clause 42.10.4 (Efficiency Savings)
 Clause 50 (Service Changes and Facilities Changes)
 Clause 51A (Linen Costs)
 Clause 59.9 (Increased Premium and Loss)
 Clause 67.2 (Increased Cost on Retender)
 Clause 70 (Force Majeure)
 Clause 71 (Relief Events)
 Part 1A, Paragraphs 3 (General Explanation of Charge), 4 (Inflation Adjustments), 8 (Change in Hospital Capacity) and Paragraph 9A (Hospital Cover Exclusion)

and the relevant constituent elements of Part 1A Table 1 and Table 2 shall (except in the case of Clause 67.2) be amended accordingly

8.1.3 **Monthly Adjustments to Unitary Charge**

The Unitary Charge shall be adjusted, if appropriate, for each Monthly Reporting Period in accordance with the following provisions:

by deducting:

8.1.3.1 the Availability Deduction

8.1.3.2 the Performance Deduction

8.1.3.3 the Permitted Deductions

and by adding or deducting, as the case may be

8.1.3.4 the Occupancy Variation

8.1.3.5 any excess or shortfall in the Utility Costs, linen costs and telephone costs against the provisional allowances as determined pursuant to Paragraph 14 of Part 1A, Clause 51A and Clause 40.3 respectively.

8.1.4 Zero Payment Circumstances

For any Monthly Reporting Period the Unitary Charge as adjusted pursuant to Clause 8 (disregarding any Indemnity Amount and Recoverable Revenue) shall not be less than zero.

8.2 Early Part Payment

The Trust shall pay to the SPC on the last day of each Monthly Reporting Period (or if later, within 21 days after the SPC shall have provided to the Trust an appropriate invoice) (or if that day is not a Business Day then the immediately preceding Business Day) an amount equal to 70 per cent of the Unitary Charge applying in that Monthly Reporting Period (as specified in Part 1A prior to any adjustment under Clause 8.1.3). If the Unitary Charge as adjusted pursuant to Clause 8.1.3 subsequently invoiced for the Monthly Reporting Period in question is less than the amount paid to the SPC under this Clause 8.2 in respect of such Monthly Reporting Period, then the Trust shall be entitled to deduct the amount of the overpayment as a Permitted Deduction from any future payments due to the SPC.

8.3 Invoices

Within 10 days following the end of each Monthly Reporting Period the SPC shall submit a further invoice (the "Reconciling Invoice") setting out the Unitary Charge payable in respect of that Monthly Reporting Period adjusted, if appropriate, in accordance with Clause 8.1.3, and for amounts already invoiced under Clause 8.2. The SPC shall attach to each Reconciling Invoice the following reports (all as more particularly described in Part 1A):

8.3.1 the Availability Report for that Monthly Reporting Period

8.3.2 the Performance Monitoring Report for that Monthly Reporting Period

8.3.3 the Occupancy Report for that Monthly Reporting Period

8.3.4 the linen report for that Monthly Reporting Period

8.3.5 the Utility Cost report for that Monthly Reporting Period

8.3.6 the telephone cost report for that Monthly Reporting Period

8.3.7 a schedule specifying the effect of each or any of the adjustments required by any of the matters set out in Clause 8.1.2 (or otherwise in accordance with

this Agreement) for that Monthly Reporting Period and the effect the adjustments would have on individual elements of Table 2 for the Payment Year in which that Monthly Reporting Period takes place.

8.4 Due Date for Payments

In respect of each Monthly Reporting Period, subject to Clause 8.6 the Trust shall pay to the SPC the amount properly due less any sum paid under Clause 8.2 (if applicable) for that Monthly Reporting Period on the 21st day following the date of receipt of the Reconciling Invoice pursuant to Clause 8.3.

8.5 Payment

All payments under this Agreement shall be made in Sterling by electronic transfer of funds to the bank account of the SPC (which shall be an account located in the United Kingdom) specified in the relevant invoice quoting the invoice, number against which payment is made.

8.6 Disputed Invoices

8.6.1 The Trust shall inform the SPC if it disputes in good faith the amount specified in any invoice delivered pursuant to Clauses 8.2 or 8.3 (the "Disputed Amount") within 15 days of receipt of the relevant invoice, providing details of the amount disputed (by reference to specific Services) and the grounds of the dispute. If the Trust gives such notice to the SPC, the Trust shall be entitled to deduct any Disputed Amount from the relevant payment, but not otherwise. However, any failure by the Trust to give such notice shall be without prejudice to the right of the Trust to give such notice at any later date, and make a deduction of the relevant Disputed Amount from any payment then or thereafter falling due for payment to the SPC under this Agreement. The Trust will not however give such notice at any time later than 60 days after first receiving the final draft audited accounts of the SPC (which cover a period in which the relevant invoice then disputed was first issued) unless (i) it is required or recommended to do so by the National Audit Office or Accounts Commission for Scotland or their agents or (ii) the dispute arises as a consequence of discovery of fraud or corruption. If, within a period of six months of submission, it subsequently transpires that the amount of the invoice is incorrect by reason of a genuine error, the SPC may submit a revised invoice or credit note to the Trust (specifying what the error was) and providing a complete corrected statement and information as required by Clause 8.3 whereupon the Trust shall pay or be credited with the amount properly due, in accordance with Clause 8.4. If, within a further period ending 180 days after the end of the relevant financial year of the SPC during which the invoice error first occurred, it transpires that the amount of the invoice is incorrect by reason of an error which a Service Provider acting in accordance with Good Industry Practice might also have made, the SPC may submit a revised invoice (specifying what the error was) and providing a complete corrected statement and information as required by Clause 8.3, whereupon the Trust shall pay the amount properly due in accordance with Clause 8.4.

8.6.2 In the event that the Trust disputes the amount specified in any invoice in accordance with Clause 8.6 it shall pay the undisputed part of the invoice in accordance with Clause 8.6 but shall be entitled to withhold the balance pending resolution of the dispute.

8.6.3 The parties shall negotiate in good faith in an attempt to resolve such dispute, and subject to paragraphs 5.5 and 5.6 of Part 2, if the Trust and the SPC are unable to resolve the dispute within 14 days of the date of receipt of an invoice either may refer the dispute for resolution under the Dispute Resolution Procedure.

8.6.4 Following resolution of any dispute any amount agreed or adjudged to be due shall be paid within 4 Business Days of the date of agreement or determination together with interest thereon at the Overdue Interest Rate from (and including) the due date for payment to (but excluding) the date of payment thereof in full.

8.7 Late Payment

Subject to Clause 8.6, if any amount due remains unpaid after the due date for payment such amount shall bear interest calculated from day to day at the Overdue Interest Rate from and including the due date for payment to but excluding the date of payment.

8.8 Part Months

8.8.1 Where the Hospital Operations Date does not occur on the first calendar day of a Monthly Reporting Period, the Unitary Charge for the period between the Hospital Operations Date and the end of the Monthly Reporting Period in which the Hospital Operations Date falls shall be equal to the Unitary Charge pro-rated according to the number of days in that Monthly Reporting Period falling on or after the Hospital Operations Date.

8.8.2 Where the Primary Period Expiry Date does not occur on the final calendar day of any Monthly Reporting Period and the Term has been extended, the Unitary Charge for that Monthly Reporting Period shall be the aggregate of (i) the Unitary Charge calculated pursuant to Part 1A for the period between the first day of the relevant calendar month and the Primary Period Expiry Date, pro rated according to the number of days and (ii) the Unitary Charge calculated pursuant to Part 1B for the period between the day following the Primary Period Expiry Date and the last day of the relevant Monthly Reporting Period, pro rated according to the number of days.

8.8.3 Where the Term is extended into a second Continuing Period pursuant to Clause 4.2, and the last day of the first Continuing Period does not occur on the final day of any Monthly Reporting Period, the principles contained in Clause 8.8.2 shall apply mutatis mutandis by reference to the Unitary Charge payable in the first and second Continuing Periods.

8.8.4 Where the date of termination or expiry of the Term does not occur on the final calendar day of any Monthly Reporting Period, the Unitary Charge for the period between the first day of the calendar month in which the date of termination or expiry of the Term falls up to and including the date of termination or expiry shall be equal to the Unitary Charge pro-rated according to the number of days in that Monthly Reporting Period occurring prior to the termination or expiry of this Agreement.



8.9 Deductions to Charges

The Unitary Charge under this Clause 8 (subject to adjustments pursuant to Clauses 8.1.2 and 8.1.3) shall be paid without set-off, withholding or deduction of any sort save as required by law or in respect of any Permitted Deductions.

8.10 Inflation Adjustments

If in respect of any Year the information required for the calculation of an adjustment necessary to reflect the inflation provisions of Part 1A is not published before the date on which the first invoice subsequent to the Adjustment Date in respect of such Year is raised by the SPC, then the invoice shall calculate the Unitary Charge payable by reference to the inflation index applicable to the Unitary Charge payable in respect of the annual rate for the preceding Monthly Reporting Period in respect of which RPI is published, and the Trust shall pay any underpayment (if any) or be credited with any overpayment for the current Monthly Reporting Period and each succeeding Monthly Reporting Period until the information is published together with interest at the Interest Rate on the next succeeding due date for payment.

8.11 Presentation Format

SPC will submit to the Trust all invoices and supporting reports and schedules required to be delivered by it in terms of this Clause 8 or Part 1A in hard and electronic format. The electronic format will be in such form as the Trust may require (acting reasonably). The format of presentation where the report or schedule (including the Pricing Schedule) is updating or changing a previous report or schedules (including the Pricing Schedule) shall be such that the Trust need only test the integrity of the new data supplied by the report or schedule or Pricing Schedule.

9 Income Generation Schemes

9.1 The Trust and the SPC have agreed terms applicable to the following Income Generation Schemes, which will commence on the Hospital Operations Date:

9.1.1 Catering: Staff and Visitors

9.1.1.1 The SPC shall grant a licence incorporating a right of non-exclusive occupation to the Principal Service Provider of an area to be agreed at the Hospital Operations Date for a period expiring not before the Primary Period Expiry Date, for the purpose of staff and visitor catering in accordance with the terms of the relevant Specification.

9.1.1.2 For each Payment Year for which this catering Scheme operates if the Total Revenue of the Scheme (which for this purpose shall include any payment to the SPC pursuant to Clause 9.1.1.2) exceeds £400,000 RPI Indexed from 1 April 1997 (the "Threshold") in any Payment Year (or pro rata if the Scheme Accounts are not coterminous with Payment Years) the SPC will pay to the Trust, by way of downward adjustment to the Unitary Charge, 8% of the Total Revenue in excess of such Threshold, and this amount shall, for the purposes of this Clause 9, constitute Recoverable Revenue.



9.1.1.3 At any Market Test (which will be only in accordance with the overall regime and timing agreed for all Tested Services) in relation to the whole catering service, bids will be invited on the basis that the incoming Service Provider will purchase the Equipment used in the relevant Service at the Written Down Value. The invitation to tender will also require bidders to provide variant prices for each of the following options (a) a contract period of 3 or 7 years (in each case with the price subject to the agreed indexation provisions at RPI minus 0.25%) and (b) with and without the revenue share provisions contained in Clause 9.1.1.2.

9.1.2 Retail

9.1.2.1 The SPC shall grant a licence incorporating a right of non-exclusive occupation to the Principal Service Provider of an area of 1000 sq ft in a location to be agreed at the Hospital Operations Date for a period of 7 years (subject to extension and subject to early termination by a minimum of 1 year's notice from the licensee) for the purpose of retail sales ("the Retail Concession"). If the Trust and SPC shall agree a larger area for the Retail Concession, the Trust will receive the full benefit of the open market rental value for such additional area, calculated in accordance with Clause 9.1.2.5 *mutatis mutandis*.

9.1.2.2 The SPC shall procure that at all times during the existence of such licence, the following range of items shall be available for sale from 07:00 to 21:00 each day:

Newspapers
Magazines
Chocolates
Confectionery
Crisps
Biscuits
Soft Drinks
*Basic Dairy Produce - Milk, Yoghurt, Ice-Cream
*Basic Provisions - Tea, Coffee, Tinned Food etc
Greeting Cards
*Wrapping Paper
*Flowers
Basic Toiletries
Stationery Items
Small Gifts/Toys

("the Minimum Range")

and that such items (other than those marked * above) will be made available for sale to Patients in Beds by means of a delivery service.

9.1.2.3 The SPC has allowed to the Trust as a credit in the calculation of the Unitary Charge for the duration of the Retail Concession, an annual sum equal to £28,101 (RPI Indexed minus 0.25%) per annum ("the Concession Fee")

If this retail Scheme is at any time discontinued and not replaced by a different Scheme, then, provided always the SPC has given a maximum of 1 year's notice of discontinuance in writing to the Trust, the Unitary Charge shall be adjusted accordingly (to reinstate such monies on an ongoing basis). If at any time the licensed area is not being used for any Scheme or if the Minimum Range is not made available pursuant to Clause 9.1.2.2 in each case for a period in excess of 30 days in a 12 month period, the Trust may, by a minimum of 5 Business Days notice in writing to SPC, require that the area be licensed to the Trust for the remainder of the Term at no cost for any use at the discretion of the Trust.

9.1.2.4 For each Payment Year for which this retail Scheme operates if the Total Revenue of the Scheme exceeds £350,000 RPI Indexed from 1 April 1997 in a Payment Year (or pro rata if the Scheme Accounts are not coterminous with Payment Years) (the "Threshold") the SPC will pay to the Trust 8% of the Total Revenue in excess of such Threshold, and this amount shall, for the purposes of this Clause 9 constitute Recoverable Revenue.

9.1.2.5 On each seventh anniversary of the grant of the Retail Concession, the Concession Fee shall be reviewed and adjusted to the open market value on the assumption (if not a fact) of (i) a willing licensor and licensee (ii) that the area of the Retail Concession is available for immediate occupation and use and (iii) that any rent free period has expired

and taking no account of:

- (i) any incentive or premium which a licensee might expect to receive
- (ii) any goodwill
- (iii) any damage or destruction
- (iv) any depreciatory effect on such sum by reason of the application of VAT to it.

9.2 Right of SPC to Implement Further Schemes

Subject to Clauses 9.1 and 9.11 the Trust acknowledges that the SPC shall have the right to carry on (and/or allow third parties to do so) any operations or activities in connection with which it charges any person other than the Trust any amount of money or money's worth, with the prior written consent of the Trust which consent shall be granted or not in accordance with Clause 9.3, but may not otherwise carry on or permit any Scheme. All assets and set up costs required for a Scheme shall be funded by or on behalf of the SPC.

9.3 Trust Consent

Subject to prior agreement on the amount of Target Revenue and Recoverable Revenue for each Scheme, the Trust shall not unreasonably withhold or delay its consent to any

Income Generation Scheme proposed by the SPC. Reasonableness of proposals shall be considered in the light of proposed charges and the impact of the proposed Scheme on:

- 9.3.1 the provision of healthcare services to patients of the Trust
- 9.3.2 the functionality of the Hospital
- 9.3.3 the working environment of the Trust Staff
- 9.3.4 local public opinion towards the Trust
- 9.3.5 anything which is materially detrimental to the Trust's business.

Any consent given shall be irrevocable.

9.4 Target Revenue and Recoverable Revenue

- 9.4.1 At any time prior to the commencement of a Scheme pursuant to Clause 9.2 the SPC shall prepare and deliver to the Trust for approval an estimated Target Revenue for such Scheme together with all relevant calculations and relevant supporting data used by the SPC in calculating the same, a description of such Scheme and details of its proposals for Target Revenue.
- 9.4.2 The Trust and the SPC shall forthwith endeavour to agree a Target Revenue for each Scheme within a reasonable time and in any event within 21 days of delivery by the SPC of its proposals.
- 9.4.3 If the Trust and the SPC are unable to agree a Target Revenue in respect of a proposed Scheme then, if the SPC wishes to continue with the proposed Scheme, the Scheme shall proceed on the basis that the Trust receives 25% of all Net Profit Before Tax ("the Profit Share") of the Scheme, provided always however that if, in any period of account the Scheme fails to make a Net Profit Before Tax, any shortfall may be carried forward indefinitely and set against Net Profit Before Tax in any future period of account.
- 9.4.4 For each Scheme the SPC shall pay the Recoverable Revenue to the Trust or the Profit Share (as the case may be) in accordance with Clause 9.7.

9.5 Net Profit Before Tax

The Net Profit Before Tax of any Scheme shall be equal to the total aggregate incomings received by the Principal Service Provider or the relevant provider of the Scheme (if not the Principal Service Provider) (as specified in the Scheme Accounts) less (1) the total aggregate outgoings (as specified in the Scheme Accounts) and (2) depreciation charges against Scheme Assets but provided that:

- 9.5.1 the net profits are calculated before tax
- 9.5.2 no provision is made in respect of past or future tax liabilities of the Principal Service Provider or the relevant provider of the Scheme (if not the Principal Service Provider) whether in relation to the Scheme or generally
- 9.5.3 no provision is made in respect of the payment of dividends or interest other than interest due on borrowings financing the Scheme

- 9.5.4 the accounting policy for depreciating Scheme Assets is established in accordance with the accounting principles set out in the definition of Written Down Value
- 9.5.5 all sums shall be calculated excluding any applicable VAT other than VAT not recoverable in calculating Net Profit Before Tax in Clause 9.5.1.

9.6 Scheme Accounts

The SPC shall prepare quarterly accounts ("Scheme Accounts") for each Scheme separately. All annual Scheme Accounts shall be prepared in accordance with the accounting principles described in Clause 48.10 (Accounting Principles). The Scheme Accounts shall be audited separately by the SPC's auditors at each financial year end of the SPC. In the event that any transaction effected between the SPC and any Connected Party in operating any Scheme is effected otherwise than on an arms' length basis then, for the purpose of calculating the revenue for such transaction, the deemed revenue of such transaction or Net Profit Before Tax as the case may be (determined pursuant to Clause 9.4) shall be the revenue or Net Profit Before Tax as the case may be which would have been obtained if the transaction had been effected on an arms length basis and the deemed revenue for such transaction or Net Profit Before Tax as the case may be shall be reflected in notes to the Scheme Accounts.

9.7 Payment

The SPC shall (in accordance with the procedure in Clause 8.1.2) account quarterly in respect of periods ending at the end of June, September, December and March in each Year to the Trust, by way of credit against the Unitary Charge for any Recoverable Revenue due under Clauses 9.1 or 9.2 with effect from the day falling five months after (but including) the date the Scheme started operations ("the Scheme Start Date"). At the same time the SPC shall send a copy of the relevant Scheme Accounts to the Trust. If a Scheme does not generate any Recoverable Revenue in a quarter the SPC shall so notify the Trust and send a copy of the relevant Scheme Accounts to the Trust. If any amount due under Clause 9.6 remains uncredited after the due date such amount shall bear interest calculated from day to day at the Overdue Interest Rate from and including the due date for payment to but excluding the date of payment.

9.8 Inspection

The SPC shall, at the request of the Trust on reasonable notice, make available for inspection and copying by the Trust during normal business hours (including in an electronic format to the extent the records are kept in electronic format subject to a duty of commercial confidentiality as set out in Clause 74 (Confidentiality)) all records and logs kept by the SPC in connection with the implementation or operation of a Scheme to the Trust or its auditors for the purpose of verifying any Scheme Accounts.

9.9 Disputed Scheme Accounts

If it appears to the Trust acting in good faith that:

- 9.9.1 there are discrepancies on the face of any of the Scheme Accounts or
- 9.9.2 there are discrepancies in any of the Scheme Accounts revealed by an inspection under Clause 9.8 (Inspection)

then the Trust shall within 60 days of receipt of final draft audited annual Scheme Accounts be entitled to dispute any Scheme Accounts relative to the period which is disputed giving written details of each matter which it disputes. If the Trust and the SPC are subsequently unable to agree the Scheme Accounts within 14 days either party may refer the dispute to the Dispute Resolution Procedure.

9.10 Revisions to Scheme Accounts

If as a consequence of a revision to Scheme Accounts:

9.10.1 by virtue of the provisions of Clause 9.9 or

9.10.2 by virtue of a change required by the SPC's auditors

a further payment is due to the Trust in respect of a Scheme then the payment shall be made within 14 days of the date of revision. The SPC shall at the time of remitting payment send a copy of the revised Scheme Accounts to the Trust. If a revision indicates that the SPC shall have overpaid the Trust the SPC shall not be entitled to a rebate but shall be entitled to deduct an amount equal to such overpayment from any future payments due by the SPC under Clause 9.7 or, if no such payments arise within a period of 12 months, the Trust shall rebate the amount due to the SPC.

9.11 Exceptions

No Scheme will include any of the following:

9.11.1 car parking for which any charge is made

9.11.2 subject to paragraph 8.3 of Part 1A, the provision of medical services other than by the NHS

9.11.3 undertakers services

9.11.4 solicitors services

9.11.5 anything which adversely affects the reputation of the Trust.

10 Not used

SECTION 3: DEVELOPMENT**11 Licence to Enter**

- 11.1 During the period until the Hospital Operations Date, the Trust hereby permits the SPC, SPC Staff and the Funders and their advisers to enter and have access to the New Build Hospital and the Existing Hospital for the purpose of giving effect to the rights and obligations under this Agreement, and the Project Documents to which both the SPC and the Trust are party subject always to such right being exercised only in accordance with the Access Policy.
- 11.1A Notwithstanding any other term of this Agreement the SPC shall be entitled to have access to the New Build Hospital and the Existing Buildings in accordance with, but subject to the restrictions in, the terms of the Access Policy.
- 11.2 Such rights of entry and access are subject to any rights of public passage or access existing over any part of the New Build Hospital and the Existing Hospital, and any statutory right of any relevant authority or third party to have reasonable access over the New Build Hospital and the right of contractors employed by the Trust to have access in accordance with the Access Policy for the execution on or near the New Build Hospital of any works not included in the Project with the consent of SPC (such consent not to be unreasonably withheld) and subject to the Trust indemnifying the SPC for any damage or loss arising including the cost of funds.
- 11.3 Without prejudice to any breach by the Trust of Clause 27.3A, the SPC has satisfied itself in relation to the means of access to the New Build Hospital and the Existing Hospital, the possibility of interference by any person with such access and the times and methods of working necessary to prevent any nuisance whether public or private to any third parties.
- 11.4 Subject to the provisions of Clause 11.5, the permission hereby conferred shall subsist throughout the Term of this Agreement, save that the SPC shall have no licence or right to the Existing Hospital after the Hospital Operations Date.
- 11.5 Following the occurrence of an SPC Event of Default and subject to the Trust Direct Agreement the Trust shall be entitled to revoke the permission conferred by this Clause upon the issue of a Termination Notice issued under Clause 64.1.2 (Trust's Right to Terminate).

12 Project Duties and Program

- 12.1 The SPC will, in accordance with and subject to the detailed terms of this Agreement, design, construct, and equip with the New Equipment, the Facilities and carry out and complete Hospital Commissioning on or before the Time for Hospital Completion.
- 12.2 Within 21 days after Financial Closing the SPC shall submit to the Trust Works Representative for review a Program showing:
- 12.2.1 the anticipated sequence and timing of the activities by which the SPC is to carry out the Development
- 12.2.2 the anticipated respective times for submission by the SPC of Design Documentation.

Unless and until amended by the Program, the elements of the Outline Program shall have effect as if they were elements of the Program. Without prejudice to the other

provisions of this Agreement, the Outline Program and the Program submitted shall be indicative only and shall not impose any contractual obligation on the SPC.

12.3 The SPC may amend the Program from time to time, in which event the SPC shall provide a copy of such amendment to the Trust Works Representative. Review of or comment on the detailed Program by the Trust Works Representative shall not relieve the SPC of any of its obligations under this Agreement. If the Trust Works Representative considers that with such amendment the Development will not be ready before the Time for Hospital Completion, the SPC will consult with the Trust Works Representative in good faith with a view to appraising him of the SPC's proposals for future completion of the Development on or before the Time for Hospital Completion.

12.4 The Trust Works Representative may, however, at any time notify the SPC if the Trust Works Representative considers that the rate of progress of the Development is too slow to meet the Time for Hospital Completion and that this is not due to a circumstance for which the SPC is entitled to an Extension of Time, in which event the SPC shall consult with the Trust Works Representative in good faith with a view to appraising him of the SPC's proposals for future completion of the Development on or before Time for Hospital Completion.

13 Approvals Obligations

13.1 The SPC shall be wholly responsible for, and undertakes to the Trust:

13.1.1 to apply for, diligently pursue and obtain all Relevant Permissions consistent with the Approved Design to enable the Development to be completed in accordance herewith

13.1.2 to apply for and obtain at its own cost all Relevant Permissions by such date as will enable the SPC to proceed with and complete the Development by the Time for Hospital Completion and to pay all fees, give all notices and comply with all requirements in that regard or pursuant to the Relevant Permission

13.1.3 to use all reasonable endeavours to ensure that each Relevant Permission shall be free from unusual or onerous conditions which shall adversely affect the Project after the Hospital Operations Date

13.1.4 to provide to the Trust details of any such conditions attached to a Relevant Permission

13.1.5 except to the extent that they have already been produced to the Trust, to produce to the Trust's Solicitor monthly, unless in the SPC's reasonable opinion (acting reasonably) it considers the Trust should see them sooner, all notices, permissions, consents, and licences from a statutory authority in any way connected with the Development, which may have been served upon or sent to the SPC since the previous notices, permissions and consents were sent pursuant to Clause 13.1.5; and

13.1.6 to procure delivery to the Trust not later than the Time for Hospital Completion of a Completion Certificate in respect of all building warrants then outstanding for the Development.

13.2 The Trust shall be wholly responsible for, and undertakes to the SPC to apply for, diligently pursue and obtain at its own cost all Trust Consents consistent with the Approved Design by the date specified in the Program or (if no date is specified) by such

date as will enable the SPC to proceed with and complete the Development in accordance with the Program and will consult with the SPC in good faith with a view to appraising it of the Trust's proposals for obtaining the Trust Consents so as to facilitate completion of the Development on or before Time for Hospital Completion.

- 13.3 The SPC shall from the date of this Agreement keep the Trust informed of all material steps taken in obtaining the Relevant Permissions and shall provide the Trust with copies of any relevant documentation from the date of this Agreement and shall in particular, make and circulate accurate minutes of meetings held in connection with the Development with the Planning Authority and, if practical to do so, give the Trust adequate notice of and the opportunity to attend all meetings in that regard and shall take due account of representations made by the Trust.
- 13.4 The Trust shall provide the SPC with such information technical expertise data and assistance as the SPC may reasonably require in relation to the Relevant Permissions, to the extent that such assistance does not incur significant cost to the Trust or result in significant disruption to its management functions; although the Trust will so co-operate in good faith, it does not warrant to the SPC the accuracy or availability of such assistance or anything derived from such assistance and the Trust's failure to co-operate or any inaccurate information provided shall not diminish the obligations of the SPC.
- 13.5 The Trust will at the request of the SPC enter into a Planning Agreement, on the following terms:
- 13.5.1 only to the extent that such Planning Agreement is a requirement of the Planning Authority for a Relevant Permission
- 13.5.2 the SPC will be the primary obligor under such Planning Agreement and will to the extent allowed by the Planning Authority in a manner satisfactory to the Trust acting reasonably, free and relieve the Trust of all liability thereunder
- 13.5.3 to the extent practicable the Trust will be party to such a Planning Agreement only for the purpose of giving its consent thereto and to the extent practicable such agreement shall not impose any liability upon the Trust to undertake any action or incur any cost
- 13.5.4 the terms of such Planning Agreement shall be subject to the approval of the Trust (such approval not to be unreasonably withheld or delayed)
- 13.5.5 the SPC will indemnify the Trust against all costs and expenses reasonably incurred by the Trust in negotiating and entering into such Planning Agreement (but not including management time); and
- 13.5.6 the effect of the Planning Agreement shall be conditional upon the carrying out of a specified operation under the Town and Country Planning (Scotland) Act 1997.

14 Design Obligations

- 14.1 The SPC undertakes to the Trust that it will:
- 14.1.1 ensure that all Design Documentation produced by the SPC complies with the Trust's Requirements, except where the Trust has granted a specific

- dispensation from the requirement to comply with the Trust's Requirements as described in Part 13A
- 14.1.2 diligently develop the Developed Design, and develop Stage D Design in regular consultation with the Trust in accordance with the Design Liaison Procedure, and provide the Trust with accurate and complete copies of all general arrangement design information relevant to the Project, but not detailed construction documentation, which is communicated to or by the SPC ensuring that at all times the Trust has in its possession a full current copy of the Design Documentation. Following completion of Stage D Design the SPC shall notify the Trust of any changes to the Design Documentation previously provided and the Trust may only raise objections if the Design Documentation does not meet the Trust's Requirements
- 14.1.3 during the period from Financial Closing through to the completion of the Stage D Design, the SPC will submit each development of the Developed Design or modification to the Trust for approval. Such approval shall not be unreasonably withheld or delayed where such development or modification is consistent with the Trust's Requirements. However, where such development or modification reveals the likelihood that the Trust would encounter operational problems, the SPC will work closely with the Trust to find a solution and will incorporate the Trust's reasonable remedial requirements at the SPC's cost, the SPC being entitled to minimise additional costs to it so far as not compromising the operational practicability of the Hospital. The Stage D Design shall be considered complete only when the Trust has confirmed its approval of Stage D Design, such approval not to be unreasonably withheld or delayed
- 14.1.4 design the Development such that it shall comply with the Trust's Requirements and comply with the Relevant Standards
- 14.1.5 not specify for use any Prohibited Materials, and will specify for use materials, goods and New Equipment which are new and of appropriate quality having regard to their intended use in the Development
- 14.1.6 warrant that all artistic and literary copyright and design rights which may subsist in the Design Documentation are or shall be vested in the SPC (or that the SPC has or shall have a suitable licence to use the same and to grant the licence referred to in this Sub-Clause) and the SPC hereby grants to the Trust from the date of Financial Closing a perpetual royalty free non-exclusive licence to use the same further to its rights under this Agreement including any use or alteration to the Hospital following the Trust's acquisition of the Hospital pursuant to Clause 67.7 (Condition of Hospital on Transfer), for the purposes of completion, maintaining, operating, repairing, renewing or replacing the Development provided that such licence and the rights attached thereunder shall terminate upon the Trust or its successors ceasing to occupy the New Build Hospital for the provision of healthcare
- 14.1.7 exercise and continue to exercise in the performance of its obligations hereunder all skill, care and diligence which is expected of a professionally qualified, fully skilled and competent designer experienced in the design and construction of hospitals of a size, scope and complexity similar to the Project.

Subject to Clause 14.1.2, where the Trust or the SPC proposes or wishes to change the Basic Design, the Stage D Design or the Developed Design the Trust may at any time request or the SPC may at any time recommend such change only in accordance with the provisions of Clause 50 (Service Changes and Facilities Changes).

16 Construction Obligations

16.1 The SPC undertakes to the Trust that:

16.1.1 it will not commence construction of the Development or a relevant part thereof until it holds all Relevant Permissions required for such commencement

16.1.2 it will use all reasonable endeavours to construct the Development in such a manner as will not, except as set out in the Access Policy, interfere with the lawful operation of the Existing Hospital, nor the comfort, convenience or amenity of Patients, Visitors and Trust Staff within the Existing Hospital

16.1.3 in carrying out the Development it will:

16.1.3.1 liaise with the relevant statutory undertakers and utilities to procure that the Development is provided with the relevant statutory mains services

16.1.3.2 comply in all material respects with all conditions attaching to the Relevant Permissions and to any legislation regulations or notices affecting the Development

16.1.3.3 make proper provision for the support of any land, walls, buildings and roads adjoining the New Build Hospital and take all practicable measures to prevent nuisance in or around the New Build Hospital

16.1.3.4 not without the prior consent of the Trust not to be unreasonably withheld or delayed use any materials in substitution for those specified in the Design Documentation unless of an equivalent or superior standard

16.1.4 subject to any Extension of Time permitted under Clause 25, it will complete the Development and the provision of the Facilities on or before the Time for Hospital Completion

16.1.5 it will not permit the use in the Development of the Prohibited Materials

16.1.6 it is the client for the purposes of the CDM Regulations in respect of the whole of the design and construction of the Development and undertakes to issue a declaration to that effect under Regulation 4 of the CDM Regulations as soon as reasonably practicable after the date of this Agreement

16.1.6A it will construct the Development in accordance with the Approved Design.

16.2 If the Hospital Commissioning Certificate has not been issued by the Independent Certifier by the Time for Hospital Completion in accordance with the provisions of Clause 22, then the SPC shall pay to the Trust monthly in arrears the sum of ONE HUNDRED THOUSAND POUNDS (£100,000) STERLING for each complete calendar



- month or pro rata for part of a month which shall elapse between the Time for Hospital Completion and the earlier of (i) the occurrence of the Hospital Operations Date and (ii) termination of this Agreement pursuant to the provisions of Clauses 16.4 and 64.1 (Trust's Right to Terminate).
- 16.3 The sums to be paid in accordance with Clause 16.2 and/or 21.1.2 (Delay in Early Takeover) are by way of liquidated damages and not a penalty and shall together with the Trust's right to terminate this Agreement under Clause 16.4 and Clause 64 (Trust's Right to Terminate) be the Trust's sole remedy against the SPC in respect of any delay in the occurrence of, or failure to achieve, the Hospital Operations Date.
- 16.4 If on the expiry of eighteen months from the Time for Hospital Completion the Hospital Operations Date has not occurred, the Trust shall be entitled to terminate this Agreement in accordance with the provisions of Clause 64 (Termination for SPC Default); provided however that the Trust shall not be entitled to exercise any such right of termination pursuant to this Clause 16.4, following damage to the Project by reason of an Insured Risk, to the extent that the SPC is diligently continuing to reinstate the Project and recommence provision of the Services as a whole.
- 16.5
- 16.5.1 In the event of the SPC becoming aware at any time prior to the Hospital Operations Date that the New Build Hospital is Contaminated then the SPC shall give notice to the Trust Works Representative so that the Trust Works Representative can inspect such Contamination. Upon the reasonable satisfaction of the Trust Works Representative that such Contamination exists (subject always to resolution of any dispute under the Dispute Resolution Procedure), the Trust shall be obliged to make a Change in accordance with the provisions of Clause 50 (Service Changes and Facilities Changes), and assist the SPC to obtain the Relevant Permissions to construct the Development and the SPC shall use all reasonable endeavours to keep the costs of such remedial action to a minimum.
- 16.5.2 Without prejudice to the provisions of Clause 16.5.1 (and always ensuring there is no double counting), the Trust will pay to the SPC within 30 Days of receipt of an appropriate invoice (accompanied by such vouchers, information and documentation as shall be reasonably necessary to evidence the entitlement of the SPC to receive payment of the same):
- 16.5.2.1 any cost, liabilities, penalties, damages or awards (i) to the extent that they are incurred or made against the SPC in respect of or arising from Environmental Claims arising from the presence of any substances in or on or under the New Build Hospital, and (ii) to the extent that the same could not have been avoided or mitigated by a reasonably competent contractor engaged in constructing the Development or a reasonably competent provider of the Service
- 16.5.2.2 all reasonable costs and expenses (including without limitation landfill tax) incurred or suffered by SPC in carrying out or in connection with any Remediation Works, subject to the SPC using all reasonable endeavours to keep the costs of such Remediation Works to a minimum, and
- 16.5.2.3 the reasonable costs of investigating or defending and/or negotiating the settlement of or settling any Environmental Claims, to the extent that the same could not have been avoided

or mitigated by a reasonably competent contractor engaged in constructing the Development or a reasonably competent provider of the Service

- 16.5.3 Without prejudice to the provisions of Clause 16.5.1 (and always ensuring there is no double counting) the Trust will pay to the SPC within 30 Days of receipt of an appropriate invoice (accompanied by such vouchers, information and documentation as shall be reasonably necessary to evidence the entitlement of the SPC to receive payment of the same) the reasonable costs of investigating or defending and/or negotiating the settlement of or settling any Environmental Claims related to the Existing Buildings, to the extent that the same could not have been avoided or mitigated by a reasonably competent contractor engaged in providing the Managed Services to the Existing Buildings

in each case to the extent only that they arise out of Pre-existing Contamination and on discovery of the same, and subject always to the foregoing provisions of this Clause 16.5.2, the Trust shall be obliged to make a change in accordance with Clause 50 (Services Changes and Facilities Changes) to enable the SPC to obtain the Relevant Permissions and effect the Remediation Works.

- 16.6 Where the Trust makes a Change under Clause 16.5, subject to the provisions of Clause 50 (Service Changes and Facilities Changes), and subject always to resolution of any dispute under the Dispute Resolution Procedure, the SPC shall be entitled to (i) such extension of time as agreed or determined under Clause 25 and (ii) such additional costs as determined under Clause 50 (Service Changes and Facilities Changes) (including for the avoidance of doubt the cost to the SPC or the Contractor of interest on any construction sum or borrowing associated with the Development).
- 16.7 As between the SPC and the Trust, all fossils, antiquities and other objects having artistic historic or monetary value which may be found on or at the New Build Hospital by the SPC or the Contractor are or shall, subject to applicable law, become the property of the Trust. Upon discovery, the SPC shall inform the Trust Works Representative as soon as practicable of such discovery and take steps to preserve the item in the condition in which it was found.
- 16.8 In the event the SPC discovers at any time prior to the Hospital Operations Date that the New Build Hospital or part thereof comprises an area of archaeological interest or contains fossils, antiquities or other objects of interest or value the SPC shall give notice to the Trust Works Representative. If upon receipt of such notice and after inspection and investigation and consultation with the appropriate local authority, the Trust Works Representative or the local authority is reasonably satisfied that the New Build Hospital or part thereof is such an area of archaeological interest or content, the Trust shall be obliged to either obtain clearance for the SPC to continue with the Development or shall make a Change in accordance with the provisions of Clause 50 (Service Changes and Facilities Changes) to enable the SPC to obtain the Relevant Permissions to construct the Development and the SPC shall use all reasonable endeavours to keep the cost of remedial action to a minimum.
- 16.9 Where the Trust makes a Change under Clause 16.8, subject to the provisions of Clause 50 (Service Changes and Facilities Changes), the SPC shall be entitled to (i) such extension of time as agreed or determined under Clause 25 and (ii) such additional costs as determined under Clause 50 (Service Changes and Facilities Changes) (subject always to resolution of any dispute under the Dispute Resolution Procedure), but shall not be entitled to recover the cost to the SPC or the Contractor of interest on any construction

sum or borrowing associated with the Development attributable to any such delay for which an extension of time is given.

- 16.10 Without prejudice to Clauses 16.5 and 16.8 hereof notwithstanding any reports or data or opinions made available to it, or used to obtain Relevant Permissions, the SPC shall be deemed to have satisfied itself as to the suitability of the New Build Hospital and facilities to which it will acquire rights for the purpose of undertaking this Agreement and the nature and extent of the risk assumed by it in relation to this Agreement and shall be deemed to have gathered all information necessary to discharge its obligations under this Agreement including information as to the nature, location and condition of the New Build Hospital (including hydrological, geological, geotechnical and sub-surface conditions) and all other circumstances and conditions affecting the Development, including those resulting from the Relevant Permissions and Legal Provision.

17 Contracts with Third Parties

- 17.1 The SPC will prior to Financial Closing submit to the Trust a copy of the Principal Contracts.
- 17.2 The SPC will (or will procure that the Contractor will):
- 17.2.1 forthwith following Financial Closing render unconditional the Building Contract and shall thereafter not terminate or amend the same in such a way that the interests of the Trust are materially adversely affected except with the consent of the Trust such consent not to be unreasonably withheld or delayed, (provided always that this prohibition shall not be construed so as to restrict the SPC's day to day management of such contract or the ability of the SPC to adjust prices where it considers it is commercially reasonable to do so)
- 17.2.2 forthwith following Financial Closing render unconditional the appointment of each party to the Principal Contracts in the form previously submitted and shall thereafter not terminate or amend the same in such a way that the interests of the Trust are materially adversely affected except with the consent of the Trust such consent not to be unreasonably withheld or delayed (provided always that this prohibition shall not be construed so as to restrict the SPC's day to day management of such contracts or the ability of the SPC to adjust prices where it considers it is commercially reasonable to do so)
- 17.2.3 ensure that the Contractor and the professional advisers employed in connection with the Development by the SPC and Contractor including the Professional Team have exercised and will exercise all reasonable skill, care and diligence in the performance of their respective duties in connection with the Development
- 17.2.4 not in any material way act or make any omission contrary to the advice of any member of the Professional Team without first advising the Trust Works Representative in writing providing full details
- 17.2.5 procure that the Contractor shall execute and deliver to the Trust on or before Financial Closing a deed in the form set out in Part 14 of the Schedule
- 17.2.6 procure that the members of the Professional Team shall on or before Financial Closing duly execute and deliver to the Trust a Collateral Warranty in the form set out in Part 15

- 17.2.7 procure the delivery to the Trust and the Funders not later than the Hospital Operations Date of (a) a structural engineer's certificate that the structural design of the Development is in accordance with the Relevant Standards, the Approved Design and the relevant British Standards and Codes of Practice (such certificate to include details of floor loadings) (b) a certificate of the Architect that the design of the Development has been completed in all material respects in accordance with the Approved Design and that to the best of his knowledge and belief no Prohibited Materials have been used in the Development and (c) a certificate from an engineer (covered by suitable professional indemnity insurance) that the design of the mechanical and electrical systems forming part of the Development are properly installed and satisfactory in all respects, and in accordance with the Relevant Standards, and comply with all relevant British Standards and Codes of Practice.

18 Trust Works Representative

- 18.1 The Trust has appointed and shall retain until the end of the Defects Liability Period the Trust Works Representative. In respect of the matters set out in Clauses 18.2 and 18.3, (a) the Trust Works Representative shall have purely a liaison role (b) the Trust Works Representative shall not be able to bind the Trust and shall not be acting as the agent of the Trust and (c) the SPC shall owe no duty to the Trust Works Representative other than as set out in Clause 18.4. In respect of the matters set out in Clauses 18.2 and 18.3:
- 18.1.1 none of the exercise of such duties failure to exercise such duties or the appointment or engagement of the Trust Works Representative by the Trust shall in any way relieve the SPC of any liability for any of its obligations under the PFI Documents or otherwise
- 18.1.2 no approval consent or failure to disapprove or comment on any matter by the Trust Works Representative or acquiescence on the part of the Trust Works Representative shall relieve the SPC of any liability for any of its obligations under the PFI Documents or otherwise
- 18.2 General matters in respect of which the Trust Works Representative has a liaison role are as follows:
- 18.2.1 quality assurance on behalf of the Trust concerning the Project and the SPC's design specifications workmanship and materials
- 18.2.2 considering on behalf of the Trust the design and specification of the Project and the supply, installation, construction, testing, commissioning and completion of the Project and performance of the Contractor's obligations pursuant to Clause 23
- 18.2.3 considering on behalf of the Trust whether the Project has been carried out by the SPC in accordance with the Design Documentation in and to the standards of safety quality and performance required by the PFI Documents and the Relevant Permissions.
- 18.3 Specific matters in respect of which the Trust Works Representative has a liaison role are as follows:
- 18.3.1 to monitor the design and site progress where appropriate against the Program and the SPC's systems for monitoring the progress of the Project

- 18.3.2 to receive review and consider the Design Documentation which is specified in the PFI Documents is to be sent to the Trust Works Representative for consideration
- 18.3.3 to examine either on a continuous basis or at regular intervals the steps taken by the SPC in respect of quality assurance and to consider whether the same are adhered to (for which purpose the Trust Works Representative may arrange and carry out such inspections as he reasonably deems necessary in order to ensure the quality of the Project and compliance with the PFI Documents)
- 18.3.4 to consider the SPC's operating procedures and operating and maintenance manuals
- 18.3.5 to liaise with the SPC's third party inspectors undertaking statutory duties for pressure parts and lifting equipment
- 18.3.6 to monitor the SPC's applications for Relevant Permissions
- 18.3.7 to monitor Hospital Commissioning
- 18.3.8 to advise the Trust of any difference between actual and specified performance of the Project
- 18.3.9 to notify the Trust of defects which in the Trust Works Representative's view should be rectified
- 18.3.10 to consider and make recommendations to the Trust upon any applications for Extensions of Time pursuant to Clause 25 and
- 18.3.11 to exercise any other powers and duties authorised by the Trust
- 18.4 The SPC shall co-operate with the Trust Works Representative and provide such access information and co-operation as the Trust Works Representative may reasonably specify to enable him to perform his duties hereunder.
- 18.5 The Trust Works Representative shall have no authority to relieve the SPC of any of its duties or obligations under the PFI Documents or to give any instructions or directions to the SPC or to order any work which, in either case, involves or might involve delay to the Project or extra payment by the Trust or to make any Change to the Project. Where the Trust Works Representative fails in carrying out its obligations to the Trust in accordance with this Clause 18, the Trust shall not be liable for any time delays to the Project or additional payments.
- 18.6 In the discharge of his functions hereunder the Trust Works Representative shall not owe any duty to the SPC.
- 18.7 The SPC may require the Trust or the Trust Works Representative to confirm in writing any communication of the Trust Works Representative which is not in writing. The SPC shall make such requirement without undue delay and the Trust or the Trust Works Representative shall so confirm in writing his communication without undue delay and in any event within 2 Business Days.
- 18.8 No duty expressed to be given by the Trust to the Trust Works Representative under this Clause 18 shall in any way expressly or impliedly impose any obligation on the SPC or

grant any right to the Trust which is not imposed on the SPC or granted to the Trust by any other provision of this Agreement.

19 Transfer Equipment

- 19.1 At the Execution Date the Trust is the owner of the Transfer Equipment detailed in Part 20.
- 19.2 At any time prior to three months prior to the estimated Hospital Operations Date the Trust shall be entitled to add or delete any item of Group 3 and 4 equipment from Part 20 by notice in writing to the SPC, and shall keep the SPC updated of any changes thereto, (on a monthly basis where necessary) until 3 months prior to the Hospital Operations Date when such list of Groups 3 and 4 equipment shall become final.
- 19.3 For the avoidance of doubt, ownership of the Transfer Equipment shall at all times remain with the Trust.
- 19.4 Not later than three months prior to the Hospital Operations Date, the Trust may request from the SPC an offer in connection with the refurbishment and transfer of such Transfer Equipment and its commissioning for use in the Hospital, in which event such request for an offer shall constitute a request for a Change under Clause 50 (Services Change and Facilities Change).
- 19.5 If (through the mechanism of the procedure for Change under Clause 50 (Services Change and Facilities Change)), the Trust accepts any offer in relation to Transfer Equipment, requested by it from SPC, the SPC will refurbish, transfer and commission in the Hospital the relevant equipment as Transfer Equipment on terms to be agreed. If the Trust shall decline any such offer, the Trust shall remain responsible for disposal of such equipment.

20 New Equipment

- 20.1 All New Equipment shall be procured and commissioned by the SPC in accordance with the terms of this Agreement, and the Hospital Operations Date shall not occur until the New Equipment is so Commissioned.
- 20.2 All New Equipment so procured and commissioned in Clause 20.1 shall, as at the Hospital Operations Date, be delivered with all available warranties from the manufacturers (where relevant).
- 20.3 The SPC shall in accordance with the Hospital Commissioning Programme make available to the Trust at no cost to the Trust, the New Equipment for the purpose of training, for a period of not less than two months prior to the estimated Hospital Operations Date.

21 Commissioning, Completion and Taking Over

- 21.1 The SPC undertakes to the Trust that it will:
- 21.1.1 during the construction period of the Development and in any event not later than six (6) months prior to the scheduled Hospital Operations Date submit to the Trust for review preliminary Hospital Commissioning Programmes and method statements in respect of Hospital Commissioning based on the procedures and statements set out in Part 18 (Hospital Commissioning Procedure) and thereafter develop the same, taking the Trust's reasonable comments into account and ensuring that at all times it has delivered to the

- Trust a full current copy of the Hospital Commissioning Programmes and method statements
- 21.1.2 not less than three hundred and sixty (360), ninety (90) and thirty (30) days prior to the scheduled Hospital Operations Date the SPC shall provide written notification to the Trust of the SPC's then current estimate of the Hospital Operations Date. If the anticipated Hospital Operations Date specified in such notification is earlier than the Time for Hospital Completion, or any previously notified anticipated Hospital Operations Date, the SPC may indicate its intention to complete the Development and invite the issue of the Hospital Commissioning Certificate at the occurrence of the Hospital Operations Date at such earlier date provided that (i) the Hospital Operations Date shall not in any circumstances be earlier than 31 December 1999 (ii) on such notification being given, the Time for Hospital Completion shall be brought forward to the date then notified and in the event of any subsequent delay for which no Extension of Time is permitted pursuant to Clause 25, the SPC shall pay to the Trust (i) liquidated damages of FIFTY THOUSAND POUNDS (£50,000) STERLING for each complete calendar month or pro rata for part of a month which shall elapse between the revised Time for Hospital Completion and the original Time for Hospital Completion specified herein and if the delay continues beyond the original Time for Hospital Completion (ii) liquidated damages pursuant to Clause 16.2 (and not pursuant to Clause 21.1.2(i)) for the period after the original Time for Hospital Completion
- 21.1.3 give the Trust 14 days written notice prior to the scheduled commencement of the procedures inviting the Trust Works Representative, to attend the Hospital Commissioning Procedure
- 21.1.4 carry out and complete Hospital Commissioning in accordance with the Hospital Commissioning Program.
- 21.2 The Trust Works Representative shall:
- 21.2.1 be entitled to attend and monitor Hospital Commissioning
- 21.2.2 discuss with the SPC and advise the Trust of any outstanding items which, subject to Clause 21.3, require rectification in order to achieve the issue of the Hospital Commissioning Certificate.
- 21.2A Forthwith following Financial Closing the SPC will prepare and issue an invitation to tender to each of Mouchel International Consultants, Babtie Management and Llewelyn-Davies and, failing adequate responses from the same, such others as shall be agreed or determined by Dispute Resolution Procedure, for appointment as Independent Certifier in terms in the Agreed Form. The evaluation criteria to be applied shall include (a) PFI experience as Independent Certifier, (b) experience as arm's length project management auditor rather than checker, (c) knowledge of the PFI process, (d) hospital experience and (e) cost. Each of the Trust and the SPC shall nominate two persons to a joint panel, for the purpose of selecting and approving the appointment by the SPC of the Independent Certifier following the receipt and evaluation of bids. If insufficient or inadequate or unacceptable bids are received, or if a substitute Independent Certifier is to be appointed, the process shall be repeated as many times as may be required to procure an appointment or substitute appointment. Any dispute will be referred to the Dispute Resolution Procedure. The Trust will pay on demand to the SPC a sum which in aggregate does not exceed the lower of (i) £62,500 and (ii) one quarter of the cost of the Completion

Services set out in the terms of appointment of the Independent Certifier, in each case together with VAT, payable in the manner and at the times stated in the Agreed Form appointment, provided that the Trust shall not be required to make any payment thereunder until the issue of the Hospital Commissioning Certificate.

- 21.3 The Independent Certifier shall participate in the Design Liaison Procedure in accordance with its terms and determine whether Hospital Commissioning has been satisfactorily completed and if so satisfied shall issue the Hospital Commissioning Certificate (and shall note thereon outstanding items of work or defects requiring rectification), but shall not do so unless in the Independent Certifier's opinion (a) all Clinical Areas are complete and (b) to the extent the use of such Clinical Areas is dependent on any Non Clinical Areas, such Non Clinical Areas are in such a condition as do not prevent the proper functional operation of the Clinical Areas. The Independent Certifier, in considering whether or not it is appropriate to issue the Hospital Commissioning Certificate, shall not have regard to (i) the condition of the Existing Buildings, except to the extent that these are not suitable for certification pursuant to Clause 27.12 solely as a result of failure by the SPC in the performance of its obligations pursuant to Part 18 (Hospital Commissioning) in relation to Existing Building integration and (ii) the failure to complete the Development on the area covered by the buildings marked "IT/Telephone" and "Finance" on the plan attached to the Access Policy by the Time for Hospital Completion in circumstances which mean such failure to complete is as a result of Excused Delay as defined by the Access Policy.

22 Phased Completion

The Trust may request or the SPC may recommend that the completion of the Facilities be achieved in sections, in which event the parties shall follow the Change Control Procedure in respect of each such section on the basis that:

- 22.1 early handover of any section of the Facilities shall only take place with the consent of each of the Trust and the SPC (and the Dispute Resolution Procedure shall not apply)
- 22.2 the Hospital Commissioning Procedure shall apply to such section (in advance of the rest of the Hospital), and the Hospital Operations Date in respect of such section shall take place on such date as the Hospital Commissioning Certificate is issued in respect of such section, and the Term shall continue, in respect of such section, to the same Primary Period Expiry Date as applies to the rest of the Hospital; the Term shall remain 30 years from the date the last section of the Development achieves its Hospital Operations Date
- 22.3 the SPC shall prepare and submit to the Trust a proposal which clearly identifies the cost implications to the Trust of early acceptance of such section, and the effect on the cost to the Trust of the Project (and any change from the amounts set out in Part 1A Table 1 delivered at Financial Closing)
- 22.4 the parties shall determine through the Change Control Procedure (but without the right of either party to seek to invoke the Dispute Resolution Procedure) (i) an applicable charge for such section (ii) Availability and Performance Regimes (allowing for the fact that different standards may be applicable to allow for the fact that not all of the Hospital will have been Commissioned) and (iii) an appropriate adjustment to the liquidated damages payable to the Trust pursuant to Clause 16.2 and 21.1.2 and (iv) any other matters relevant to the early handover of such section
- 22.5 the issue of a Hospital Commissioning Certificate in respect of any part of the Development which is not the whole shall not prejudice the right of the Trust to (i) payment of liquidated damages pursuant to Clause 16.2 and 21.1.2 or (ii) terminate the

PFI Contract pursuant to Clause 64.1 (SPC Event of Default) in respect of the Project as a whole and not only those parts of the Development which have not yet achieved Hospital Operations Date.

23 Rectification of Defects

- 23.1 Notwithstanding the issue of the Hospital Commissioning Certificate, the SPC shall be responsible for rectifying or making good by correction, repair or replacement (and, where necessary, redesign within a reasonable period of time) and in any event before the expiry of the Defects Liability Period at its expense any error in, defect or damage to any part of the Development or any failure of the Project to comply with the PFI Documents which may appear before or occur during the Defects Liability Period.
- 23.2 If any such outstanding item shall not be remedied by the SPC within a reasonable time following notice to the SPC requesting the remedy of the same the Trust may provided it has given the SPC not less than 7 Business Days notice of its intention so to do, proceed to do the work, provided that it does so in a reasonable manner. The reasonable cost incurred by the Trust may, without prejudice to any other method of recovery, be deducted from the Unitary Charge as a Permitted Deduction.

23A Energy Efficiency

Where the Trust bears any increased costs as a result of failure by the SPC to comply with the energy policy forming part of the Trust's Requirements, notwithstanding the provisions of Clause 73 (Limitation of Rights and Liabilities), the SPC shall be liable to the Trust for all such costs incurred, which costs shall be treated by the Trust as a Permitted Deduction.

24 Project Documentation

- 24.1 The SPC shall deliver to the Trust on the Execution Date such as may exist of, and shall not later than the Hospital Operations Date deliver to the Trust the Relevant Permissions and insofar as not already provided two full sets of the Approved Design representing the Development as built. All working drawings and drawings relating to services structural calculations operating and maintenance manuals details of all contractors and sub-contractors employed in connection with the Development and suppliers of all materials used therein will be kept available in a building manual in the New Build Hospital. The Trust shall be entitled to inspect the same during business hours and reproduce all of the same for purposes in connection with the Development as the Trust may reasonably require.
- 24.2 The SPC shall:
- 24.2.1 on or before 18 weeks (or earlier if consistent with Good Industry Practice) prior to the estimated Hospital Operations Date supply to the Trust Works Representative two copies of preliminary operating and maintenance manuals and/or instructions for the Project. These preliminary drafts shall then be revised and finalised in consultation with the Trust Works Representative
- 24.2.2 at least 8 weeks (or earlier if consistent with Good Industry Practice) prior to the estimated Hospital Operations Date supply to the Trust Works Representative two copies of draft operating and maintenance manuals and/or instructions for the Project produced in accordance with Clause 24.2.1

- 24.2.3 not later than the Hospital Operations Date supply to the Trust Works Representative two copies of comprehensive operating and maintenance manuals and/or instructions for the Project
- 24.2.4 within three months after the Hospital Operations Date supply to the Trust Works Representative two copies of the operating and maintenance manuals and/or instructions showing any revisions to the operating manuals, maintenance instructions and drawings from those last supplied
- 24.2.5 the operating and maintenance manuals, instructions, drawings and revisions supplied in accordance with Clauses 24.2.2, 24.2.3 and 24.2.4, together with any updates which may be produced from time to time shall be supplied in a technologically advanced good quality format consistent with Good Industry Practice and capable of being read by commercially available software, and in such detail as will enable the Trust to operate, maintain and consider adjustments to the Project or any part thereof.
- 24.3 Notwithstanding Hospital Commissioning, if documents called for by Clause 24.2.3 are not supplied at the Hospital Operations Date, the Trust may deduct the sum of £10,000 for each month or part thereof during which such documents remain not supplied. Such deduction shall be a Permitted Deduction. Such monies shall be returned to the SPC without interest on supply of the outstanding document or documents. If the documents are not supplied within six months of the Hospital Operations Date, the Trust may proceed to acquire such documents, provided that it does so in a reasonable manner, and the cost incurred by the Trust in so doing may, without prejudice to any other method of recovery, be deducted from the Unitary Charge as a Permitted Deduction to the extent that deductions made pursuant to this Clause have been insufficient.

25 Extension of Time for Hospital Completion

- 25.1 Subject to Clause 16.4, if by reason of any one or more of the following:
- 25.1.1 any Force Majeure Event
- 25.1.2 any Change occurring under Clause 50 (Service Changes and Facilities Changes)
- 25.1.3 any breach by the Trust or Trust Staff of any of the Trust's obligations or warranties under this Agreement
- 25.1.4 strike by the Trust or Trust Staff
- 25.1.5 a change to or introduction or modification or repeal of any Legal Provision which affects the design or construction of the Facilities which relates to or otherwise affects (i) the provision of healthcare or (ii) hospitals, alone (and in each case is not of a more general application)
- 25.1.6 the New Build Hospital is Contaminated
- 25.1.7 the New Build Hospital is or becomes an area of archaeological interest or contains fossils, antiquities or other objects of interest or value

the SPC shall have been delayed in the carrying out of the Project, then provided the SPC shall have used and shall continue to use its reasonable endeavours to avoid and minimise the delay, and provided also that the SPC shall within 30 days or as soon as reasonably

practicable thereafter of it becoming aware of the relevant event have given the Trust Works Representative notice of its claim for an extension of time and (as soon as reasonably practicable thereafter) full particulars of the extension to which it considers itself entitled, the SPC shall be entitled to such extension of the Time for Hospital Completion (or, if the Time for Hospital Completion has already occurred, of the eighteen month period referred to in Clause 16.4) as shall be reasonable. The Trust Works Representative shall on receipt of such notice and particulars advise the Trust of the extension (if any) of the Time for Hospital Completion (or, if the Time for Hospital Completion has already occurred, of the eighteen month period referred to in Clause 16.4) to which the SPC is in the Trust Works Representative's opinion entitled, and the Trust shall forthwith issue notification to the SPC of the period of such extension which the Trust reasonably considers to be fair, and the Time for Hospital Completion (or such eighteen month period, as appropriate) shall be adjusted accordingly.

- 25.2 If the SPC shall not agree with a notification given by the Trust under Clause 25.1, adjusting the Time for Hospital Completion (or such eighteen month period as appropriate), and shall give written notice to that effect to the Trust within 14 days of receipt of such notification the appropriate period of extension of time shall be determined by the Dispute Resolution Procedure pursuant to Clause 69 (Dispute Resolution Procedure).
- 25.3 The SPC shall be under an obligation to notify the Trust, as soon as is practicable, that it has failed to give notice of a relevant event pursuant to Clause 25.1 within the time required and if the Trust is not satisfied that such failure was inadvertent, or not consistent with the standard reasonably expected of a competent design and build contractor, then the Trust may request the SPC for a written explanation. If the Trust is not satisfied with such explanation acting reasonably then the matter shall be referred to the Dispute Resolution Procedure. If the Dispute Resolution Procedure determines that, on the balance of probabilities, the SPC's failure was neither committed intentionally with the purpose of deriving some benefit nor inconsistent with the standard reasonably expected of a competent design and build contractor, then the SPC shall be entitled to an Extension of Time in accordance with the provisions of Clause 25, but not otherwise.
- 25.4 Where the provisions of Clauses 25.1.3 or 25.1.4 apply, the SPC shall be entitled to its additional costs arising (including for the avoidance of doubt the cost to the SPC or the Contractor of interest on borrowing associated with the Development) as determined as if it were a Change pursuant to the Change Control Procedure.
- 25.5 The parties agree that if the Hospital Operations Date is later than 1 June 2001 the dates in Table 1 of Part 1A will be revised to reflect the actual date on which payments of the Unitary Charge are to commence.

26 Events of Default

It shall be an Event of Default if the Building Contract or the appointment of any member of the Professional Team shall be terminated prior to the Hospital Operations Date, and the SPC shall not within 90 days thereafter have entered into a new Building Contract or made a new appointment of the relevant member of the Professional Team with a party and in a form approved by the Trust (whose approval shall not be unreasonably withheld) and in each case the appropriate form of collateral warranty shall have been executed and delivered to the Trust in the form set out in Part 15.

SECTION 4: PROPERTY

27 Grant of Ground Lease

- 27.1 The Trust will grant at Financial Closing and the SPC will accept at Financial Closing the Ground Lease of the New Build Hospital in the Agreed Form.
- 27.2 The rateable value of the New Build Hospital is as shown in the valuation roll and all outgoing in respect of water, sewerage, electricity, gas, oil and such like outgoing, shall be apportioned at the Date of Entry. The Trust will continue to be responsible for the payment of rates (or any equivalent local tax from time to time) throughout the Term (except where the Trust is not an occupier under any Income Generating Scheme (other than in respect of catering under Clause 9.1.1) or in respect of any area affected by a Change pursuant to paragraph 9 of Part 1A of the Schedule to this Agreement).
- 27.3 The SPC will be deemed to have satisfied itself in respect of those matters disclosed in the property enquiry certificates dated 16 March 1998 and 27 January 1998 and all other planning and property related documents exhibited by the Trust to the SPC.
- 27.3A The Trust is not aware of any servitudes, rights of way, wayleaves, overriding interests (as that term is defined in the Land Registration (Scotland) Act 1979) or rights in favour of third parties over the New Build Hospital not disclosed in the title deeds exhibited to the SPC but does not warrant the position.
- 27.4 The risk of damage to or destruction of the New Build Hospital shall pass to the SPC on Financial Closing.
- 27.5 At Financial Closing there shall be granted by the Trust a Deed of Conditions in the Agreed Form granting and regulating inter alia respective rights of access and egress over and under and through the New Build Hospital and the Surplus Site ("the Deed of Conditions") and the Trust and the SPC shall arrange for the Deed of Conditions to be registered in the Land Register along with the Ground Lease at the Trust's expense.
- 27.6 At or prior to Financial Closing there shall be exhibited to the extent not already done so (the SPC having accepted, subject to continuation of searches, that the Trust has, as at the date or dates to which the aftermentioned searches have been brought down, a valid and marketable title to the New Build Hospital):
- 27.6.1 a valid marketable prescriptive progress of titles in respect of the Trust's heritable title to the New Build Hospital
 - 27.6.2 searches in the Property and Personal Registers against the Trust for the full prescriptive periods and a Form 12 report in respect of Title Number [LAN 126440] brought down to Financial Closing
 - 27.6.3 discharges of all existing securities
- all disclosing no matter prejudicial to the interest of the SPC in the Ground Lease to be granted.
- 27.7 Both the Trust and the SPC shall validly execute the Ground Lease at Financial Closing and the SPC will arrange for the Ground Lease to be stamped and thereafter registered in the Land Register and the Books of Council and Session. Both parties shall co-operate to ensure that the SPC's interest in the Ground Lease is registered in the Land Register

of Scotland at the same time as it is registered in the Books of Council and Session. The Trust undertakes to clear the Land Register of any deed, decree or diligence (other than as created by or against the SPC) in the property or personal registers that may have been created in the period from the dates which the aforementioned searches were brought down prior to Financial Closing to the earlier of (i) the date of registration of the Ground Lease in the Land Register and (ii) the date falling 14 days after Financial Closing

- 27.8 The SPC will meet the stamp duty and registration costs of the Ground Lease.
- 27.9 The terms and conditions of this Clause 27 will remain in full force and effect and form a continuing contract between the SPC and the Trust notwithstanding execution and delivery of the Ground Lease and may be founded upon.
- 27.10 As soon as practicable after the Execution Date, the Trust shall, at its sole expense, procure a survey from a surveyor reasonably acceptable to the SPC ("the Agreed Surveyor") in Agreed Form (the "Survey") which will establish the general condition and fabric of the Existing Buildings, and exhibit this Survey to the SPC and thereafter until the Existing Buildings Certification Date, the Trust shall ensure that the Existing Buildings are sound, operationally safe, and exhibit only minor deterioration consistent with fair wear and tear and can be expected to perform adequately to their full normal life.
- 27.11 At the Hospital Operations Date, the Trust shall, at its sole expense procure a further survey from the Agreed Surveyor which will establish the condition of the Existing Buildings to ensure that the general standard and fabric of the Existing Buildings have been maintained to, and are in, the standard required by Clause 27.10 and the Trust will ensure that the Existing Buildings show no deterioration from the date of such further survey until the Hospital Operations Date (other than such deterioration as is consistent with fair wear and tear).
- 27.12 If after the procurement of the Survey referred to in Clause 27.10 above, the parties agree (failing which the Agreed Surveyor shall determine) that the Existing Buildings fall short of the standard required by Clause 27.10 and that the Existing Buildings require additional works carried out to upgrade them to that standard, the Trust shall at the request of the SPC procure the execution of such works with all due speed and at its own expense. Where the Agreed Surveyor is satisfied that the Existing Buildings have been upgraded to the standard required by Clause 27.10 he shall issue certification to that effect, and the Trust shall be deemed to have complied with its obligation to put the Existing Buildings in the condition required by Clause 27.10 and such certification shall be final and binding on the parties.
- 27.13 The Trust shall on the Existing Buildings Certification Date transfer to the SPC (or its nominee) the benefit of all contractors and manufacturers warranties then in existence in respect of the Existing Buildings and their plant and machinery.

28 Grant of Occupational Sublease

- 28.1 The SPC will grant at Financial Closing and the Trust will accept at Financial Closing the Occupational Sublease of the New Build Hospital in the Agreed Form:
- 28.2 At Financial Closing there will be validly executed by the SPC and delivered to the Trust the Occupational Sublease of the New Build Hospital in the Agreed Form and there will be exhibited to the Trust:

- 28.2.1 searches in the Personal Registers against the SPC for the full prescriptive period of 5 years
- 28.2.2 searches in the Register of Charges and companies file of the SPC disclosing no entry prejudicial to the ability of the SPC to grant the Occupational Sublease and confirming that no liquidator or receiver or administrator has been appointed to the SPC nor has it been struck off
- 28.2.3 if required, evidence of the consent of any creditor under any existing security and a Certificate of Non-crystallisation from the creditor in any Floating Charge or Debenture affecting the SPC's interest in the New Build Hospital

the searches to disclose no matter prejudicial to the interest of the Trust as tenant in the Occupational Sublease and (i) in the case of 28.2.1 to be continued to (provided it is registered within 14 days of Financial Closing) the date of registration of the Occupational Sublease in the Land Register and (ii) in the case of 28.2.2 continued to the earlier of 22 days after the date of registration of the Occupational Sublease in the Land Register and 36 days after Financial Closing.

- 28.3 The Trust will meet the stamp duty and registration costs of the Occupational Sublease. The Trust shall deliver an extract of the Occupational Sublease and an office copy of the Land Certificate in favour of the SPC forthwith after the same becomes available.
- 28.4 The terms and conditions of this Clause 28 will remain in full force and effect and form a continuing contract between the SPC and the Trust notwithstanding execution and delivery of the Occupational Sublease and may be founded upon.

28A Ground Lease and Occupational Sublease Amendments

- 28A.1 Notwithstanding the terms of the Ground Lease and the Occupational Sublease and the subsequent grant thereof, the terms of this Clause 28A shall apply to the Ground Lease and the Occupational Sublease in preference to the terms thereof and this Clause shall remain in full force and effect and form a continuing contract between the SPC and the Trust notwithstanding execution and delivery of the Ground Lease and the Occupational Sublease and may be founded upon.
- 28A.2 The parties acknowledge that the Initial Period (as defined in the Ground Lease) and the Occupational Sublease are respectively to endure for the Term notwithstanding the terms of the Ground Lease and the Occupational Sublease. As such, if called upon to do so by either party serving on the other written notice to that effect the parties shall each as soon as practicable thereafter validly execute and enter into Deeds of Variation of the Ground Lease and the Occupational Sub-lease which shall provide for (i) in the case of the Ground Lease, expiry of the Initial Period and (ii) in the case of the Occupational Sublease (subject as aftermentioned) expiry of the Occupational Sublease as a whole equating to the expiry of the then known Term. If the Term is subsequently extended then further Deeds of Variation of both the Ground Lease and the Occupational Sub-lease shall be validly executed and entered into by the SPC and the Trust to reflect such increase in an equivalent increase to the Initial Period under the Ground Lease and the terms of the Occupational Sublease respectively. The SPC will meet the stamp duty and registration costs of each of the Deeds of Variation of the Ground Lease and the Trust will meet the stamp duty and registration costs of each of the Deeds of Variation of the Occupational Sublease. Provided always that, no Deed of Variation of the Occupational Sublease will be entered into in terms of this clause the effect of which is that the period of the Occupational Sublease is decreased as a result of the operation of this clause, subject



always to Condition 4 of the Occupational Sublease and subject to the period of the Occupational Sublease not exceeding the Term (notwithstanding the original duration of the Occupational Sublease).

The SPC and the Trust will respectively arrange for the Deed(s) of Variation of the Ground Lease and Deed(s) of Variation of the Occupational Sublease to be stamped and thereafter registered in the Books of Council and Session. Both parties shall co-operate to ensure that the parties' interests in the Deed(s) of Variation of the Ground Lease and Deed(s) of Variation of the Occupational Sub-lease are registered in the Land Register of Scotland at the same time as they are registered in the Books of Council and Session.

Notwithstanding that the Deed(s) of Variation are not executed and delivered the Initial Period of the Ground Lease will endure for the Term and the Occupational Sublease will endure for the Term.

28A.3 The Trust will not without the consent of the SPC during the Term or (ii) if later, following service of notice by the SPC of its intention to purchase the New Build Hospital in accordance with this Agreement:

28A.3.1 sell, dispose or otherwise in any way deal with or transfer any part or the whole of its heritable interest in the subjects let under the Ground Lease other than in respect of a transfer of its whole interest to a party to whom it has simultaneously transferred its interest in this Agreement in accordance with the terms of this Agreement;

28A.3.2 grant any interposed head lease in respect of the subjects let by the Ground Lease; or

28A.3.3 assign its interest in the Occupational Sublease other than an assignment of its whole interest to a party to which it has simultaneously transferred its interest in this Agreement in accordance with the terms of this Agreement.

and in case of breach of any of the said restrictions such breach shall constitute a fundamental breach of the Trust's obligations under this Agreement in accordance with Clause 63.9 of this Agreement. Provided that this clause shall not apply for any period beyond 2 years after the Term (as such period may be extended to account for any period during which the Trust is in breach of its obligations relating to such purchase).

28A.4 With regard solely to the Ground Lease:

28A.4.1 Notwithstanding the terms of Clause 3.3 of the Ground Lease, the Trust shall not be entitled to terminate the Ground Lease unless and until the date upon which the SPC is obliged to vacate the Hospital in accordance with Clause 67.4 of this Agreement.

28A.4.2 The terms of Clause 5 of the Ground Lease are subject to the terms of this Agreement including Clause 25.1.

28A.4.3 Notwithstanding the terms of Clause 6 of the Ground Lease, any warranty of the Trust shall be subject to the development provisions in this Agreement during the Development Phase. The Trust acknowledges and agrees that, notwithstanding the terms of Clause 5.1 of the Ground Lease, the SPC is entitled to carry out the development provisions in this Agreement.

- 28A.4.4 Both the rights of the Trust and the SPC in the Ground Lease and the obligations of the Trust and the SPC in the Ground Lease shall be subject to the rights and obligations of the Trust and the SPC within this Agreement, and the terms of this Agreement shall be deemed to prevail, in the event of any conflict. Both the Trust and the SPC agree that no additional rights or obligations which may arise at common law as a result of the Ground Lease shall apply between the parties.
- 28A.4.5 All notices that may be served pursuant to the Ground Lease shall be served conform with the requirements for service of notices contained within this Agreement.
- 28A.4.6 For the avoidance of doubt the provisions of Clauses 6, 8 and 9 of the Ground Lease are subject to the provisions of this Agreement which shall prevail.
- 28A.4.7 The obligations upon the SPC to remove at the expiry of the Ground Lease shall be subject to the terms of this Agreement which shall prevail.
- 28A.4.8 With regard to Clause 2 of Part 1 of the Schedule to the Ground Lease, the SPC will be entitled to use the New Build Hospital for any uses permitted from time to time in accordance with this Agreement during the Initial Period of the Ground Lease.
- 28A.4.9 Notwithstanding the terms of Clause 6 of Part 1 of the Schedule to the Ground Lease, the following provisions shall apply:
- 28A.4.9.1 The SPC shall not assign in part, charge or dispose of (in whole or in part) its interest in the Ground Lease other than in accordance with Clause 53 of this Agreement and in respect of an assignation or disposal simultaneously with its interest in this Agreement
- 28A.4.9.2 The SPC shall not assign the whole interest of the SPC in the Ground Lease other than where the interest of the SPC in this Agreement is simultaneously assigned to the same party pursuant to Clause 53.3 thereof.
- 28A.4.9.3 The SPC will be entitled to share occupation of the New Build Hospital with any party with whom it is entitled to share occupation in terms of this Agreement and will be entitled to grant a licence of the Income Generating areas such as the shop without the Trust's consent the Trust's rights of occupation pursuant to the Occupational sublease being subject to the rights that may be created by such licences so long as they are not contrary to the provisions of this Agreement and in particular Clause 9 hereof and do not create any relationship of landlord and tenant.
- 28A.4.10 The Trust and the SPC agree that Clauses 3.2 and 7 of the Ground Lease are subject to the provisions of Clause 59.7.4 of this Agreement.

28A.5 With regard solely to the Occupational Sublease:

- 28A.5.1 Both the rights of the Trust and the SPC in the Occupational Sublease and the obligations of the Trust and the SPC in the Occupational Sublease shall be subject to the rights and obligations of the Trust and the SPC within this Agreement, and the terms of this Agreement shall be deemed to prevail, in the event of any conflict. Both the Trust and the SPC agree that no additional rights or obligations which may arise at common law as a result of the grant of the Occupational Sublease shall apply between the parties.
- 28A.5.2 All notices that may be served pursuant to the Occupational Sublease shall be served conform with requirements for service of notices contained within this Agreement.
- 28A.5.3 The obligations upon the Trust to remove at the expiry of the Occupational Sublease shall be subject to the terms of this Agreement which shall prevail.
- 28A.5.4 With regard to Clause 4 of the Occupational Sublease, the Trust and the SPC record their agreement that the SPC will be entitled to terminate the Occupational Sublease if the SPC has terminated this Agreement
- 28A.5.5 The Trust and the SPC agree that the insurance provisions contained in this Agreement shall prevail over the terms of Clause 7.6 of the Occupational Sublease
- 28A.5.6 The obligations of the Trust imposed by the Occupational Sublease shall, notwithstanding its terms, not come into force until the Hospital Operations Date, except Clauses 7.2, 7.3, 7.4 and 7.6 thereof shall apply from Financial Closing.
- 28A.5.7 The obligations of the Mid-Landlord (as defined in the Occupational Sublease) shall, notwithstanding its terms, not be enforceable by the Trust prior to the Hospital Operations Date to the extent that equivalent obligations are not then enforceable in accordance with the provisions of this Agreement.
- 28A.5.8 The Trust will only be entitled to assign its interest in the Occupational Sublease to a Health Service Body which contemporaneously assumes the obligations of the Trust as a party to this Agreement in accordance with the provisions of Clause 53 of this Agreement.
- 28A.5.9 Notwithstanding the terms of Clause 11.2 of the Occupational Sublease, the SPC shall not be entitled to exercise its rights to terminate the Occupational Sublease in terms of said Clause 11.2 where the Trust has simultaneously transferred its interest in this agreement to the same party as it has assigned its interest in the Occupational Sublease.
- 28A.5.10 The Trust and the SPC agree that Clauses 3 and 10 of the Occupational Sublease are subject to the provisions of Clause 59.7.4 of this Agreement.

28B **Option to Purchase New Build Hospital**

- 28B.1 The following Clause shall apply if the SPC serves notice in terms of Clause 28B.3 aftermentioned.



- 28B.2 In this Clause, the following terms shall have the following meanings:
- 28B.2.1 **Open Market Value** means the best price (exclusive of Value Added Tax) at which the sale of the Trust's heritable interest in the subjects more particularly defined as "the Premises" in the Ground Lease ("the Option Subjects") would have been completed unconditionally for cash consideration on the Transfer Date assuming:
- 28B.2.1.1 a willing seller
 - 28B.2.1.2 that prior to the Transfer Date there had been a reasonable period (having regard to the nature of the Option Subjects and the state of the market) for the proper marketing of the Option Subjects, for the agreement of price and terms and for the completion of the sale
 - 28B.2.1.3 that the state of the market, level of values and other circumstances were, on the Transfer Date, the same as on the date of valuation
 - 28B.2.1.4 that no account is taken of any additional bid by a purchaser with a special interest
 - 28B.2.1.5 that both parties to the transaction had acted knowledgeably, prudently and without compulsion
 - 28B.2.1.6 that the Ground Lease remains and will continue to remain in full force and effect throughout its term and
 - 28B.2.1.7 that there shall be disregarded any value attributable to any buildings on the Option Subjects.
- 28B.2.2 **Transfer Date** means the first day after the expiry of the Term
- 28B.2.3 **the Price** means an amount equal to the Open Market Value of the Option Subjects.
- 28B.3 The SPC shall be entitled to serve notice of its intention to exercise its option to purchase hereunder not less than one year and not more than five years prior to expiry of the Term.
- 28B.4 At or prior to the Transfer Date in exchange for the Price the Trust will deliver a validly executed Disposition so as to be self-proving in favour of the SPC or its nominees of the Option Subjects and there will be delivered or exhibited a valid, marketable title to the Option Subjects together with:
- 28B.4.1 a Land Certificate containing no exclusion of indemnity under Section 12(2) of the Act and all necessary links in title evidencing the Trust's exclusive ownership of the Option Subjects and a Form 12 Report incorporating a personal search against the Trust and any other parties having an interest in the Option Subjects within the prescriptive period brought down as near as practicable to the Transfer Date and showing subject as aforesaid no entries adverse to the Trust's interest. In addition, the Trust will furnish to the SPC such documents and evidence as the Keeper may require to enable the interest of the SPC to be registered in the Land Register without exclusion of

indemnity under Section 12(2). The Land Certificate to be issued to the SPC will, subject to the Ground Lease, disclose no entry, deed, decree or diligence prejudicial to the SPC's interest other than such as are created by or against the SPC or have been disclosed to and accepted by the SPC prior to the Transfer Date and subject as aforesaid, the Trust undertakes to clear the register of any such entry, deed, decree or diligence forthwith after the issue of the Land certificate to the SPC

- 28B.4.2 searches in the Register of Charges and Companies File against any limited company having an interest in the Option Subjects within the prescriptive period disclosing no matter prejudicial to the interests of the SPC in the Disposition to be granted
- 28B.4.3 discharges of any securities then outstanding over the Option Subjects
- 28B.5 The SPC acknowledges that, as at the date to which the searches referred to in Clause 27.6 are brought down, the Trust has a valid and marketable title to the Option Subjects and the obligations of the Trust in Clause 28B.4 shall be construed subject to this Clause
- 28B.6 The SPC will meet the Stamp Duty and registration costs of the Disposition
- 28B.7 The Trust will not, without the consent of the SPC, do nor allow anything to occur which may prejudice the validity or marketability of its title to the Option Subjects at the date of delivery of the aftermentioned Disposition and the Trust will not grant any incumbrance over it that will be outstanding at the date of registration of the said Disposition all in the period from the date to which the searches referred to in Clause 27.6 are brought down to the date of registration of the Disposition in favour of the SPC or its nominee referred to in Clause 28B.4.
- 28B.8 The rates and all other outgoings in respect of water, sewerage, electricity, gas, oil and such like outgoings, shall be apportioned at the Transfer Date and shall be the responsibility of the SPC after the Transfer Date.
- 28B.9 The Trust and the SPC agree that the terms of this Clause 28B and, in particular, Clauses 28B.4, 28B.5 and 28B.6 will subsist notwithstanding expiry of the natural Term or delivery of the Disposition referred to in Clause 28B.4 and may be founded upon. This Clause 28B shall not be enforceable and shall be treated as *pro non scripto* in the event that either party terminates the Agreement or it is terminated at any time prior to the natural expiry of the Term.

29 Transfer of Surplus Land at Hairmyres

The Trust will sell and the SPC will purchase the Surplus Site as follows:

- 29.1 The subjects of sale comprise the Surplus Site.
- 29.2A Subject to Clause 30.3 the purchase price for the Surplus Site shall be £4,250,000 exclusive of VAT payable in accordance with the terms of Clause 29.11. On transfer of the Surplus Site the Trust will issue to the SPC a valid tax invoice for the sum of £4,250,000 (exclusive of VAT) in respect of the transfer.
- 29.2B Notwithstanding any other provisions of this Agreement on transfer of the Surplus Site, the SPC will issue to the Trust a valid tax invoice which complies with the requirements

- of the VAT Regulations 1995 Part III for the sum of £4,250,000 (exclusive of VAT) in respect of advance services.
- 29.3 Entry to and vacant possession of the Surplus Site will be given to the SPC or its nominee(s) ("the donee") on Financial Closing (in this Clause 29 hereinafter called "the Date of Entry").
- 29.4 At the Date of Entry, the SPC shall procure delivery to the Trust of the Surplus Land Note and Surplus Land Guarantee.
- 29.5 The purchase price shall include the whole heritable fixtures and fittings in, upon and about the Surplus Site together with the whole common, mutual and exclusive rights and pertinents of and pertaining to the Surplus Site and the whole rights pertaining to the Surplus Site in terms of the Deed of Conditions.
- 29.6 The rateable value of the Surplus Site is as stated in the valuation roll.
- 29.7 The Trust will be liable for all charges in connection with the maintenance and repair of the Surplus Site instructed or approved by it prior to the Date of Entry or arising from any statutory order or notice issued prior to the Date of Entry. The risk of damage to or destruction of the Surplus Site remains with the Trust until the Date of Entry.
- 29.8 The minerals are included in the sale of the Surplus Site in so far as the Trust has title thereto.
- 29.9 The SPC is satisfied that the Trust has a valid and marketable title to the Surplus Site subject only to the Form 12 Report to be exhibited in terms of Clause 29.11 and the Trust's obligations in terms of Clause 29.12.
- 29.10 Property enquiry certificates from South Lanarkshire Council dated 16 March 1998 and West of Scotland Water dated 27 January 1998 have been exhibited by the Trust. The SPC is satisfied on all matters covered thereby.
- 29.11 On the Date of Entry in exchange for delivery of a Surplus Land Note for £4,250,000 and the Surplus Land Guarantee (the Trust and the SPC acknowledging that the Financial Model represents a lower level of borrowing than required by the SPC reflecting the credit of £4,250,000 towards the SPC's capital expenditure not qualifying for capital allowances being a part of the expenditure required hereunder) in terms of Clause 29.4 there will be delivered a valid Disposition in the Agreed Form of the Surplus Site executed so as to be self proving in favour of the donee and there will be delivered or exhibited a valid and marketable prescriptive progress of title in respect of the Trust's heritable title to the Surplus Site and a Form 12 Report brought down as near as practicable to the Date of Entry showing no entries adverse to the Trust's interest, the cost (if any) of said report being the responsibility of the Trust.
- 29.12 The Trust shall provide such documents and evidence including a plan as the Keeper may require to enable the Keeper to issue a Land Certificate in the name of the donee as registered proprietor of the Surplus Site containing no exclusion of indemnity in terms of Section 12(2) of the Land Registration (Scotland) Act 1979. The Land Certificate to be issued to the donee will disclose no entry, deed, decree or diligence prejudicial to the interest of the donee other than such as are created by or against the donee. The Trust shall forthwith clear the register of any entry, deed, decree or diligence other than such as are created by or against the donee.

- 29.13 Notwithstanding delivery of the said Disposition this Clause 29 shall remain in full force and effect and may be founded upon.
- 29.14 If the PFI Documents are terminated for any reason prior to the Hospital Operations Date then this Clause 29 shall be deemed terminated also except to the extent that it relates to that part of the Surplus Site already then disposed to the donee and except in relation to Clause 30.6. In the event of the termination of the PFI Documents prior to the Hospital Operations Date the amount referred to in terms of the Surplus Land Note shall become immediately due and payable to the Trust, in exchange for the Surplus Land Note. In addition, in the event of such termination (but not otherwise) interest will be payable by the SPC to the Trust from the Date of Entry at 1% above the Interest Rate per annum until fully paid.

30 Surplus Clawback

- 30.1 In this Clause 30 the following terms shall have the following meanings:
- 30.1.1 **Masterplan** means an overall planning scheme for development of inter alia the Surplus Site to be agreed amongst the Trust, the SPC (or its nominee) and South Lanarkshire Council.
- 30.1.2 **Dealing** means sale, transfer, conveyance, disposition, long lease, excambion, feu disposition, feu charter or other form of long term divestment at more than nominal value by the donee or some other member of the same Group as Kier Group plc ("the Kier Group") (a **Connected Person**) to a company or person not being a member of the Kier Group (an **Unconnected Person**) (declaring that a disposal as aforesaid by a secured creditor or any liquidator receiver or administrator of a Connected Person under any form of power of sale shall be deemed to be a Dealing by the Connected Person).
- 30.1.3 **Net Developable Acre** or **NDA** means land within the Surplus Site upon which there can be constructed in terms of the Masterplan which failing detailed planning consent granted in respect of the Surplus Site dwellinghouses (including flats), gardens, estate roads (including footpaths) and lanes small areas of land required for incidental open space/landscaped areas, small scale tree planting, toddlers' and/or childrens' play areas, but excluding sections of road where there is no frontage access to houses, larger open areas or open spaces and woodland or structural landscaping but all on the basis of best practice in the market place for housing developments of the nature proposed by the SPC or its nominee and the reasonable commercial endeavours of the SPC or its nominee to keep all exclusions to a minimum and **Net Developable Acreage** shall be construed accordingly.
- 30.1.4 **Project Costs** means all properly and reasonably incurred cost by the donee exclusive of VAT relating to the Surplus Site and its development (other than the development of a roundabout at Eaglesham Road and a distributor road through the Surplus Site as required) as such costs shall be increased in the same manner as provided for in Clause 30.2 relative to the sum of £275,000, including but not limited to:
- 30.1.4.1 clearance of the Surplus Site (including demolition)

- 30.1.4.2 installation of services of electricity, gas, water, drainage, sewerage and telecommunications infrastructure to the Surplus Site
- 30.1.4.3 the cost of compliance with any Section 75 Agreement under the Town and Country Planning (Scotland) Act 1997 relative to the Surplus Site
- 30.1.4.4 professional fees properly incurred in relation to the foregoing (excluding fees in relation to applications for detailed planning consent and roads construction consent)
- 30.1.4.5 VAT on supplies of goods and services on the foregoing to the extent that it is not recoverable by credit against input tax or repayment by HM Customs & Excise
- 30.2 In the event that after the Date of Entry there is a Dealing of any part of the Surplus Site otherwise than as housing units after development (as opposed to land to be used for housing) then and in any such case the SPC will pay to the Trust by a telex transfer of cleared funds to a UK Bank account nominated by the Trust (not less than 1 Business Day before completion of the relevant sale) on completion of the relevant sale an amount equal to one half of the realised value of such part in excess of £275,000 per Net Developable Acre on the basis that in determining the amount of such excess (i) the Surplus Site Distributor Road and the Surplus Site Roundabout have been completed failing which at the Trust's sole opinion there shall be substituted for the realised value a value determined by the Independent Surveyor on the assumption that such obligations have been completed (ii) the said sum of £275,000 per Net Developable Acre shall be increased by a percentage equal to the percentage increase in RPI in the period from the Date of Entry to the date of the Dealing and (iii) there shall be deducted from the realised value the portion of the Project Costs attributable to the part so sold; Provided that the clawback provision in this Clause 30.2 will expire and be of no further force and effect from and after the fifth anniversary of the Date of Entry.
- 30.3 If on the occasion of approval of the Masterplan insofar as it relates to the Surplus Site which failing in the event that on the occasion of a grant of detailed planning permission in terms of the ongoing discussions with South Lanarkshire Council in respect of residential development of the Surplus Site (for the purposes of this Clause 30.3 hereinafter referred to as "detailed planning permission") the Masterplan which failing the detailed planning permission identifies further Net Developable Acreage over and above 17 Net Developable Acres, then the SPC will pay to the Trust by a telex transfer of cleared funds to a Bank account nominated by the Trust within fourteen days of the SPC receiving notification of the approval of the Masterplan a sum in respect of each Net Developable Acre or part thereof (if any) over and above 17 acres at the rate of £250,000 per such Net Developable Acre; this sum and any other sum payable under this Clause 30 is to be treated as representing an adjustment to the original price for the Surplus Site and, as such, shall serve as an adjustment to the purchase price in Clause 29.2.
- 30.4 The SPC shall keep the Trust fully informed of all matters pertinent to the foregoing provisions and of any grant of detailed planning permission in respect of the Surplus Site and, in particular, but without prejudice to the generality of the foregoing, shall as soon as practicable notify the Trust in writing of any matter which the SPC reasonably believes will become an event which will invoke the foregoing provisions and of any grant of detailed planning permission in respect of the Surplus Site and shall supply the Trust in writing with all relevant details relating to each and every Dealing and each and every such grant of detailed planning permission.

- 30.5 Failing agreement between the parties as to the Project Costs, Net Developable Acreage or operation of Clause 30.2 the matter shall be dealt with by reference to the Dispute Resolution Procedure.
- 30.6 This Clause 30 shall survive expiry or earlier termination of the PFI Documents.



SECTION 5: FACILITIES MANAGEMENT**31 The FM Service****31.1 Period**

For the duration of the Term the SPC shall provide or procure the provision of the FM Service to the Trust and shall provide or procure the provision of the Managed Services to the Trust in each case in accordance with the provisions of the relevant PFI Documents.

31.2 Good Faith

In performing or procuring the provision of the FM Service the SPC shall act in good faith with a view to ensuring that each Managed Service is provided in accordance with the requirements of this Agreement including, without limitation, Clauses 33.6 and 42.10.

31.3 Early Service Provision

The parties shall consult in good faith with a view to agreeing what arrangement may be entered into to commence the early delivery of certain Managed Services as set out in Recital F through the Change Control Procedure.

32 Managed Service and FM Service Provision**32.1 Provider**

The Managed Services and the FM Service may be provided by the SPC or by sub-contractors satisfying the requirements as to sub-contractors set out in this Agreement. Save as specified in Clause 75 (No Corruption), the SPC shall be responsible to the Trust for any act or omission of any sub-contractor or its employees, sub-contractors or agents (as well as its own employees or agents) as if it were its own act or omission.

32.2 Responsibility for Service Provider

Any obligation of the SPC to do or refrain from or omit to do any act or thing or a reference to a Service Provider having such an obligation includes an obligation of the SPC to procure, in relation to a Managed Service where it is not the Service Provider, that the Service Provider so does, refrains from doing or omits to do such act or thing.

32.3 The FM Service and the Managed Services are not provided to the LHC Building unless and until the Trust exercises the option in Clause 32.4.

32.4 The Trust may by a minimum of one month's notice to the SPC after the Hospital Operations Date require as a Change to the FM Service and the Managed Services to be provided to the LHC Building (for the benefit of the Trust or its nominee) at a price no greater than the average price of equivalent Services to the remainder of the Hospital. The Availability Regime will not apply, but the Performance Regime will apply to those Services.

33 Managed and FM Services: Description and Specification

33.1 Specification

From each relevant Service Start Date the SPC shall supply or procure the supply to the Trust of each of those Managed Services separately identified in Part 23 and also of the FM Service.

33.2 Period

Each Managed Service and the FM Service shall be provided throughout the period starting with its Service Start Date and ending on the expiry of the Term or earlier termination in accordance with Clauses 64 (Termination by Reason of Default), 66.1 (SPC's Right to Terminate) or 70.9 (Termination on Force Majeure). In respect of each Managed Service there is set out in Part 23 the Service Start Date for the relevant Managed Service, the initial period for which the Managed Service will be provided and the proposed identity of the initial Service Provider for that initial period. The ultimate identity of Service Providers will be determined in accordance with Clause 55 (Sub-contracting).

33.3 Service Standards

The SPC shall, in providing the FM Service and each Managed Service procure that the Service Provider and the Principal Service Provider shall, at all times act in good faith and in all material respects comply with the Service Standards.

33.4 Compliance with Relevant Law, etc

In providing the FM Service and the Managed Services, the SPC and the Principal Service Provider, in the case of the Managed Services, the Service Provider shall comply in every respect with all relevant Legal Provision. The SPC, the Service Provider and the Principal Service Provider (as the case may be) shall also comply with all applicable NHSiSME recommended practices as set out in the health notices, circulars and directives issued and/or in force at the Execution Date and with any change in those practices and others which are implemented through a Change. The SPC and the Principal Services Provider shall have responsibility for compliance in the case of FM Services and any Managed Services provided and shall have responsibility for ensuring compliance in the case of FM Services and Managed Services provided by others.

33.5 Compliance with Trust Policies and Procedures

The SPC and, in the case of the Managed Services, the Service Provider, shall comply with Trust Procedures. The sole responsibility for compliance will be the SPC's and, in the case of the Managed Services, the Principal Service Provider and the Service Providers.

33.6 Use of Skill and Care

The SPC and, in the case of the Managed Services, the Service Provider, shall in accordance with Good Industry Practice:

- 33.6.1 provide the FM Service and the Managed Services in accordance with the Service Standards and this Agreement



- 33.6.2 rectify FM Service and Managed Service defects notified to it by the Trust and
- 33.6.3 co-operate with the Trust to achieve improvements in the FM Service and Managed Services without imposing additional costs or liabilities on the SPC.

33.6A Provisional Services Prices

The SPC shall procure that the Principal Service Provider shall market test the pest control, waste services and window cleaning Managed Services and appoint the successful bidders prior to the relevant Service Start Date for such Managed Services. Table 1 in Part 1A shall thereupon be adjusted to take account of any excess or shortfall in respect of the cost of such Managed Services as judged against the amounts provisionally allowed for such Managed Services in Table 1 in Part 1A. The Unitary Charge shall be adjusted accordingly.

34 Quality Control

34.1 Quality Control System

In respect of each Managed Service the SPC shall, or shall procure that the Principal Service Provider and the relevant Service Provider shall, by no later than the relevant Service Start Date institute and maintain a properly documented system of quality control at least equivalent to standard industry practice to monitor compliance with the Service Standards in respect of the relevant Managed Service and ensure that such quality control systems are implemented at all times and are accredited by an independent body to the standards consistent with Good Industry Practice. Such system shall include detailed procedures for dealing with complaints.

34.2 Characteristics

The system referred to in Clause 34.1 shall be operated by the relevant members of the SPC Staff and shall not rely on completion of documents by the Trust Staff. The system should include regular visits to relevant locations to assess hygiene (where relevant), quality and consumer satisfaction.

34.3 Performance Monitoring System

In respect of each Managed Service the SPC shall by no later than the relevant Service Start Date institute and maintain the Performance Monitoring System.

34.4 Services Audit Procedure

The Trust, the Trust Representative or deputy shall, at the Trust's own cost be entitled to audit all the Managed Services at any time and at any frequency during the Term. The Trust shall not audit the Managed Services in such a way as to (i) obstruct the provision of the Managed Services by the SPC or, (ii) increase the SPC's operational costs.

34.5 SPC Co-operation

The SPC shall ensure the participation of all relevant SPC Staff in auditing the operation of the Performance Monitoring System as part of the Services Audit Procedure and ensure that SPC Staff provide all information reasonably required by the Trust, that SPC Staff co-operate in relation to any random monitoring inspection carried out by the Trust and respond in full and without undue delay to any matters arising out of the foregoing.

35 Control of Infection**35.1 Prevention**

- 35.1.1 The SPC shall draw up a document setting out procedures to be followed by Service Providers and all employees engaged in the provision of the FM Service and the Managed Services (consistent with the Trust's Procedures on control of infection) the aim of which is to minimise the risk of infection being introduced to the Hospital environment from outside and the risk of the spread of infection within the Hospital. This document shall be submitted in draft to the Trust Representative not less than three months prior to the expected Hospital Operations Date. The SPC shall make all reasonable changes and additions to the document requested by the Trust.
- 35.1.2 The SPC shall ensure that all SPC Staff whose duties will be affected by the document shall be given a copy of the document and are fully informed of the procedures which they must carry out in furtherance of the policies set out in the document.
- 35.1.3 The Trust shall ensure that all Trust Staff follow Trust Procedures as they relate to Infection Procedures and that all Trust Staff duties will be affected by Infection procedures have access to a copy of it.
- 35.1.4 Notwithstanding the obligations of the SPC under Clauses 35.1.1 and 35.1.2 the SPC shall:
- 35.1.4.1 take, and procure that all Service Providers take, all reasonable precautions in the course of their obligations under the PFI Documents against possible outbreaks of infection at the Hospital
 - 35.1.4.2 comply with, insofar as it affects the performance of any of the Services, all guidelines or directions issued by NHSiSME or the Scottish Centre for Infection and Environmental Health or any other competent authority issuing guidelines on control of infection valid at the date of this Agreement or subsequently introduced as a Change
 - 35.1.4.3 the provisions of Clause 35.1.4.2 shall apply mutatis mutandis in respect of Trust Staff.

35.2 Outbreak

- 35.2.1 In the event of an outbreak of infection at the Hospital or a reasonable concern on the part of the Trust about the possibility of an outbreak, the SPC and all Service Providers shall comply with any reasonable directions given by the Trust or any of its staff in implementing procedures intended to limit the spread of the infection. The SPC and the Service Providers shall ensure that all SPC Staff are instructed to comply with all such directions.
- 35.2.2 The procedures to be implemented on an outbreak of infection may require cancellation or suspension of certain duties in respect of any one or more of the Services. It may also require additional duties to be undertaken. The SPC agrees that all such additional duties or rescheduled duties shall be carried out as directed by the Trust whether within or outside normal working hours pursuant to Clauses 35.2.3 and 35.2.4.

- 35.2.3 Whether such additional duties or rescheduled duties are as a result of an SPC Infection Risk or otherwise, the SPC shall carry out all such duties during the first 48 hours which are affected at no additional cost to the Trust.
- 35.2.4 Where such additional duties are not as a result of an SPC Infection Risk, the SPC shall carry out such duties and the Trust shall reimburse the SPC's reasonable costs incurred in carrying out such duties in the period after the first 48 hours affected, and Performance and Availability Deductions shall not be applied to the extent that such duties would reasonably prevent compliance by the SPC with any Specification.

35.3 Investigation

- 35.3.1 The SPC, the Principal Service Provider and the Service Providers shall cooperate with the Trust and any person designated or appointed by it to investigate an outbreak of infection and shall further:
- 35.3.1.1 make available all staff for interview
 - 35.3.1.2 make available all documents and records compiled by the SPC, the Principal Service Provider or Service Providers which may be of relevance to the investigation
- 35.3.2 If the Trust or its consultants prepare a report which recommends changes to Trust Procedures at the Hospital either for the purpose of minimising the risk of an outbreak of infection or the procedures to be implemented in the event of an outbreak, the SPC and all Service Providers shall, subject always to this being implemented as a Change insofar as the recommended changes affect the provision of the FM Service or the Managed Services make the necessary changes to their normal practices and procedures and their practices and procedures in the event of an outbreak of infection.

36 Staff

36.1 Sufficient Trained and Competent Staff

The SPC shall supply or procure the provision of sufficient trained and competent staff with the necessary qualifications, skills and experience to provide continuity of each of the FM Service and the Managed Services and to ensure that the FM Service and the Managed Services are provided at all times with reasonable skill and care in accordance with the Service Standards. The Transfer Employees which are in the direct employment of the Trust shall be deemed to satisfy this criteria.

36.2 Staff Skill Levels

In connection with the provision of the FM Service and the Managed Services, the SPC shall employ only such persons as are sufficiently skilled, trained and experienced to provide the FM Service and the Managed Services to the Service Standards. The SPC shall provide on-going training for the SPC Staff which may be required by law or may be reasonably necessary.

36.3 Information About Convictions

Owing to the nature of the Services, employees of the SPC, the Principal Service Provider, and Service Providers are exempt from the provisions of Section 4(2) of the

Rehabilitation of Offenders Act 1974 and accordingly the SPC shall require that all employees engaged in the provision of the Services or any of them shall provide information in accordance with the said Act about convictions which would otherwise be spent under the provisions of the Act. The SPC shall use all reasonable endeavours to ensure that SPC Staff with convictions of which it is aware or who do not have appropriate references shall not be employed in the performance of the FM Service or the Managed Services where such employment would or might reasonably be regarded as inappropriate. Further the SPC shall, to the extent it is legally able to do so, disclose to the Trust Representative the name and address of each member of SPC Staff and sufficient information to enable proper checks to be made as appropriate in respect of the convictions of its SPC Staff engaged in and about the provision of the FM Service or the Managed Services and the Trust may require any such member of SPC Staff employed at the Hospital by the SPC, Principal Service Provider or a Service Provider in breach of this provision to be removed from the provision of the FM Service or the Managed Services or any of them.

36.4 **Protection of Children**

If owing to the nature of any particular Service the duties of members of SPC Staff will create substantial opportunities for access to children the SPC shall, in the selection of such SPC Staff comply subject to Clause 33.5 with the Trust's Protection of Children Policy in force at the Execution Date or as Changed from time to time pursuant to the Change Procedure and the reasonable directions and requirements of the Trust Representative in this regard.

36.5 **Equal Opportunities**

The SPC shall comply in all respects with the Agreed Form equal opportunities policy of the SPC (the current version of which at the Execution Date is set out in Part 26). If the SPC wishes to change the equal opportunities policy it will first seek the Trust's consent (such consent not to be unreasonably withheld).

36.6 **Trust Veto**

The Trust Representative shall be entitled, but not unreasonably or vexatiously, to require the SPC, by notice in writing, to remove from the provision of the FM Service or Managed Services (or any of them) any member of staff specified in such notice, including the SPC Contract Manager and any Provider Service Manager. The SPC shall forthwith remove any such member of SPC Staff from the provision of the FM Service or Managed Services and shall as soon as is practicable thereafter provide (in accordance with this Agreement) a replacement if necessary. The Trust shall not, save as provided below, be liable to the SPC, the Principal Service Provider or the Service Provider or to the member of staff in question in respect of any liability, loss or damage occasioned by such removal and the SPC shall fully indemnify the Trust against any claim made by any such member of staff, provided that where such member of staff, SPC Contract Manager or Provider Service Manager has been appointed in accordance with the provisions of this Agreement, and the SPC is not in breach of this Agreement in relation to that person, the Trust shall pay to the SPC the reasonably and necessarily incurred Claims and Losses incurred by the SPC in complying with the Trust's requirement and the SPC shall not indemnify the Trust against any claim made by any such member of staff.

36.7 **Trust and Other Policies**

The Trust shall make all reasonable efforts to communicate Trust Procedures to the SPC promptly upon the commencement of this Agreement and subject to a Change upon any

subsequent change in policy. Subject thereto, the SPC shall ensure that all SPC Staff involved in the provision of the Services have adequate knowledge of and training in respect of all of the Trust Procedures and that such staff comply with all reasonable directions of the Trust pursuant thereto.

36.8 Supervision

The SPC shall ensure that:

- 36.8.1 the SPC Staff shall be appropriately managed and supervised in connection with the provision of the Managed Services
- 36.8.2 relevant SPC Staff will be nominated by the SPC Contract Manager to carry out supervising duties in respect of each Managed Service and details of supervising SPC Staff provided to the Trust
- 36.8.3 relevant SPC Staff will wear a uniform, agreed between the Trust and the SPC prior to the Service Start Date. Where the parties fail to agree, the matter shall be referred to the Dispute Resolution Procedure. Such uniform shall not be changed or altered in any material way without the prior written consent of the Trust not to be unreasonably withheld or delayed. The appropriate SPC Staff shall carry out their duties and behave while on the Trust's premises in an orderly manner, in a manner which is appropriate to a healthcare environment and in as quiet and as least disruptive a manner as may be reasonably practicable having regard to the nature of their work
- 36.8.4 appropriate work wear will be provided at the SPC's or Service Provider's expense and the relevant SPC Staff will be required to wear proper safety gear and use safety equipment which is reasonably necessary and the SPC shall indemnify the Trust against any Claims or Losses which may arise as a consequence of a failure on the part of a relevant member of SPC Staff to wear such safety gear or use such safety equipment
- 36.8.5 in addition to the requirements of Clause 36.7, the relevant members of the SPC Staff are at all times aware of all of the relevant rules and provisions relating to their employment, including health and safety, fire precautions and any local regulations applying to any location at which they may be engaged in providing any of the Managed Services
- 36.8.6 the SPC Staff (where relevant) will wear identity badges agreed by the Trust and the SPC prior to the Service Start Date. The identity badges shall not be changed or altered in any material way unless with the prior written consent of the Trust not to be unreasonably withheld or delayed
- 36.8.7 the SPC Staff shall conform to appropriate standards of personal hygiene and not smoke or consume alcohol or be under the influence of drugs (other than prescribed medication which does not affect their performance) at any location at the Hospital where they may be engaged in providing any of the Services.

36.9 Service Required in an Emergency

The SPC acknowledges that in respect of each Managed Service there may be a need for the relevant members of SPC Staff to work outside of the normal working hours specified in the relevant part of Part 23, in the event of an emergency and agrees that it will use

39.3 Access to Information

During the transitional arrangements the SPC shall cooperate fully with the Trust, which cooperation shall extend to full access to all documents, reports, summaries and any other information required to achieve an effective transition without disruption to any relevant FM Services and Managed Services.

39.4 Information Required for Tendering Purposes

The SPC acknowledges that, further to Clause 42.7.1, the Trust may wish to invite tenders for the award of a contract relating to some or all of the relevant Managed Services pursuant thereto. The SPC will provide the Trust with such information as it shall reasonably require for the purpose of preparing the invitation to tender or the provision of information to tenderers or potential tenderers including, but without prejudice to the generality of the foregoing, the following details:

- 39.4.1 full name and ages of all SPC Staff employed by the SPC in connection with the performance of the relevant Service (and where employees are not engaged wholly in the performance of the relevant Service, the SPC shall provide details of the relevant employee's participation indicating the proportion of his time in which he is so engaged and how the remainder of his time is spent in the provision of the Service in the Hospital)
- 39.4.2 the dates of commencement of employment for all such staff
- 39.4.3 details of such employees' terms and conditions of employment stating in particular salary, bonus and holiday entitlement, pension entitlement and other benefits (including benefits arising on termination of employment). A copy of the terms and conditions of employment relating to the employees must also be provided
- 39.4.4 an indication of the principal activities performed by each employee
- 39.4.5 details of membership of any trade union and agreements (including collective agreements) with any trade union.

39.5 Accuracy of Information Provided

The SPC acknowledges that the Trust will be relying upon the accuracy of the information provided by the SPC pursuant to the foregoing provisions of Clause 39.4 in the preparation of the relevant invitation to tender and the SPC hereby agrees to indemnify the Trust in respect of any loss or liability arising directly or solely from any inaccuracy of the information including any liability arising from any claim made by any person who is awarded a contract which includes such information.

39.6 Good Faith etc

The SPC shall act in good faith and take all reasonable steps to minimise disruption and ensure that the handover is achieved in accordance with the timetable reasonably required by the Trust.

40 Plant, Premises and Equipment**40.1 Licence to Use Equipment**

In connection with the provision of each Managed Service, the Trust shall permit the SPC, the Principal Service Provider or any relevant Service Provider to use the Transfer Equipment. The SPC, Principal Service Provider or Service Provider shall use the Transfer Equipment only in connection with the provision of the Managed Services and shall ensure that the SPC Staff use the Transfer Equipment only for that purpose. The Trust acknowledges that it has sole responsibility for the condition of the Transfer Equipment and that the SPC shall have no responsibility under the Performance Monitoring System (and incur no Performance Failure Points) or suffer any Availability Deduction to the extent that any service is disrupted or impaired as a result of the Transfer Equipment. The permissions given in this Clause 40 to use the Transfer Equipment belonging to the Trust is personal to the SPC, the Principal Service Provider, the Service Provider and its/their staff and shall cease immediately this Agreement ceases to be in force or, if earlier, immediately the relevant Service Period expires or is terminated. Nothing in this clause implies any obligation on the Trust to replace any Transfer Equipment.

40.2 Licence to Use Premises

40.2.1 On and after the Hospital Operations Date, the Trust hereby permits the SPC, SPC Staff and Funders and its advisers to enter and have access to the New Build Hospital and the Existing Buildings for the purpose of giving effect to the rights and obligations under this Agreement and the Project Documents to which both the SPC and the Trust are party, subject always to such right being executed only in accordance with the Access Policy.

40.2.2 Subject to Clause 40.2.1 only the SPC, SPC Staff and persons making deliveries to the SPC or who are otherwise required in connection with the provision of the Services ("the Relevant Person") may enter or use any part of the Hospital (other than any public areas) without prior written permission of the relevant Trust Service Representative. For the avoidance of doubt it is hereby declared that the permission to enter and use the Hospital hereby given is not the grant of a lease of any part of such premises but merely a personal licence to the Relevant Persons to enable it or them to provide the relevant Service or Services.

40.3 Telephones

The SPC shall be responsible for providing and operating a telephone system for the use of the Trust and Trust Staff. The Trust shall meet the cost of (a) all telephone line rental and (b) all outgoing calls by Trust Staff (but not the SPC Staff or the public or Patients).

40.4 Equipment

Subject to the provisions of Clause 40.1 and unless expressly stated to the contrary in this Agreement, the SPC shall provide and maintain in good, safe, serviceable and clean condition all equipment, vehicles, plant, stores, materials and other things required for the provision of the Managed Services to the Service Standards.

40.5 Relevant Equipment

Where the SPC or the Service Provider has under its control any equipment belonging to the Trust which it uses in connection with the Managed Services ("Relevant Equipment") the SPC shall maintain (save for usual wear and tear) such equipment safe and free from harm and in good and serviceable condition at the cost of the Trust. The SPC shall separately in respect of each Managed Service provide to the Trust in each year of the Service Period within 30 days of the anniversary of the relevant Service Start Date in the period prior to the Hospital Operations Date and after the Hospital Operations Date within 30 days of each anniversary of the Hospital Operations Date a report listing all Relevant Equipment which is in its possession. The report shall state the condition of such equipment and give details of all equipment replacements over the previous twelve months. Any losses of the Relevant Equipment (otherwise than through fair wear and tear) which are identified by the Trust Representative shall be replaced by the SPC at its expense (subject to receiving from the Trust a contribution in respect of betterment to the Trust), within 30 days of receipt of notification from the Trust.

40.6 Trust Not Liable

The Trust will not be held accountable nor liable, whether in contract, delict or otherwise for any loss of profit or consequential losses arising from breakdown of Relevant Equipment in connection with the Managed Service.

40.7 New Equipment

40.7.1 The SPC shall maintain in good, safe, fully serviceable and clean condition all New Equipment.

40.7.2 The SPC shall, subject always to the provisions of the Planned Maintenance Program and Intermediate Maintenance Program ensure that all New Equipment for the use of Trust Staff is at all times available for the use of Trust Staff.

40.7.3 The SPC shall, unless the Trust agrees otherwise in writing, replace each item of New Equipment for the use of Trust staff on or before the date on which the relevant item is unable reliably or safely to operate or function in accordance with its specification.

40.7.4 The SPC shall keep, update and maintain all relevant information, manuals, maintenance records, and the like pertaining to the New Equipment.

40.8 Safety of Equipment

The SPC will commission an annual health and safety check by an independent inspector approved by the Trust of all plant, Relevant Equipment (for the use of SPC Staff) and New Equipment (other than equipment owned and used by the Trust) and, without prejudice to the provisions of Clause 40.5 the SPC will undertake remedial action in respect of any such plant, Relevant Equipment or New Equipment that is identified as unsafe in such inspection.

40.9 Security

The SPC shall save in respect of the action of Trust Staff, Patients or Visitors be responsible for the security of all goods and equipment belonging to the Trust and used

by the SPC in or about the provision of the Services or otherwise belonging to the SPC or Service Provider or the SPC's staff and on the Trust's premises.

40.10 Use of Facilities

The SPC Staff will be entitled to use, within those parts of the Hospital to which they are required to have access in the performance of the Services or any of them, free of charge:

40.10.1 staff washroom and lavatory facilities

40.10.2 existing internal telephone system

40.10.3 restaurant facilities and

40.10.4 lifts and escalators.

40.11 No Alterations Without Consent

The SPC will not add to, alter or modify any part of the Hospital except pursuant to its obligations, (if any) under the Occupational Sublease without the prior written consent of the Trust Representative such consent not to be unreasonably withheld and subject always to such reasonable conditions as shall be imposed by the Trust Representative, such consent and conditions not to be unreasonably withheld or imposed, or in accordance with the provisions of this Agreement.

40.12 Hazardous Materials

The Company shall ensure that all hazardous materials or equipment used or stored at the Hospital by a Service Provider are kept under proper control and safe-keeping and shall ensure that all such materials are properly and clearly labelled on their containers and that the chemical compositions of such materials are declared to the Trust. The Trust shall be entitled to require a Service Provider to cease using any hazardous material or equipment if in its reasonable opinion it represents an unacceptable health risk to staff or Patients. The appropriate COSHH assessments will be kept available by the SPC for immediate inspection by the Trust.

41 Variation of Scope of Services

41.1 No Volume Guarantee

Without prejudice to paragraphs 7 (Occupancy Variation) and 9 (Change in Hospital Capacity) of Part 1A, the Trust does not guarantee any particular minimum volume requirement in respect of the Managed Services or any of them.

41.2 Changes

Changes to a Specification shall be governed by Clause 50 (Services Changes and Facilities Changes) or under Clause 41.3 below.

41.3 Trust's Right to Require Day to Day Changes

Notwithstanding the provisions of Clause 41.2, the Trust may, upon giving the SPC not less than 2 Business Days notice in writing, require day to day changes in the provision of the Managed Services by the SPC or a Service Provider on a temporary basis provided they do not expose the SPC to Performance Failure Points or Availability Deductions or

have cost consequences (other than immaterial ones) and the SPC shall use all reasonable endeavours to comply with any such changes so required. The SPC shall so procure the provision of the Managed Service or Managed Services on a temporary basis in accordance with changes required by this Clause 41.3 as from the date of expiry of the said notice for the period stipulated in the said notice.

41.4 Additional Managed Services

- 41.4.1 If the Trust shall require any additional service (other than an existing Service) relating to the Hospital to be provided it may give notice of this to the SPC. Such notice shall:
- 41.4.1.1 indicate the nature of the additional service
 - 41.4.1.2 set out a draft output specification for the service
 - 41.4.1.3 set out information as regards employees currently engaged in the provision of any similar service to the Trust
 - 41.4.1.4 indicate the required commencement date for the service.
- 41.4.2 The SPC shall within six weeks or longer if reasonably required of receiving such a notice submit a note containing the following information relating to the service:
- 41.4.2.1 any proposals it has as regards the specification
 - 41.4.2.2 its proposals (if applicable) as regards employees on the basis that TUPE is applicable to transfer their contracts of employment
 - 41.4.2.3 its proposed sub-contractor and proposals for market testing (which the Trust may require to be effected on the same or substantially the same basis as is described in Clause 42)
 - 41.4.2.4 its proposals as to price and payment terms.
- 41.4.3 Any such additional service, whether or not provided by or through the SPC, shall be implemented through a Change. If the Trust does not invite or accept the SPC's proposals for the provision of such additional service the SPC will nevertheless be included on the tender list and invited to bid in any tender process for such service.
- 41.4.4 The SPC and SPC Staff shall co-operate in good faith with the Trust to enable the Trust to procure and obtain the benefit of any such additional service and the SPC and SPC Staff shall not (whether by act or omission) obstruct or prevent the Trust the Trust Staff or the provider of any additional service from carrying out any of their duties in connection with such additional service. The SPC will use reasonable endeavours to ensure that the SPC Staff and persons authorised by the SPC will not interfere with the carrying out of any such additional service.

42 Market Testing/Benchmarking Services

42.1 Application

The Tested Services shall be Benchmarked (as a single Service and not as individual services) or Market Tested (as individual services) as Clause 42.3 shall determine.

42.2 Timing

Subject to Clause 42.10, Testing shall take place as follows:

42.2.1 on each seventh anniversary of the Hospital Operations Date, or

42.2.2 at the option of the SPC at any time following the second anniversary of the Hospital Operations Date but subject to the following:

42.2.2.1 the SPC may only exercise this option once in any Triennium (notwithstanding that such Testing may apply only to a single service)

42.2.2.2 the charge to be made to the Trust for providing the relevant Tested Service(s) will only be adjusted to the extent that

$$C \geq (SC \times 1.1) + (SC \times RPI_n)$$

where C is the cost to the Principal Service Provider of providing (i) the Tested Services as a whole or (ii) a single Service identified by the SPC, which shall be the relevant Service to be Tested

SC is the cost to the Principal Service Provider of providing the relevant Tested Services at the last Testing (or, in respect of the first Testing, at 1 April 1997)

RPI_n is the percentage change in RPI over the relevant period (as determined in accordance with the definitions of Tested Service Price Movement).

42.3 Benchmarking or Market Testing

Irrespective of whether Testing takes place by virtue of the operation of Clause 42.2.1 or Clause 42.2.2 or Clause 42.10 the Services shall be Tested by Benchmarking unless the Trust in its reasonable discretion shall be satisfied that there is insufficient suitable and available comparative data at the time to enable an objective comparison to be made by Benchmarking, in which case if the Trust shall so direct, Testing shall be by Market Testing. Any decision by the Trust may be referred to the Dispute Resolution Procedure by the SPC, but only as to the reasonableness of the Trust's decision.

42.4 Benchmarking

Benchmarking will establish the Benchmark Price Movement against which the Tested Service Price Movement will be compared.

its reasonable efforts to make arrangements to provide out of hours emergency cover. When an emergency occurs during the working hours provided for by this Agreement, staff should be diverted from their normal duties to deal with it for a period of up to 48 hours from occurrence of the emergency and the SPC will be allowed dispensation in relation to the required Service Standards and, where applicable, the Performance and Availability Regimes as a result of such redeployment of SPC Staff. This service forms part of each of the Services to be provided pursuant to this Agreement and, for a period of 48 hours shall be provided at no extra cost to the Trust; thereafter continuance of such emergency arrangement shall be subject to the Trust issuing a Change requirement pursuant to Clause 50.3 (Service Changes).

37 Staff Health and Hygiene

- 37.1 The SPC shall, in respect of each relevant member of SPC Staff, comply or procure compliance with the Trust's health screening policies and requirements as from time to time communicated to the SPC. Health screening services undertaken by the Trust's Occupational Health Department in this regard will be charged to the SPC at cost.
- 37.2 The SPC and any Service Providers shall use all reasonable endeavours not to employ in connection with provision of the Services any person who it becomes aware is showing active signs of or is under treatment for any infectious or communicable disease, or who is a known carrier of such disease; or who has in the recent past suffered from recurrent sore throats; or who has in the previous six months recent past suffered from any of the enteric group of fevers; or who has suffered from dysentery and who has had recurrent symptoms of this disease unless shown to be free from active infection by six bacteriological examinations carried out over the period of one month.
- 37.3 The SPC shall use all reasonable endeavours to ensure that as soon as any person employed in connection with the provision of Services who is engaged in the handling of food becomes aware that he is suffering from any of the following:
- typhoid fever
 - paratyphoid fever
 - any other salmonella infection
 - amoebic or bacillary dysentery
 - any staphylococcal infection likely to cause food poisoning or
 - any other condition made notifiable by any Legal Provision relating to food hygiene

such person shall without delay give notice of that fact to the Provider Service Manager who shall without delay give, in addition to any notice required by any Legal Provision relating to food hygiene, notice of that fact to the Trust. The Trust shall be entitled to direct the SPC and/or the Service Provider to take such action as may be necessary to minimise the risk of the spread of infection including the removal of such person from the Hospital and/or the isolation of an area within the Hospital. The Provider Service Manager shall ensure that the directions of the Trust are carried out without delay and shall at all times keep the relevant Trust Service Representative informed of any other action taken. Any person removed from the Hospital or area of the Hospital isolated under this Clause shall not be permitted to return to the Hospital or be returned to normal operation unless and until the approval of the Trust's Control of Infection Doctor has first been obtained, such approval not to be unreasonably withheld or delayed

38 Communications**38.1 Representation**

The Trust Representative will represent the Trust and the SPC Contract Manager will represent the SPC. Each will manage the Facilities Management Section (Section 5) of this Agreement for the party which he represents. They will be the communication interfaces for their respective organisations and will be entitled to receive notices and give instructions in accordance with this Agreement on behalf of the party who each represents.

38.2 Deputies

Each of the Trust Representative and the SPC Contract Manager may nominate one deputy to perform some or any of the functions necessary to be performed by them under this Agreement (provided that each party shall notify the other of the identity of such deputy). Each will also nominate (as the context may require on behalf of the Trust or the SPC or the Service Provider) the Trust Service Representative and the Provider Service Manager in respect of each Service and one competent deputy to perform any of the functions necessary to be performed by them at service level.

38.3 Consent

The appointment of the first SPC Contract Manager, and the first Provider Service Manager for the Principal Service Contract and their respective authorised deputies will be subject to the prior written consent of the Trust, such consent not to be unreasonably withheld or delayed.

39 Duty to Provide Information etc on Discontinuance**39.1 Obligation to Assist**

If the Term is terminated early pursuant to Clauses 64.1 (Trust's Right to Terminate) or 66 (SPC's Right to Terminate) or 70 (Termination on Force Majeure), the SPC shall, if requested, provide assistance in the execution of transitional arrangements to achieve the transfer of responsibility for the provision of the relevant FM Service and Managed Service to the successor contractor with the minimum disruption to the provision of the Service on the actual discontinuance of that FM Service and Managed Service and consequent transfer of responsibility between the SPC, the Trust or the Service Provider to the extent reasonable and necessary for an orderly implementation of an alternative to that Service. The Trust shall, in the case of any termination pursuant to Clause 66.1 (Trust's Default), indemnify the SPC and the Service Provider against any costs and expenses arising pursuant to this Clause 39.1.

39.2 Transfer of Data etc

As part of the transitional arrangements the SPC shall transfer or make arrangements to transfer (in an orderly manner so as to maintain its integrity) all available information in relation to the FM Service and Managed Services and data in or on whatever media available as directed by the Trust to the Trust or its third party contractor as directed by the Trust.

42.5 Market Testing

Market Testing will establish the Market Test Price against which the relevant Service Cost will be compared.

42.6 Price Adjustment**42.6.1 Benchmarking**

On Benchmarking, where the Benchmark Price Movement is greater or less than the Tested Service Price Movement, the Tested Services Price shall be adjusted upwards or downwards (by a percentage amount) as appropriate by the difference between the Tested Service Price Movement and the Benchmark Price Movement, provided always that the first "Z" of such adjustment shall be ignored. For this purpose, "Z" is a sterling amount equal to 5% of the Tested Services Price.

42.6.2 Market Testing

On Market Testing where the Market Test Price is greater or less than the price of the relevant Tested Service, that part of the Total Service Price which relates to the relevant Tested Service shall be adjusted upwards or downwards (by a percentage amount) as appropriate by the difference between the Tested Service Price and Market Test Price, provided always that the first "Z" of such adjustment shall be ignored. For this purpose "Z" is a sterling amount equal to 5% of that part of the Total Service Price which relates to the Tested Services.

42.6.3 For the purposes of Clause 42.6.1 adjustments to the relevant part of the Total Service Price resulting from any Change shall not be taken into account when determining the Tested Service Price Movement.

42.6A Testing and Changes

42.6A.1 To the extent that the relevant Tested Service Price is adjustable in accordance with the provisions of this Clause 42, Table 1 of Part 1A shall be adjusted, and the Unitary Charge will thereafter be determined in accordance with Part 1A. For the avoidance of doubt in circumstances where any Service Provider has been replaced and the Service Cost of the relevant Service is, in reality different to the Service Cost assumed, for the purposes of this Agreement, the Testing provisions of this Agreement shall continue to operate by reference to the Service Cost assumed for the purposes of this Agreement.

42.6A.2 Worked examples of the intended application of the Benchmarking and Market Testing regimes are contained in Table 1 to Part 29.

42.7 Market Testing Procedures**42.7.1 Tendering**

The SPC shall invite tenders for the provision of the Tested Services for the ensuing Service Period on the same contract terms as previously provided (i) in accordance with all relevant Legal Provision (ii) on a basis that the successful tenderer will purchase the equipment (other than the Transfer

Equipment) used in providing the relevant Managed Services at the Written Down Value and (iii) on the basis that the incoming Service Provider will take over the contracts of employment of the relevant work force (and reimburse the outgoing Service Provider the reasonable costs of any member of the work force whose employment is not taken over). Further the SPC will comply with the tendering procedure set out in Part 29.

42.7.2 **Trust's Involvement**

The Trust shall be fully informed of all steps to be taken as regards each Market Test and the Trust and the SPC shall seek, acting through the selection panel, to achieve unanimity on the evaluation criteria and weights to be applied in selecting a successful tenderer provided always that such evaluation criteria shall include service quality as well as service cost. The selection panel shall be responsible for the selection of shortlisted bidders and subject to Clause 42.8 the award of the contract for the provision of the Managed Service for the ensuing Service Period. It shall consist of 5 members: 2 of whom shall be appointed by the Trust, 2 by the SPC and 1 shall be appointed jointly or, in default of agreement by the Expert in accordance with the provisions of Clause 69 (Dispute Resolution Procedure). Each member shall have one vote and the panel shall act by majority vote if unanimity cannot be achieved.

42.7.3 **Service Provider Right to Tender**

Subject to Clause 42.7.1, the incumbent Service Provider may submit a tender for the provision of all or any relevant Tested Services for the ensuing Service Period. Where the selection panel propose to award the contract for the provision of the Tested Service to a party other than the incumbent Service Provider, then the incumbent Service Provider shall have the opportunity to match the best tender received by the selection panel and if an offer to that effect is submitted by the incumbent Service Provider it shall be entitled to retain the Tested Service, subject to Clause 42.8.

42.7.4 **Equipment**

After a Tested Service has been Market Tested and a new Service Provider in respect of such Service has been selected by the selection panel for the ensuing Service Period, the equipment owned by the outgoing Service Provider and used in connection with such Managed Service will be purchased by the incoming Service Provider at Written Down Value.

42.7.5 **Ethical Procurement**

The SPC shall ensure that the SPC Staff involved in the Market Testing of any Tested Service are unbiased in the treatment of potential bidders for the relevant contract and that no information is made available to or other advantage is given to the potential Service Providers (including the SPC or any Linked Organisation) that is not given or not made available to all potential Service Providers. Appropriate procedures shall be established to secure that this is the case. The SPC shall provide a certificate signed by one of its directors confirming whether or not any proposed Service Provider or organisation invited to tender or negotiate to become a Service Provider is a Linked Organisation and whether or not the requirements of this Clause

42.7.5 have been complied with. Following evaluation of the bids, the right to match referred to in Clause 42.7.3 will take effect.

42.7.6 **Bona Fide Tendering**

If less than two bona fide offers from other than the incumbent Service Provider are received by the SPC in a Market Test, the SPC and the Trust shall consult in good faith with a view to determining the acceptability of the offer or offers received. If, following such consultation, the Trust reasonably determines that less than two bona fide offers from other than the incumbent Service Provider have been received as a result of the operation of Clause 42.7.3 and not as a result of general market forces, then the SPC shall carry out another Market Test within 10 weeks, in which event the incumbent Service Provider shall have no right to match pursuant to Clause 42.7.3.

42.8 **Other Consequences**

If a person ("Successful Bidder") other than the incumbent Service Provider offers the most favourable bid established in accordance with the evaluation criteria set out in Clause 42.7.2, the SPC may appoint the incumbent Service Provider pursuant to Clause 42.7.3 (on the terms offered by the Successful Bidder) provided that it is complying with its obligations hereunder and is lawful. The SPC may not appoint the incumbent Service Provider if the Market Test arises pursuant to Clause 44 (Service Default).

42.9 **Costs of Testing**

Each party shall bear its own costs incurred in Testing, save that the Trust shall bear the full cost (and indemnify the SPC) of any Testing pursuant to Clause 42.10, which does not result in a downward adjustment to the Total Service Price.

42.10 **Efficiency Savings**

42.10.1 The SPC recognises that the Trust's purchasers or the Scottish Office may require the Trust to realise efficiency savings within its operation and that the required efficiency savings may be in excess of 0.25 per cent per annum (which amount is referred to in paragraph 2.2 of Part 1A of the Schedule). The SPC and the Trust agree that they shall work together in an attempt to achieve efficiency savings in the provision of the Tested Services as a whole.

42.10.2 The SPC and the Trust shall use reasonable endeavours to make an annual saving in the cost to the Trust of the provision of the Tested Services (which does not compromise the quality of the Services), taking into account the level of efficiency savings which may be required from the Trust by its purchasers.

42.10.3 If Clause 42.10.2 is not successful in delivering the required savings then, (but only then), the SPC and the Trust shall use reasonable endeavours to suggest savings (and concurrent changes in the Services Specification) which will have a minimal impact on the quality of Tested Services.

42.10.4 If the SPC is unable to deliver a saving as described in Clause 42.10.2 or the Trust is not reasonably satisfied that the saving being offered is of an amount which the SPC ought to be capable of delivering, or the Trust is unwilling to accept the impact on quality of measures suggested by the SPC pursuant to

Clause 42.10.3, then the Trust shall be entitled to Test the Tested Services but subject to the following provisos:

42.10.4.1 the Trust may not Test the Tested Services in the two years following the Hospital Operations Date

42.10.4.2 the Trust may only Test the Tested Services once in any Triennium.

42.10.5 For the avoidance of doubt, for the purposes of this Clause 42.10 only, the disregarded 5% specified in Clause 42.6 shall not apply (and the full amount of any adjustment may be made).

43 Service Default

In relation to the Managed Services the following are each a Service Default:

- 43.1 a Service Provider is convicted at any time of breach of any statutory duty imposed upon it in the course of or in connection with carrying out a Managed Service, and such breach has a serious adverse effect on the well being of Patients or the reputation of the Hospital
- 43.2 a Service Provider is convicted of breaching any statutory duty imposed upon it in the course of or in connection with carrying out a particular Managed Service, on two occasions within a rolling five year period
- 43.3 a Service Provider suffers Financial Default
- 43.4 3 or more Default Points are correctly allocated to the SPC in respect of the provision of any single Managed Service in any period of twelve consecutive calendar months
- 43.5 a Service Default arising under Clause 50.3.4 (Service Changes).

44 Replacement of Service Provider

- 44.1 Upon a Service Default under Clause 43.1 or 43.2, the SPC shall itself assume the responsibilities of the Service Provider in respect of the Managed Service in respect of which the conviction or Service Default arose on a temporary basis as soon as practicable.
- 44.2 On the occurrence of a Service Default under Clauses 43.1 and 43.3, the Trust shall be entitled by written notice to the SPC to require the SPC to replace the relevant Service Provider in respect of all Managed Services provided by such Service Provider and on the occurrence of a Service Default under Clauses 43.2, 43.4 and 43.5 the Trust shall be entitled by written notice to the SPC to require the SPC to replace the relevant Service Provider in respect of the particular Managed Service in respect of which the Service Default arose, allowing in each case a reasonable period, being not less than 3 months and not more than 6 months, for the SPC to complete such replacement.
- 44.3 If the SPC fails to replace the relevant Service Provider then, unless the said notice has been withdrawn by other written notice, a default shall occur and the Trust may thereupon:
 - 44.3.1 assume the responsibilities of the SPC and, if the situation so requires, the Service Provider for a temporary period to be determined by the Trust for the continuation of the provision of the relevant Managed Service in respect of

which the Service Default has arisen on giving to the SPC notice in writing to this effect or

44.3.2 in the case of a Service Default relating to a Managed Service assume the responsibilities of the SPC within the meaning of the FM Service for a temporary period to be determined by the Trust insofar as they relate to the provision of that Managed Service.

44.4 The Trust may extend the period for which it has assumed the SPC or the Service Provider responsibilities pursuant to 44.3.1 or 44.3.2 as it sees fit. The Trust shall end the assumption of the SPC and/or the Service Provider responsibilities once satisfied in its absolute discretion that the SPC and/or the Service Provider as appropriate is in a position to resume and fully discharge those responsibilities.

44.5 Termination by the Trust of some but not all Managed Services shall not affect the terms of the provision of the FM Service and/or the Managed Services not so terminated.

44.6 **Duty to Co-operate**

The SPC undertakes to co-operate and procure that all Service Providers co-operate with any new party appointed pursuant to Clause 44.

44.7 **Cost To Trust**

On a Service Default, and in respect of any temporary provision of a Service by the Trust pursuant to Clause 44.3, the SPC shall pay on demand to the Trust all sums, costs and liabilities properly incurred by the Trust in connection with or arising out of such temporary provision, to the extent that the total cost to the Trust of the Services is at any time in excess of the Unitary Charge, and failing such payment the Trust may deduct the amount due as a Permitted Deduction.

SECTION 6: OPERATING THE SERVICES AND FACILITIES**45 Trust Representative****45.1 Authorisation - Trust Representative**

The Trust shall appoint or designate the Trust Representative for the purpose of this Agreement to represent the Trust following (but not prior to) the Hospital Operations Date. Any written notice, information or communication given to or made by the Trust Representative shall be deemed to have been given to or made by the Trust. The Trust shall ensure that the Trust Representative or any deputy appointed pursuant to Clause 38.2 duly authorised to act on the Trust's behalf is available for consultation with the SPC at all times including outside normal working hours.

45.2 Authorisation - Trust Service Representative

The Trust shall appoint or designate in respect of the FM Service and may appoint in respect of all Managed Services a Trust Service Representative. In the absence of a specific appointment the Trust Representative is the Trust Service Representative in respect of any Service. Any written notice, information or communication given to or made by the Trust Service Representative in respect of any Service shall be deemed to have been given to or made by the Trust. The Trust shall ensure that the Trust Service Representative in respect of each Service, or a deputy appointed pursuant to Clause 38.2 and authorised to act on the Trust's behalf, is available for consultation with the SPC at all reasonable times.

45.3 Notification of Identity

The Trust shall at any time after the signing of this Agreement give the SPC notice in writing of the identity(ies) of the Trust Representative and the Trust Service Representative(s) in respect of a Service(s) and deputies appointed pursuant to Clause 38.2.

45.4 Continued Authority of Representatives

Until notice of a subsequent appointment shall have been given by the Trust, the SPC shall be entitled to treat as the Trust Representative or, as the context may require, as the relevant Trust Service Representative or the relevant deputies appointed pursuant to Clause 38.2 the last person identified as such to the SPC by the Trust in accordance with this Agreement.

46 Provider Contract Management**46.1 Authorisation - SPC Contract Manager**

The SPC shall appoint the SPC Contract Manager for the purpose of this Agreement. Any written notice, information or communication given to or made by the SPC Contract Manager shall be deemed to have been given to or made by the SPC. The SPC shall ensure that the SPC Contract Manager, or a competent deputy duly authorised to act on the SPC's behalf, is available for consultation with the Trust at all times including outside normal working hours.



46.2 Authorisation - Provider Service Managers

The Principal Service Provider shall appoint or designate in respect of each Managed Service a Provider Service Manager but any written notice, information or communication given or made in respect of the relevant Managed Service shall be given to the Principal Service Provider, provided always that, in the case of any notice concerning any of the following matters, such notice is also simultaneously copied to SPC:

- Termination Warnings
- Termination Notice
- Notices of Service Failure identified by the Trust
- Notice of disagreement of any Performance Monitoring Report or Availability Report
- Notice of an emergency under Clauses 36.9 or 64.4 (Emergency Remedy)
- any Change Notice
- Notice of any Force Majeure
- Notice of any reference to the Disputes Resolution Procedure
- Notice as regards temporary alternative arrangements
- Any notice of complaint concerning Services or Facilities other than as noted in the SPC help desk logbook.

The Principal Service Provider shall ensure that in respect of each Managed Service the relevant Provider Service Manager or a competent deputy duly authorised to act on the Service Provider's behalf is available for consultation with the Trust (as well as with the SPC Contract Manager) at all times including outside normal working hours.

46.3 Replacement

- 46.3.1 The SPC acknowledges that the individuals fulfilling the functions of the SPC Contract Manager and the Provider Service Managers are important to the fulfilment of the SPC's obligations under this Agreement and the SPC undertakes to use all reasonable endeavours to ensure that such key personnel are not removed or replaced to the detriment of its performance of this Agreement. However, in the event that any of the SPC Contract Managers and/or the Provider Service Managers become unavailable or the SPC or Service Provider wishes to replace the SPC Contract Manager or any Provider Service Manager for any reason, the SPC or Service Provider (as the case may be) will have the right, upon giving 30 days' notice in writing to the Trust, and subject to the rights of the SPC to appoint a temporary replacement, to replace such individual with another individual whose abilities and qualifications approximate to those of the individual so replaced.
- 46.3.2 Any notice given by the SPC or Service Provider pursuant to Clause 46.3.1 shall include the identity of the proposed new SPC Contract Manager or Provider Service Manager, as the context may require. The Trust shall be entitled, on receipt of such notice, to object to the identity of the proposed replacement. In the event that the Trust so objects on the grounds of ability or qualification the parties will negotiate in good faith to agree a new replacement satisfactory to both parties.
- 46.3.3 The provisions of this Clause 46.3 shall apply to the authorised deputies of the SPC Contract Manager and each Provider Service Manager mutatis mutandis.

46.4 Notification of Identity

- 46.4.1 The SPC shall as soon as practicable after Financial Closing notify the Trust of the identity of the SPC Contract Manager.
- 46.4.2 On or before each Service Start Date, the SPC shall give the Trust notice of the identity and qualifications of the Provider Service Manager in respect of the relevant Service.

46.5 Continued Authority of Managers

Until notice of a subsequent appointment shall have been given by the SPC or Service Provider (as the case may be), the Trust shall be entitled to treat as SPC Contract Manager or, as the context may require, the relevant Provider Service Manager or the relevant authorised deputy the last person identified as such to the Trust in accordance with this Agreement.

47 Liaison Group

- 47.1 The Trust and the SPC shall establish within one month following Financial Closing and maintain throughout the Term a Liaison Group to oversee, subject to Clause 47.3, the implementation of the Project, the operation of the Hospital and the delivery of the Services including in particular in the period prior to the Hospital Operations Date:
- 47.1.1 the implementation of this Agreement
- 47.1.2 reviewing the design configurations of the Hospital and the ward layouts and assessing the need for Facilities Changes
- 47.1.3 the process for carrying out the Developed Design of the Hospital in accordance with Part 7
- 47.1.4 the procedures for Hospital Commissioning and handover of the Hospital
- 47.1.5 any interim arrangements for the delivery of the Services
- 47.1.6 all transitional arrangements including workforce planning and timing of staff transfers
- 47.1.7 reviewing the arrangements for Transfer Equipment
- 47.1.8 reviewing SPC procedures to ensure that the Services can be effectively delivered at the Hospital from the Hospital Operations Date
- 47.1.9 any proposals for amendment of the Project Documents
- and in the period following the Hospital Operations Date:
- 47.1.10 reviewing the Specifications and assessing the need for Service Changes
- 47.1.11 any proposals for the extension of the Hospital
- 47.1.12 reviewing policies adopted by the Trust, the SPC, any Service Provider and any sub-contractors relevant to the performance of Managed Services

- 47.1.13 consideration of the Trust's and the SPC's performance
- 47.1.14 consideration and implementation of Income Generation Schemes
- 47.1.15 any proposals for amendment of the PFI Documents.
- 47.2 The Liaison Group shall not have the status of a committee of the Trust under the standing orders of the Trust. Each party acknowledges that their representatives on the Liaison Group shall not, in such capacity, be entitled to bind them or waive or amend any provision of the Project Documents and that all matters discussed or reviewed by the Liaison Group shall be subject to approval by the Trust and SPC's board of directors respectively.
- 47.3 The Liaison Group shall conduct its affairs in accordance with Part 7 and may establish sub-groups in respect of particular aspects of the Project, Hospital or provision of the Services.
- 47.4 The Liaison Group shall conduct itself in accordance with the liaison procedures set out in Part 7 and establish any more detailed procedures as it sees fit consistent therewith.
- 47.5 Any reasonable recommendations made by the Liaison Group shall be given appropriate consideration by the boards of the SPC and the Trust.

48 Reports, Information and Records

- 48.1 The provisions of this Clause 48 shall apply throughout the period of the Term.
- 48.2 **Required Reports**
- The SPC shall submit to the Trust the Reports specified in Part 11 in the Agreed Form, in such numbers as are provided therein.
- 48.3
- 48.4 **Objections to Reports**
- 48.4.1 If the Trust considers that any Report either has not been compiled in accordance with the provisions of this Agreement or has been based on erroneous information or data, then it may serve a notice to that effect on the SPC within 28 days of receipt of such Report, objecting to the same.
- 48.4.2 If any such information has not been resolved by agreement between the Trust and the SPC within 14 days after the service of such notice, then either of them may refer the matter to the Dispute Resolution Procedure.
- 48.5 **Revisions to Reports**
- If:
- 48.5.1 the resolution (whether by agreement or determination under the Dispute Resolution Procedure) of any objection made pursuant to Clause 48.4.1 or
- 48.5.2 the correction of any calculation pursuant to any provision of the Project Documents

in either case requires any revision or adjustment to any Report, the SPC shall, as soon as practicable, issue revised versions of each affected Report and each such revised Report shall, for all purposes of the PFI Documents, take the place of the relevant original Report.

48.6 Further Information

The SPC shall upon request, at any time and from time to time, provide to the Trust such further information in respect of the Project and the SPC, (other than Confidential Information) as the Trust may reasonably require and provided the Trust's request for further information in respect of the Project or the SPC, is reasonable, there will be no charge in respect of the provision of such information.

48.7 Information Provision by the Trust

The Trust shall upon request, at any time and from time to time, provide the SPC with such information in respect of the Project and the Trust, (other than Confidential Information) as the SPC may reasonably require and provided the SPC's request for further information in respect of the Project or the Trust, is reasonable, there will be no charge in respect of the provision of such information.

48.8 Financial Information About the SPC

Without prejudice to the generality of Clause 48.6, the SPC shall furnish to the Trust:

48.8.1 as soon as they become available and in any event not later than 180 days after the close of each of its accounting financial year periods, copies of the audited financial statements of the SPC for such period, including a balance sheet prepared as at the end of such accounting financial year period, a profit and loss account and a statement of the source and application of funds in respect of such accounting financial year period

48.8.2 as soon as they become available and in any event not later than 90 days after the end of the first half of each of its financial years, copies of the unaudited financial statements of the SPC for such financial half year including a balance sheet prepared as at the end of such period and a profit and loss account in respect of such period

48.8.3 as soon as they become available and in any event not later than 30 days after the end of each successive three month period in each of the SPC's financial years the SPC's quarterly management accounts for that period including a balance sheet prepared as at the end of such period and its profit and loss account in respect of such period.

48.9 Financial Information About the Trust

Without prejudice to the generality of Clause 48.7 or 49.3, the Trust will:

48.9.1 keep the SPC informed of any discussions held with Lanarkshire Health Board, which may result in material changes to the Trust's income

48.9.2 provide the SPC from time to time with (i) such part of the Trust's contract with Lanarkshire Health Board as the Trust is free to publish and (ii) as soon as they become available and in any event within [180] days of its accounting

financial year period copies of the Trust's annual report, audited accounts and published financial information

- 48.9.3 provide the SPC from time to time with such details set out in 48.9.2 of the Trust's contracts with other healthcare purchasers (whose business represents 3% or more of the Trust's income).

48.10 Accounting Principles

The SPC will ensure that the financial statements referred to in Clauses 48.8.1 and 48.8.2 are prepared in accordance with generally accepted accounting principles and practices in the United Kingdom current at the time of their preparation that such financial statements shall present fairly and accurately the results of the operations of the SPC for the period in question and the state of its affairs as at the date to which the financial statements are made up.

48.11 Financial Information on the Contractors

Without prejudice to the generality of Clause 48.6, the SPC shall furnish to the Trust:

- 48.11.1 as soon as they become available and in any event not later than 180 days after the close of each of their respective accounting periods, copies of the audited financial statements of the Contractor (until the end of the Defects Liability Period), and the Principal Service Provider under the Principal Services Contract for such periods, including, in each case a balance sheet prepared as at the end of such accounting period, a profit and loss account and a statement of the source and application of funds in respect of such accounting period
- 48.11.2 as soon as they become available and in any event not later than 90 days after the end of the first half of each of their respective financial years, copies of the unaudited financial statements of the Contractor (until the end of the Defects Liability Period), and the Principal Service Provider under the Principal Services Contract for such financial half year including a balance sheet prepared as at the end of such period and a profit and loss account in respect of such period (provided that the Principal Service Contractor need not produce any such half yearly reports until 1999) and provided that a failure by the SPC to comply with its obligations under this Clause 48.11 shall not constitute a breach of contract or an Event of Default if such failure results from an act or omission which is not within the SPC's control and which could not be remedied by the SPC taking reasonable steps (not including legal proceedings) to do so.

48.12 Required Records

The SPC shall maintain and update those Records relating to the Project set out in Part 11.

48.13 Audit

The Records shall be kept in good order and in such form as to be capable of audit by the Trust. The SPC shall make such Records available for inspection by or on behalf of the Trust at all reasonable times.

48.14 Copies

The Trust shall, subject always to Clause 74 (Confidentiality), be entitled to take copies of all Records at the Trust's cost and for that purpose to use such copying facilities as are maintained at the place where the Records are kept.

48.15 Advisers

If the Trust decides to appoint advisers or consultants to appraise or evaluate any information disclosed by the SPC pursuant to this Clause 48 then the Trust shall be entitled to disclose all such information to its appointed advisers and all obligations of disclosure expressed to be granted to the Trust in this Clause 48 shall also be deemed to be expressed to be granted to the Trust's advisers and the Trust shall procure that those advisers shall themselves be subject to Clause 74 (Confidentiality). The Trust shall notify the SPC of the appointment of any such adviser.

48.16 Retention of Records

48.16.1 All records shall be retained for no less than the period specified in respect of such Records set out in Part 11.

48.16.2 Where the period for the retention of any Records (as set out against the relevant class of Records in Part 11) has expired, the SPC shall notify the Trust as to what it intends to do with such Records. If it intends to dispose of them or subsequently decides to dispose of them, the SPC shall notify the Trust and if the Trust, within 30 days of such notice, elects to receive those Records or any part of them, the SPC at its own cost shall deliver up such Records to the Trust at the location as the Trust shall reasonably specify.

48.16.3 Upon the early termination for whatever reason of the Term (other than expiry), of this Agreement, the SPC shall deliver up to the Trust, at such location as the Trust shall reasonably specify, all Records which were in existence at the date of termination (or, where those Records are required by statute to remain with the SPC, copies thereof) or such part of such Records as the Trust may by notice to the SPC specify. The Trust shall make available to the SPC all the Records the SPC delivers up pursuant to this Clause 48.16.3 subject to reasonable notice. The Trust may by notice to the SPC require such Records be deposited in storage with a third party experienced in the safe storage of such documents, who shall be approved by the Trust acting reasonably (provided always that, in the case of Clause 48.16.3.2 the ongoing responsibility for such Records, following delivery, shall lie with the Trust). Such Records shall be kept in safe storage for a period of not less than the period following the date of termination indicated in Part 11. Both the SPC and the Trust shall be granted access to such Records at all reasonable times by the third party. The costs of retaining those Records in safe storage shall be borne:

48.16.3.1 by the SPC (in one lump sum advance payment) where the termination arises as a result of a default by the SPC

48.16.3.2 by the Trust (in one lump sum advance payment) where the termination arises as a result of a default by the Trust

48.16.3.3 in cases of termination other than those governed by Clauses 48.16.3.1 or 48.16.3.2 above, by the SPC and the Trust in equal proportions, by one lump sum advance payment.

48.17 Computer Records

To the extent that the Records of the SPC are to be created or maintained on a computer or other electronic storage device, then the SPC shall agree with the Trust Works Representative or the Trust Representative as the case may be, a procedure for back-up and off-site storage for copies of such Records and shall adhere to such agreed procedure and shall cause the Contractor and the Principal Service Provider to implement and adhere to such agreed procedure.

48.18 Appropriate Trust Representative

For the purposes of this Clause 48 the Trust shall be represented by, in the period prior to the Hospital Operations Date, the Trust Works Representative and, in period on and after the Hospital Operations Date, the Trust Representative.

49 Consents and Approvals

49.1 Subject to Clause 49.4, the SPC shall be solely responsible for securing the grant and all subsequent renewals, extensions and modifications of any permits, licences, consents and authorisations (including but not limited to the Relevant Permissions, but excluding the Trust Consents) which at any time during the Term be necessary to carry out the Project and/or perform the Services and shall ensure that, as far as is legally possible, those permits are obtained in the SPC's name.

49.2 The Trust shall be solely responsible for securing the grant and all subsequent renewals, extensions and modifications of, any Trust Consents.

49.3 Without derogating from the SPC's obligations in Clause 49, where the Trust is, prior to the Hospital Operations Date or the relevant Service Start Date as the context requires, the holder of any relevant permit which is capable of transfer to the SPC and which would be necessary or desirable for the SPC to perform its obligations under the PFI Documents, the Trust shall use its reasonable endeavours, at the SPC's cost, to secure that transfer and shall provide all assistance reasonably required by the SPC, at the SPC's cost, to secure the issue of any required permit.

49.4 If any permit under Clause 49.1 above cannot legally be obtained in the SPC's name and must be obtained in the name of the Trust, the SPC shall in the event of any query, breach, prosecution or other dealing in respect of such permit, give the Trust all necessary assistance and information to enable the Trust to respond to the matter.

49.5 The SPC shall comply with all current and relevant permits.

50 Service Changes and Facilities Changes

50.1 Right to Require Changes

The Trust shall be entitled at any time during the Term to require the implementation of Service Changes and Facilities Changes in accordance with the provisions of this Clause 50 provided that:

- 50.1.1 until such time as a Change is made in accordance with the Change Control Procedure, the SPC shall, unless otherwise agreed in writing between the parties, continue to operate in accordance with this Agreement as if the request or recommendation had not been made
- 50.1.2 any discussions which may take place between the Trust and the SPC in connection with a request or recommendation for change before the authorisation of a resultant Facilities Change or Services Change shall be without prejudice to the rights of either party
- 50.1.3 any work undertaken by the SPC its permitted sub-contractors or agents which has not been authorised in advance by a Facilities Change or Services Change and which has not been otherwise agreed in accordance with the provisions of this Clause 50 shall be undertaken entirely at the expense and liability of the SPC unless the Trust specifies or agrees otherwise in writing and
- 50.1.4 when a proposed Change affects both Services and Facilities the procedure for both a Facilities Change and a Services Change shall be followed.
- 50.2 **Facilities Changes**
- 50.2.1 Subject to the provisions of this Clause 50, the Trust may require a Facilities Change at any time during the Term by sending a Change Notice to the SPC setting out details of the Facilities Change required.
- 50.2.2 The SPC shall submit a CCN regarding the Facilities Change in accordance with the Change Control Procedure within 28 days of the date of the Change Notice or such later date as may be reasonable as stipulated by the Trust in the Change Notice.
- 50.2.3 The Change Control Procedure shall establish, inter alia,
- 50.2.3.1 the Change Capital Cost or Change Capital Savings associated with implementing a Facilities Change
- 50.2.3.2 if applicable, the Change Financing Cost associated with implementing the Facilities Change
- 50.2.3.3 if applicable, any Increased Operating Cost or Operating Saving associated with implementing the Facilities Change.
- 50.2.4 If:
- 50.2.4.1 the SPC does not submit a CCN within 14 days following the date of a written reminder notice by the Trust which may be issued at any time following the expiry of the initial date set for submission of the CCN under Clause 50.3.2
- 50.2.4.2 the SPC does not start work in implementing the Facilities Change within 28 days of the date of approval of the CCN by the Trust or the date of determination by the Expert of the matters to be covered in the CCN under the Dispute Resolution Procedure



then the same shall be an Event of Default or Change Failure, determined by Clauses 50.2.5 and 50.2.6.

- 50.2.5 If the SPC does not complete the Facilities Change in accordance with the program set out in the CCN and the Change Capital Cost of the Facilities Change set out in the CCN aggregated with the Change Capital Costs of all Facilities Changes in the period until the fifteenth anniversary of the Hospital Operations Date is greater than the Change Threshold then the occurrence of either event set out in Clauses 50.2.4.1 or 50.2.4.2 shall be a Change Failure ("Change Failure").
- 50.2.6 If the Change Capital Cost of the Facilities Change set out in the CCN aggregated with the Change Capital Costs of all Facilities Changes in the period until the fifteenth anniversary of the Hospital Operations Date is less the Change Threshold then the occurrence of either event set out in Clause 50.2.4.1 or 50.2.4.2 shall be an Event of Default.
- 50.2.6A In any case where the SPC has commenced the implementation of a Facilities Change, and subject to the provisions of Clause 25 which shall apply mutatis mutandis, the SPC shall pay to the Trust monthly in arrears, a sum equal to one per cent of the Change Capital Cost associated with implementing the relevant Facilities Change, for each complete calendar month or pro rata for part of a month which shall elapse between the time for completion of the Facilities Change set out in the CCN and the expiry of a period equal to 25% of the time for undertaking and completing the relevant Facilities Change in accordance with the program set out in the CCN (such period being the "Change Overrun Period"). The sums to be paid pursuant to this Clause are by way of liquidated damages and not a penalty and shall together with the Trust's other rights pursuant to this Clause, be the Trust's sole remedy against the SPC in respect of any delay in completion of the relevant Facilities Change.
- 50.2.6B If on the expiry of the Change Overrun Period, the Facilities Change has not been completed the Trust shall have the right (i) to elect to continue to receive liquidated damages at the amount stated in this Clause or (ii) at any time while the relevant Facilities Change remains incomplete (and notwithstanding any previous election to continue to receive liquidated damages) to determine that an SPC Event of Default shall have occurred.
- 50.2.7 On an Event of Default related to Change the Trust shall be entitled to procure the implementation of the Facilities Change itself without reference to the SPC (in the case of an Event of Default) or in accordance with an agreed programme (in the case of a Change Failure). In the event that the SPC and the Trust are unable to agree a programme, the programme shall be settled by an Expert pursuant to the Dispute Resolution Procedure. The Trust shall accordingly be entitled to make or allow a third party to make whatever alterations or additions to the building and fabric of the Hospital as may be necessary or desirable for the implementation of the Facilities Change in the case of an Event of Default, or as are required by the agreed programme, in the case of a Change Failure, provided that the Trust shall reimburse the SPC the reasonable costs of any damage to the Facilities arising from the implementation of a Facilities Change and the Unitary Charge shall be adjusted to reflect any increases in the cost of providing the Services.

50.2.8 The SPC undertakes that it shall indemnify the Trust against any Claim or Losses, and any consequential loss arising where the SPC fails to comply with the provisions of the Public Works Contracts Regulations 1991 and/or the Public Supply Controls Regulations 1995 and Public Service Contracts Regulations 1993, if applicable.

50.3 Service Changes

50.3.1 The Trust may require a Service Change at any time during the Term by sending a Change Notice to the SPC setting out details of the Service Change required.

50.3.2 The SPC shall submit a CCN regarding the Service Change in accordance with the Change Control Procedure within 28 days of the date of the Change Notice or such later date as may be reasonable as the Trust may stipulate in the Change Notice.

50.3.3 The Change Control Procedure shall establish, *inter alia*, any Increased Operating Costs or Change Capital Costs or Change Financing Cost or Change Capital Savings or Operational Savings associated with implementing the Service Change.

50.3.4 If:

50.3.4.1 the SPC does not submit a CCN within 14 days following the date of a written reminder notice by the Trust which may be issued at any time following the expiry of the initial date set for submission of the CCN or under Clause 50.3.2

or

50.3.4.2 the SPC does not implement the Service Change within 14 days following the date of a written reminder notice by the Trust which may be issued at any time following the date set for implementation of the Service Change in the approved CCN

then the occurrence of such event shall be a Service Default.

50.4 Change Restrictions

The SPC shall have no obligation to undertake a Change where:

50.4.1 the Residual Value of the Hospital would be materially adversely affected

50.4.2 there has been a material adverse change in the Trust's financial position

50.4.3 during the period while a material amount of Financial Indebtedness is outstanding under the Financing Documents, there has been any material adverse change in the Trust's financial position, in the reasonable opinion of the Funders

50.4.4 the Facilities subject to the Change cannot be insured on commercial terms (unless the Trust, as between itself and the SPC, accepts responsibility as insurer for those risks which cannot be insured against)

- 50.4.5 Relevant Permissions are not obtainable
- 50.4.6 any Legal Provision (including those related to health and safety) would be breached.
- 50.4.7 the Change Threshold is exceeded, and despite performance of its obligations pursuant to Clause 50.5, the SPC is unable to procure the finance for any Change Capital Cost.

50.5 Changes above Change Threshold

For the avoidance of doubt, the SPC acknowledges and undertakes to the Trust:

- 50.5.1 that it is obliged to provide or procure the finance for any Change Capital Cost which is less than the Change Threshold (irrespective of the availability of such finance to the SPC from Funders or others)
- 50.5.2 that it is obliged to do everything possible to procure from the Funders and/or other reputable lending or equity sources, on the best terms then reasonably available, the finance for any Change Capital Cost above the Change Threshold.

50.6 Other Changes

The SPC shall be under no obligation to:

- 50.6.1 follow any change to Trust Procedures
- 50.6.2 make any change pursuant to Clause 35.3.2
- 50.6.3 make any change pursuant to Clause 36.7
- 50.6.4 follow any change to the Patients Charter

unless and until in each case, the proposed change comes into effect as a Change.

50.7 SPC Recommendations

- 50.7.1 The SPC may recommend (but may not require) a Change in accordance with the Change Control Procedure and the Trust shall give reasonable consideration to such recommendation.
- 50.7.2 If the SPC recommends a Facilities Change and undertakes such Change before it is agreed with the Trust under the Change Control Procedure:
 - 50.7.2.1 the Unitary Charge shall not be subject to adjustment
 - 50.7.2.2 the SPC shall not be relieved of any of its obligations under the PFI Documents for a failure to obtain agreement of the Trust to a Facilities Change unless the Trust is acting unreasonably.

50.8 Adjustment to Charges

On the occurrence of a Facilities Change or a Service Change, the Unitary Charge shall be adjusted, and future Pricing Schedules created, in accordance with Part 1A.

50.9 Capital Payment Option

If the implementation of a Change requires an outlay of capital by the SPC, the Trust may elect at its absolute discretion to pay to the SPC, as an alternative to adjusting the Unitary Charge, a sum equal to such capital outlay (calculated in accordance with Part 6) and any corresponding adjustment to the Unitary Charge by reason of the effect on the Services shall be calculated and made in accordance with Part 6. For the avoidance of doubt, any such capital payment shall be unconditional (and shall not operate by way of loan).

50.10 Date of Implementation of Change

Subject always to the provisions of Clause 50.12, the SPC undertakes to procure the performance of the Service or Services affected by a Change in accordance with the Change as from the date set out in the approved CCN.

50.11 Disputes

If the Trust disputes the proposed revision to the Unitary Charge contained in the CCN then the Trust and the SPC shall negotiate in good faith the extent of the revision to the Unitary Charge. If the Trust and the SPC are unable to agree either may refer the dispute to the Dispute Resolution Procedure.

50.12 Continuation of Service Provision

In the event that revision to the Unitary Charge has not been agreed or determined within 30 days of a Change Notice (or such longer period as may be reasonable as stipulated by the Trust) the SPC shall:

- 50.12.1 in the case of the Change to a Managed Service, provide the Managed Service in accordance with Clause 50.10 with the Unitary Charge revised to such level as is not in dispute
- 50.12.2 in the case of a Change to the Facilities which is less than the Change Threshold, commence implementation of the Change on the later of the date determined in accordance with Clause 50.10 and 7 days after the issue of an expedited finding pursuant to Clause 69.3
- 50.12.3 in the case of a Change to a Facility in excess of the Change Threshold, work shall only commence when terms of the Change have been agreed.

When the revision to the Unitary Charge is subsequently agreed or determined, such revision shall be back dated to when the Change took effect and the Trust shall pay such accumulated arrears at the time of the next due date for payment of the Unitary Charge together with interest thereon at the Overdue Interest Rate.

51 Changes of Law

Where there is a Change of Law then the SPC or the Trust shall give notice to each other of such Change of Law and the effect it will have on the Facilities, Services or cost of provision thereof, and any such notice shall forthwith trigger a Change and the Change Control Procedure shall then apply (with the proviso that the SPC may, subject to the Dispute Resolution Procedure, require, and not just recommend, that the Change be made in respect of that Change of Law).

51A Linen Costs

The Service Cost in respect of the linen Managed Service output specification assumes that 84,000 items of linen are procured in each Monthly Reporting Period at a cost of 39p per item. To the extent that the number of items of linen actually procured in any Monthly Reporting Period is different from the assumed number of 84,000, the Unitary Charge shall be adjusted accordingly.

52 Licence of Intellectual Property

- 52.1 The SPC hereby grants to the Trust a non-exclusive, royalty free limited licence to use all Intellectual Property Rights specified in Clause 52.2 during the Term further to its rights under this Agreement, including any use of or alteration to the Hospital following the Trust's acquisition of the Hospital pursuant to Clause 67.7 (Condition of Hospital on Transfer), for the purposes of completing, maintaining, operating, repairing, renewing or replacing the Development provided that such licence and the rights attached thereto shall terminate upon the Trust or its successors ceasing to occupy the New Build Hospital for the provision of healthcare. The Trust shall be entitled to transfer the licence granted by this Clause only to a successor to it pursuant to Clause 53.2 or after termination or expiry hereof (if the licence subsists) to any other person taking an interest in the Hospital, but may sub-licence any of its rights under this Clause 52.1 without the consent of the SPC.
- 52.2 The Intellectual Property Rights licensed by or pursuant to this Clause 52 shall be all Intellectual Property Rights (whether now in existence or coming into existence during the Term) relating to the design, construction, fitting out, completion, commissioning or testing of the New Build Hospital, the operation and maintenance of the New Build Hospital (to the extent that the SPC shall have responsibility for the same) provided always that the licence shall not extend to any changes to the building management system after the date of termination of this Agreement.
- 52.3 To the extent that any of the Intellectual Property Rights referred to in Clause 52.2 are generated by or maintained on a computer or in any other machine readable format, the SPC shall procure, at no charge to the Trust, the grant of a licence or sub-licence for and supply of a copy of any relevant software or database to enable the Trust or its nominee to access and otherwise use that data for the purposes set out in the PFI Documents or otherwise to assist the Trust in the discharge of its functions in connection with the Project. Where such software or database is not readily available in the market at reasonable cost, the SPC shall procure at no charge to the Trust a copy of the relevant program and the grant of a Licence or Sub-licence for such software or database.
- 52.4 Within 60 days from the Execution Date or as soon as practicable thereafter the SPC shall submit to the Trust the procedures and practices which the SPC proposes to adopt for maintaining security of data, materials and documents, including arrangements for the backing up and subsequent recovery of information stored in electronically retrievable form. The Trust may only object and require alterations or additions to those procedures and practices which are adopted by it if in the Trust's reasonable opinion they do not accord with Good Industry Practice and/or they are inconsistent with the proper operation of the Hospital. The SPC shall (and shall cause each of its sub-contractors to) comply with the above procedures and practices. The SPC or the Trust may request a change in the above procedures and practices at any time during the Term only in accordance with the Change Control Procedure.
- 52.5 The SPC shall indemnify the Trust on demand and hold it harmless from and against all claims made or brought by any persons for or on account of actual or alleged

- infringement of any Intellectual Property Rights referred to in Clause 52.2 properly used by the Trust in accordance with the terms of this Agreement.
- 52.6 The SPC and the Trust shall at the request of the other execute all documents and do all such further acts which may be necessary or desirable to bring into effect or to confirm the terms of any licence created by or pursuant to this Clause 52.
- 52.7 Subject to Clause 52.8 any licences of Intellectual Property Rights created by or pursuant to this Clause 52 shall survive early termination (but not expiry) of the Term.
- 52.8 In so far as the Intellectual Property Rights to be licensed to the Trust under the above provisions of this Clause 52 relate to the operation and maintenance of the Hospital, the SPC will ensure that during the Term, and during any period following termination pursuant to Clauses 64 (Termination by Reason of Default), 66 (the SPC's Right to Terminate) and 70 (Force Majeure), the Trust will have reasonable access to all operational data which relates to the provision of the Services. The licence of Intellectual Property Rights under this Clause, only so far as it relates to any software in use by the SPC or Service Provider, shall cease when, after termination of this Agreement, the SPC or Service Provider provides the Trust with the means to extract and read by commercially available software, all data held at the date of termination regarding the Services in that software format.



SECTION 7: SAFEGUARDING THE PROJECT**53 Assignment****53.1 No Assignment**

Subject to Clauses 53.2 and 53.3 and save as expressly provided in this Agreement (or pursuant to arrangements contemplated in Clause 54.2), no party may assign, charge or dispose of (whether in whole or in part) any of its rights or obligations under the PFI Documents.

53.2 Health Service Reorganisation

The Trust may assign and transfer all (but not part only) of its rights and obligations under the Project Documents to which it is a party to any other Health Service Body in connection with any reorganisation of health services only if the assignee is a Health Service Body which

53.2.1 has the support of its purchaser (or the support of substantially all of the former group of purchasers) for the continuing purchase of services from the assignee and

53.2.2 is able to demonstrate that it has procured funding for the payment of any sum which is due immediately upon it becoming assignee.

53.3 SPC's Limited Right to Assign

The SPC may assign all but not part only of its obligations under the PFI Documents only in the circumstances and to a person satisfying the requirements of the Alienation Criteria.

53.4 SPC's Right to Grant Security

The Trust has approved the grant by the SPC of all charges, assignments and other security requirements of the Funders specified in the Financing Documents, and the appointment of the Agent pursuant to the Financing Documents. No provision of this Agreement shall prevent such grant nor shall result in an SPC Event of Default.

54 Change of Control**54.1 Change of Control of SPC**

The occurrence of any of the following events shall be an SPC Event of Default:

54.1.1 in the period prior to the Hospital Operations Date a Change of Control of the SPC occurs without the prior written consent of the Trust in its absolute discretion or

54.1.2 in the Year following the Hospital Operations Date a Change of Control of the SPC occurs without the prior written consent of the Trust, which consent shall not be unreasonably withheld

54.1.3 in the Year following the Hospital Operations Date failure by any Member of the Kier Group immediately prior to that company ceasing to be a Member of the Kier Group, to transfer any shares in the SPC held by it to another



Member of the Kier Group unless such departure would not in any event cause a Change of Control.

54.2 Change in Creditors or Level of Debt Under Financing Documents

The SPC shall not:

- 54.2.1 subject to Clause 54.2.3, in the period prior to the Hospital Operations Date change the Financing Documents to which the SPC is a party (other than a change which is administrative or non-material or made to reflect a Change, or an agreed amendment to this Agreement) without the prior written consent of the Trust in its absolute discretion, and breach of this shall be an SPC Event of Default. No such consent shall be required in respect of any change to the Financing Documents required as a result of any change in law
- 54.2.2 in the period from and after the Hospital Operations Date (i) change the Agent without the prior written consent of the Trust (which consent shall not be unreasonably withheld and shall not be required in the case of an Agent who has at least ten current syndications in the London syndications market) (ii) change the financing by increasing borrowings by more than £5,000,000 of new borrowings (other than to finance a Change) or by reason of addition of Rolled Up Interest and/or fees to the Financial Indebtedness under the Financing Documents, or by changing the character of the debt financing by using derivative instruments of a speculative nature which do not relate to the interest payments profile under the Financing Documents in such a way as to increase materially the risk of insolvency of SPC, or refinance the Project without the consent of the Trust which consent shall not be unreasonably withheld, having regard to the sums proposed to be provided, the pricing structure of such refinancing and the manner in which and by whom such refinancing is to be administered, provided that the Trust shall not seek to obtain any price reduction from the SPC as a result of this Clause 54.2.2
- 54.2.3 in the period prior to the Hospital Operations Date raise any Financial Indebtedness other than in respect of the Project, without the consent of the Trust, such consent not to be unreasonably withheld.

54.3 Notification of Change

The SPC shall:

- 54.3.1 inform the Trust within 10 days of becoming aware of the transfer of any interest (i) in shares in the SPC or (ii) in debt under the Financing Documents, from a person holding an interest in any shares in the SPC or in debt under the Financing Documents (a "Transferor") to any other person (the "Transferee"); and
- 54.3.2 provide the Trust with such information on the identity of the Transferee, the nature of its business activities and its financial status as the Trust may reasonably require and as the SPC is acting with due diligence, able to supply.

55 **Sub-contracting**55.1 **Sub-contractors**

In providing the Services the SPC may sub-contract any Service or a part or parts of any Service without the consent of the Trust except as provided in Clauses 55.2 and 55.3. Where the SPC proposes to employ sub-contractors, it shall prior to appointment of the same supply the Trust with such information as to their qualifications for such employment as the Trust may reasonably request and shall within 14 days after entering into any Principal Contract (and on any subsequent change being made) send copies of the Principal Contract to the Trust. Insofar as the provisions of this Clause 55 relate to market testing they supplement those of Clause 42.

55.2 The SPC shall not without the prior written consent of the Trust (which consent shall not be unreasonably withheld or delayed) appoint a party as a replacement under any of the Principal Contracts (or enter into any arrangement with substantially similar effect).

55.3 The SPC shall not appoint a party as a replacement under any subcontract affecting the services of laundry, clinical waste and catering (or enter into any arrangement with substantially similar effect) where the Trust can (or could, given the opportunity) show that the proposed replacement is, in objective terms, demonstrably unsuitable. If the Trust objects to any proposed replacement it shall give reasons to the SPC within 14 days of being notified of the proposed replacement.

55.4 **SPC's Responsibility for Sub-contractors**

Subject to Clause 75 (No Corruption) the SPC shall be fully responsible for the acts and omissions of all its sub-contractors as if they were the acts and omissions of the SPC.

55.5 **Transfer**

Any sub-contract (including for the avoidance of any doubt any arising pursuant to Clause 42) shall include provision for the employer's part of the sub-contract to be assigned, at the option of the Trust, to the Trust in the event of the termination for default of the SPC under this Agreement. The Trust may require that a sub-contractor enter into direct contractual obligations with the Trust under which it undertakes to comply with its obligations under the sub-contract.

56 **Enforcing Sub-contracts**

56.1 SPC shall perform its obligations and exercise its rights under and observe all the terms of all agreements between itself and the other party to a Principal Contract in respect of its obligations under the PFI Documents and, without limitation, shall not:

56.1.1 terminate or permit the termination of any of the Principal Contracts (or take or omit to take any action which would or might give rise to (a) repudiation or other termination of the Principal Contracts or (b) any right of suspension or termination at the instance of any other party to any of the Principal Contracts)

56.1.2 make or agree to any material addition or amendment to or deletion from any of the Principal Contracts (other than to reflect a Change or any agreed change to the Project Documents)

56.1.3 depart from, or waive or fail to enforce, any rights it may have under any of the Principal Contracts

in such a way that the interest of the Trust is, in the reasonable opinion of the Trust, materially adversely affected provided always that nothing in this Clause 56 shall restrict the SPC's day to day management of the Principal Contracts as it thinks best, or its ability to adjust prices where it considers it commercially reasonable to do so.

56.2 To the extent that any action is approved (or not promptly objected to) by the Trust under Clause 56.1, the Trust shall not be liable for any resulting loss, increased cost or damage suffered by the SPC or any other person, and the SPC shall indemnify the Trust on demand and hold it harmless against any claims against the Trust so arising.

56.3 Without derogating from Clauses 56.1 and 56.2, if (a) an amendment is made to any of the Principal Contracts, (b) the SPC grants a waiver or release of any of the obligations of another party under a Principal Contract, or (c) any agreement is made which materially affects the interpretation or application of any of the Principal Contracts, then the SPC shall deliver to the Trust a conformed copy of each amendment, release, waiver or agreement or (so far as it is not in writing) a true and complete record in writing within 15 Business Days of the date of its creation, certified as a true copy by an officer of the SPC.

56.4 In relation to any amendments made or any waiver or release of any obligations under any of the Principal Contracts or the entering into of any agreement referred to in Clause 56.3, the SPC shall, in so far as it is able, procure due compliance with the provisions of the Restrictive Trade Practices Act 1976 (as amended).

57 Restrictions on SPC

SPC shall:

57.1 at all times carry on and conduct its affairs properly, and efficiently

57.2 until the Hospital Operations Date, not engage in any business, other than entering into the Project Documents and performing its obligations under them and effecting any related and consequential and ancillary transactions

57.3 not until the Hospital Operations Date create or have outstanding any mortgage, pledge, lien, assignation, assignment, encumbrance, right of set-off, title transfer or retention arrangement, security interest or other arrangement conferring a priority or preference over general creditors (other than (i) liens arising by operation of law, which shall be released by SPC promptly and (ii) under or pursuant to the Financing Documents) on the whole or any part of its undertaking or assets, present or future to secure any present or future obligations of SPC or of any other person

57.4 procure that no encumbrance of the kinds described in Clause 57.3 is created or permitted to subsist over any interest in any of the authorised share capital (issued and unissued) of SPC, except under or pursuant to the Financing Documents

57.5 not:

57.5.1 prior to the Hospital Operations Date, incur any material Financial Indebtedness, other than its obligations under the Financing Documents

57.5.2 consolidate or merge with or into any other entity or convey or transfer its undertaking or assets, either individually or substantially as an entirety, to any person

in each case without the Trust's prior written consent which consent shall not be unreasonably withheld.

58 TUPE

58.1 Application of TUPE

The SPC and the Trust acknowledge and agree that TUPE applies to the implementation of this Agreement in that in respect of each Managed Service the economic unit(s) providing that service to the Trust at the date of transfer shall be transferred to the SPC and/or relevant Service Provider on the relevant Service Start Date.

58.2 Employee Information

In respect of each Service the job descriptions, remuneration, holiday entitlement, length of service and pension details and other relevant details of employees (including membership of any recognised trade union and recognition agreement) presently employed (by the Trust or others) in relation to the provision of that Service to the Trust are set out in Part 8. The Trust shall update such details one month prior to the anticipated Hospital Operations Date and again on the Hospital Operations Date, and if the details change (from the original details) or if any person transfers across who is not listed in Part 8, any such change or transfer shall be a Change.

58.3 Co-operation and Consultation

58.3.1 The Trust, the SPC and the Service Provider shall co-operate with each other in consultation with the Transfer Employees, and any other affected employees (within the meaning of regulation 10 of TUPE) and with relevant trade unions all as provided in TUPE and provide such information as is reasonably required concerning the Transfer Employees.

58.3.2 The Trust shall not unreasonably refuse the SPC or the relevant Service Providers access to the Transfer Employees to undertake training at no cost to the Trust.

58.4 Pensions

58.4.1 The SPC and, in the case of each Managed Service, the Service Provider shall offer (or procure that such is offered by the relevant trustees) to each Transfer Employee who is a member of or entitled to be a member of the NHS superannuation scheme, membership of a pension scheme certified by the Government Actuary as offering benefits broadly comparable to the benefits offered by the NHS superannuation scheme. The SPC shall deliver such a certificate to the Trust before the relevant Service Start Date and ensure that the offer to Transfer Employees referred to in this Clause 58.4 is made available for Transfer Employees to accept for at least three months after the relevant Service Start Date.

58.4.2 The SPC and, in the case of each Managed Service, the Service Provider shall offer (or procure that such is offered by the relevant trustees) to each Transfer Employee who is a member of the NHS superannuation scheme the

right, if so exercised by the Transfer Employee, to transfer his accrued service benefits in the NIS superannuation scheme which shall have accrued to him up to but excluding the relevant Service Start Date ("Accrued Entitlement") into the SPC's or the Service Provider's (as appropriate) pension scheme upon the basis that his Accrued Entitlement will provide him with benefits broadly comparable to those which he would have received had his Accrued Entitlement remained in the NHS superannuation scheme.

58.4.3 In the event that the Secretary of State makes a block transfer to the SPC's or Service Provider's (as appropriate) pension scheme under the provisions of the National Health Service Superannuation Scheme (Scotland) Regulations 1995 the SPC shall procure that every Transfer Employee in respect of whom the block transfer is made shall receive additional benefits (additional to those to which he is entitled under Clause 58.4.2) equal to the actuarial value of the block transfer attributable to him less the actuarial value of any single transfer payment which would have been made if the block transfer had not been made.

58.4.4 The Trust has arranged for pension advice to be given by independent pension advisers to all Transfer Employees who request it. The SPC and the Service Provider shall allow such advisers reasonable access to the premises of the SPC or the Service Provider, as the case may require, and to the Transfer Employees for the purposes of giving such independent pension advice. The Trust shall procure that such pension advisers consult with the SPC and, if relevant, the Service Provider as to the date and timing of any meetings prior to such meetings taking place. The terms of reference for the pension advisers shall be to advise each individual on the best way to maximise the benefits to that person under the NHS Superannuation Scheme and the pension arrangements to be put in place by the SPC.

58.5 SPC to Become Employer

In respect of each Service on and from the relevant Service Start Date, the SPC or the relevant Service Provider will become the employer of the Transfer Employees as if the SPC or the Service Provider were the employer named in their respective contracts of employment.

58.6 Indemnity

58.6.1 In this Clause 58.6.1 "Trust Transfer Employee Costs" shall mean any and all actions, costs, claims, proceedings, demands, fines, damages or expenses of Transfer Employees transferring to the employment of the SPC or the relevant Service Provider, made against the Trust, including any such arising on the termination of their employment by the SPC or the relevant Service Provider for breach of contract of employment, unfair dismissal, redundancy, sexual or racial discrimination related to disability, failure to inform or consult, loss of earnings relating to their employment by the SPC or unlawful deduction from wages or any other matter arising at any time after the date falling six months after the Hospital Operations Date. The SPC shall indemnify and hold the Trust harmless in respect of Trust Transfer Employee Costs reasonably incurred by the Trust which result from some act or omission which occurred while the Transfer Employee was in the employment of the SPC or the relevant Service Provider (and which in each case is suffered or incurred by the Trust) including (without limitation) any such claim brought:

- 58.6.1.1 by any Transfer Employee or
- 58.6.1.2 by any trade union in relation to the terms of employment of any Transfer Employee.

58.6.2 If any contract of employment between the Trust or any of its Trust Staff and any of their employees (other than the Transfer Employees) shall as a result of the operation of the provisions of TUPE have effect as if made between the SPC or any Service Provider and such employee, the SPC or relevant Service Provider shall have the right after consultation with the Trust and such employee immediately to terminate such contract of employment and the Trust shall indemnify the SPC or relevant Service Provider fully at all times from and against all and any costs, losses, damages, claims, liabilities and expenses of any nature suffered or incurred by the SPC or relevant Service Provider as a result thereof including the termination of such contract of employment.

58.6.3 The Trust and the SPC agree that insofar as TUPE has the effect of transferring any Transfer Employee or any other employee of the Trust or of any of its Staff to any Service Provider:

58.6.3.1 the SPC may undertake to indemnify such Service Provider in respect of any claim, recourse or liability it may incur in respect of such Transfer Employee or employee (any such indemnity to be subject to the same conditions and in the same terms mutatis mutandis as those entered into by the Trust in favour of the SPC)

58.6.3.2 if (and to the extent that) any Service Provider shall make any claim covered by an indemnity given by the SPC pursuant to Clause 58.6.3.1, the SPC shall be indemnified by the Trust in this Clause 58.6.3.2 and the SPC shall be entitled to claim under such indemnities given by the Trust as if liability were originally incurred by the SPC.

58.7 Interim Period

Without prejudice to the provisions of Clause 58.2 during the Interim Period:

- 58.7.1 the Trust shall give notice to the SPC of any disciplinary proceedings or the dismissal of any of the Transfer Employees employed directly by it. Upon dismissal of such an employee he or she will cease to be a Transfer Employee
- 58.7.2 the Trust shall notify the SPC of any Transfer Employee in its employment who shall terminate his employment and thereupon that employee shall cease to be a Transfer Employee
- 58.7.3 the Trust shall be entitled (but not obliged) to replace any Transfer Employee or engage additional employees to work in the relevant economic unit and such employees will become Transfer Employees and
- 58.7.4 the Trust shall not make any significant change in the organisation or composition or remuneration of its workforce engaged in the provision of a Service except in good faith and having consulted the SPC in advance of such change.

58.8 Trust Employment Indemnities and Warranties

- 58.8.1 In this Clause 58.8.1 "SPC Transfer Employee Costs" shall mean any claim or claims by any of the Transfer Employees made against the SPC or such Service Provider at any time for breach of contract of employment, unfair dismissal, redundancy, sexual or racial discrimination, discrimination related to disability, failure to inform or consult, loss of earnings relating to their employment by the Trust or unlawful deduction from wages or any other matter. The Trust shall indemnify and hold the SPC harmless in respect of SPC Transfer Employee Costs reasonably incurred by the SPC or such Service Provider in relation to such claim or which result or resulted from either (a) some act or omission or any matter which relates to any period prior to the transfer of employment to the SPC or such Service Provider under TUPE or (b) subject to Clause 58.8.2 the termination of their contract of employment by the SPC or such Service Provider at any time during the six months following the Hospital Operations Date.
- 58.8.2 The SPC will not, and will procure that no Service Provider will, during the six months following the Hospital Operations Date, terminate the contract of employment of any person whose contract transfers to the SPC or a Service Provider unless (a) the Service Provider has a bona fide operational reason for reducing the workforce (in which case to the extent that it is not inconsistent with a reasonable policy for avoiding unfair selection for redundancy, the Service Provider will endeavour to minimise the Trust Transfer Employee Costs) or (b) the conduct of the employee justifies dismissal in the reasonable opinion of the Service Provider at the time of dismissal, or (c) the employee's ability or qualifications to perform the duties expected of him or her by the Service Provider are, in the reasonable opinion of the Service Provider, inadequate
- 58.8.3 The Trust shall provide to the SPC upon request any and all information reasonably required by the SPC and give all reasonable co-operation to the SPC in relation to the handling of any claims.
- 58.8.4 All salaries and other emoluments (including holiday pay) tax and national insurance payments, contributions to retirement benefit schemes and bonus and commission arrangements relating to the Transfer Employees shall be borne by the Trust up to the Hospital Operations Date and by the SPC or relevant Service Provider thereafter and all necessary apportionments shall be made.
- 58.8.5 The Trust and the SPC shall use reasonable endeavours to secure that following termination of this Agreement any employee directly employed in the provision of the services hereunder whose employment shall have been disclosed to the Trust at that time shall be employed by the Trust and that so far as may be lawful any liability to any such employee by virtue of or in connection with the consequences for his employment of the termination of this Agreement whether by way of a redundancy payment, compensation for unfair dismissal, breach of contract or otherwise or to his trade union representatives shall be avoided or failing that minimised provided that if TUPE shall operate upon termination of this Agreement so that the contract of employment of any such employee shall have effect thereafter as if made between the employee and the Trust compliance with TUPE shall constitute sufficient compliance with this sub-clause in relation to the employee.

58.9 Existing Industrial Disputes

58.9.1 In relation to Transfer Employees who are in the employment of the Trust on the Hospital Operations Date immediately prior to the Hospital Operations Date (and if there is a continuing or threatened dispute, sufficiently early to enable the SPC to manage the same), the Trust will provide the SPC with full details of any continuing or threatened industrial dispute involving such Transfer Employees or any trade union or staff association representing such Transfer Employees and having made due enquiry, the Trust will confirm to the SPC whether or not there are circumstances which may result in any industrial dispute involving any such Transfer Employees (and if so, provide full details about its knowledge of the same). Where the Trust notifies the SPC of any continuing dispute (or fails to notify the SPC in breach of the foregoing undertaking) and such dispute directly affects the provision of any or all of the Services to the Trust (the "Disputed Services") in the 6 weeks following the Hospital Operations Date, then both the Availability and Performance Regimes shall only apply to the extent that performance of the Disputed Service is unaffected by any industrial dispute

58.9.2 Notwithstanding the foregoing, the Trust shall not be obliged to provide any details or confirmation regarding any existing, threatened or possible dispute which may arise with such Transfer Employees as a result of this Agreement and the arrangements which will be a consequence of it and the foregoing shall only survive for a period of 3 months following the Hospital Operations Date, after which the Availability and Performance Regimes shall recommence

58.10 Notwithstanding any other provisions of this Agreement, if the SPC shall cease to provide directly or indirectly all or any of the Services for any reason other than the expiry of the Term, the Trust shall, or shall procure that a third party shall, reimburse the SPC without delay with amounts payable by it in respect of all Claims (and associated reasonable costs and expenses) for, and all Losses incurred in respect of, termination payments (including, without limitation, redundancy payments, whether statutory or otherwise payments in lieu of notice and protective awards and compensation for unfair dismissal where the same could not reasonably have been avoided) to which the persons employed in the provision of the Service or Services concerned at the time of the cessation (or any trade union, staff association or workers' representatives) are entitled arising from the termination of their employment within one month of cessation of the relevant Service. The Trust agrees and acknowledges that the SPC will be entering into a corresponding commitment for the benefit, directly or indirectly, of the Service Providers.

59 Insurance

59.1 Insurance Cover

59.1.1 Except as provided in Clause 59.1.4, the SPC shall take out and maintain in force the insurances specified in Part 9 to the extent that they are reasonably available in the market at reasonably commercial rates throughout the relevant stages of the Term. Where such insurances specified in Part 9 are not for any reason kept in force by the SPC, except as provided in Clause 59.1.4, then the SPC undertakes to the Trust that such lack of insurance cover will not affect the Availability Regime set out in Part 2, which shall continue to have effect as if such insurances were in force. Each such insurance shall name at least the parties indicated in Part 9.

- 59.1.2 Before taking out or changing any such insurances, the SPC shall submit to the Trust's Works Representative (prior to the Hospital Operations Date) and the Trust Representative (on or after the Hospital Operations Date):
- 59.1.2.1 the identity of the insurer and
- 59.1.2.2 the principal terms and conditions of such insurances or any revision to such terms and conditions
- in each case, for prior approval in writing by the Trust (such approval not to be unreasonably withheld).
- 59.1.3 The SPC shall not (insofar as it is reasonably within its power) take or fail to take any reasonable action or permit anything to occur in relation to it, which would entitle any insurer to refuse to pay any claim under any such insurance policy.
- 59.1.4 Notwithstanding the Availability Regime, Availability Deductions shall not be made to the extent that any Component Unit is not Available by reason of any event which is an Insured Risk but in respect of which the SPC does not have such insurance cover (the "Relevant Cover"), but only where the Relevant Cover for such Insured Risk is not available solely by reason of Hospital Cover Exclusion and the SPC has given the Trust 30 days (or such lesser period as is practicable) prior notice of its intention to cancel or not renew such cover and the SPC does in fact cancel or not renew such cover within such period of notice.
- 59.1.5 If the parties are unable to agree as to whether or not and to what extent there is Hospital Cover Exclusion the matter will be referred to the Dispute Resolution Procedure which will take account of the risks of the parties under the Project Documents and the terms on which the required insurance had previously been available in the world wide market.

59.2 Copies

The SPC shall furnish copies of all insurance policies which are marked disclosable in Part 9 to the Trust Works Representative or the Trust Representative on request. During ordinary business hours, the Trust Works Representative and/or the Trust Representative shall be entitled to inspect the original policies of insurance taken out and maintained pursuant to Clause 59.1 which are or should be in the custody of the SPC, together with evidence that the premia payable thereunder have been paid and that the insurances are in full force and effect.

59.3 Rights of Subrogation and Notice of Cancellation

All Agreed Insurances which are marked "Waiver of Subrogation" in Part 9 shall contain a clause to the effect that the insurers have agreed to waive all rights of subrogation against the Trust and its servants and agents and Agreed Insurances shall provide 30 days' written notice to be given to the Trust before any cancellation, non-renewal or material modification of any such policy.

59.4 Renewal Certificates

Renewal certificates in relation to Agreed Insurances shall be obtained as and when necessary and copies thereof (certified in a manner acceptable to the Trust or the Trust

Representative as the case may be) shall be forwarded to the Trust Works Representative or the Trust Representative as the case may be as soon as possible but in any event at least 10 days before the relevant renewal date.

59.5 Trust's Right to Insure

If the SPC fails to obtain or maintain any Agreed Insurances the Trust shall, without prejudice to any of its other rights under the PFI Documents, have the right to procure such insurances itself to the extent the same continue to be available commercially at reasonable rates. Any sum paid by the Trust in this regard shall immediately become due and payable to the Trust by the SPC, as a Permitted Deduction.

59.6 Notification of Claims

The SPC shall notify the Trust Works Representative (prior to the Hospital Operations Date) and the Trust Representative (on or after the Hospital Operations Date) of any circumstances which may give rise to any claim in excess of £15,000 RPI Indexed with respect to any of the Agreed Insurances referred to in this Clause 59, promptly upon becoming aware of the same.

59.7 Application of Proceeds

- 59.7.1 Subject to the following provisions of this Clause 59.7, all proceeds of any Agreed Insurances (other than liability to third parties) shall be applied towards reimbursement of repair/rebuild costs associated with the Project.
- 59.7.2 Notwithstanding any other part of this Clause 59.7, during the last 5 years of the Term (a) the proceeds of the Agreed Insurances (other than liability to third parties) will be paid directly to the SPC (or the Agent as applicable), (b) the Availability and Performance Regimes shall continue to apply in respect of the areas affected, and (c) the SPC shall not be obliged to repair/rebuild the Facilities.
- 59.7.3 While the Trust Direct Agreement is in force the proceeds of Agreed Insurances shall be applied in accordance with its terms.
- 59.7.4 If a Constructive Total Loss occurs while any Financial Indebtedness remains outstanding under the Financing Documents and the Agent does not agree in accordance with the provisions of the Trust Direct Agreement that insurance proceeds may be applied towards repair/rebuild of the Hospital, the Term shall (unless the Constructive Total Loss occurs in the last 5 years of the Term) forthwith come to an end and (without prejudice to the accrued or pre-existing rights and liabilities of the parties), the SPC's obligation to provide the Services and the Trust's obligation to pay for the Services shall end, the Ground Lease (unless the Constructive Total Loss occurs in the last 5 years of the Term) shall simultaneously come to an end, the SPC shall (unless the Constructive Total Loss occurs in the last 5 years of the Term) vacate the Hospital in accordance with the provisions of Clause 67.4 and the provisions of Clauses 67.5, 67.6, 67.9 and 67.10 to the extent applicable shall apply but the provisions of Clauses 67.7 and 67.8 shall not apply.
- 59.7.4A Where a Constructive Total Loss shall occur at any time and Hospital Cover Exclusion applies, either party may terminate the Project Documents to which it is a party by giving the other one month's notice, and Clauses 70.10 to

70.12 inclusive shall apply as if notice had been given pursuant to Clause 70.9.

59.8 Saving

Neither failure to comply nor full compliance with the insurance provisions of this Agreement shall limit or relieve the SPC in respect of its liabilities and obligations under any part of the PFI Documents.

59.9 Increased Premium and Loss

If as a result of any act or omission (negligent, wilful or otherwise) of the Trust or Trust Staff or Patients or Visitors the premium for the Agreed Insurances in future years shall be increased, the Trust shall forthwith on demand reimburse the SPC the cost of such increase in premium (or pay the same direct to the insurer as the case may be), where the aggregate amount of all sums specified in Clause 60.3.2 (b) is in excess of £25,000 RPI Indexed in any Year (pro rata for part of a Year) (the "Insurance Threshold"). The SPC shall bear the aggregate cost of all such amounts up to the Insurance Threshold in any Year.

60 Indemnities

60.1 SPC's Indemnities

60.1.1 The SPC shall indemnify and hold the Trust its servants, agents, employees and officers harmless against Losses or Claims:

60.1.1.1 in relation to damage to property real or personal (excluding any damage to the New Build Hospital) including any infringement of any third party rights, including (without limitation) Intellectual Property Rights caused by the default or negligence of the SPC or SPC Staff

60.1.1.2 in relation to injury to persons including injury resulting in death caused by the default or negligence of the SPC or SPC Staff

60.1.1.3 against any Claims by third parties including Visitors to the Hospital and Patients and invitees of the Trust caused by the default or negligence of the SPC or SPC Staff.

60.2 SPC Indemnity Exceptions

Notwithstanding anything to the contrary contained in Clause 60.1, the indemnification provided for in Clause 60.1 and in Clause 60.5.1.2 shall not apply to any Loss or Claim:

60.2.1 which is attributable to matters which occur, or fail to occur, prior to Financial Close or more than two years after the expiration or earlier termination of this Agreement regardless of when asserted

60.2.2 to the extent which it is attributable to matters which are caused by acts or omissions of the Trust or Trust Staff or Patients or Visitors

60.2.3 to the extent that such Claim or Loss is a result of any failure on the part of the Trust to comply with any of the terms of any Project Document, or is a

result of any default of the Trust contained in any Project Document to which it is a party

- 60.2.4 to the extent the Claim or Loss is in respect of taxes
- 60.2.5 which are part of the normal administrative costs and expenses of the Trust
- 60.2.6 to the extent that such it is caused by or arises out of or as a consequence or any negligence or wilful misconduct of the Trust or Trust Staff or Patients or Visitors
- 60.2.7 if the Trust is in breach of its obligations under Clause 60.6
- 60.2.8 which are required to be borne by the Trust in accordance with any other provision of this Agreement.

Upon payment in full of any indemnity pursuant to this Clause 60.2 or any other indemnity in favour of the Trust contained in this Agreement by the SPC, the SPC will be subrogated to any right of the Trust in respect of the matter against which such indemnity has been made.

If the Trust obtains any recovery in respect of all or any part of any amounts (which amounts may include interest) which the SPC has paid to the Trust, the Trust will promptly account to the SPC for such amount.

The SPC will pay the Trust in respect of Claims or Losses pursuant to this Clause 60.2 or any other indemnity in favour of the Trust contained in this Agreement within ten (10) Business Days of receipt of a written demand therefor accompanied by a written statement describing the basis of such indemnity and the computation of the amount so payable provided, however, that such amount need not be paid by the SPC prior to the earlier of (i) the date such Claim or Loss is payable (where not already paid by the Trust) or (ii) the date of demand (if no date for payment is specified therein) and provided further that the SPC need not make any such payment so long as the Trust has consented to the SPC contesting the underlying basis of Claim or Loss in accordance with Clause 60.6.

60.3 Trust Indemnities

- 60.3.1 The Trust shall indemnify and hold the SPC and any relevant Service Provider, and SPC Staff harmless against any Losses or Claims:
 - 60.3.1.1 in relation to damage to property real or personal including any infringement of any third party rights, including (without limitation) Intellectual Property Rights caused by the default or negligence of the Trust or Trust Staff
 - 60.3.1.2 in relation to injury to persons including injury resulting in death caused by the default or negligence of the Trust or Trust Staff
 - 60.3.1.3 against any Claims by third parties including Patients, Visitors to the Hospital and Patients' invitees of the SPC caused by the default or negligence of the Trust or Trust Staff
- 60.3.2 Without prejudice to the provisions of paragraphs 2.4 and 2.5 of Part 2, the Trust shall be responsible for any damage or injury caused by any Patient or Visitor (whether to the Facilities or to any person, including without

prejudice to the generality of that term, employees of the SPC or the Trust or their Patients) and shall indemnify the SPC against any repair costs arising therefrom except to the extent (a) of amounts actually recovered by the SPC from the insurers in respect of damage to property (or which would be so recoverable by the SPC but for any breach by it of its insurance obligations hereunder); and (b) that the aggregate amount of (i) such sums and (ii) any increased insurance premia or deductibles arising out of any such insurance claims or insurance claims resulting from acts or omissions of the Trust or Trust Staff is equal to or less than the Insurance Threshold in any Year. Where it cannot reasonably be determined whether any injury or damage has been committed by a Patient or a Visitor and, in the event of dispute the matter may be referred by either party to the Dispute Resolution Procedure.

60.4 Trust Indemnity Exceptions

- 60.4.1 Notwithstanding anything to the contrary contained in Clause 60.3 the indemnification provided for in Clause 60.3 and in Clause 60.5.1.2 shall not apply to any Loss or Claim:
- 60.4.1.1 which is attributable to matters which occur, or fail to occur, prior to Financial Close or more than 2 Years after the expiration or earlier termination of this Agreement regardless of when asserted
 - 60.4.1.2 to the extent which it is attributable to matters which are caused by acts or omissions of the SPC or any of its officers, employees, servants and agents, contractors or affiliates
 - 60.4.1.3 to the extent that such Claim or Loss is a result of any failure on the part of the SPC to comply with any of the terms of this Agreement, or is a result of any default of the SPC contained in this Agreement
 - 60.4.1.4 to the extent the Claim or Loss is in respect of taxes
 - 60.4.1.5 which are part of the normal administrative costs and expenses of the SPC
 - 60.4.1.6 to the extent that such it is caused by or arises out of, or as a consequence or any negligence or wilful misconduct of the SPC or SPC Staff
 - 60.4.1.7 which are required to be borne by the SPC in accordance with any other provision of this Agreement.
- 60.4.2 Upon payment in full of any indemnity pursuant to Clause 60.4.1 or any other indemnity in favour of the SPC contained in this Agreement by the Trust, the Trust will be subrogated to any right of the SPC in respect of the matter against which such indemnity has been made.
- 60.4.3 If the SPC obtains any recovery in respect of all or any part of any amounts (which amounts may include interest) which the Trust has paid to the SPC, the SPC will promptly account to the Trust for such amount.



60.4.4 The Trust will pay the SPC in respect of Claims or Losses pursuant to this Clause 60.4 or any other indemnity in favour of the SPC contained in this Agreement within ten (10) Business Days of receipt of a written demand therefor accompanied by a written statement describing the basis of such indemnity and the computation of the amount so payable provided, however, that such amount need not be paid by the Trust prior to the earlier of (i) the date such Claim or Loss is payable (where not already paid by the SPC) or (ii) the date of demand (if no date for payment is specified therein) and provided further that the Trust need not make any such payment so long as the SPC has consented to the Trust contesting the underlying basis of Claim or Loss.

60.5 **General Provisions**

60.5.1 At all times:

60.5.1.1 the SPC shall not itself commit or permit or knowingly suffer to be permitted and will use its best endeavours to ensure that no third party permits any delict within the New Build Hospital

60.5.1.2 each party shall indemnify and keep the other (or, in respect of indemnities from the Trust, any relevant Service Provider and any of its Staff) fully indemnified on a full indemnity basis against all costs, charges, damages, fines, penalties, claims and demands whatever for or in respect of the New Build Hospital and the Development for which such party is responsible under this Agreement

60.5.1.3 in the event that any party fails to implement any undertaking obligation or other condition imposed on them under this Agreement, to reimburse to the other party the enforcement costs incurred by such party together with interest thereon until reimbursement at the Overdue Interest Rate without prejudice to any other remedy of the other party

60.5.2 Where this Agreement provides for the reimbursement or indemnity of the SPC by the Trust for costs or liabilities or Claims or Losses or the adjustment of the Unitary Charge by reference thereto it shall include reimbursement or indemnity or adjustment in respect of the costs or liabilities or Claims or Losses of any SPC Staff fulfilling the obligations of the SPC as permitted by this Agreement.

60.6 **Conduct of Claims Subject to SPC's Indemnities**

60.6.1 If the Trust receives any notice, demand, letter or other document concerning any Claim from which it appears that the Trust is or may become entitled to indemnification under any part of the PFI Documents, the Trust shall give notice in writing to the SPC as soon as reasonably practicable.

60.6.2 Subject to Clauses 60.6.3 through to 60.6.6, on the giving of a notice pursuant to Clause 60.6.1, where it appears that the Trust is or may become entitled to indemnification from the SPC in respect of all of the liability arising out of the act or omission which is the subject of the Claim, the SPC shall, subject to providing the Trust with an indemnity in respect of all claims, related costs and expenses connected with such Claim, be entitled to



the SPC acknowledges that the Controller and Auditor General or any auditor designated or appointed by the Accounts Commission for Scotland may examine such documents as he may reasonably require which are owned, held or otherwise within the control of the SPC and may require the SPC to produce such oral or written explanations as he considers necessary. For the avoidance of doubt it is hereby declared that the carrying out of an examination under Section 6(3)(d) of the National Audit Act 1983 or any reenactment thereof or Section 86 of the National Health Service (Scotland) Act 1978 or any reenactment thereof in relation to the SPC is not a function exercisable under this Agreement.

62 Limitation of Agency

The Trust and the SPC hereby agree and declare that the SPC is not an agent express or implied of the Trust and the Trust is not an agent express or implied of the SPC for any purpose (other than as specifically expressed at Clause 67.5) and shall not at any time either expressly or impliedly hold out itself or permit itself to be held out to be so. The SPC shall at all times be an independent contractor and nothing in the PFI Documents shall be construed as creating any partnership between the Trust and the SPC.



SECTION 8: DEFAULT AND TERMINATION**63 Events of Default**

The following are SPC Events of Default:

- 63.1 the SPC enters into voluntary or involuntary liquidation or dissolution (other than a solvent liquidation with the prior consent of the Trust for the purposes of amalgamation or reconstruction), or makes a composition or an arrangement with, or an assignment or assignation of, its creditors generally, or is the subject of a proposal for a voluntary arrangement for composition of debts or scheme of arrangement approved in accordance with the Insolvency Act 1986 or under the said Act there is an appointment of an administrator, or a receiver, or an administrator or administrative receiver (as defined in the said Act), or a trustee or liquidator is appointed in each case over any substantial part of its assets, or any resolution is passed in connection with its dissolution or liquidation or any petition is filed or similar proceedings are commenced for the appointment of an administrator, receiver or administrative receiver, trustee or liquidator (save where the same are contested in good faith and discharged within 21 days)
- 63.2 failure by the SPC to pay all or any sums (subject to the Dispute Resolution Procedure) to the Trust pursuant to Clauses 16.2 and Clause 21.1 (liquidated damages) for 60 days or more
- 63.3 the exercise by the Trust of its entitlement to terminate pursuant to Clause 16.4 (backstop date for completion)
- 63.4 breach of Clause 75 (No Corruption) by the SPC itself (but for the avoidance of doubt, not by any sub-contractor or employee of the SPC who is acting in breach of Clause 75 without the actual prior knowledge or authority of the SPC)
- 63.5 the actual acceleration of payments due to a Funder consequent upon default thereunder by the SPC
- 63.6 failure to implement a Facilities Change or Services Change required to be implemented by the SPC in accordance with Clause 50
- 63.7 any assignation or purported assignation of the whole or any part of the PFI Documents which is not in accordance with the terms of Clause 53 or entered into pursuant to arrangements in Clause 54.2
- 63.8 any of the Events of Default set out in Clause 54 (Change of Control)
- 63.9 any (i) fundamental breach of the PFI Documents by the SPC or (ii) a continuing failure in the performance of the SPC's obligations such that there is a material and adverse effect upon the Trust or its clinical services and, in either case, the SPC fails to commence rectifying such breach or failure within 90 days of notice to that effect from the Trust or fails thereafter to diligently pursue rectification of the same, provided that any dispute which may arise in this Clause 63.9 shall be determined in accordance with the Dispute Resolution Procedure.

64 Termination by Reason of Default

64.1 The Trust's Right to Terminate

The Trust shall be entitled:

- 64.1.1 in the case of any Event of Default under Clause 63.6 or 63.9 to serve notice of default (a Termination Warning) on the SPC allowing a reasonable period, being not less than one month and not more than three months, requiring the SPC to remedy the breach
- 64.1.2 in the case of any other SPC Event of Default, including any failure to remedy pursuant to Clause 64.1.1 (subject always to the provisions of Clause 16.4), to terminate this Agreement without delay on notice (a Termination Notice) to the SPC.

64.2 SPC's Obligation to Remedy Breach

In the event of service of a notice under Clause 64.1.1, the SPC shall remedy the breach before the expiry of the relevant period as stated in the said notice or within such other longer period as may be agreed between the parties as being reasonable. If the breach is not so remedied, and unless the said notice has been withdrawn by further written notice, the Trust may thereupon:

- 64.2.1 assume the responsibilities of the SPC for a temporary period to be determined by the Trust for the continuation of the provision of the Services or any of them on giving to the SPC written notice to this effect in which event the SPC shall meet the properly and necessarily incurred increased cost to the Trust of the Services further to the provisions of Clause 44.7 which shall have effect mutatis mutandis or
- 64.2.2 terminate this Agreement by issuing a Termination Notice.

If the breach has still not been remedied by the end of any such temporary period specified by the Trust pursuant to Clause 64.2.1 (or as extended by Clause 64.3), the Trust may terminate this Agreement by issuing a Termination Notice.

64.3 Resumption of Responsibility

The Trust may extend the period for which it has assumed SPC responsibilities pursuant to Clause 64.2.1 as it sees fit and will notify the SPC of that extension. The Trust shall end the assumption of SPC responsibilities once satisfied acting reasonably (and subject to the Dispute Resolution Procedure), that the SPC is in a position to resume and fully discharge those responsibilities.

64.4 Emergency Remedy

Notwithstanding the provisions of Clause 64.2 if, in the reasonable opinion of the Trust, it is necessary for the proper and efficient functioning of the Hospital in so far as it relates to the delivery of healthcare services or the health and well-being of Patients at the Hospital that any breach or non performance by the SPC of its obligations under the PFI Documents be remedied immediately and if such immediate remedy is not forthcoming on notice to the SPC of that requirement, the Trust shall be entitled to remedy such breach or non performance, provided always that it keeps disruption of the business and operation of the SPC to a minimum and (i) in circumstances where the SPC

is in breach of its obligations and the actions of the Trust are justified pursuant to the provisions of this Clause 64.4 (any dispute to be settled in accordance with the Dispute Resolution Procedure) and Force Majeure does not apply, the reasonable cost of such remedy being effected by the Trust shall be due and payable by the SPC to the Trust within 5 Business Days of demand in writing by the Trust and the provisions of Clause 44.7 shall have effect *mutatis mutandis* as if reference therein to Clause 44.3 was to this Clause 64.4, (ii) the SPC shall not seek to prevent the Trust effecting such necessary remedy and in particular, shall not seek any interdict or interim interdict or judicial relief in any form against the Trust or any person acting on its behalf in connection with such remedial action and (iii) such remedial action shall be without prejudice to the other rights of each Party under this Agreement.

65 Trust Direct Agreement

The Trust's right to terminate pursuant to Clause 64 shall be read subject to the terms and conditions of the Trust Direct Agreement: any entitlement of the Bank pursuant to the Trust Direct Agreement shall, as between the Bank and the Trust (but not otherwise) prevail to the extent there is any conflict with the provisions of this Agreement.

66 The SPC's Right to Terminate etc

66.1 Trust's Default

The following are Trust Events of Default:

- 66.1.1 The non payment by the Trust of (i) £1,200,000 RPI Indexed during a period of 60 days or more (ii) £2,400,000 RPI Indexed during a period of 14 days or more or (iii) £250,000, RPI Indexed during more than 90 days in any 180 day period; provided always that if there is any dispute in good faith about the amount due to the SPC from the Trust, then provided any amount which is due and is not in dispute is not outstanding, the non-payment of the amount in dispute shall not constitute a Trust Event of Default. No delay or failure in payment by the Trust except as stated above shall constitute a default entitling the SPC to suspend or withhold performance of its part of the PFI Documents, or seek to terminate the same. Following a Capacity Change pursuant to paragraph 9 of Part 1A, the amounts referred to in this Clause 66.1.1 shall be reduced by 7.5%.
- 66.1.2 If the Trust is dissolved, unless another Health Service Body becomes responsible for discharging all or substantially all of the functions of the Trust and the rights and liabilities (past and future) under this Agreement and every other Project Document to which the Trust is a party are transferred to such Health Service Body which becomes responsible to the SPC for discharging the Trust's obligations thereunder and such Health Service Body has demonstrably adequate resources immediately available to it to meet its obligations to the SPC and has the continuing support of the purchasers.
- 66.1.3 The Government of the United Kingdom or any agency effect any seizure, compulsory acquisition, expropriation or nationalisation (whether compulsory or otherwise, and whether or not for fair compensation) of all or a substantial part of the Development.
- 66.1.4 The Trust ceasing to be a statutory body formed pursuant to the National Health Service (Scotland) Act 1978 whose purpose is the provision of healthcare to the community, and whose primary source of funding is,

directly or indirectly, public funding. For these purposes public funding shall mean finance or payment from any Competent Person or from any purchasers of health services (such as Public Health Authorities or GP fundholders) who are themselves primarily funded by any Competent Person.

- 66.1.5 If the Trust commits a fundamental breach of its obligations under this Agreement or any of the other Project Documents to which it is expressed to be a party or any part thereof and such breach has an adverse actual prospective or contingent effect on the ability of the SPC to perform its obligations under the Agreement or any part thereof that is material unless the breach gives rise to a claim for money under the terms of this Agreement whether by way of payment, damages or otherwise and such amount is paid within one month of the same becoming due.
- 66.1.6 (i) any law, statute, statutory instrument, order, bye-law or other enforceable legislation
- (ii) any regulation, directly applicable directive, decision or other legislation of the European Union or its predecessor organisations having the force of law in Scotland from time to time or otherwise applying to the Trust, or
- (iii) any other legal provision, publicly proposed whether in any green paper, white paper, draft legislation, subordinate legislation, treaty, regulation, directive or decision

in each case is published by HM Government and/or the European Commission, that will have a material adverse effect on the ability of the Trust to comply with any of its material obligations under this Agreement or any of the other Project Documents to which it is expressed to be a party or which will remove or adversely amend the Secretary of State's powers over the Trust (as contained in the Comfort Letters) without reasonably acceptable alternative solutions being provided.

66.2 SPC's Right to Terminate for Default

The SPC shall be entitled to terminate this Agreement in the case of any default referred to in this Clause 66 which has not been cured by the Trust pursuant to Clause 66.4, by issuing notice to the Trust to that effect (a "Termination Notice") provided that it shall have first served notice of default on the Trust (a "Termination Warning") allowing a period of not less than one month or, in the case of Clause 66.1.1(ii), 14 days, requiring the Trust to remedy the breach. Such Termination Warning shall be ineffective unless a full copy thereof is sent contemporaneously by recorded delivery to NHSiSME or such other party as the Trust may from time to time nominate in writing. Any such Termination Warning from the SPC can be given at any time after the default has arisen (without having to wait for any 60 or 14 day period referred to in Clause 66.1 to elapse).

66.3 Trust's Obligation to Remedy

In the event of service of a notice under Clause 66.2, the Trust shall, or NHSiSME on its behalf, may remedy the breach before the expiry of the relevant period. If the breach is not so remedied to the satisfaction of the SPC, and unless the said notice has been withdrawn by further written notice, the SPC may thereupon terminate this Agreement forthwith on written notice to both the Trust and NHSiSME.

66.4 Late Payment Capable of Remedy

For the avoidance of doubt any failure on the part of the Trust to make any payment due hereunder on the due date shall be deemed to be a breach which is capable of remedy by late payment including interest at the Overdue Interest Rate, provided that any breach of Clause 66.1.1(iii) shall only be remedied if, prior to the issue of any Termination Notice, payment is made in full of all sums outstanding and due for payment (following which there shall be deemed to be no days of non-payment within the preceding 90 days, as described in Clause 66.1.1(iii)).

66.5 Compensation on Trust Default

If the Term is terminated pursuant to Clause 66.2, the Trust shall pay to the SPC compensation calculated as the aggregate of:

- (i) the amount necessary to pay the SPC an amount equal to the Equity Investment plus the Subordinated Debt, adjusted by the addition of the amount required to achieve the Equity Rate of Return on the Total Equity for the period between subscription and termination of the Protected Period
- (ii) Senior Debt
- (iii) Residual Value discounted at a real rate of 6%
- (iv) Break Costs
- (v) the costs reasonably incurred by the SPC (including the costs of its professional advisors) in connection with such termination
- (vi) any other valid Claim against the SPC arising from such termination pursuant to Clause 66.2
- (vii) any unpaid Unitary Charge or other sums due from the Trust to the SPC pursuant to the Project Documents
- (viii) the costs reasonably incurred by the SPC in terminating any subcontract
- (ix) amounts under Clause 58.10

to the extent that such sums have not been recovered from other sources calculated, in the case of costs specified in (viii) and (ix), not later than one month after termination, such payment to be made together with interest at the Overdue Interest Rate thereon up to the date of payment in full, which shall be paid as soon as practicable and in any event not later than 30 days after such termination and the Occupational Sublease shall terminate immediately prior to payment in full. On payment in full, the SPC shall assign to the Trust the benefit of any outstanding insurance claim for material damage or construction all risks, as identified in Part 9.

- 66.6** The Trust will co-operate with the SPC in structuring such method of payment of compensation payable under Clause 66.5 above with a view to minimising any potential adverse consequences to the SPC from receipt of such compensation, including *inter alia* making compensation payments to the Funders.



66.7 Acquisition of Assets

The payment referred to in Clause 66 will be applied as follows:

- 66.7.1 first, in acquiring from the SPC the Ground Lease for an amount which is equal to the sum of (a) the indexed base cost of the same and (b) the then tax written down value of any industrial buildings and structures situated on land which is the subject of the Ground Lease (and the parties agree that the amount in (b) shall be apportioned to such industrial buildings and structures)
- 66.7.2 second, in applying the balance (if any, and the sum of £1 if not, but subject in any event to a maximum equal to the tax written down value, or carrying value for trading assets, of the same) in purchasing from the SPC all moveable plant and machinery held for the purposes of the New Build Hospital; and
- 66.7.3 third, in paying the balance (if any) to the SPC as compensation for any future income foregone in consequence of the early termination of this Agreement

but the aggregate amount applied under Clause 66.7 shall not exceed the total amount payable pursuant to Clause 66.5.

67 Consequences of Termination

67.1 Preservation of Rights

- 67.1.1 Upon the expiry or earlier termination of the Term for whatever reason, the Trust and the SPC shall have no further rights, obligation or liabilities hereunder except:
 - 67.1.1.1 for rights, obligations and liabilities which shall have arisen on or prior to the date of such expiry or earlier termination or
 - 67.1.1.2 rights, obligations and liabilities arising from provisions surviving expiry or termination of the Term in accordance with Clause 67.1.2
- 67.1.2 All provisions in this Agreement requiring to survive expiry or termination in order to give effect to their intended meanings shall survive expiry or termination of the Term. Without prejudice to the generality of the foregoing the following Clauses shall survive expiry or earlier termination of the Term:

Clause 39 (Duty to Provide Information on Discontinuance)
 Clause 52 (Licence of Intellectual Property)
 Clause 60 (Indemnities) (but subject always to the express provisions of Clauses 60.4.1.1 and 60.2.1)
 Clause 66.2 (The SPC's Right to Terminate for Default)
 Clause 67 (Consequences of Termination)
 Clause 68.1 (Preservation of Funders Rights)
 Clause 70 (Force Majeure)
 Clause 74 (Confidentiality)
 Clause 85 (Notices)
 Clause 86 (Governing Law)



67.2 Increased Costs Recovery

In the event that the Trust shall terminate the Term pursuant to Clause 64.1, it shall be entitled to claim (and the SPC shall within 30 days of the Trust's first demand pay, or the Trust may treat as a Permitted Deduction) the increased cost of purchasing the Service or any part thereof from an alternative source and the provisions of Clause 44.7 shall have effect mutatis mutandis as if references in Clause 44.7 to Clause 45.3 were references to this Clause.

67.3 Continued Provision of the Services

The Services being vital to the principal activities of the Trust must be continued notwithstanding any Event of Default referred to in Clause 63. The Trust shall therefore be entitled, upon the happening of any SPC Event of Default or the giving of notice pursuant to Clause 63.9, to take such measures as are necessary to safeguard the continued provision of the Services (including without limitation the provision of such Services itself or procuring the provision of such Services by a third party) or, as the context may require, the relevant Services, and in the event that the Trust takes any such measures:

- 67.3.1 the SPC shall pay to the Trust on the Trust's first demand (or the Trust may treat as a Permitted Deduction) all reasonable costs incurred by the Trust in taking such measures up to the date of a Termination Notice
- 67.3.2 the SPC shall have no claim against the Trust in respect of any interference by the Trust with the performance by the SPC of the relevant Service or other Service affected by the intervention required by the Trust.

67.4 Vacation of Hospital

On expiry of the Term pursuant to Clause 4.4, the Trust shall vacate the Hospital on the Date of Expiry otherwise the SPC shall vacate the Hospital (i) within 7 days of the effective date of a Termination Notice pursuant to Clause 64.1.2 (ii) within 7 days of payment in full pursuant to Clauses 66.5 or 70.10 or (iii) within 7 days of the termination of the Term pursuant to Clause 59.7.4.

67.5 SPC Equipment

On vacation of the Hospital by the SPC pursuant to Clause 67.4, the SPC shall not remove and shall ensure that a Service Provider does not remove from the Hospital, (a) any Equipment or (b) items owned or used or intended to be used by the SPC or the Service Provider in the performance of any Services ("Inventory Equipment" which expression shall not include Leased Equipment, which is provided for in Clause 67.6). Within 30 days of termination, the Trust will arrange an inventory of Equipment by a party approved by the SPC, and failing such approval, within 1 day of notification thereof by a party nominated pursuant to Clause 69 (Dispute Resolution Procedure). On completion of the inventory the Trust may purchase all or any of such Inventory Equipment, at the Written Down Value. Ownership in such Inventory Equipment and others purchased shall pass to the Trust on payment of the Written Down Value, and the Trust will pay the SPC the value of such Inventory Equipment within 30 days of completion of the inventory. Unwanted Inventory Equipment shall be made available for collection by the SPC and others within 30 days of completion of the inventory and if not removed within 7 days after the Trust has given details of the same to the SPC, may be sold or destroyed by the Trust at its discretion and the Trust shall be the exclusive agent



of the SPC or the Service Provider as appropriate, empowered to sell all Equipment in the ownership of the SPC or the Service Provider for that purpose.

67.6 Leased Equipment

In relation to any Equipment used by the SPC or a Service Provider in the performance of any Service and leased from a third party the SPC shall procure that the Trust shall have the following rights on vacation of the Hospital by the SPC pursuant to Clause 67.4:

- 67.6.1 a right to use such Equipment (or allow a third party so to do) at the Hospital for a period of three months following the date of vacation of the Hospital by the SPC pursuant to Clause 67.4 on the same terms and conditions (other than the payment of any arrears or penalties incurred prior to the date of vacation) as enjoyed by the SPC
- 67.6.2 an option to enter into a new lease with the lessor of such item of Equipment for a period equal to the unexpired term of the existing lease in favour of the SPC or the Service Provider on the same terms and conditions as enjoyed by the SPC. Such option shall:
 - 67.6.2.1 be an absolute right not subject to the consent of the lessor
 - 67.6.2.2 not be conditional upon the assumption of SPC's existing liabilities under the relevant or any other leases
 - 67.6.2.3 be exercisable by the Trust at any time in the three months following the Date of Expiry.

67.7 Condition of Hospital on Transfer

The SPC warrants and undertakes that on the date of early termination of the Term pursuant to Clauses 63 (SPC Default), 66 (Trust Default) or 70 (Force Majeure) (but not, for the avoidance of doubt, at the expiry of the Term) after the Hospital Operations Date, the Facilities shall be in a condition consistent (subject to any Force Majeure) with performance of the SPC's obligations under this Agreement in a manner prudently planned to avoid Performance Deductions and Availability Deductions, such that there will not be at the date of such early termination, by reason of previous acts or omissions any imminent likelihood of any Performance Deductions or Availability Reductions arising out of the Hard FM Services. Where the Trust terminates pursuant to Clause 64, the Trust's sole remedy for breach of this Clause 67.7 shall be to Re-tender the Services pursuant to Clause 68.3.

67.8 Inspection of Hospital

- 67.8.1 In the event of termination pursuant to Clause 66 (Trust Default) or 70 (Force Majeure), the Trust and the SPC shall jointly appoint an independent person ("Independent Person") agreed by the Trust and the SPC to undertake an inspection ("Inspection") of the Hospital (including Equipment). The Inspection shall take place on a date or dates specified by the Trust within 7 days of notice of termination giving at least 5 days' notice of such Inspection, and which Inspection shall be, in any event, prior to the contracted date for payment of compensation (if any) and if the Trust shall not so arrange such Inspection the SPC may do so. The Trust and the SPC agree that the Principal Service Provider may also participate in the appointment of the Independent Person.



- 67.8.2 If the Trust and the SPC and if relevant the Principal Service Provider, are unable to agree on the Independent Person within 14 days of a notice in writing from one party to the other requiring agreement to a specified firm or individual either may refer the selection of the Independent Person to the Chairman for the time being of the Scottish Branch of the Royal Institution of Chartered Surveyors.
- 67.8.3 The Independent Person shall be asked to issue a report ("Report") addressed to the Trust and the SPC and if relevant the Principal Service Provider, describing the condition and state of repair of the building and fabric of the Hospital and utility services within the Hospital and the Equipment taking into consideration the age of the Facilities and the wear and tear naturally occurring in a hospital similar in age and character to the Hospital and listing, and costing as envisaged in Clause 67.8.5 all remedial action and repairs (if any) required to ensure that the undertakings of the SPC set out in Clause 67.7 will be satisfied in full.
- 67.8.4 The Trust and the SPC agree that the Report shall be a conclusive statement of the matters stated within it and shall not be challengeable by either party.
- 67.8.5 If and to the extent that the Report discloses that SPC is in breach of Clause 67.7 the Trust shall be entitled to deduct from compensation pursuant to Clauses 66.5 (Trust Default) or 70 (Force Majeure) the sums set against each of the remedial action and repair obligations set out in the Report that has not been complied with in full.
- 67.8.6 The Independent Person's fees and charges in undertaking the Inspection and preparing the Report shall be borne by the Trust in the case of termination pursuant to Clause 66.2, and by the Principal Service Provider, the SPC and the Trust equally in the case of termination pursuant to Clause 70.

67.9 Consumables etc

Notwithstanding the foregoing, in circumstances where the Term has ended other than pursuant to Clause 4.4, the SPC shall not remove from the Hospital any stocks of consumables (other than perishable items), spare parts or like materials used or intended to be used in the performance of any Service, nor permit or suffer the stocks and others to be depleted or held at a level below that consistently held during the year preceding the date of vacation (having regard to the historical requirements of the Hospital). Within 30 days of termination, the Trust will arrange a stocktake and valuation by a party approved by the SPC, and failing such approval within 1 day of notification thereof, by a party nominated pursuant to Clause 69 (Dispute Resolution Procedure). The basis of the valuation shall be the cost price to the relevant Service Provider. On completion of the stocktake the Trust may purchase all or any of such stock and others, at a valuation determined by the stocktake. Ownership in such stock and others so purchased shall pass to the Trust on vacation by the SPC, and the Trust will pay the SPC the value of such purchased stock and others within 30 days of completion of the stocktake. Unwanted stock shall be made available for collection by the SPC and others within 30 days of completion of the stocktake, and if not removed within 7 days after the Trust has given details of the same to the SPC, may be sold or destroyed by the Trust at its discretion.

67.10 No Encumbrances

The Hospital and the Equipment and all assets comprised in either of them which are to transfer to the Trust at the date of such Termination (or if later the date of payment of



compensation pursuant to Clauses 66.5 (Compensation on Trust Default) or 70.10 (Compensation on Termination)), shall transfer free from all charges, mortgages, pledges, liens, encumbrances or other securities in favour of third parties.

68 Payments Following Early Termination

68.1 Preservation of Funders' Rights

Upon termination of the Term in accordance with Clause 64.1 (SPC Default) the Trust agrees that it shall thereafter throughout the Protected Period (but for no longer) pay to the Funders in total the monthly payments ("Funder Payments") calculated in accordance with Clause 68.2. No Funder Payments are due upon termination of the Term pursuant to Clause 59.7.

68.2 Calculation of Funder Payments

The Funder Payments in a month shall be equal to the lesser of the following:

68.2.1 SPC's debt service and retirement obligations to the Funders under the Financing Documents in that month (including any increased amount which may be payable pursuant to Clause 76.2.2) on the assumption, if not a fact, that the SPC has complied fully with its obligations under the Financing Documents up to the date of early termination of the Term pursuant to Clause 64.1 and is complying and will comply in full with its obligations under the Financing Documents throughout the Protected Period and this notwithstanding that the Funder Payments may be less than the SPC's actual debt service and retirement obligations to the Funders under the Financing Documents in that month

68.2.2 the Unitary Charge that would have been payable in that month had the Term not been terminated pursuant to Clause 64.1 less the Re-tendered Service Cost (as defined below) for that month.

68.3 Re-tendering Services

68.3.1 Upon lawful early termination of the Term by the Trust pursuant to Clause 64.1 the Trust shall be entitled to re-tender the Services ("the Re-tender") in order to establish the Re-tendered Service Cost (as defined below).

68.3.2 The Trust shall conduct the Re-tender as it sees fit but subject to the following:

68.3.2.1 the Trust may invite tenders for each of the Services separately or together or in any composition it chooses and the Trust shall diligently initiate and carry through a process to award a new contract (or contracts) for the Services

68.3.2.2 the Trust shall not include in the Re-tender services which are not included within the Services

68.3.2.3 the Specifications against which tenders for the Services will be sought will be generally in accordance with their respective specification as at the date of termination provided that the Trust may make minor and incidental changes as it sees fit but not so as to materially increase the cost of providing those Services



- 68.3.2.4 if the Trust reasonably considers that new capital investment is required in the building and fabric of the Hospital or the utility services at the Hospital or the Relevant Equipment in use at the Hospital or Relevant Equipment requires to be replaced in each case in order to bring it into conformance with the requirements specified in Clause 67.7 (whether or not it applies) it shall be entitled to specify that such capital investment be made by the bidder to whom the contract is awarded as a condition of the award of the contract
- 68.3.2.5 the Trust shall comply with the provisions of the Public Services Contracts Regulations 1993 or the Public Works Contracts Regulations 1991 as appropriate.
- 68.3.3 The Trust shall award contracts for the provision of the Services on the Re-tender to the bidder(s) proposing the most economically advantageous tender(s) to the Trust (on evaluation criteria to be decided by the Trust) as that term is defined in the Public Services Contracts Regulations 1993 or the Public Works Contracts Regulations 1991 as applicable.
- 68.3.4 The Trust shall be free to award contracts for the provision of the Services upon the Re-tender for such durations as it sees fit. If any contracts awarded under the Re-tender expire or terminate for whatever reason prior to the Expiry Date the Trust shall be entitled to invite tenders for the relevant Services at that time and the provisions of this Clause 68.3 shall apply to such invitation to tender as if it were part of the Re-tender and such invitations to tender shall be deemed to fall within the definition of Re-tender for the purposes of this Clause 68.
- 68.3.5 The "Re-tendered Service Cost" for a month shall be calculated as follows:
- 68.3.5.1 in period prior to award of contracts under the Re-tender the charges payable by the Trust in the relevant month in procuring the Services for such interim period or the reasonable costs of providing such Services itself in such interim period
- 68.3.5.2 where a contract for one or more of the Services awarded under the Re-tender is in force the charges payable by the Trust under that contract in the relevant month plus, where a contract for one or more of the Services awarded under the Re-tender is not in force for whatever reason, the charges payable by the Trust in the relevant month in procuring the relevant Services for such interim period or the reasonable costs of providing such Services itself in such interim period.
- 68.3.6 The Funder Payments shall be payable by the Trust at the end of the calendar month following the month for which payment is due and shall be effected by electronic transfer of funds and shall be paid to the Agent but following the award by the Trust of a contract or contract for all the Services on a Re-tender, Funder Payments shall be payable, by the Trust on the last day of the calendar month following the relevant Monthly Reporting Period.
- 68.3.7 At the same time as remitting the Funder Payments the Trust shall send a report to the Agent setting out the Re-tendered Service Cost and its breakdown for the relevant month.



SECTION 9: GENERAL

69 Dispute Resolution Procedure

69.1 Escalation Procedure

In the event of any dispute, difference or question of interpretation arising between the parties, neither party shall commence any proceedings or refer the matter to any Expert pursuant to Clause 69.2 until, unless stated to the contrary by this Agreement, the escalation procedure set out below has been fully exercised unless the party seeking resolution has a need to take such steps in order to protect the undertaking or to protect or preserve any right of action it may have. The escalation procedure is that:

69.1.1 day to day minor matters in respect of a particular Service shall be discussed between the relevant Trust Works Representative, Trust Service Representative as the case may be and the relevant Provider Service Manager

69.1.2 in the case of more important matters or if resolution cannot be achieved at this level then:

69.1.3 the matter shall be discussed between the Trust Representative and the SPC Contract Manager

69.1.4 if resolution is not achieved within 2 days of commencement of such discussions (or such other period as the Trust Representative and the SPC Contract Manager shall agree) then the matter shall escalate through the following levels of authority with the same maximum time intervals:

SPCTrust

1. Liaison Committee
2. Chief Executive

- Liaison Committee
- Chief Executive

69.1.5 The parties shall seek amicable solutions within this procedure and shall seek to resolve any dispute as soon as is practicable and in a time frame which recognises the seriousness (or otherwise) of the matter in question on the business or undertaking of each party. Where the Trust Representative or the SPC Contract Manager is unavailable to attend a meeting the relevant party shall ensure that a deputy shall be appointed and attend the meeting on his behalf

69.1.6 in addition, and without prejudice to the foregoing, at any time after the referral of any dispute to the Chief Executives of the SPC and the Trust, either party may require the dispute to be sent to an alternative dispute resolution mediation procedure through the Centre for Dispute Resolution

69.1.7 if the parties fail to agree terms of settlement within 14 days of the commencement of the alternative dispute resolution procedure or such extended period as may be agreed between them then the dispute or difference may be referred to an expert in accordance with Clause 69.2. The commencement of the alternative dispute resolution procedure is hereby defined as any requisition made pursuant to Clause 69.1.6

69.1.8 performance of this Agreement shall not be affected by nor stop during any consultation pursuant to this Clause 69.



69.2 Reference to an Expert

Any dispute, difference or question of interpretation of a technical nature including as to content, quality or any calculation, associated with the Trust Requirements, the Services, the Unitary Charge or extensions of time and any dispute over the amount of any payment due to any party or as to the cause or applicability of any deduction from the Unitary Charge, arising in connection with the PFI Documents, any issue as to whether a party is acting reasonably in the context of a provision of the PFI Documents which expressly requires it so to act or any issue in which it is expressly stated in the PFI Documents that the Dispute Resolution Procedure is applicable may be referred by either party, on notice thereof in writing to the other party, for determination to a person with appropriate expertise agreed by the parties or, failing agreement within 3 calendar days of the date of such notice, a person with appropriate expertise to be appointed at the request of either party by the Relevant Appointor or his nominee.

69.3 Expedited Interim Finding

In relation to any dispute over the amount of any payment due or as to the cause or inapplicability of any deduction from the Unitary Charge the parties agree that if, for any reason, the dispute has not been resolved within 7 days, the matter may forthwith, on demand by either party, be referred to an Expert pursuant to Clause 69.2 for a preliminary finding to be made on an expedited basis, as follows:

- 69.3.1 if the parties cannot within 1 day agree the identity of the Expert then he shall be appointed in accordance with Clause 69.4.2
- 69.3.2 each party shall submit representations to the Expert within 2 Business Days of his appointment with a view to the Expert making a preliminary finding within a further 2 Business Days of receipt of such evidence.

The procedure set out in this Clause 69.3 is without prejudice to the rights and remedies of the parties under the rest of this Clause 69 or the other provisions of this Agreement (any or all of which may be pursued in conjunction with this Clause 69.3). The parties agree, however, to abide by any preliminary finding of the Expert pursuant to this Clause 69.3 and make necessary payments accordingly or take other action required forthwith on the Expert making his preliminary finding (pending any further resolution under this Clause 69 and without prejudice to either party's right to receive an adjusting payment or compensation if any further and different resolution to the dispute is reached pursuant to this Clause 69).

69.4 Relevant Appointor

For the purposes of this Clause the Relevant Appointor is the President for the time being of the Law Society of Scotland unless:

- 69.4.1 the matter to be determined relates to a determination of the costs incurred or to be incurred by the SPC in effecting a Change to the Facilities or an Extension of Time in which case the Relevant Appointor is the Chairman for the time being of the Scottish Branch of the Royal Institution of Chartered Surveyors
- 69.4.2 the matter relates to the mathematical recalculation of the Unitary Charge in which case the Relevant Appointor is the President for the time being of the Institute of Chartered Accountants in Scotland.



69.5 Replacement Expert

If the Expert is unable or unwilling to complete the reference, a replacement expert shall be appointed by the parties, or if the parties cannot agree on a replacement expert within 3 calendar days of a request to do so by one of the parties, by the Relevant Appointor or his nominee.

69.6 Terms of Reference of the Expert

The terms of reference of the Expert shall be agreed between the parties or in the absence of agreement stipulated by the Relevant Appointer incorporate the following:

- 69.6.1 the investigation shall be conducted according to procedures established by the Expert after his appointment. Procedural directions agreed by the parties, and communicated to him within 7 calendar days of his appointment, shall be incorporated therein
- 69.6.2 the Expert shall act as an expert, not as an arbiter
- 69.6.3 each party shall have the right to submit representations to the Expert and shall at the same time submit a copy to the other party. The Expert, having received such representations, shall be entitled to act on his own opinion but may make his own investigations should he deem it necessary and may require oral representations to be made to him. Further, the Expert may seek professional advice at any stage during the process as he thinks fit
- 69.6.4 the parties shall submit any information relevant to the reference of whatever nature, including information recorded on magnetic media and any information the parties may designate as confidential, that is requested by the Expert to enable him to understand the issue to be determined and the parties' representations in respect of it. The parties shall also authorise third parties to produce such information as necessary
- 69.6.5 the decision ("Decision") of the Expert shall be communicated in writing to the parties with a full explanation of its basis. The Decision shall not be final and binding on the parties unless:
- 69.6.5.1 they shall previously (or subsequently) otherwise agree or
- 69.6.5.2 this Agreement states that it is or
- 69.6.5.3 neither party issues and serves legal proceedings within 90 calendar days after the date the Decision is communicated to the parties, but the Decision and all proceedings leading to this Decision and information provided in the course thereof shall be admissible in evidence in any legal proceedings
- 69.6.6 the Expert shall be entitled to include in his Decision actions required by one or both parties, including payment of any sum by way of a valuation or compensation provided for under the Agreement. Such actions shall commence and be completed according to periods specified by the Expert for such purpose in the notification of the Decision to the parties. In the case of a payment, if such payment is delayed beyond the specified period, the Expert shall be entitled to award interest to the party receiving such payment, at the Overdue Interest Rate

- 69.6.7 the Expert shall undertake to each of the parties not to disclose any information obtained in relation to the reference, its occurrence and the decision resulting from it to any person other than the parties without their written permission and further shall undertake not to disclose any information submitted to him by the parties designated as confidential to any person, including the other party, without the consent of the owning party and
- 69.6.8 the Expert shall not be liable for any claim relating to his conduct in connection with this procedure except in the case of wilful misconduct.

69.7 Pre-emptive Settlement

At any time prior to the Decision being communicated to the parties, they may agree a settlement of the dispute or difference referred to the Expert. In such event, the Expert shall be entitled to recover from the parties fees in respect of time already spent on the reference and all reasonable expenses incurred in relation to it.

69.8 Confidentiality

Without prejudice to Clause 69.6.5.3, the parties shall treat as confidential, in accordance with the provisions of Clause 74 information obtained in relation to the reference, its occurrence and the Decision resulting from it.

69.9 Expert's Costs, Fees and Expenses etc

- 69.9.1 The Expert shall be entitled to fees as set out in the agreement between the parties and the Expert and to reasonable expenses. Such fees shall be paid in such shares as the Expert shall determine (in which respect his Decision shall be final and binding) and
- 69.9.2 the Expert may determine an amount of costs incurred by a party in respect of the reference, which are to be recovered from the other party and if so determined, he shall notify the parties of such costs in his Decision.

69.10 Applicability

If, following notification by a party to the other party of its intention to refer any dispute, difference or questions of interpretation to an Expert for resolution, the parties are unable to agree within 7 days of such notice the applicability of the Dispute Resolution Procedure on the grounds specified in Clause 69.2, they shall refer to the President for the time being of the Law Society of Scotland or his nominee who shall decide whether the Dispute Resolution Procedure is applicable pursuant to the provisions of Clause 69.2 and which Expert is appropriate to the Dispute.

70 Force Majeure

70.1 Effect on Obligations

Neither party shall be in breach of an obligation or warranty under the PFI Documents and neither party shall have any claim for indemnity or any other remedy to the extent that a party is unable to perform that obligation in whole or in part by reason of a Force Majeure Event. In the event of any conflict between this Clause and any other provisions of the PFI Documents, this Clause shall prevail.

70.2 Notice and Mitigation

If either Party shall seek to rely on this Clause 70, it shall as soon as practicable give notice to the other Party with full particulars, to the extent known by such party at such time, of the act or matter claimed as a Force Majeure Event. Such Party shall, to the extent which can be reasonably determined at the time of such notice, include in such notice a preliminary estimate of the obligations affected and, the period of time that the affected Party will be unable, to the extent known by such party at such time, to perform such obligations. When appropriate or when reasonably requested to do so by the other Party the affected Party shall provide further notices to the other Party more fully describing the Force Majeure Event and its cause or causes and effects and providing or updating information relating to the efforts of the affected Party to avoid and/or to mitigate the effects thereof and estimates, to the extent practicable, of the time that the affected Party reasonably expects it will be unable to carry out any of its affected obligations due to the Force Majeure Event. The affected Party shall provide, promptly on becoming aware thereof, notice to the other Party of, with respect to an ongoing Force Majeure Event, the cessation of the Force Majeure Event and its ability to recommence performance of its obligations under this Agreement. The affected Party shall take all reasonable steps to remedy any failure to perform its obligations and shall negotiate in good faith with the other Party to mitigate the effects of a Force Majeure Event. Both the affected Party and the other Party will share equally any reasonable costs incurred in remedying or mitigating the effects of the Force Majeure Event, provided that the Trust retains the right at all times (where it is the other Party) to refuse to share such costs by written notice, where it considers these costs to be unreasonable. Where the Trust (as the other Party) so refuses by written notice the to SPC to share such costs of remedy or mitigation, the SPC will not be obliged to incur significant cost in providing a remedy or mitigating such Force Majeure Event.

70.3 Continuing Provision of Services

On the occurrence of a Force Majeure Event the Trust and the SPC shall negotiate in good faith with a view to restructuring arrangements to ensure the continued provision of Services.

70.4 Cessation of Unitary Charge

If a Force Majeure Event occurs at the Hospital which results in the Trust being unable to use a substantial part of the Hospital, the Trust may, on written notice to the SPC release the SPC from the obligation to provide all Services and the Trust shall then on ceasing to use the Services, cease to be liable to pay the Unitary Charge for so long as the Force Majeure Event continues.

70.5 Partial Performance

If a Force Majeure Event occurs which results in the SPC being unable to provide any part of the Services but so that the SPC is able to provide and the Trust is able to benefit from one or more of the Services or part thereof, the SPC will (unless the Trust gives notice to the SPC pursuant to Clause 70.4 that it is ceasing to require any further Service), continue to perform the Services or part thereof unaffected by a Force Majeure Event and the Trust will remain liable to pay the elements of the Unitary Charge which are attributable to the Services which the SPC continues to provide in accordance with the terms of this Agreement. If the Trust, as a result of Force Majeure, uses the Facilities and obtains Services from someone other than the SPC, the Trust shall continue to pay to the SPC the Unitary Charge in respect of such Services and Facilities, but shall

be entitled to deduct from such element of the Unitary Charge as a Permitted Deduction its cost of acquiring such Service from such other person.

70.6 No Increased Cost to Trust

No Force Majeure Event will justify any increase in the cost of the Services or any of them unless agreed by the Trust pursuant to Clause 70.2. The cost to the Trust of any of the Services which continue to be performed pursuant to Clause 70.5 unaffected by a Force Majeure Event shall not be greater than the cost of such Service as a component of the Unitary Charge immediately prior to the occurrence of a Force Majeure Event. Without prejudice to Clause 70.2, notwithstanding that a Party may be temporarily released from its obligations hereunder by reason of a Force Majeure Event, no such Force Majeure Event shall entitle the SPC (directly or indirectly) to an increase in the Unitary Charge.

70.7 Consequences of a Force Majeure Event

So long as the affected Party has in all material respects since the occurrence of the Force Majeure Event complied with the obligations of this Clause 70 and continues so to comply, then:

70.7.1 the affected Party shall not be liable for any failure or delay in performing its obligations under or pursuant to this Agreement during the existence of such Force Majeure Event nor shall any Performance Failure Points accrue in relation to any affected Service or Availability or other deduction be made as a result thereof

70.7.2 any performance deadline that the affected Party is obligated to meet under this Agreement shall be extended on a day for day basis, provided however that no relief including the extension of performance deadlines shall be granted to the affected Party pursuant to this Clause to the extent that such failure or delay would have nevertheless been experienced by the affected Party had the Force Majeure Event not occurred

70.7.3 the Term shall be extended day for day by the length of time during which the Force Majeure Event has effect

70.7.4 the Unitary Charge payable for such extended period shall be the Unitary Charge applying on what would have been the Primary Period Expiry Date, but for the occurrence of Force Majeure Events, as adjusted for inflation pursuant to paragraph 4 of Part 1A.

70.8 Third Party Performance

Insofar as restructured arrangements cannot be reached between the Trust and the SPC pursuant to Clauses 70.2, 70.3 and 70.5, if the SPC is the party affected by the Force Majeure Event, the Trust may obtain the affected Services from any third party (at the Trust's own cost) until the SPC resumes the provision of the affected Services. The SPC shall provide reasonable assistance and information to any such third party for such third party to provide the affected Services (and shall procure like co-operation from each relevant Service Provider). The Trust shall reimburse the SPC and SPC Staff in respect of any Claims or reasonable costs suffered by them as a result of the provision of such Service by any such third party.



70.9 Option to Terminate

If any Force Majeure Event has effect for more than 180 days or the aggregate number of days during which Force Majeure Events subsist is more than 180 days in any period of 18 months, either Party may terminate the Project Documents to which it is a party by giving the other one month's notice in writing.

70.10 Compensation on Termination

If the Project Documents are terminated pursuant to Clause 70.9 the Trust shall pay to the SPC compensation calculated as the aggregate of:

- (i) the Senior Debt
- (ii) Residual Value discounted at a real rate of 6%
- (iii) Subordinated Debt plus accrued interest
- (iv) Equity Investment
- (v) any unpaid Unitary Charge or other sums due by the Trust to the SPC pursuant to the Project Documents
- (vi) Break Costs
- (vii) the costs reasonably incurred by the SPC (including the reasonable costs of its professional advisers) in connection with such termination
- (viii) any other valid Claim against the SPC arising from such termination pursuant to Clause 70.9
- (ix) the cost reasonably incurred by the SPC in terminating any subcontract
- (x) amounts under Clause 58.10

to the extent that such sums have not been recovered from other sources calculated, in the case of costs specified in (viii) and (ix), not later than one month after termination, such payment to be made together with interest at the Overdue Interest Rate thereon up to the date of payment in full, which shall be paid as soon as practicable and in any event not later than 30 days after such termination and the Occupational Sublease shall terminate immediately prior to payment in full. On payment in full, the SPC shall assign to the Trust the benefit of any outstanding insurance claim for material damage or construction all risks, as identified in Part 9.

70.11 The Trust will co-operate with the SPC in structuring such method of payment of compensation payable under Clause 70.10 with a view to minimising any potential for adverse consequences to the SPC from receipt of such compensation, including inter alia making compensation payments to the SPC Funders.

70.12 Acquisition of Assets

The payment referred to in Clause 70.10 will be applied as follows:

- 70.12.1** first, in acquiring from the SPC the Ground Lease for an amount which is equal to the sum of (a) the indexed base cost of the same and (b) the then tax written down value of any industrial buildings and structures situated on land which is the subject of the Ground Lease (and the parties agree that the amount in (b) shall be apportioned to such industrial buildings and structures)
- 70.12.2** second, in applying the balance (if any, and the sum of £1 if not, but subject in any event to a maximum equal to the tax written down value, or carrying value for trading assets, of the same) in purchasing from the SPC all moveable plant and machinery, held for the purposes of the New Build Hospital; and

70.12.3 third, in paying the balance (if any) to the SPC as compensation for any future income foregone in consequence of the early termination of this Agreement

but the aggregate amount under this Clause 70.12 shall not exceed the total amount payable pursuant to Clause 70.10.

71 Relief Events

On the occurrence of a Relief Event, the provisions of Clause 70 shall have effect mutatis mutandis as if a Force Majeure Event had occurred, save that:

- 71.1 if the Relief Event occurs prior to the Hospital Operations Date, the Time for Hospital Completion shall be delayed and the Term extended, day for day pursuant to Clause 70.7.3 (and the provisions of Clause 70.7.4 shall apply), and there shall be no opportunity to terminate pursuant to Clause 70.9 (except where the Relief Event occurs for 250 days in aggregate at any time prior to the Hospital Operations Date, in which case the parties shall have the opportunity to terminate pursuant to Clause 70.10, and, for the avoidance of doubt, the provisions of Clause 70.10 shall apply, mutatis mutandis) and
- 71.2 if the Relief Event occurs on or after the Hospital Operations Date, the Unitary Charge shall continue to be payable (unless payment would cease or reduce for any other reason pursuant hereto), Availability Deductions and Performance Deductions shall not apply (unless they would nevertheless apply for any other reason pursuant hereto), there shall be no opportunity to terminate pursuant to Clause 70.9 and there shall be no day for day extension to the Term pursuant to Clause 70.7.3.

72 Illegality & Unenforceability

If at any time any of the Project Documents are or become illegal or unenforceable in whole or in part then the parties shall consult in good faith for up to 30 days in an attempt to restructure the Project Documents to overcome the illegality or unenforceability. If the parties are unable to restructure the Project Documents within such period and it is unlawful or impractical for either party to continue to perform its material obligations hereunder, then either party may give notice to terminate the Project Documents and any connected agreements entered into between the Trust and the SPC on a minimum of 7 days notice in writing whereupon the provisions of Clauses 70.10, 70.11 and 70.12 shall apply mutatis mutandis. For the avoidance of doubt, this clause shall have no application to the circumstances specified in any of the Trust Events of Default.

73 Limitation of Rights and Liabilities

- 73.1 The parties acknowledge and agree that on and after the Hospital Operations Date
- 73.1.1 Neither party shall have any right or remedy against the other in respect of the design, standard and availability of Facilities or the standard or performance of Services (collectively hereinafter referred to as the "Limited Recourse Obligations") other than as expressly contained in the Availability Regime and the Performance Regimes respectively (which regimes contain the entire rights and remedies of the parties applicable in respect thereof).
- 73.1.2 Without prejudice to the generality of Clause 73.1.1, no rights or remedies shall arise in contract or in damages or at law or by way of indemnity or in respect of any misrepresentation or breach of warranty, in each case in respect of the Limited Recourse Obligations other than as expressly contained in the Availability Regime and Performance Regimes respectively (and to the

extent that any such rights or remedies would otherwise arise they are hereby waived).

- 73.1.3 The Trust's rights and remedies to make recourse in respect of the Limited Recourse Obligations pursuant to any collateral warranty, or any guarantee, indemnity, bond or other surety provided by any third party in respect of the Limited Recourse Obligations shall be subject to the provisions of this Clause 73 (as if the same were set out therein mutatis mutandis)

provided always that nothing contained in this Clause 73 shall prejudice

- (a) the Trust's right to terminate this Agreement pursuant to Clause 64.1 for an SPC Event of Default or the SPC's right to terminate this Agreement pursuant to Clause 66.2 for a Trust Event of Default or either party's right to terminate pursuant to Clause 70.9
- (b) the rights of the Trust under either the Trust Direct Agreement or the Services Direct Agreement
- (c) any insurances taken out by either party in respect of the Limited Recourse Obligations
- (d) the rights of the Trust expressly set out in:

Clause 5 (SPC Warranties)
 Clause 9.1 (Staff & Visitor Catering)
 Clause 21.1.2 (Damages for Late Completion)
 Clause 23.2 (Rectification of Defects)
 Clause 23A (Energy Efficiency)
 Clause 24.3 (Damages for Failure to Supply Manuals etc)
 Clause 36.9 (Emergency)
 Clause 43.1 (Statutory Breach)
 Clause 50.2.5 (Failure to Change Damages)
 Clause 60.2 (SPC Indemnities)
 Clause 67.7 (Condition of Hospital on Transfer)

- (e) the rights of the SPC expressly set out in:

Clause 59.7 (Application of Proceeds)
 Clause 60.3 (Trust Indemnities)

- 73.2 73.2.1 The Trust's right pursuant to Clause 14 shall not be limited by Clause 73 in respect of any part or parts of the New Build Hospital which was not Available on certification of the New Build Hospital on the Hospital Operations Date pursuant to Clause 21.3 and in respect of any such part or parts shall continue not to be so limited until such time as such part or parts respectively become Available, whereupon the limitations in Clause 73.1 shall apply.

- 73.2.2 Without prejudice to the provisions of Clause 73.2.1, the rights of the Trust in respect of any breach of any express or implied design or build warranty at the Hospital Operations Date (whether or not known or manifest at such time) shall cease as from the Hospital Operations Date, but shall revive on termination pursuant to Clause 64.1, 66.2 and 70.9.

In the event of any conflict between this provision and any other provision in this Agreement or any other Project Document, this provision shall prevail.

74 Confidentiality

74.1 Non-Disclosure

Each party shall ensure that all Confidential Information which is supplied to it by the other party or otherwise becomes available to it shall be treated as confidential. Confidential Information shall not be disclosed or revealed except as required by law or to Funders or as required for the purposes of the Finance Documents or to such third parties as the parties may agree. The provisions of this Clause 74 shall not apply to any information which is in the public domain.

74.2 Use

Without prejudice to the Contractor's obligations in Clause 74.1, the SPC further undertakes that any medical records in the possession, custody or control of the SPC or in the possession, custody or control of any party under the SPC's control shall be used for the sole purpose of the execution of obligations arising hereunder.

74.3 Precautions

The SPC shall take all necessary precautions to ensure that all Confidential Information is treated as confidential and not disclosed or revealed other than in accordance with the terms of this Agreement.

74.4 Employees etc

A disclosure or revelation of Confidential Information by an employee, consultant or sub-contractor of the SPC or the Trust shall be deemed to be a disclosure or revelation of Confidential Information by the SPC or the Trust as the case may be.

74.5 Data Protection Act Compliance

The SPC warrants that it will duly observe all of its obligations under the Data Protection Act 1984 which arise in connection with this Agreement.

74.6 No Announcements

Except with the written consent of the Trust, the SPC shall not make any press announcement or publicise this Agreement in any way.

75 No Corruption

If the SPC itself (but not any servants, sub-contractors, or employees in each case acting without authority) has, or at any time shall have, done any of the forbidden acts mentioned below, the Trust may on a Serious Breach, in serious cases, terminate this Agreement and/or recover from the SPC the amount of any loss resulting from such termination or, if in the opinion of the Trust, at all times acting reasonably and not vexatiously, such corrupt act is of a less serious nature, the SPC will incur a reduction in the Unitary Charge for one month of £2,500 for each such act which sum shall be a Permitted Deduction. The forbidden acts are:

- 75.1 offering or giving to any person any gift or consideration of any kind as an inducement or reward for doing or for forbearing to do, or for having done or for having forborne



to do, any act in relation to the obtaining, execution or carrying into effect of this or any other Agreement with the Trust or for showing or for forbearing to show any favour or disfavour to any person in relation to this or any other Agreement with the Trust

75.2 the commitment of any offence under the Prevention of Corruption Acts 1889-1916 or the giving of any fee or reward to any officer of the Trust which shall have been exacted or accepted by such officer under colour of his office or employment and is otherwise than such officer's proper remuneration

76 **Taxes**

76.1 **VAT**

76.1.1 All amounts payable by either party under the PFI Documents are expressed exclusive of any VAT properly payable in respect of the supplies to which they relate.

76.1.2 Each party shall in addition forthwith pay to the other party an amount equal to any VAT properly payable by that party in respect of any supply received under the terms of the PFI Documents, provided that it shall first have received from the other party a valid tax invoice in respect of that supply which complies with the requirements of VAT Regulations 1995 Part III. In the event of any conflict with the application of the definition of Relevant Tax Law, this Clause 76 shall prevail.

76.1.3 The SPC hereby undertakes to the Trust that in the event that any VAT is payable by the SPC in advance of the due date for payment by the Trust for the service in question, by virtue of Statutory Instrument 1997/2887, the SPC will not raise an invoice against the Trust for payment without having first received a letter from HM Customs & Excise confirming that such a charge to VAT would be applied to all hospital procurements made under the Private Finance Initiative where the contractual terms are substantially similar.

76.2 **Deductions from Payments**

76.2.1 All sums payable by either party to the other under the PFI Documents shall, subject to the rights of the Trust pursuant to Clause 8.9, be paid free and clear of all deductions or withholdings whatsoever in respect of taxation, save as may be required by law.

76.2.2 If the Trust is so required to make any withholding or deduction in respect of (i) any interest payable at the Overdue Interest Rate or any interest element of Senior Debt payable pursuant to Clauses 66.5, 68.2.1 or 70.10 (but not otherwise) or (ii) any payment, as a consequence of the matters specified in item (v) of the definition of Change of Law, the sum due from the Trust will be increased to the extent necessary to ensure that, after the making of such withholding or deduction, the SPC receives a net sum equal to the amount which it would have received had no such deduction or withholding been made, and the Trust will promptly deliver to the SPC any receipts, certificates or other proof evidencing the amount (if any) paid or payable in respect of any such deduction or withholding as referred to above

76.3 Tax Credits

76.3.1 if the SPC receives the benefit of a tax credit or an allowance resulting from an additional amount paid by the Trust under sub clause 76.2.2 above, it shall (if it can do so without prejudice to the retention of such benefit) pay to the Trust such part of that benefit as will leave it (after such payment) in no more and no less favourable a position than it would have been in if no additional amount has been required to be paid, and

76.3.2 the SPC shall use reasonable endeavours to obtain the benefit of any such tax credit provided that it can do so without prejudice to its tax affairs.

77 Costs and Expenses

Each party shall be responsible for paying its own costs and expenses in relation to the preparation, execution and implementation of this Agreement, except where expressly provided to the contrary and except for any award of costs or expenses by a competent court.

78 Restrictive Trade Practices Act

Any provision of this Agreement or any agreement or arrangement of which it forms part which is subject to registration under the Restrictive Trade Practices Act 1976 shall not take effect until the date after particulars have been furnished to the Director General of Fair Trading pursuant to Section 23 of that Act.

79 Severability

If any provision in this Agreement shall be or become illegal, invalid or unenforceable, the effectiveness of the remaining provisions of this Agreement shall not be prejudiced or impaired.

80 Amendments

No amendments to any part of the PFI Documents shall be binding unless in writing and presumed under Section 3 of the Requirements of Writing (Scotland) Act 1995 to have been granted by the Trust and the SPC, except Changes made in accordance with the Change Control Procedure.

81 Third Party Beneficiaries

This Agreement, the Ground Lease and the Occupational Sublease shall not confer any rights of suit or action whatsoever on any third party.

82 Waiver

Any failure of or delay by either party in relation to the exercise of its rights under this Agreement shall not constitute a waiver of such rights and any waiver in respect of one act or omission shall not operate as a waiver in respect of any other or future acts or omissions.

83 Entire Agreement

This Agreement, the Ground Lease and the Occupational Sublease (together with any document described as a 'Completion Side Document' and signed by both parties) constitute the entire understanding between the parties in relation to their subject matter and replace in its entirety any statement, correspondence, representation or warranty expressed or implied by or on behalf of either party prior to the date of this Agreement.



84 Set Off

Whenever, pursuant to the terms of this Agreement, any sum of money is payable by or recoverable from the SPC and due to the Trust as a Permitted Deduction then the Trust may deduct or set-off the amount of such sum from any sum then due or which at any time thereafter may become due from the Trust to the SPC under this Agreement.

85 Notices

85.1 Any notice or communication (including the communication of a Decision) which is given under this Agreement shall be given in writing. Any notice given under or in connection with this Agreement shall be regarded as properly served when:

85.1.1 in the case of a notice to the SPC, it is delivered by hand or by post to the SPC at Tempsford Hall, Sandy, or if it is sent by fax to a published fax number of the SPC (presently 01767 641738) marked for the attention of the Company Secretary or

85.1.2 in the case of a notice to the Trust, if it is delivered by hand or by post to the address stated in this Agreement or if it is sent by fax to a published fax number of the Trust (presently 01355 572712) marked for the attention of the Trust Representative for the time being by name.

85.2 Provided that if the day of service is not a Business Day or service takes place after 5 pm on a Business Day (or after 4.30 pm on a Friday) then the notice shall be deemed to be served on the following business day.

86 Governing Law and Jurisdiction**86.1 Governing Law**

This Agreement shall be governed by and interpreted in accordance with the laws of Scotland.

86.2 Jurisdiction

The parties hereby agree that any proceedings to be raised by either or both parties will be as a commercial action (as defined in Chapter 47 of The Rules of the Court of Session) under the jurisdiction of the Court of Session in Scotland unless (i) the parties agree otherwise or (ii) any such proceedings are rejected by such Court, in which case the parties agree to submit themselves to the non-exclusive jurisdiction of the Court of Session in Scotland.



87 Registration

The parties hereto consent to registration hereof for preservation: IN WITNESS WHEREOF these presents consisting of this and the 146 preceding pages together with the Schedule and Plans 1 to 5 annexed, are executed as follows:

SIGNED for and on behalf of
THE HAIRMYRES AND STONEHOUSE HOSPITALS NATIONAL HEALTH SERVICE TRUST

at LONDON

on 27 MARCH 1998

by ALLAN KILPATRICK SEIVINGS,
CHIEF EXECUTIVE AND PETER GALLAGHER,
DIRECTOR OF FINANCE AND INFORMATION

Witness

SIGNED for and on behalf of
H DGH LIMITED

at LONDON

on 27 MARCH 1998

by GARY BARNES AND
TIMOTHY RICHARD PEARSON

CERTIFIED TRUE COPY

Theodore Goddard
THEODORE GODDARD
150 ALDERSGATE STREET
LONDON EC1A 4EJ

