

SUMMIT HEALTHCARE (LAW) LIMITED

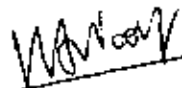
(Reg. No. 182649)

MINUTES of a MEETING of the
BOARD of DIRECTORS of SUMMIT
HEALTHCARE (LAW) LIMITED held
at London on the 17th day of June 1998
at 11.15 am/pm

Present: Michael John Collard
Robert Woolf
William Moyes

CERTIFIED TO BE A
TRUE COPY OF THE
ORIGINAL DOCUMENT

In attendance: Alan Cambell (Dundas & Wilson)
Grigor Milne (Dundas & Wilson)
Gordon McCreath (Dundas & Wilson)



DIRECTOR

It was agreed that Mr Collard should act as Chairman of the Meeting. The Chairman established that a quorum was present and declared the Meeting open.

1. BACKGROUND

The Chairman reported that the meeting had been called to consider the Company's entering into various arrangements to carry out the design, financing, construction, fitting out, commissioning, operation and maintenance of the New Law District General Hospital, Netherton, Lanarkshire (the Project).

2. FINANCING OF THE PROJECT

The Chairman reported that the Company's carrying out of the Project would be financed in part through Summit Holdings (Law) Limited (SHL), the owner of the entire issued share capital of the Company, and in part through Summit Finance (Law) PLC (Issuer), the wholly owned subsidiary of the Company. The financing would be structured as follows.

British Linen Investments Limited (BLI), Edison Capital (Netherlands) Investments BV (Edison) and PFI Investors Limited (PFI) (together the Investors) will invest equity share capital and subordinated coupon bearing investment sums in SHL and SHL will invest equivalent equity share capital and subordinated coupon bearing investment sums in the Company pursuant to a shareholders' undertaking among inter alia the Investors, SHL and AMBAC Insurance UK Limited (AMBAC) (the Shareholders' Undertaking) and a subscription and shareholders' agreement among the Investors, the Company, Issuer and SHL (the Agreement). The obligations of Edison and PFI to invest in Holdings pursuant to the Shareholders' Undertaking will be supported by letters of credit. The obligations of BLI to invest in SHL pursuant to the Shareholders' Undertaking will be guaranteed by The British Linen Bank Limited in the Shareholders' Undertaking.

Issuer will issue guaranteed secured bonds (the Bonds) due 2028 pursuant to a bond trust deed (between SHL, the Company, Issuer, AMBAC and Royal Exchange Trust Company Limited (the Bond Trustee). The issue of the Bonds will be underwritten by Morgan Stanley & Co. International Limited (Morgan Stanley) pursuant to a subscription agreement between, inter alia, SHL, the Company, Issuer, AMBAC and Morgan Stanley. Issuer will advance the proceeds of the Bonds to the Company for the purposes of the Project pursuant to an intercompany loan agreement. AMBAC will issue to the Bond Trustee a financial guarantee insurance policy in respect of the Bonds, pursuant to which AMBAC will guarantee scheduled payments of principal and interest and certain other amounts in respect of UK withholding taxes in respect of the Bonds. The various obligations of Issuer, the Company and SHL to the various other parties to the Finance Documents (as defined in the Collateral Deed hereinafter defined) will be secured in favour of a security trustee (the Security Trustee), as trustee for those various other parties pursuant to a security trust deed. The obligations of Issuer, the Company and SHL to the Security Trustee, the Bond Trustee and AMBAC will be recorded in a collateral deed.

3. SUBSCRIPTION AND SHAREHOLDERS' AGREEMENT

The Chairman tabled a copy of the Agreement which related to inter alia the regulation of the relationship of the Investors and the future operation and carrying on of the Company's business. All of the Directors declared their respective interests

in the Agreement for the purposes of Section 317 of the Companies Act 1985 (the Act). After due consideration was had of the Agreement, IT WAS RESOLVED:-

- (i) that the terms of the Agreement be and are hereby approved; and
- (ii) that it was in the best interests of, for the commercial benefit of, and within the capacity of the Company to enter into and implement the provisions of the Agreement and any Director be and is hereby authorised to sign the Agreement (and any other ancillary documents contemplated thereby) on behalf of the Company.

The Meeting was then adjourned to allow the Agreement to be signed on behalf of the Company. On resumption of the Meeting it was noted that the Agreement had been signed for and on behalf of the Company and all other parties thereto.

4. EXTRAORDINARY GENERAL MEETING

The Chairman reminded the Meeting of the provisions of Clause 3 of the Agreement.

IT WAS RESOLVED to recommend to the shareholders the passing of the following resolutions:-

- (i) that the Memorandum of Association of the Company be amended as follows:
 - (a) by the adoption of a new Clause III(1)(aa) to be inserted in substitution for and to the entire exclusion of the existing Clause III(1)(aa) as follows:
 - “(aa) To act as an intermediate holding company and, without prejudice to the foregoing generality, to act as an intermediate holding company for, and to borrow money from, Summit Finance (Law) PLC (Reg. No.185067), to design, build, finance, manage and operate a new district general hospital for the Law Hospital National Health Service Trust or any successor body thereof or any body to whom the functions of the said Trust are transferred and to grant certain securities in respect thereof”; and

(b) by the deletion of the word "and" in the second last line of the existing Clause III and its replacement with a comma; and

(c) by the insertion of the following wording at the end of Clause III:

"and (H) the objects specified in the different paragraphs of this clause shall not, except where the context expressly so requires, be in any way limited or restricted by reference to or inference from the terms of any other paragraph or the name of the Company, but may be carried out in as full and ample a manner and shall be construed in as wide a sense as if each of the said paragraphs defined the objects of the separate, distinct and independent company.

(ii) that the Articles of Association produced to the Meeting and for the purpose of identification signed by the Chairman (the New Articles) be adopted as the new Articles of Association of the Company in substitution for and to the exclusion of the existing Articles of Association of the Company;

(iii) that the authorised share capital of the Company be increased from £12,500 to £100,000 by the creation of an additional 87,500 Ordinary Shares of £1 each, such shares to rank pari passu in all respects with the existing Ordinary Shares of the Company;

(iv) that the Directors be generally and unconditionally authorised pursuant to section 80 of the Companies Act 1985 at any time or times during the period of 5 years from the date of this Meeting to allot relevant securities (as defined in sub section (2) of the said section 80) up to a maximum nominal amount of £100,000;

The Chairman produced to the Meeting a form of Written Resolution of the Sole Member of the Company approving the above mentioned Resolutions for the purposes of Section 380 and 382B of the Act. The Meeting then adjourned to allow the Sole Member of the Company to sign the Written Resolution.

On resumption of the Meeting, it was noted that Resolutions Nos. 1, 2, 3 and 4 contained in the Written Resolution of the Sole Member of the Company had been passed as Written Resolutions of the Company.

5. **BANKER**

A standard bank mandate form of Lloyds Bank Plc and an engrossment copy of an accounts agreement among, *inter alia*, the Company and the Bank (the Accounts Agreement) was tabled. IT WAS RESOLVED THAT:-

- (a) Lloyds Bank plc be appointed as the Company's Bank;
- (b) the Accounts (as defined in the Accounts Agreement) be opened for the Company with the Bank at its branch at 12 Bothwell Street, Glasgow G2 6MY (Sort Code 30-15-53);
- (c) the signatories authorised to sign and endorse documents in relation to the Accounts (as detailed in the resolution in the standard form referred to below) shall be any two Directors, provided that one is a member of Panel A of the Board and one is a member of Panel B of the Board. For the purposes of this Resolution, Panel A shall consist of Robert Woolf and Michael Collard and Panel B shall consist of William Moyes;
- (d) a resolution in the standard form required by the Bank (a copy of which is annexed hereto) be and the same is hereby passed as part of the proceedings of this Meeting and entered in the Minute Book; and
- (e) a copy of the said standard form resolution (with the names of the signatories entered in the appropriate spaces) be forwarded to the Bank by the Secretary together with specimen signatures of the members of Panels A and B of the Board as authorised signatories.

6. **ALLOTMENT OF SHARES**

The Chairman advised the Meeting that the current shareholdings in the Company were :-

Name of Shareholder	No. of Shares	Class of Shares
Summit Holdings (Law) Limited ("SHL")	12,500	Ordinary Shares of £1 each

The Chairman reminded the Meeting of the terms of Clause 3.3.3 of the Agreement and advised that £87,500 had been received by the Company from SHL in respect of the above application by SHL for a further 87,500 Ordinary Shares of £1 each pursuant to the said Clause. It was noted that the said sum was to be so used by the Company subject to the Agreement becoming unconditional, failing which it would be returned to SHL.

The Chairman advised the Meeting that the Directors were authorised to allot the relevant securities up to an aggregate nominal amount equal to the unissued authorised share capital of the Company.

IT WAS RESOLVED that:-

- (i) 87,500 Ordinary Shares of £1 each be allotted and a letter of allotment be issued in respect thereof to SHL;
- (ii) the Company Secretary be and is hereby instructed to write-up the Register of Members of the Company to reflect such allotments (including a note that the Company is a single member company); and
- (iii) any two Directors be and are hereby authorised to execute a share certificate in respect of the shares so allotted.

7. **PAYMENT OF SUBSCRIPTION MONIES FOR SHARES PREVIOUSLY ALLOTTED**

The Chairman referred to the Company's subscription on 22nd May 1998 for 49,998 Ordinary Shares of £1 each in Issuer. The Chairman then advised that, under the terms of Clause 3.3.4 of the Agreement, the £37,498.50 outstanding in respect of the

49,998 Ordinary Shares allotted to the Company by Issuer should now be paid to Issuer.

IT WAS RESOLVED that such sum should now be paid by the Company to Issuer.

8. **TABLING OF DOCUMENTS**

8.1 The Chairman tabled a copy of the latest draft of a master definitions schedule (the **Master Definitions Schedule**) between the Company and the Law Hospital National Health Service Trust to be entered into in relation to the Project, and of a collateral deed (the **Collateral Deed**) between SHL, the Company, Issuer, Royal Exchange Trust Company Limited and AMBAC Insurance UK Limited to be entered into in relation to the Project. IT WAS RESOLVED that the definitions contained in the Master Definitions Schedule or the Collateral Deed would apply to this Clause of these Minutes. In the event of any inconsistency in the said definitions, the definition contained in the Collateral Deed has been used.

8.2 Each of the following draft or final documents in relation to inter alia the Project were duly considered by the meeting:-

1. Project Agreement;
2. Development Agreement;
3. General Provisions;
4. Services Agreement;
5. Equipment Agreement;
6. Master Definitions Schedule;
7. Output Specification;
8. Method Statements;
9. Equipment Specifications;
10. Investment Plan;
11. Law Hospital National Health Service Trust (the Trust) Disclosure Letter;
12. Building Contract Direct Agreement;
13. Services Sub-Contract Direct Agreement;
14. Equipment Sub-Contract Direct Agreement;
15. Financier Direct Agreement;

16. Building Contract (and the schedules thereto);
17. Performance Bond;
18. Building Contract Guarantee;
19. Collateral warranty to be given by Sir Robert McAlpine Limited (SRMcA) to Summit Healthcare (Law) Limited and the Trust;
20. Collateral warranty to be given by Hulley & Kirkwood/Thorburn Colquhoun to Summit Healthcare (Law) Limited;
21. Collateral warranty to be given by Percy Thomas Partnership to Summit Healthcare (Law) Limited;
22. Collateral warranty to be given by [Sub-contractor] to Summit Healthcare (Law) Limited;
23. Agreement for consultant services to be entered into between Summit Healthcare (Law) Limited and Chesterton plc trading as Cyril Sweett Project Consultants;
24. Services Sub-Contract;
25. Equipment Sub-Contract;
26. Services Sub-Contract Guarantee;
27. Deed relating to £[11,400,000] (to be finalised) HoldCo Coupon Bearing Investment Sum to be executed by SHLL and the HoldCo Shareholders;
28. Deed relating to £[11,400,000] (to be finalised) Summit Coupon Bearing Investment Sum to be executed by SHL and the Company;
29. Collateral Deed;
30. Accounts Agreement;
31. Security Trust Deed;
32. Shareholders' Undertaking;
33. Terms and conditions of the Bonds being the terms and conditions to be endorsed on each Bond in definitive form;
34. Bond Trust Deed;
35. Bond Policy;
36. Insurance and Indemnity Agreement;
37. Paying Agency Agreement;
38. Investment Management Agreement;

39. Letter of credit from Lloyds Bank to the Security Trustee re the obligations of PFI Investors Limited under the Shareholders' Undertaking;
40. Letter of Credit from First Chicago NBD Corporation to the Security Trustee re the obligations of Edison Capital (Netherlands) Investments BV under the Shareholders' Undertaking;
41. Letter of comfort from Bank of Scotland to MBLA - AMBAC International re the involvement of The British Linen Bank Limited in the Project;
42. Intercompany Loan Agreement;
43. The Floating Charges;
44. The Assignations;
45. Summit Share Pledge;
46. Two stock transfer forms evidencing the transfer in security of the entire issued share capital of Issuer pursuant to the Summit Share Pledge;
47. HoldCo Share Pledge;
48. Stock transfer form evidencing the transfer in security of the entire issued share capital in the Company pursuant to the HoldCo Share Pledge;
49. Standby Commitment (which contemplates the entry into the Standby Facilities referred to therein);
50. Standard Security;
51. Head Lease;
52. Sub-Lease;
53. Certificate of title to be given by Dundas & Wilson in relation to the Property;
54. Offering Circular in respect of the issue of the Bonds including the letter of non-applicability in relation to compliance with the Listing Rules; and
55. Subscription Agreement.

(collectively, together with any other letters, notices, documents or agreements ancillary thereto or in connection therewith, "the Documents")

9. DECLARATION OF INTERESTS

- 9.1 Those present being directors (and/or representatives of shareholders) of the Company or any other party to any of the Documents declared their interest as such to the meeting in accordance with Section 317 of the Companies Act 1985.

9.2 It was noted that the Articles of Association of the Company permitted the Directors who were so interested to nonetheless count towards the quorum for the purposes of the meeting and to vote on matters to be transacted at the meeting.

10. **PRODUCTION CONSIDERATION APPROVAL AND AUTHORITY**

The Directors present then considered the terms and provisions of the Documents in detail and having done so, IT WAS RESOLVED THAT:

10.1 the transactions contemplated in the Project and the Documents are in the interests of and to the benefit of the Company and that they are hereby approved;

10.2 the entering into by the Company of any of the Documents that have already been executed on behalf of the Company is hereby approved and ratified in all respects;

10.3 all Documents required to be executed as a deed and to which the Company is a party (and any other document required to be executed by the Company as a deed in connection with the Project including any powers of attorney) should be executed and delivered as a deed by the Company:

- (a) in the manner prescribed by Section 36A(4) Companies Act 1985; or
- (b) by any attorney properly appointed by the Company; or
- (c) be executed under the common seal of the Company,

subject in each case to such amendments as the persons executing the same on behalf of the Company shall think fit;

10.4 any two Directors of the Company or a Director and the Secretary or any attorney duly appointed by the Company be authorised to witness the affixing of the common seal of the Company for the purposes of paragraph 10.3 above;

10.5 all Documents required to be executed by the Company which are governed by the law of Scotland (and any other document required to be executed by the Company in connection with the Project which is governed by the law of Scotland) should be executed and delivered on behalf of the Company:-

- (a) by any two Directors or by one Director and the Secretary; or
- (b) by two attorneys properly appointed or by one such attorney and a witness;
or
- (c) by one Director before a witness; or
- (d) (where the prescribed method of execution of the Document or document in question is not that set out in paragraph 10.5 (a), (b) or (c)) by any one Director or the Secretary or by any attorney properly appointed,

subject in each case to such amendments as the person or persons executing the same on behalf of the Company shall think fit;

10.6 any Director or Secretary of the Company or any attorney duly appointed by the Company be and is hereby authorised to execute any of the Documents to which the Company is party and any other documents required to be executed on behalf of the Company in connection with the Project other than as a deed and do all such acts and things and agree and execute on behalf of the Company all such other documents as may be required in order to implement the Project and generally to sign all such certificates, formalities certificates, confirmations, requests, letters, appointments, powers of attorney and notices and other documents as may be required in connection with the Project, subject in each case to such amendments as the person executing the same on behalf of the Company shall think fit;

10.7 any of the persons referred to in paragraph 10.6 be and are hereby authorised to agree to such further amendments to the Documents as such person shall think fit.

11. ABILITY TO PAY DEBTS

The Directors were satisfied that the Company was able to pay its debts within the meaning of that term in Section 123(1) of the Insolvency Act 1986 and would also be so able after entry into and completion of the Documents.

12. **HOLDCO SHARES PLEDGE**

There was then produced to the meeting an unexecuted stock transfer form evidencing the transfer in security of the entire issued share capital of the Company pursuant to the HoldCo Shares Pledge. IT WAS RESOLVED THAT:

- (i) subject to the execution of the HoldCo Shares Pledge and the execution pursuant thereto of the above-mentioned stock transfer form, Royal Exchange Trustee Nominees Limited be entered in the Register of Members of the Company;
- (ii) any two Directors or any single Director before a witness be and are hereby authorised to execute a share certificate in respect of the shares so transferred in exchange for the existing certificates; and
- (iii) a new share certificate, a certified copy of the stock transfer form and a certified copy of the appropriate entry in the Register of Members of the Company be delivered to Royal Exchange Trustee Nominees Limited, Royal Exchange Trust Company Limited and AMBAC Insurance UK Limited.

13. **ACCOUNTING REFERENCE DATE**

IT WAS RESOLVED that the accounting reference date of the Company be changed to 31st March, and that the current accounting reference period of the Company be extended from 28th February 1999 to 31st March 1999 pursuant to section 225 of the Companies Act 1985.

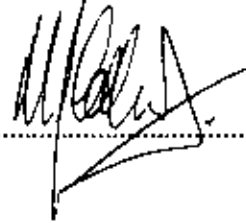
14. **APPOINTMENT OF AUDITORS**

IT WAS RESOLVED that Messrs Ernst & Young be appointed as auditors of the Company.

15. **GENERAL**

IT WAS RESOLVED to instruct the Secretary to make all requisite entries in the Register of Members of the Company, the Register of Directors of the Company, to file a Minute of this Meeting in the Minute Book, and to lodge all appropriate returns with the Registrar of Companies.

There being no further business, the Chairman declared the Meeting closed.

A handwritten signature in black ink, appearing to be 'M. P. ...', is written over a horizontal dotted line.

Chairman

DATED 17 June 1998

(1) SERCO GROUP PLC

- and -

(2) SUMMIT HEALTHCARE LAW LIMITED

**PARENT COMPANY GUARANTEE
NEW LAW DISTRICT GENERAL HOSPITAL - SERVICES SUB-CONTRACT**

ASHURST MORRIS CRISP
Broadwalk House
5 Appold Street
London EC2A 2HA

Tel: 0171 638 1111
Fax: 0171 972 7990
Ref: LMM/539120

THIS GUARANTEE

BY

- (1) **SERCO GROUP PLC** (Company Registration No. 2048608) having its registered office at Serco House, Hayes Road, Southall, Middlesex UB2 5NJ (the "Guarantor"); and

TO

- (2) **SUMMIT HEALTHCARE (LAW) LIMITED** (Company Registration No. 182649) having its registered office at Saltire Court, 20 Castle Terrace, Edinburgh (the "Employer")

WHEREAS

- (A) Serco Limited (the "Subsidiary"), has entered into a contract dated 16th June 1998 with the Employer in relation to the provision of certain Services at the New Law District General Hospital as described in the contract (the "Services Sub-Contract").
- (B) The Guarantor is the beneficial owner of one hundred per cent. (100%) of the issued share capital of the Subsidiary.
- (C) The Guarantor has agreed to guarantee all the obligations of the Subsidiary under the Services Sub-Contract on the terms set out below.

NOW IT IS HEREBY AGREED as follows:-

1. The Guarantor in consideration of the Employer entering into the Services Sub-Contract with the Subsidiary, for itself, its successors and assigns, hereby absolutely, irrevocably and (except as expressly provided herein) unconditionally guarantees to the Employer as a continuing guarantee the due, proper and punctual performance by the Subsidiary of all the terms, conditions, obligations and agreements on the part of the Subsidiary contained in the Services Sub-Contract (including, without limitation, the payment of monies) and agrees that if the Subsidiary shall in any respect fail to perform any of its obligations (including, without limitation, the payment of monies) arising under the Services Sub-Contract or shall commit any breach of or fail to fulfil any warranty as set out in the Services Sub-Contract, then the Guarantor will forthwith perform and fulfil in place of the Subsidiary each and every obligation or warranty in respect of which the Subsidiary has defaulted or as may be unfulfilled by the Subsidiary. The Guarantor shall be liable to the Employer for any and all losses, damages, expenses, liabilities, claims, costs or proceedings which the Employer may suffer or incur by reason of the said failure or breach: provided always that the Guarantor's liability under this Guarantee shall not exceed that of the Subsidiary under the Services Sub-Contract determined on the basis that the Services Sub-Contract is valid, enforceable and has full force and effect.
2. The Guarantor covenants and agrees with the Employer that any act, event, circumstance or omission which but for the provisions of this Clause 2 may affect, change or release the Guarantor from its obligations under this Guarantee, including, without limitation:-

- (i) waiver by the Employer of any terms, provisions, conditions, obligations and agreements of or under the Services Sub-Contract or any failure to make demand upon or take action against the Subsidiary;
- (ii) any modification or changes, however fundamental, to the Services Sub-Contract or referred to in the Services Sub-Contract;
- (iii) the giving by the Employer of any consent to an assignment or the making of any assignment of the Services Sub-Contract;
- (iv) the granting of extensions of time or other indulgence to the Subsidiary;
- (v) any dealings between the Employer and the Subsidiary;
- (vi) the avoidance or termination of the Services Sub-Contract or the employment of the Subsidiary for default by the Subsidiary; and
- (vii) (except to the extent that such breach is not caused by the Subsidiary and affects, changes or releases the Subsidiary from its obligations under the Services Sub-Contract) any breach by the Employer of any terms of the Services Sub-Contract;

may be made and done without notice to or the consent of the Guarantor and no such act, event, circumstance or omission shall in any way affect, change or release the Guarantor from its obligations under this Guarantee and the liability of the Guarantor hereunder shall not be in any way affected thereby.

3. This Guarantee shall remain in full force and effect until performance in full of the terms, conditions, obligations and agreements on the part of the Subsidiary contained in the Services Sub-Contract notwithstanding any act, event, circumstance or omission which but for the provisions of this Clause 3 may affect, change or release the Guarantor from its obligations under this Guarantee, including, without limitation:-

- (i) the insolvency, liquidation, receivership, reorganisation, amalgamation, reconstruction or any analogous event of the Subsidiary, the Guarantor or any other person;
- (ii) any disclaimer of the Services Sub-Contract by a liquidator of the Subsidiary, the Guarantor or any other person;
- (iii) any change in the status, function, control or ownership of the Subsidiary; and/or
- (iv) unenforceability or invalidity of any obligations of the Subsidiary so that this Guarantee shall be construed as if there were no such unenforceability or invalidity.

4. Until the terms, conditions, obligations and agreements on the part of the Subsidiary contained in the Services Sub-Contract have been unconditionally and irrevocably performed in full the Guarantor shall not by virtue or as a result of any payment or performance by it under this Guarantee in respect of the Services Sub-Contract:-

- (a) be subrogated to any rights, security or moneys held or received or receivable by the Employer; or
 - (b) receive, claim or have the benefit of any payment, distribution, security or indemnity from the Subsidiary or (if and for so long as the Employer has any unsatisfied claims outstanding or pending against the co-sureties) any such co surety; or
 - (c) unless so directed by the Employer (when the Guarantor will prove in accordance with such directions) claim as a creditor of the Subsidiary in competition with the Employer.
5. The Guarantor shall hold in trust for the Employer and forthwith pay or transfer (as appropriate) to the Employer any such payment (including an amount equal to any such set-off), distribution or benefit of such security, indemnity or claim in fact received by it in breach of Clause 4.
6. No delay or omission of the Employer in exercising any right, power or privilege hereunder shall impair such right, power or privilege or be construed as a waiver of such right, power or privilege nor shall any single or partial exercise of any such right, power or privilege preclude any further exercise thereof or the exercise of any other right, power or privilege. The rights and remedies of the Employer herein provided are cumulative and not exclusive of any rights or remedies provided by law.
7. A waiver given or consent granted by the Employer under this Guarantee will be effective only if given in writing to the Guarantor and then only in the instance and for the purpose for which it is given.
- 8.1 If at any time any one or more of the provisions of this Guarantee is or becomes invalid, illegal or unenforceable in any respect under any law, the validity, legality and enforceability of the remaining provisions hereof shall not be in any way affected or impaired thereby.
- 8.2 As a separate and alternative stipulation the Guarantor unconditionally and irrevocably agrees that any sum expressed to be payable by it or obligation to be performed by it under this Guarantee but which is for any reason (whether or not now existing and whether or not now known or becoming known to the Guarantor) not recoverable from or enforceable against the Guarantor on the basis of a guarantee shall nevertheless be recoverable from or enforceable against the Guarantor as if the Guarantor were the sole principal debtor or obligor (where relevant).
- 9.1 Save as specifically otherwise provided in this Guarantee any notice, demand or other communication to be served under this Guarantee may be served upon a party hereto only by posting by first class post or delivering the same by hand or sending the same by facsimile transmission to the party to be served at its address or facsimile number shown immediately after its name on the signature page of this Guarantee or at such other address or number as it may from time to time notify in writing to the other party.

- 9.2 A notice or demand served by first class post shall be deemed duly served on the second business day after the date of posting and a notice or demand sent by hand or facsimile transmission shall be deemed to have been served at the time of delivery or transmission unless served after 5.00 pm in the place of intended receipt in which case it will be deemed served at 9.00 a.m. on the following business day. For the purposes of this paragraph "business day" means a day on which commercial banks are open for business in Edinburgh or London.
- 9.3 In proving service of any notice it will be sufficient to prove, in the case of a letter, that such letter was properly stamped or franked first class, addressed and placed in the post and, in the case of facsimile transmission, that such facsimile was duly transmitted on a business day to a current facsimile number of the addressee at the address referred to below.
10. The Employer may assign or charge this Guarantee or any benefit arising from it in favour of the Financiers to the Employer under the Summit Assignment (as amended, varied or supplemented from time to time) and their permitted successors, transferees and assigns on such terms as it sees fit without the consent of the Guarantor and without affecting, changing or releasing the Guarantor from its obligations under this Guarantee. Subject to the terms of the Services Sub-Contract Direct Agreement dated 16 June 1998 (as amended, varied or supplemented from time to time) the Employer may not otherwise assign or charge this Guarantee without obtaining the Guarantor's prior written consent.
11. This Guarantee shall be governed by and construed in accordance with the laws of Scotland and each of the persons constituting the Guarantor and the Employer separately prorogate the non-exclusive jurisdiction of the Court of Session in Scotland in relation to any disputes hereunder the parties

IN WITNESS whereof this agreement consisting of this and the preceding three pages has been executed as follows:-

Subscribed for and on behalf of
 SERCO GROUP PLC
 at Raymond
 on 17 day of JUNE 1998

acting by

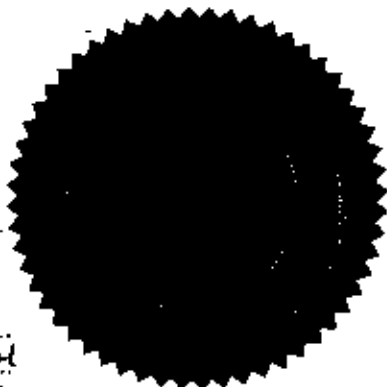
RICHARD WHITE (Director)
CHRISTOPHER HYMAN (Secretary)





in the presence of

Witness David Smith
 Full name DAVID MARK SMITH
 Address 13 DAPER COURT
MOUNT AVE, EALING
WINDON



Subscribed for and on behalf of
SUMMIT HEALTHCARE (LAW)
LIMITED

at MICHAEL JOHN COLCARD.
on 17th day of June 1998

by MICHAEL JOHN COLCARD Director

and D. S. Company Director/Secretary
Services, Ltd.

)
)
)
.....
Director

Alan D. Caplan
.....
Director/Secretary

Zory Christie, witness.
ZORY CHRISTIE
26 SOUTH TANNIN ROAD
EDINBURGH.

SERVICES SUBCONTRACT

**for the Design, Build, Finance and Operate Project
for the New Law District General Hospital, Netherton**

between

SUMMIT HEALTHCARE (LAW) LIMITED

and

SERCO LIMITED

Dundas & Wilson
Saltire Court
20 Castle Terrace
EDINBURGH
EH1 2EN

Index

No	Heading	Page No
1.	Definitions and Interpretation	1
2.	Condition Precedent	5
3.	Transition Services	7
4.	Commissioning Period	10
5.	Services	10
6.	Duration	12
7.	Payment	12
8.	Excluded Obligations	12
9.	Estates Maintenance	14
10.	Additional Serco Obligations	14
11.	Summit's Obligations	22
12.	Warranties and Design Assumptions	24
13.	Organisation, Co-operation and Information	27
14.	Confidentiality	29
15.	Licence of Intellectual Property Rights	30
16.	Employees	33
17.	Use of Premises	34
18.	Termination	35
19.	Consequences of Early Termination/Expiry	43
20.	Compensation	47
21.	Force Majeure/Suspension Events	49
22.	Indemnities	50
23.	Liabilities/Remedies	56
24.	Availability	58
25.	Dispute Resolution Procedure	59
26.	Notices	59
27.	Law and Jurisdiction	61
28.	Restrictive Trade Practices Act	61
29.	General	61
30.	Corrupt Gifts and Payment of Commission	64
31.	Set Off	65
32.	New Services	66
33.	Invalidity	66

Schedule

Part 1	Services During Commissioning Procedure	68
Part 2	Payment	72
Part 3	Insurance	77
Part 4	Joint Operating Group	83
Part 5	Compensation	84
Part 6	Estates Maintenance	86
Part 7	Design Assumptions	95
Part 8	Employees	96
Part 9	Disputes Resolution Procedure	97

SERVICES SUBCONTRACT

between

SUMMIT HEALTHCARE (LAW) LIMITED (Registered No 182649) whose registered office is situated at Saltire Court, 20 Castle Terrace, Edinburgh EH1 2EN ("**Summit**"); and

SERCO LIMITED (Registered No 242246) whose registered office is situated at Serco House, Hayes Road, Southall, Middlesex UB2 5NJ ("**Serco**").

WHEREAS

- (A) Law Hospital National Health Service Trust ("**the Trust**") wishes to procure the provision of a new hospital at Netherton to be known as the New Law District General Hospital and certain services in relation to that hospital and Summit has or is about to enter into a Project Agreement and related agreements with the Trust which will secure the required hospital and services for the Trust.
- (B) Summit wishes to sub-contract to Serco the provision of, and Serco is willing to provide, certain services in relation to that hospital on the terms and subject to the conditions of this Agreement.

NOW THEREFORE IT IS HEREBY AGREED as follows:-

1. DEFINITIONS AND INTERPRETATION

- 1.1 In this Agreement, unless the context otherwise requires, the following words and expressions shall have the following meanings:-

Additional Costs has the meaning set out in Part 1 of the Schedule;

Deep Clean has the meaning set out in Part 1 of the Schedule;

Design Assumptions has the meaning set out in Clause 12.3;

Dispute Resolution Procedure means the procedure referred to in Clause 25 and set out in Part 9 of the Schedule to this Agreement;

Guarantee means the guarantee in the Agreed Form to be given by the Guarantor in favour of Summit;

Guarantor means Serco Group plc (Registered No 2048608) whose registered office is situated at Dolphin House, Windmill Road, Sunbury-on-Thames, Middlesex TW16 7HT;

Indemnified has the meaning set out in Clause 22.5;

Indemnifier has the meaning set out in Clause 22.5;

Interim Security Services has the meaning set out in Part 1 of the Schedule;

Interim Estates Services has the meaning set out in Part 1 of the Schedule;

Initial Term means the period of seven years from and after the Operational Date;

Master Definitions Schedule means the document so entitled signed by the Trust and Summit and dated on the Execution Date, as amended or supplemented at any time;

Mobilisation Period has the meaning as set out in Clause 2.A.1 of this Agreement;

Mobilisation Services means all activities to be undertaken by Serco during the Mobilisation Period in preparation for the performance of the Services including, without limitation, preparation testing and implementation of programmes and procedures for training, management and administration, drafting of operating manuals, negotiation and preparation of sub-contracts, management, administration and training;

parties means Serco and Summit;

Recovery Amount has the meaning set out in Clause 22.3;

Serco Residual Cap has the meaning set out in Clause 23;

Serco Contract Officer means the person nominated from time to time by Serco under Clause 10.15;

Services has the same meaning as in the Master Definitions Schedule subject (in respect of the Estates Maintenance Service) as provided in Clause 9 and Part 6 of the Schedule and subject further as provided in Clause 18.9.

1.2 Unless otherwise defined in this Agreement, any word or expression given a meaning in the Master Definitions Schedule or, failing which, in the DBFO Contracts (as such expression is defined in the Master Definitions Schedule) shall have the same meaning when used in this Agreement.

1.3 In this Agreement, unless the context otherwise requires:-

1.3.1 a reference to a Clause is a reference to a clause of this Agreement;

1.3.2 reference to a numbered Provision shall be a reference to the paragraph of the General Provisions bearing that number;

1.3.3 any reference in this Agreement to a document “**in the Agreed Form**” is a reference to a document approved by Summit and Serco a copy of which has been signed for the purpose of identification by or on behalf of each of them;

1.3.4 any reference to a statutory provision includes a reference to all amendments and modifications to that provision and any subsequent legislation made from time to time under it (and in each case whether before or after the entering into of this Agreement) subject to potential adjustments in payment under the Change Provisions;

1.3.5 references to the singular include the plural and vice versa and references to any gender include the other genders;

1.3.6 references to a “**person**” include any individual, firm, unincorporated association, public organisation or body corporate including any Governmental Authority;

- 1.3.7 any reference to a public organisation shall be deemed to include a reference to any successor to that public organisation or any organisation or entity on which the functions or responsibilities of that public organisation have been conferred or imposed, including without limitation under or pursuant to the Scotland Bill 1998 following its enactment;
- 1.3.8 headings and indices shall be ignored for the purpose of construing this Agreement;
- 1.3.9 any references to an agreement or other document includes (subject to all relevant approvals) a reference to that agreement or document as amended supplemented, substituted, novated or assigned;
- 1.3.10 the words **“herein”**, **“hereto”** and **“hereunder”** refer to this Agreement as a whole and not to the particular clause, schedule, part, section, paragraph or annex in which that word may be used;
- 1.3.11 reference to a **“subsidiary”** or **“holding company”** shall be construed according to Section 736 of the Companies Act 1985 (as amended) and to a **“subsidiary undertaking”** shall be construed according to Section 258 of that Act (as amended).
- 1.4 The Schedule forms part of and shall be construed as one with this Agreement.
- 1.5 The language of this Agreement is English. All correspondence, drawings, design data, test reports, certificates, specifications and information shall be supplied by the supplying party entirely in English.
- 1.6 In any case where Serco is to use reasonable endeavours to procure or ensure compliance by any other party, it shall ensure that that person contracts to so comply and shall take all reasonable steps available to it to enforce such contractual provisions.
- 1.7 References to persons for whom Summit is responsible in terms of this Agreement shall be construed in accordance with Clause 11.1, references to persons for whom Serco is responsible in terms of this Agreement shall be construed in accordance with Clause 10.14 and references to persons for whom the Trust is responsible in terms of the DBFO Contracts

shall be construed in accordance with Clause 8.2 of the Project Agreement. References in this Agreement to any person for whom Summit or the Trust, or either of them, is responsible shall not include Serco or any person for whom Serco is responsible in terms of this Agreement.

1.8 If there is any conflict between the terms of this Agreement and the provisions of any of the DBFO Contracts referred to in or incorporated by reference into this Agreement, the terms of this Agreement shall prevail.

1.9 If any provision of any DBFO Contract delegated to Serco under this Agreement provides for Summit to use reasonable endeavours to procure or ensure compliance with an obligation by Approved Service Providers and/or Permitted Sub-contractors, Serco shall comply with that obligation in terms of this Agreement.

2. CONDITION PRECEDENT AND MOBILISATION SERVICES

2.1 This Agreement, with the exception of this Clause 2 and Clause 14, shall not come into effect until the Project Agreement has become unconditional in accordance with its terms (save for any provision of the Project Agreement requiring the terms of this Agreement to have become unconditional).

2.2 Immediately upon execution of this Agreement:-

2.2.1 Serco shall deliver to Summit:-

- (a) the Services Direct Agreement executed by Serco;
- (b) the Guarantee executed by the Guarantor;
- (c) a copy, certified as a true copy by its Company Secretary, of the minutes of a meeting of its board of directors in the Agreed Form authorising Serco to execute and deliver and perform its obligations under this Agreement and the Services Direct Agreement; and
- (d) a copy, certified as a true copy by the Company Secretary of the Guarantor, of the minutes of a meeting of the board of directors of the Guarantor in the

Agreed Form authorising the Guarantor to execute and deliver and perform its obligations under the Guarantee;

- 2.2.2 Summit shall deliver to Serco a copy, certified as a true copy by its Company Secretary, of the minutes of a meeting of its board of directors in the Agreed Form authorising Summit to execute and deliver and perform its obligations under this Agreement.
- 2.3 If the Project Agreement ceases to have effect in terms of Clause 3.2 thereof, then this Agreement shall thereupon immediately cease to have effect from that date and, notwithstanding any other provisions of this Agreement, neither party shall have any liability to the other under this Agreement save for any breach of this Clause 2 and/or Clause 14.
- 2A 2A.1 The Mobilisation Period will commence at the start of the twenty-fourth month after Financial Close and continue until the Services Commencement Date;
- 2A.2 During the Mobilisation Period, Serco shall perform the Mobilisation Services to Summit's reasonable satisfaction;
- 2A.3 In consideration of the performance by Serco of the Mobilisation Services, Summit shall pay to Serco the fixed amount of £739,746 Indexed from 1 April 1996 by monthly instalments (subject to delivery by Serco to Summit of a VAT invoice) of £54,000 (Indexed from 1 April 1996) in each of the first nine months and £84,582 (Indexed from 1 April 1996) in each of the following three months from the start of the Mobilisation Period, payment to be made within 15 Business Days of the end of the month to which the relevant invoice relates;
- 2A.4 The final date for payment of any sum which becomes due pursuant to this Clause 2A shall be the date on which Serco is entitled to terminate this Agreement as a result of an event referred to in Clause 18.5.
- 2A.5 Within five days after the date upon which payment becomes due pursuant to this Clause 2A (or would have become due if Serco had carried out its obligations under this Agreement and no set-off or abatement was permitted by reference to any sum claimed to be due under one or more other contracts) (but without prejudice to any

other provision of this Agreement) Summit shall provide a notice specifying the amount if any of the payment made or proposed to be made and the basis upon which such amount has been calculated.

3. **TRANSITION SERVICES**

3.1 During the Transition Period, Serco shall provide, or (subject as provided in this Agreement) procure the provision of, the Transition Services and shall observe, perform and comply with the obligations of Summit under Clause 17 (other than Clause 17.3.6) of the Project Agreement in each case at such time or times and in such manner as to ensure compliance by Summit with the terms of Clause 17 (other than Clause 17.3.6) of the Project Agreement but without prejudice to Clause 11.2.6.

3.2 In consideration of the provision and management by Serco of the Transition Services, Summit shall in accordance with and subject to the following provisions of this Clause 3 make payment to Serco of:-

3.2.1 the Transition Payment less the aggregate amount of (i) any of the Transition Costs which have been incurred by Summit or its sub-contractors (other than Serco) and (ii) a mark-up of ½% of the Transition Costs; and

3.2.2 all costs incurred by Serco which are reimbursable by the Trust pursuant to Clause 17.3.4 of the Project Agreement.

Within ten Business Days of the end of each calendar month during the Transition Period (or within ten Business Days of expiry of the Transition Period, as the case may be) Serco shall issue to Summit an invoice (being a VAT invoice, if applicable) for the amount due under this Clause 3.2 in respect of the immediately preceding calendar month together with such supporting documents and evidence as Summit may reasonably require. Summit will pay such invoice within ten Business Days thereafter including any VAT (if applicable) due thereon.

3.3 Summit shall notify Serco of all costs incurred or likely to be incurred by or on behalf of Summit or its sub-contractors (other than Serco) in the provision of the Transition Services and any likely changes in those costs in sufficient time to enable Serco to compile the

- forecasts required by Clauses 17.3.3 and 17.3.5 of the Project Agreement and Serco shall include those costs in all forecasts and amendments to such forecasts prepared by it in compliance with those Clauses.
- 3.4 Within three Business Days of the end of each calendar month during the Transition Period (or within three Business Days of expiry of the Transition Period, as the case may be) Serco shall provide such details of the Transition Costs incurred by Serco (for the avoidance of doubt, excluding any profit) as shall enable Summit to supply an invoice to the Trust in accordance with Clause 17.3.6 of the Project Agreement. Summit shall thereafter supply an invoice to the Trust in respect of the Transition Payment which shall include the Transition Costs so notified by Serco and the management fee referred to in Clause 17.3.1(b) of the Project Agreement. Serco shall provide to Summit (or, at Summit's direction, the Trust) all supporting information and evidence of the Transition Costs incurred by Serco as the Trust may require from Summit under Clauses 17.3.1 and/or 17.3.6 of the Project Agreement.
- 3.5 Notwithstanding the foregoing provisions of this Clause 3, Serco shall not be entitled to receive in respect of the amounts payable to it pursuant to Clause 3.2 above any amounts greater than those which Summit is entitled to recover from the Trust and which are referable to the payments due to Serco pursuant to this Clause 3 in accordance with Clauses 17.3.4 and 17.3.6 of the Project Agreement (as agreed or determined thereunder) (but without prejudice to Serco's right to pursue claims for any reduction or shortfall directly against the Trust pursuant to Clause 22.6 as applicable).
- 3.6 The final date for payment of any sum which becomes due pursuant to this Clause 3 shall be the date on which Serco is entitled to terminate this Agreement as a result of an event referred to in Clause 18.5.
- 3.7 Within five days after the date upon which payment becomes due pursuant to this Clause 3 (or would have become due if Serco had carried out its obligations under this Agreement and no set-off or abatement was permitted by reference to any sum claimed to be due under one or more other contracts) (but without prejudice to any other provision of this Agreement) Summit shall provide a notice specifying the amount if any of the payment made or proposed to be made and the basis upon which such amount has been calculated.

- 3.8 Nothing in this Clause 3, and no breach by Serco of its obligations under this Clause 3, shall affect Serco's rights or obligations in relation to the provision of the Services under this Agreement. In particular, but without limitation, no breach by Serco of its obligations under this Clause 3 shall give rise to or be counted towards any right to terminate this Agreement.
- 3.9 Summit shall advise Serco of the date on which Summit anticipates that the Transition Commencement Date will occur by not less than three months written notice to Serco and shall thereafter keep Serco informed as to any anticipated change to such date. If the Transition Commencement Date does not occur within 21 days after the date first so notified (other than as a result of any act or omission of Serco or persons for whom Serco is responsible under this Agreement) then Summit shall reimburse Serco all reasonable and proper costs incurred by Serco as a direct result of such delay up to a maximum amount of £10,000 for each whole week of delay after that 21 day period and up to a maximum aggregate amount of £250,000, provided that Serco shall use all reasonable endeavours to mitigate such costs.
- 3.10 Serco shall indemnify Summit on demand from and against all claims, costs, losses, damages, liabilities and expenses suffered or incurred by Summit as a result of or in connection with any breach of Clauses 3.1, 3.3 and 3.4 by Serco or any person for whom Serco is responsible in terms of this Agreement provided that Serco's maximum aggregate liability under this Clause 3.10 (save in respect of any liability or liabilities arising as a result of or in connection with any failure to observe, perform and/or comply with the obligations of Summit under Clauses 17.2.1 and 17.5.2 of the Project Agreement which liability shall not be limited by virtue of this Clause 3.10) shall not exceed ^{16/17} of the aggregate management fee paid to Summit under Clause 17.3.1(b) of the Project Agreement.
- 3.11
- 3.11.1 Summit shall procure that the Contractor shall provide training in the operation and maintenance of mechanical and electrical elements of plant and Group 1 equipment for appropriate Serco staff in accordance with the proposal to be developed in accordance with Clause 3.11.2 below.
- 3.11.2 During the Transition Period Summit shall supply Serco with a draft proposal for training Serco Personnel no later than 6 months prior to the Contractual Practical Completion Date and (without prejudice to Clause 25) the parties shall, acting

reasonably, endeavour to reach agreement on such proposals no later than 1 month after supply of the same to Serco. If the parties cannot reach agreement within that period either party may refer any dispute to the Disputes Resolution Procedure.

4. COMMISSIONING PERIOD

4.1 Serco shall during the Commissioning Period at the Hospital:-

4.1.1 perform its obligations specified in Section A of Part 1 of the Schedule in accordance with Applicable Laws and Good Industry Practice and the reasonable instructions of Summit; and

4.1.2 provide all assistance to Summit and its sub-contractors in relation to their commissioning activities at the Hospital during the Commissioning Period as Summit shall reasonably request.

4.2 Serco shall indemnify Summit on demand against any claims, losses, damages expenses or other liabilities suffered or incurred by Summit as a result of failure by Serco to comply with its obligations under Clause 4.1 but without prejudice to Clause 22.2 below.

4.3 In consideration of performance by Serco of its obligations under Clause 4.1 and Section A of Part 1 of the Schedule, Summit shall make payment to Serco in accordance with Section B of Part 1 of the Schedule.

5. SERVICES

5.1 Subject to Clause 2, Summit, relying on the representations of Serco in Clause 12.1, appoints Serco exclusively (subject as provided in the Change Provisions and as otherwise expressly provided in this Agreement) to provide, or procure the provision of, the Services throughout the Initial Term (but subject to Clauses 6.2, 18 and 21.5 (early termination)) on the terms and subject to the conditions set out in this Agreement and Serco accepts such appointment.

5.2 During the Initial Term, Serco shall provide, or (subject as provided in this Agreement) procure the provision of, the Services and shall observe, perform and comply with the obligations of Summit under the Services Agreement (including, for the avoidance of doubt, the General Provisions, the Output Specification and the Method Statements) in each case at such time or times and in such manner as to ensure compliance by Summit with the terms of

the Services Agreement unless expressly otherwise provided in Clause 8 or Clause 9 of this Agreement.

- 5.3 No guarantee is given by Summit in respect of the levels of demand for the Services which the Trust will require during the Initial Term or any period during the Initial Term.
- 5.4 Serco confirms that it has been involved in the negotiation of the DBFO Contracts (for the avoidance of doubt including the Output Specification and the Method Statements), in so far as they relate to the Services, and has copies of and has had the opportunity to fully consider the terms of those contracts and has taken those terms into account in entering into this Agreement. Serco acknowledges that it will not have any claim against Summit arising from any misunderstanding or inaccurate interpretation by Serco of any provision of any of the DBFO Contracts.
- 5.5 Serco shall not knowingly act or omit to act in such a way as to cause Summit or any of its sub-contractors to be in breach of any obligations on the part of Summit or any of its sub-contractors under the DBFO Contracts not delegated to Serco under this Agreement except to the extent that such obligations conflict or interfere with Serco's obligations under this Agreement.
- 5.6 Each of Serco and Summit undertake to co-operate in good faith with the other in order to facilitate the performance of this Agreement and, in particular, each party will have due regard to any reasonable and proper representation made by the other on any matter which may affect the respective rights, obligations and liabilities of the parties under this Agreement or under any other agreement or instrument at any time entered into by either of them in connection with the Project.
- 5.7 If either Serco or Summit becomes aware of any conflict or inconsistency between or within any of the documents forming part of or incorporated by reference into this Agreement or any requirement thereof or any instruction properly issued thereunder, that party shall inform the other accordingly and the parties shall meet, discuss in good faith and use reasonable endeavours to agree the manner in which such conflict or inconsistency shall be resolved but failing such agreement, either party may refer the matter in dispute to be resolved under the Dispute Resolution Procedure.

6. DURATION

6.1 This Agreement shall, subject to Clause 2, commence on the date of execution of this Agreement and shall subsist until the last day of the Initial Term, but subject to the lawful exercise of any termination rights set out in this Agreement and to Clause 6.2.

6.2 Subject to the provisions of the Services Direct Agreement, this Agreement shall (without prejudice to the rights of either party in respect of any antecedent breach or in respect of any right or obligation which is expressed to survive the termination of this Agreement) unless previously terminated in accordance with its terms terminate and cease to have effect automatically on the date of termination of the Project Agreement.

7. PAYMENT

In consideration of the performance by Serco of its obligations under this Agreement, Summit shall make payments to Serco in accordance with Part 2 of the Schedule.

8. EXCLUDED OBLIGATIONS

Unless otherwise agreed in writing by Summit and Serco from time to time, Serco shall not be obliged to perform any of the following obligations of Summit under the Services Agreement:-

8.1 any obligations of Summit to the extent they relate to the Equipment Services;

8.2 the obligations of Summit under Clause 4.2 of and Part 2 of the Schedule to the Services Agreement (utilities) and paragraphs 2 and 5 (save, in the case of paragraph 5, in respect of maintenance obligations) of the Appendix to Part 8 of the Output Specification (Utilities Contingency Provision) subject as provided in Clause 10.2;

8.3 the obligations of Summit under Clause 5.4 of the Services Agreement (consultation) subject as provided in Clause 10.15;

8.4 the obligations of Summit under Provision 3.2 (patient confidentiality) subject as provided in Clause 14.6;

8.5 the obligations of Summit under Provisions 7.1 and 7.2 (agreement management) subject as provided in Clause 10.15;

- 8.6 the obligations of Summit under Provision 8.1 (prompt payment) subject as provided in Clause 10.9.5;
- 8.7 the obligations of Summit under Provision 10 (reputation of the Trust) subject as provided in Clause 10.8;
- 8.8 the obligations of Summit under Provision 11 (Approved Service Providers);
- 8.9 the obligations of Summit under Provision 12 (market testing) subject as provided in Clause 10.6;
- 8.10 the obligations of Summit under Provision 15 and Part B of the Schedule (Penalty Points);
- 8.11 the obligations of Summit under Provisions 16.2.5 to 16.2.8;
- 8.12 the obligations of Summit under Provision 18 (status of Summit) subject as provided in Clause 29.11;
- 8.13 the obligations of Summit under Provision 20 (Tax Deduction Scheme);
- 8.14 the obligations of Summit under Provision 22.1 (security) subject as provided in Clause 17.4;
- 8.15 any obligations of Summit under Provision 4 and Part A of the Schedule to the General Provisions (payment mechanism) subject as provided in Part 2 of the Schedule;
- 8.16 the obligations of Summit under Parts D and E of the Schedule to the General Provisions (Change Provisions) subject as provided in Clause 10.5 and Part G of the Schedule to the General Provisions (Reinstatement);
- 8.17 the obligation of Summit to provide as part of the Summit Items, the patient meal trolleys and the central dishwasher and ward pantry dishwashers pursuant to Part 1 of

the Schedule to the Services Agreement (Trust Related Materials) and the obligations of Summit under paragraph 1.7 of Part 1 of the Schedule to the Services Agreement; and

8.18 the obligations of Summit in relation to the IT Network, IT Software and IT Repairs under Part 8 of the Output Specification.

9. ESTATES MAINTENANCE

The provisions of Part 6 of the Schedule shall apply with regard to the parties' respective responsibilities for the Estates Maintenance Service and the parties shall comply with their respective obligations under Part 6 of the Schedule.

10. ADDITIONAL SERCO OBLIGATIONS

10.1 Latent Defects

10.1.1 Serco shall promptly upon becoming aware of any defect or any circumstance likely to give rise to any defect in the Buildings during the Commissioning Period and the Initial Term notify Summit and give Summit details of such defect or circumstances of which Serco is or becomes aware.

10.1.2 In performing the Services, Serco shall use all reasonable endeavours consistent with Serco's obligations under this Agreement to ensure that it does not thereby prejudice any rights which Summit may have against the Contractor under the Building Contract. Serco acknowledges that it has been provided with a copy of the Building Contract.

10.1.3 Serco acknowledges that during the Commissioning Period and from the Services Commencement Date the Contractor will require access to the Hospital and/or the Site for the purposes of remedying such snagging items as may be set out in the list attached to the Certificate of Contractual Practical Completion.

10.2 Utilities

10.2.1 Serco shall, and shall use all reasonable endeavours to procure that its sub-contractors shall, carry out its activities at the Hospital in an energy and water efficient manner (but, notwithstanding the foregoing, shall not be required to reimburse Summit for any amounts Summit is obliged to pay to the Trust pursuant to

paragraph 3.2 of Part 2 of the Schedule to the Services Agreement) and shall provide training to its staff in this regard and shall co-operate in the development and implementation of an energy (and, if required by the Trust, water) efficiency programme to be prepared by Summit and the Trust in terms of paragraph 3 of Part 2 of the Schedule to the Services Agreement and shall provide to Summit or, at Summit's direction, the Trust such information and advice as the Trust may reasonably request pursuant to or as is otherwise required by paragraph 1.2 of Part 2 of the Schedule to the Services Agreement.

10.2.2 Serco shall pay for its own line rental and call charges in respect of telephones used by it in its FM Manager's office at the Hospital.

10.2.3 Serco shall perform Summit's obligations under paragraph 2 of Part 2 of the Schedule to the Services Agreement (Interruptible Gas Supply) at such time or times and in such manner as to ensure compliance by Summit with that provision provided that the liability of Serco for failing so to do shall not exceed 75% of that of Summit to the Trust in respect of each failure and provided that Summit shall not without the consent of Serco agree a period shorter than 4 hours for requiring the interruption of the gas supply.

10.2.4 Serco shall perform Summit's obligations under paragraph 4 of Part 2 of the Schedule to the Services Agreement (Monitoring of Usage) at such time or times and in such manner as to ensure compliance by Summit with such provisions.

10.2.5 Serco shall as soon as reasonably practicable advise Summit in the event that the Reserve Fuel begins to be used.

10.3 **Insurance**

Serco shall procure that insurance is effected and maintained in accordance with the requirements of Section B of Part 3 of the Schedule.

10.4 Default

Serco shall promptly inform Summit in writing of:-

10.4.1 any breach or default under this Agreement or any of its contracts with Permitted Sub-Contractors of which it is aware; and

10.4.2 any event described in Clause 18.1 (events of default);

giving reasonable details of the circumstances and the steps being taken to remedy or mitigate their effect.

10.5 Change

Serco shall:-

10.5.1 make available to Summit or, at the direction of Summit, the Trust, such information, documents, assistance and co-operation at such time or times and in such manner (i) as Summit may request to ensure compliance by Summit with the provisions of the Change Provisions in so far as they relate to the Services and Serco's obligations under this Agreement and (ii) as otherwise requested by Summit in connection with those provisions;

10.5.2 implement and/or comply with any Change in accordance with the terms thereof in so far as relative to the Services and its obligations under this Agreement subject, where Summit is entitled to or subject to an adjustment in the payments to it under the DBFO Contracts, to an adjustment in the payments to be made under this Agreement as provided in Part 2 of the Schedule to this Agreement; and

10.5.3 procure similar co-operation, assistance, information, documents and compliance of or from its Permitted Sub-contractors.

10.6 Market Testing

Without prejudice to the provisions of Clause 16, Serco shall, at no additional cost to Serco unless Summit agrees to pay such costs:-

- 10.6.1 co-operate with Summit and the Trust in the operation of the market testing procedure in Provision 12 and provide such information and documents to Summit, the Trust and potential tenderers as Summit may request to facilitate the market testing procedure with a view to achieving a smooth handover from Serco to any incoming service provider (but excluding the provision of any Proprietary Information of Serco);
- 10.6.2 sell to the incoming service provider, with effect from the relevant Market Testing Date, all Related Materials (save for any Transferring Related Materials which shall transfer at nil cost), subject to such Related Materials being in an appropriate and satisfactory condition and not excessive in quantity, redundant or obsolete and reasonably suitable for their purpose at a price to be agreed or, failing agreement, at their market value and on the basis that Serco shall warrant to the incoming service provider that it has good title to such Related Materials;
- 10.6.3 if the market testing procedure fails to produce a new service provider as envisaged in Provision 12.7.1, Serco shall assist in effecting a smooth handover of the Services from it to Summit and/or the Trust, as the case may be.

10.7 Summit Approval

If any provision of any DBFO Contract delegated to Serco under this Agreement requires in respect of any matter the consent or approval or agreement of the Trust or, but for the delegation to Serco, of Summit in respect of that matter, such matter shall also require the consent or approval or agreement of Summit, not to be unreasonably withheld or delayed provided that, in the case of matters requiring the consent or approval or agreement of the Trust, Summit shall be deemed to be acting reasonably in withholding or refusing such consent or approval or agreement if such consent or approval or agreement on the part of the Trust has been withheld or refused.

10.8 Reputation of the Trust

Serco shall not, and shall use all reasonable endeavours to procure that no Personnel shall, knowingly do or omit to do anything in relation to this Agreement or otherwise which may bring the standing or reputation of the Trust or the Hospital into disrepute or attract adverse publicity to the Trust or the Hospital.

10.9 Permitted Sub-contractors

- 10.9.1 Serco may only subcontract the provision of all or any part of the Services in accordance with, and shall comply with, Provision 13 and with the prior written consent of Summit and on such terms and subject to such reasonable conditions as may be specified by Summit in any such consent.
- 10.9.2 Serco shall ensure that no Permitted Sub-contractor to whom the employment of any Employees is to transfer (whether by operation of the Directive, the Employment Regulations or otherwise) shall commence the provision of Services until it has entered into a Services Direct Agreement with the Trust save in terms of paragraph 2(d) of the Trust Objection Procedure when such direct agreement shall be entered into as soon as reasonably practicable (but in any event within two weeks of completion of such procedure).
- 10.9.3 Notwithstanding the appointment of any Permitted Sub-contractor, Serco shall remain liable for the performance of its obligations under this Agreement.
- 10.9.4 Serco shall not amend, terminate or waive any default under any contract with any Permitted Sub-contractor without the prior written consent of Summit, such consent not to be unreasonably withheld or delayed.
- 10.9.5 Serco shall include in its contracts with any Permitted Sub-contractor a written undertaking to pay for the relevant goods and/or services within 30 days, or such longer period (i) as may result in commercial benefit to the Project or (ii) as the Trust may agree, after receipt of the supplier's invoice and (provided that such goods and/or services have been supplied in accordance with the relevant agreement and such liability to pay has arisen and there is no dispute in good faith and in accordance with the conditions of the relevant contract for resolution of disputes regarding the amount due) shall comply with the undertaking to pay.
- 10.9.6 Serco shall include in any contract with a Permitted Sub-contractor a provision that such contract will terminate immediately upon the termination (for any reason) of this Agreement and no compensation payable upon any such termination (in aggregate under or in respect of all such subcontracts) shall be greater than that

payable in relation to the termination of such sub-contract on termination of this Agreement on the principles set out in Clause 20 and Part 5 of the Schedule.

10.9.7 Serco shall provide to Summit details (excluding prices) of all contracts with Permitted Sub-contractors and of all amendments to such contracts within five Business Days of the date such contract or amendment thereto is entered into or made.

10.10 Licences

10.10.1 Serco shall observe, perform and comply with the obligations of Summit under Clauses 10.6, 10.8 and 10.9 of the Project Agreement to the extent they relate to the Services and Serco's obligations hereunder at such time or times and in such manner as to ensure compliance by Summit with the provisions of those Clauses. Serco shall exhibit to Summit on request any permits, licences, consents or authorisations the responsibility of Serco under this Clause.

10.10.2 On expiry or termination of this Agreement, to the extent any such permits, licences, consents or authorisations the responsibility of Serco under Clause 10.10.1 are in Serco's name, Serco shall, at Summit's request, use all reasonable endeavours to procure the transfer of any such permit, licence, consent or authorisation to Summit or its nominee (and, in taking out any such permit, licence, consent or authorisation, shall (in so far as it is able) procure this is transferable to Summit or its nominee at no cost) and/or shall sign all documents and provide all assistance as Summit may reasonably require (at no cost to Serco unless Summit agrees to pay such costs) in relation to that transfer or to secure the issue of a new permit, licence, consent or authorisation to Summit or its nominee.

10.11 Applicable Laws etc

Without prejudice to Serco's obligation to provide the Services to ensure compliance by Summit with its obligations under the Services Agreement, Serco shall perform its obligations under this Agreement in accordance with all Applicable Laws, Industry Standards and Good Industry Practice.

10.12 Personnel

Serco shall not, and shall ensure that none of the persons for whom it is responsible under this Agreement shall, interfere with Summit or the Trust or persons for whom they are responsible under this Agreement or the DBFO Contracts, as the case may be, in performing their obligations under the DBFO Contracts.

10.13 Communications to the Trust

Any notices or communications to be made by Serco or its Permitted Sub-contractors to the Trust in performance of Serco's obligations under this Agreement shall be sent to the Trust directly with a copy sent to Summit at the same time, unless Summit requires in relation to any specific notices or communications or any category of notices or communications that these should first be approved by Summit in which case Serco shall not send any such notice or communication to the Trust unless it shall first have been approved by Summit and shall obtain such approval in sufficient time to ensure compliance with its obligations under this Agreement. Summit undertakes not to delay any consideration of any notice or communication submitted to it for approval under this Clause provided always Serco has given it a reasonable time in which to do so consistent with the obligations of Serco under this Agreement.

10.14 Persons for whom Serco is responsible

Serco acknowledges that, as between Summit and Serco, it will be responsible pursuant to this Agreement for the acts or omissions of its employees, agents, lessees, sub-lessees, its Permitted Sub-contractors and its sub-contractors to the same extent to which Serco would be responsible under the terms of this Agreement if they were its own acts or omissions.

10.15 Serco Contract Officer

Serco shall appoint at least two months prior to the Transition Commencement Date (and thereafter throughout the duration of this Agreement ensure that at all times there is appointed) a Serco Contract Officer to be Serco's representative and to supervise the performance by Serco of the Services and Serco's other obligations under this Agreement and his identity shall be notified to Summit by notice in writing from time to time together with details of his duties, functions and authority. Serco shall procure that the Serco Contract Officer consults the Summit Contract Officer and the Trust Contract Officer on a regular basis and as often as is necessary with a view to ensuring the efficient provision of the Services in accordance with this Agreement.

10.16 Trust Objection Procedure

Where any provision of the DBFO Contracts delegated to Serco under this Agreement requires any submission to the Trust Objection Procedure, Serco shall in making such submission comply with the requirements of the Trust Objection Procedure in relation to that submission including compliance with Trust requests for information under that procedure with a view to ensuring compliance by Summit of its obligations and requirements under that procedure.

10.17 Contamination

Serco shall be responsible for appropriate treatment or removal as described in Clause 26.10.3 of the Project Agreement of and costs relating to Contamination arising due to the act, default or omission of Serco or any person for whom Serco is responsible in terms of this Agreement and shall indemnify Summit in respect thereof.

10.18 Remedy by Trust

Without prejudice to Serco's other obligations under this Agreement, Serco shall remedy any failure to perform notified by the Trust in accordance with Provision 16.2 within the timescale required by or in terms of Provision 16.2, failing which Summit shall be entitled, but not obliged, to effect such remedy.

10.19 Services Monitoring Procedures

Summit shall be entitled to the same rights to audit the carrying out of the Services Monitoring Procedures as those to which the Trust is entitled in terms of the Services Monitoring Procedures provided that if the Trust has served a warning notice under Provision 15, Summit shall be entitled to such additional rights in relation thereto as it shall require in relation to the Services the subject of the warning notice.

10.20 Auto Attendant Facility

Serco shall purchase, install, maintain, replace and use in the provisions of the Switchboard Services an auto attendant facility approved by Summit, such approval not to be unreasonably withheld, and may remove the auto attendant facility on expiry or termination of this Agreement, provided it makes good any damage caused by such removal.

10.21 Manuals etc

Subject to Summit procuring the supply of such items or documents from the Contractor in accordance with Clause 11.6 below, Serco shall take or maintain custody of log books, all manuals, test certificates, drawings, plans, building regulations and other similar items and documents from the Contractor at Contractual Practical Completion Date for use in the Estates Maintenance Service, keep these in a secure place and permit access to them by Summit and its nominees at all reasonable times, update these in conjunction with performance of the Estates Maintenance Service and deliver them up to Summit or as it may direct on termination or expiry of this Agreement. For the avoidance of doubt, all documents and items shall remain at all times the property of Summit.

10.22 Serco shall observe perform and comply with the obligations of Summit in Part 11 of the Schedule to the Project Agreement to the extent that such relates to the Services and Serco's obligations hereunder at such time or times and in such manner as to ensure compliance by Summit with the provisions thereof.

11. SUMMIT'S OBLIGATIONS

11.1 Persons for whom Summit is responsible

Summit acknowledges that, as between Serco and Summit, it will be responsible pursuant to this Agreement for the acts or omissions of its employees, agents, lessees, sub-lessees, its Approved Service Providers, its Permitted Sub-contractors and its sub-contractors (other than, in each case, Serco or persons for whom Serco is responsible in terms of Clause 10.14 and the Trust, or persons for whom the Trust is responsible in terms of the DBFO Contracts) to the same extent to which Summit would be responsible under the terms of this Agreement if they were its own acts or omissions.

11.2 General Obligations

Summit shall:-

11.2.1 effect and maintain the insurance specified in and otherwise comply with its obligations under Section A of Part 3 of the Schedule;

11.2.2 promptly supply or procure the supply to Serco of such information as Serco shall reasonably request to enable it to perform its obligations under this Agreement at such time or times as Serco may reasonably request including information made

available to Summit by the Trust in relation to the Services under the DBFO Contracts, such information being limited to information which Summit is entitled to receive and does receive (using reasonable endeavours to obtain such information) from any third party or is otherwise within the possession or control of Summit;

- 11.2.3 not amend or agree the construction of any term of the DBFO Contracts (including, for the avoidance of doubt, the Output Specification, the Method Statements and relevant provisions of the Master Definitions Schedule referred to therein used in the construction or interpretation thereof) performance of which is delegated to Serco under this Agreement or which otherwise directly relates to performance by Serco of its obligations under this Agreement without the prior written consent of Serco, such consent not to be unreasonably withheld or delayed;
- 11.2.4 not release or waive any obligations of the Trust under the DBFO Contracts where to do so would have a material adverse effect on Serco's performance of its obligations or exercise of its rights under this Agreement without the prior written consent of Serco, such consent not to be unreasonably withheld or delayed;
- 11.2.5 not amend the Building Contract nor release or waive any of the obligations of the Contractor under the Building Contract where to do so would have a material adverse effect on Serco's performance of its obligations or exercise of its rights under this Agreement without the prior written consent of Serco, such consent not to be unreasonably withheld or delayed;
- 11.2.6 not knowingly act or omit to act in such a way as to cause Serco or any of its sub-contractors to be in breach of any obligations on the part of Serco or any of its sub-contractors in relation to the performance of the Services except to the extent that such obligations conflict or interfere with Summit's obligations under the DBFO Contracts.

11.3 **Summit Contract Officer**

The Summit Contract Officer shall be the representative of Summit in respect of all matters arising under or connected with this Agreement and his identity shall be notified in writing to Serco from time to time together with details of his duties, functions and authority.

11.4 Spare Parts

Summit shall make available to Serco free of charge for use in the Estates Maintenance Service any spare parts for the Hospital made available, at no extra cost, to Summit by the Contractor.

11.5 Method Statements

Summit shall, at Serco's request and expense, implement the procedure set out in Clause 8 of the Services Agreement subject to the consent of Summit (not to be unreasonably withheld) to any changes to the Method Statements for the Estates Maintenance Service and any other changes which, in the reasonable opinion of Summit would adversely impact on Summit.

11.6 Manuals

Summit shall procure the supply to Serco:

11.6.1 by 4 months prior to the Contractual Practical Completion Date, preliminary draft manufacturers' technical data; and

11.6.2 by 8 weeks prior to the Contractual Practical Completion Date the items and documents referred to and on the terms referred to in paragraph 7 of Part 5 of the Schedule to the Development Agreement;

11.6.3 by 8 weeks prior to the Services Commencement Date the final handover documents referred to and on the terms referred to in paragraph 7 of Part 5 of the Schedule to the Development Agreement;

in each case so far as these are necessary to enable Serco properly to provide the Estates Maintenance Service and the Interim Estates Services.

12. WARRANTIES AND DESIGN ASSUMPTIONS

12.1 Serco represents and warrants to Summit, at the date of this Agreement and on the basis that such warranties will be deemed to be repeated at Financial Close, that:-

12.1.1 Serco:

12.1.1.1 is validly incorporated; and

- 12.1.1.2 has the power and capacity to execute this Agreement and perform its obligations and exercise its rights under this Agreement;
- 12.1.2 it will not by entering into or performing its obligations or exercising its rights under this Agreement be in breach of or cause to be breached any restriction (whether arising in contract or otherwise) binding on Serco or any of its assets or undertaking which would adversely affect its performance of this Agreement or permit termination of this Agreement;
- 12.1.3 it has all necessary powers to own its assets and carry on its business as now conducted;
- 12.1.4 this Agreement constitutes a binding obligation on Serco and is enforceable in accordance with its terms.
- 12.2 Without prejudice to Clause 22.6, Serco acknowledges that, in entering into this Agreement, it is not relying upon any documentation supplied by Summit whether or not originally derived from the Trust and Summit acknowledges that in entering into this Agreement it is not relying upon any documentation supplied by Serco, save in each case as otherwise expressly provided in this Agreement.
- 12.3 Serco acknowledges that, provided that the Hospital is constructed in accordance with the design assumptions set out in Part 7 of the Schedule ("the Design Assumptions") and in accordance with the Development Agreement the design of the Hospital will satisfy its requirements to enable it to perform the Services in accordance with the terms of this Agreement.
- 12.4 Summit shall copy to Serco documents, plans and/or drawings produced as part of the detailed design development process subsequent to Financial Close and (in consideration of payment by Summit of £40,000 which amount shall (subject to the delivery by Serco to Summit of a VAT invoice in respect thereof) be payable within 15 days of Financial Close) Serco shall notify Summit in writing promptly if it believes the detailed design would or is likely to conflict with the Design Assumptions and otherwise provide comments and suggestions but without prejudice to Clause 12.5. The final date for payment of the sum

referred to in this Clause 12.4 shall be the date on which Serco is entitled to terminate this Agreement as a result of an event referred to in Clause 18.5. Within five days after the date upon which payment becomes due pursuant to this Clause 12.4 (or would have become due if Serco had carried out its obligations under this Agreement and no set-off or abatement was permitted by reference to any sum claimed to be due under one or more other contracts) (but without prejudice to any other provision of this Agreement) Summit shall provide a notice specifying the amount if any of the payment made or proposed to be made and the basis upon which such amount has been calculated.

12.5 Subject to the provisions of Clause 12.6 below, if the Hospital fails to comply in any material respect with the Design Assumptions at the Contractual Practical Completion Date, otherwise than as agreed in writing by Summit with Serco, such that this materially adversely affects the performance by Serco of the Services then, subject to Clause 22.3, Summit shall indemnify Serco against the additional costs properly, necessarily and reasonably incurred in the performance of the Services as a result of such non-compliance provided that Serco shall use all reasonable endeavours to mitigate such costs.

12.6 Serco shall within five days of request by Summit inspect the Hospital to verify compliance with the Design Assumptions and shall promptly advise Summit following such inspection and in any event within five days thereof of any non-compliance in this respect and, for this purpose, Summit shall permit Serco reasonable access to the Hospital a reasonable period prior to the Contractual Practical Completion Date. Summit shall have no liability to Serco pursuant to Clause 12.5 and Serco shall be deemed to be satisfied that the Hospital complies with the Design Assumptions to the extent that Serco omits to advise Summit of any non-compliance with the Design Assumptions in accordance with Clause 12.5 to the extent such non-compliance was readily apparent to Serco upon making such inspection or which would have been readily apparent to an experienced provider of services similar to the Services having taken all reasonable steps in making such inspection for such purposes. In the event that Serco does so advise Summit within the required period Serco and Summit shall (without prejudice to Clause 25) endeavour to agree what if any effect the matter or matters advised will have on the performance by Serco of the Services, and in the event of a failure to agree within two days of Serco having advised Summit as aforesaid the matter shall be resolved under the Dispute Resolution Procedure.

12.7 The provisions of Clause 12.5 represent the sole and exclusive remedy of Serco, and Summit shall have no further liability of whatsoever nature to Serco, in respect of any failure of the Hospital to comply with the Design Assumptions for any purposes connected with performance of the Services or Serco's obligations under this Agreement.

13. **ORGANISATION, CO-OPERATION AND INFORMATION**

13.1 Serco shall make available to Summit or, at the direction of Summit, the Trust or its nominees such co-operation, assistance, attendance at meetings, reports, information and access (including access to key Personnel and to inspect equipment, materials and records at the Site and to test and take samples) at such time or times and in such manner as Summit may request to ensure compliance by Summit with the provisions of Clauses 5.5, 5.6, 14, 15 and 18 of the Project Agreement in so far as they relate to the Services and Serco's obligations under this Agreement. Serco shall procure similar co-operation, assistance, information and access is given by its Permitted Sub-contractors.

13.2 Without prejudice to the provisions of Clause 13.1, Serco shall:-

13.2.1 provide to Summit such additional information as Summit may reasonably request in relation to Serco's obligations under this Agreement within such time as Summit shall reasonably request such information being limited to information which Serco may from time to time have within its possession or control, or which Serco is entitled to receive and does receive (using reasonable endeavours to obtain) from any third party including a Permitted Sub-contractor;

13.2.2 provide to Summit such assistance as Summit may reasonably require in relation to the performance by Summit of its obligations under the DBFO Contracts consistent with the obligations of Serco under this Agreement;

13.2.3 co-operate with Summit and its other sub-contractors and the Trust in order to ensure the efficient provision of and interface between the Services, the Equipment Services and the clinical services of the Trust and, without prejudice to the generality of the foregoing, participate in the preparation and review from time to time of the Liaison Procedures, and/or provide Summit with such assistance and documents as it may require to agree the Liaison Procedures with the Trust in consultation with Serco, and comply with the provisions and co-operate in the operation of the Liaison Procedures

in so far as they relate to the provision of the Services and Serco's obligations under this Agreement and the interface of the Services with the Equipment Services and the clinical services of the Trust;

13.2.4 so far as may be permissible under all Applicable Laws and contracts of employment, provide to Summit such access as it may reasonably require to the premises used for the purposes of, records relating to and key Personnel engaged in the Services on reasonable notice during normal working hours, save in the case of an emergency when such notice as is practicable shall be given; and

13.2.5 so far as it is able having taken all steps reasonably practical to so procure, procure similar co-operation, assistance, information, access and compliance by its Permitted Sub-contractors.

13.3 Serco shall exercise all due care and diligence in the preparation of information and documents referred to in this Clause 13 and shall ensure the same are accurate (in all material respects) and not misleading and shall ensure that at all times there shall be adequate security and retention arrangements for all such documents and information which shall in all cases be retained by Serco for a period not less than required by law or seven years from receipt thereof whichever is the greater, save with the consent of Summit and the Trust.

13.4 The provisions of Part 4 of the Schedule shall have effect regarding participation by Serco in the Joint Operating Group and the parties shall comply with their respective obligations in Part 4 of the Schedule. Serco acknowledges that the provisions of Clause 11 of the Project Agreement regulate the operation of the Joint Operating Group. Serco shall procure that any Serco representative on the Joint Operating Group will attend meetings of the Trust's sub-committees where so requested by the Trust in accordance with Clause 11.7 of the Project Agreement.

13.5 Serco shall provide, at no additional cost to Serco unless Summit agrees to pay such costs, such reasonable assistance as may be required by any person from time to time appointed as Technical Adviser under the Finance Facilities Agreements and shall provide such information as he may reasonably require to enable him to discharge his proper duties and functions.

14. **CONFIDENTIALITY**

14.1 Each party shall treat all Confidential Information of the other party and its sub-contractors as confidential and Serco shall treat all Confidential Information of the Trust, of which it becomes aware by reason of the operation of this Agreement, as confidential, except as may be necessary for the performance of any obligations under this Agreement and in the case of Summit, the Project Documents, and each party shall use all reasonable endeavours to prevent the disclosure of such Confidential Information by their respective officers, employees, agents or sub-contractors, but so that Serco acknowledges Summit may supply information to the Trust or its nominees in accordance with the DBFO Contracts and that the Trust may disclose information where permitted and subject as provided in Clause 12.2 of the Project Agreement. This Clause 14 shall survive any termination of this Agreement.

14.2 Clause 14.1 shall not apply to Confidential Information which:-

14.2.1 prior to its receipt by the recipient was in the possession of the recipient and at its free disposal;

14.2.2 is subsequently disclosed to the recipient without any obligation of confidentiality by a third party who has not derived it directly or indirectly from the other party;

14.2.3 is or becomes generally available to the public otherwise than through the act or default of the recipient or its agent or employees;

14.2.4 is required to be disclosed by Applicable Law, Competent Authority, any recognised stock exchange on which the Bonds are traded at any time or the order of any competent court or (provided tenderers shall first agree in writing to be bound by a confidentiality undertaking substantially in the terms of this Clause 14 and excluding Proprietary Information of Serco) in connection with a market testing under Provision 12; or

14.2.5 is required to be disclosed under Clause 18 of the Project Agreement after receipt of a confidentiality undertaking referred to in Clause 12.2.5 of the Project Agreement.

14.3 Nothing in this Clause 14 shall prohibit Summit from disclosing information to its current or prospective financiers, shareholders, the Promoters, any Associated Company of Summit

(excluding any company or undertaking which is a direct competitor of Serco), any rating agency, any recognised stock exchange on which the Bonds are traded at any time or, where reasonably necessary to enable any of the Project Documents to be duly performed, to a current or prospective Contractor, Approved Service Provider or Permitted Sub-Contractor and to its or their respective professional advisers, auditors, agents or representatives provided that any recipient of Confidential Information contemplated by this Clause 14.3 shall first agree in writing to be bound by a confidentiality undertaking substantially in the terms of this Clause 14.

14.4 Nothing in this Clause 14 shall prohibit Summit from disclosing relevant information which is required to be made available by Summit or by a receiver or administrative receiver or administrator to any person *bona fide* proposing to provide funding (whether by way of equity investment, loan or otherwise) to Summit or any Associated Company of Summit for the purpose of performing its obligations under the Project Documents or as otherwise provided therein, provided that any recipient of Confidential Information contemplated by this Clause 14.4 has agreed in writing to be bound by a confidentiality undertaking substantially in the terms of this Clause 14.

14.5 Serco shall use all reasonable endeavours to ensure that the conditions of employment of its Personnel shall permit disclosure of such conditions in accordance with the provisions of Clause 13 and this Clause 14.

14.6 Serco shall at all times, whether before or after termination of this Agreement, and shall use all reasonable endeavours to procure that all Permitted Sub-Contractors and all Personnel (being Personnel who have access to confidential information relating to patients) shall, keep as confidential all information relating to all patients in the Hospital, not use (save for the purpose of performing any of its obligations under this Agreement) or disclose any of that information and make every reasonable effort to prevent the use (save as aforesaid) or disclosure of any of that information by a third party, and comply with the requirements of all Trust procedures from time to time in relation to patient confidentiality. The provisions of Clause 14.2 shall apply to this Clause in the same manner as they apply to Clause 14.1.

15. LICENCE OF INTELLECTUAL PROPERTY RIGHTS

15.1 Serco shall grant, and shall procure the grant by any relevant third parties (including Permitted Sub-Contractors), of such licences or sub-licences of Intellectual Property to the

- Trust and shall supply, and shall procure the supply by any relevant third parties, of any relevant software or (subject to the provisions of the Data Protection Act 1984) database on such terms and at such time or times as are necessary to ensure compliance by Summit with the terms of Clauses 20.1, 20.2, 20.3 (excluding the licence from the IT Software Supplier), 20.6, 20.8 and 20.9 of the Project Agreement in so far as they relate to Serco and its Permitted Sub-contractors and the performance by Serco of its obligations hereunder. In the case of sub-licences granted or to be granted as required by Clause 20.3 of the Project Agreement, Summit shall pay to Serco any costs reimbursable by the Trust in respect of any such sub-licences procured by Serco.
- 15.2 Serco hereby grants to Summit, an irrevocable, non-exclusive, royalty-free licence during the Initial Term and at all times thereafter subject as provided in Clause 15.8 to use all Intellectual Property owned by Serco whether now in existence or coming into existence during the continuance of this Agreement developed for and relating to the provision of the Services and Serco's obligations under this Agreement, including, for the avoidance of doubt, any software developed or supplied to fulfil any obligation of Serco under this Agreement, solely for the purposes of (a) performing Summit's obligations to the Trust under the DBFO Contracts and (b) in relation to operation of the Hospital and performance of the Services. Summit may not sub-licence, transfer, or assign this licence without the prior written consent of Serco such consent not to be unreasonably withheld nor make any alterations, adaptations or additions to the subject matter of the Intellectual Property. Summit acknowledges that Serco is and will remain the sole owner of any such software or Intellectual Property and Summit shall acquire no right, claim or interest in any such software or Intellectual Property during the continuance of this Agreement or thereafter, save in terms of any licence granted under or in terms of this Clause 15.
- 15.3 Where Serco procures a sub-licence by a third party (including a Permitted Sub-contractor) in favour of the Trust in terms of Clause 15.1, Serco shall use reasonable endeavours to procure the grant of such a sub-licence by such third party on the same terms in favour of Summit at no additional cost (or if there is an extra cost occasioned thereby and Summit still requires the grant of such a licence, Summit agrees to pay such extra cost).
- 15.4 Summit shall comply with the reasonable instructions of Serco in relation to the use of Intellectual Property licensed under Clause 15.2 including procedures to avoid infringement of any third party rights and notification of any third party claims.

- 15.5 In accordance with the terms of the licence granted by the Trust to Summit under Clause 20.5 of the Project Agreement, Summit hereby grants to Serco an irrevocable, non-exclusive, royalty free licence during the continuance of this Agreement to use all, if any, Intellectual Property owned by the Trust, whether now in existence or coming into existence during the continuance of this Agreement, for any purpose relating to the provision of the Services. Summit shall, at Serco's request and expense, and subject to the approval of the Trust, grant to any Permitted Sub-contractor of Serco, appointed in accordance with this Agreement, a licence on substantially the terms of this Clause 15.5. Serco shall comply, and procure compliance by its Permitted Sub-contractors, with any instructions of the Trust in relation to the use of such Intellectual Property including procedures to avoid infringement of any third party rights and notification of any third party claims.
- 15.6 Serco shall indemnify Summit (or, at its direction, the Trust) on demand and hold Summit and the Trust 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 licensed under or in terms of Clauses 15.1, 15.2 and 15.3 save to the extent, in the case of Intellectual Property licensed to Summit under Clause 15.2, that any such infringement is due to failure by Summit to comply with the reasonable instructions of Serco in the use of such Intellectual Property as aforesaid or use by Summit of such Intellectual Property for a purpose for which it was not licensed under this Clause 15.
- 15.7 Subject to Clause 22.3, Summit shall indemnify Serco 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 licensed by Summit to Serco under Clause 15.5 save to the extent that such infringement is due to failure by Serco to comply with any instructions of the Trust in the use of such Intellectual Property or use by Serco of such Intellectual Property for a purpose for which it was not licensed under Clause 15.5.
- 15.8 All licences of Intellectual Property created by or pursuant to Clauses 15.2 and 15.3 shall (without cost to Summit save as provided in Clause 15.3) survive termination or expiry of this Agreement (however caused) save in respect of (a) Proprietary Information of Serco or (b) where the terms of any sub-licence procured from a third party under Clause 15.3 provide otherwise, in which case such licences or sub-licences (or the appropriate part) shall, automatically terminate on termination or expiry of this Agreement, as the case may be.

- 15.9 To the extent that any of the Intellectual Property licensed to Summit and/or the Trust under Clauses 15.2 and 15.3 is generated by or maintained on a computer or in any other machine readable format, Serco shall procure, at no charge to Summit, for the duration of this Agreement, the grant of a non-exclusive licence or sub-licence for and supply of any relevant software or (subject always to the provisions of the Data Protection Act 1984) database to enable the Trust and/or Summit or its nominee to access and otherwise use that data for the purposes set out in this Agreement.
- 15.10 Serco and Summit shall, at the reasonable request of the other or as required by the Trust in terms of Clause 20.10 of the Project Agreement, execute all documents and do all such further acts which may be necessary to bring into effect or to confirm the terms of any licence or sub-licence created by or pursuant to this Clause 15.
- 15.11 In implementation of Clause 21 of the Project Agreement, Serco shall, within six months from Financial Close, submit to Summit for approval the procedures and practices which Serco proposes to adopt for maintaining security of data, materials and documents (including without limitation all documents referred to in Clause 14 of the Project Agreement), including arrangements for the backing-up and subsequent recovery of information stored in electronically retrievable form. The parties shall agree such procedures and practices and thereafter Serco shall submit such procedures and practices for approval by the Trust in accordance with Clause 21 of the Project Agreement and comply with the Trust Objection Procedure in relation thereto. Any disputes shall be referred to the Dispute Resolution Procedure. Serco shall, and shall procure that its sub-contractors shall, comply with such procedures and practices as approved by the Trust. If Serco wishes to change such procedures and practices, the parties shall consult together regarding such proposed changes and Serco shall submit any proposals for change approved by Summit to the Trust in accordance with Clause 21 of the Project Agreement.

16. **EMPLOYEES**

The provisions of Part 8 of the Schedule shall apply with regard to employees and the parties shall comply with their respective obligations set out in Part 8 of the Schedule.

17. **USE OF PREMISES**

- 17.1 Summit shall provide or procure there is provided to Serco and its Permitted Sub-contractors such non-exclusive access to the Trust's Facilities and/or the Site as may be necessary to enable them to fulfil their obligations under this Agreement but not otherwise and subject as provided in Provision 9.2. Serco acknowledges it has been involved in the negotiation of the Liaison Procedures and the DBFO Contracts and that the access rights and the limitations set out therein are acceptable to it and further acknowledges that the Trust may restrict or deny Serco and its Permitted Sub-contractors access to the Site or any part(s) thereof, from time to time, in accordance with the Liaison Procedures.
- 17.2 Serco shall, and shall procure that its Permitted Sub-contractors shall, at all times comply with the instructions and regulations of the Trust and the reasonable instructions and regulations of Summit (provided these do not conflict with the instructions and regulations of the Trust with which Serco is obliged to comply) while present at the Hospital and/or the Site including, without limitation, all such regulations, conditions or Applicable Laws as Summit is obliged to comply with under the DBFO Contracts.
- 17.3 Serco shall co-operate reasonably with Summit, its employees, agents, contractors and sub-contractors and any person authorised by Summit to be on the Site or at the Hospital and with the Trust's employees, agents, contractors and sub-contractors and shall exercise its rights of access under Clause 17.1 so that no inconvenience or disruption is caused to Summit or the Trust or persons for whom they are responsible in terms of this Agreement or the DBFO Contracts respectively but nothing shall require Serco to act in a manner which would prevent, impede or interfere with the proper delivery of the Services by Serco or a Permitted Sub-contractor.
- 17.4 Subject to Clause 22.2 and Part 3 of the Schedule, loss of or damage to any goods, materials or equipment provided by Serco in the course of the performance of its obligations under this Agreement and any other goods, materials or equipment owned by Serco or for which Serco is responsible shall be at the sole risk of Serco. Serco shall be responsible for the security of all Related Materials and any other goods and equipment belonging to Serco and its Permitted Sub-contractors relating to the provision of the Services.
- 17.5 Serco undertakes to take good care of the accommodation, furnishings, fixtures, equipment and other materials made available by Summit and the Trust to Serco for its performance of

the Services. Within 30 days following the Operational Date, Serco shall prepare an inventory and schedule of the condition of all furniture, fixtures, equipment and other materials provided to Serco by Summit and/or the Trust for the provision of the Services, such inventory and schedule of condition to be subject to Summit approval, acting reasonably. Serco shall maintain and update the inventory on an annual basis provided it has received all necessary information from Summit to enable it to do so. Serco shall compensate Summit for any uninsured loss of or damage to any such furniture, fixtures, equipment or materials (fair wear and tear excluded).

- 17.6 Serco shall advise Summit and its sub-contractors from time to time of its proposed Planned Preventative Maintenance and/or Statutory and Mandatory Inspection and Testing programmes and both parties shall co-operate regarding programming this so far as reasonably practicable not to impact on their own individual access requirements and those of the Trust and Summit's other sub-contractors but, subject always to the requirements of the Liaison Procedures.

18. TERMINATION

18.1 Summit Termination Rights

Subject to Clause 18.7, if:-

18.1.1 any act of insolvency occurs in respect of Serco or the Guarantor (in the case of an act of insolvency in respect of Serco specified in Clauses 18.1.1.3, 18.1.1.4 and 18.1.1.5 only where the event has a material adverse effect on Serco's ability to perform any of its material obligations under this Agreement) and for the purposes of this Clause 18.1.1 "act of insolvency" means:-

18.1.1.1 a receiver, administrator, administrative receiver or liquidator being appointed and not being withdrawn, set aside or discharged within 20 Business Days over all or a material part of the assets of Serco or the Guarantor other than a solvent liquidation in terms which have been expressly and previously approved by Summit in writing (acting reasonably); or

18.1.1.2 a petition being presented or a resolution being passed for the making of an administration order in respect of Serco or the Guarantor unless a

resolution is passed not to proceed with the proposed course of action or such petition is not granted or is withdrawn, set aside or discharged in each case within 20 Business Days; or

18.1.1.3 any arrangement or composition with or for the benefit of its creditors (including any voluntary arrangements as defined in the Insolvency Act 1986) being entered into by or in relation to Serco or the Guarantor other than in the course of a solvent corporate restructuring the terms of which have been expressly and previously approved by Summit in writing (acting reasonably); or

18.1.1.4 any encumbrancer taking possession of or being appointed over, or any diligence (other than to found jurisdiction or on the dependence of an action), distress, arrestment, execution or other similar process being levied or enforced and, in any such case, not being withdrawn, set aside or discharged within 20 Business Days on all or any part of the assets of Serco or the Guarantor in any such case in respect of an amount exceeding £75,000; or

18.1.1.5 Serco or the Guarantor ceasing to carry on business, or being or becoming unable to pay its debts as they fall due within the meaning of Section 123(1)(e) of the Insolvency Act 1986 except and for so long as Serco provides to Summit evidence to Summit's reasonable satisfaction that Serco or the Guarantor is in the course of negotiation with its financiers with a view to re-scheduling or re-financing its debts or resolving the issue in question and Summit is satisfied (acting reasonably) that such refinancing, restructuring or other resolution is likely to succeed within a reasonable time thereafter;

18.1.2 Serco commits a Material Breach (not otherwise listed in this Clause 18.1) of this Agreement, a Material Breach for this purpose being a material and substantial breach of any of the terms of this Agreement in respect of which a Service Penalty Point is not and could not have been awarded but which has a material adverse effect on the carrying out, by the Trust, of clinical activities from the Site or where such breach has or will have a materially adverse effect on Summit (including without

limitation such a breach which would constitute an event of default under the Finance Facilities Agreement) and in respect of which:-

18.1.2.1 notice is given by Summit to Serco within 120 days of Summit becoming aware of the breach giving reasonable details of the matter complained of, and

(a) if capable of remedy, Serco has not commenced and thereafter completed remedial action within a reasonable period from the date of receipt of the notice from Summit which period shall be specified in the notice: or

(b) if irremediable, Serco has not compensated Summit (in terms which are reasonably satisfactory to Summit) for the loss or damage it shall have incurred as a consequence of such breach within a reasonable period from the date of receipt of the notice from Summit which period shall be specified in such notice; and

18.1.2.2 the issue of whether a Material Breach has occurred and/or whether the remedy period given to Serco is reasonable has (in the case of any dispute) first been resolved by the Dispute Resolution Procedure;

18.1.3 sufficient Service Penalty Points are awarded to Serco in any period of twelve months such that Summit shall be entitled to terminate this Agreement pursuant to Clause 18.10;

18.1.4 the Serco Residual Cap is reduced to less than £1,500,000 (Indexed from 1 April 1996);

18.1.5 the Service Score is less than 80% for any Service for any two consecutive months but disregarding for these purposes any failures agreed or determined as having been caused by any default of Summit or any person for whom Summit is responsible in terms of this Agreement;

18.1.6 Serco's right to provide more than one of the Services terminates under Clause 18.9;

18.1.7 there is a fundamental breach by Serco of the terms of this Agreement including abandonment;

18.1.8 the Guarantee ceases to be in full force and effect;

then, whilst any such termination event (specified in Clauses 18.1.1 to 18.1.8) is subsisting in any such case, without prejudice to any of its other rights or remedies, Summit may within six months of the happening of such event (or such longer period as may be agreed) at its discretion:-

(a) terminate this Agreement by notice in writing having immediate effect or on such notice (not exceeding three months) as it may at its option determine and the terms of Clauses 19 and 20 (and any other provisions of this Agreement as to rights and obligations on termination) shall apply; or

(b) serve notice of default on Serco requiring Serco at Summit's option either:-

(i) to rectify or remedy the breach(es) referred to in that notice of default continuing at the date of service of the notice within 30 days of that notice (or such longer period as Summit (acting reasonably) may agree in writing is reasonable in the circumstances prevailing at the relevant time); or

(ii) within 14 days of that notice to put forward a reasonable programme to rectify or remedy the breach(es) continuing at the date of service of the notice, that programme to be in writing and specify the proposed rectification or remedy in reasonable detail and the latest date by which it is proposed that that rectification or remedy shall be completed, in which case the terms of Clause 18.2 shall apply.

18.2 Where Serco puts forward a programme following notice under Clause 18.1(b)(ii), Summit shall have 28 days in which to notify Serco in writing that it does not accept that programme as reasonable, failing which Summit shall be deemed to have accepted that programme. Where Summit notifies Serco that it does not accept that programme, the parties shall endeavour in the following seven days to agree any necessary amendments to the programme

put forward. In the absence of agreement in that seven day period, the question whether the programme is reasonable may be referred by either party to the Dispute Resolution Procedure, and the Expert shall either accept Serco's programme as reasonable or substitute such programme as he believes to be reasonable having regard to the representations of both parties.

18.3 If:-

18.3.1 the breach(es) specified in a notice of default served under Clause 18.1(b) is or are not rectified or remedied:-

18.3.1.1 before the expiry of the period referred to in Clause 18.1(b)(i) (if applicable); or

18.3.1.2 where Serco puts forward a programme pursuant to Clause 18.1(b)(ii) which has been either accepted by Summit or determined by the Dispute Resolution Procedure to be reasonable, in accordance with that programme or such other programme as is agreed or determined pursuant to Clause 18.2, (unless due to Force Majeure or Suspension Event in which case the programme shall be extended by a period which is reasonable having regard to the period during which the Force Majeure or Suspension Event subsisted);

18.3.2 then Summit may terminate this Agreement by notice in writing having immediate effect or on such notice (not exceeding three months) as it may at its option determine and the terms of Clauses 19 and 20 (and any other provisions of this Agreement as to rights and obligations on termination) shall apply.

18.4 Without prejudice to the rights of Summit under this Clause 18 if the Trust serves notice of default on Summit under Clause 22.1(b) of the Project Agreement and that default is due to a breach by Serco of its obligations hereunder then Serco shall, at its own cost, either remedy the breaches referred to in that notice within such period as the Trust may require or co-operate with Summit and provide to Summit such information and proposals as it may request within such time as it may require to enable Summit to put forward a programme to remedy the breaches as required in terms of Clauses 22.1(b)(ii) and 22.2 of the Project

Agreement and/or agree any amendments to the programme with the Trust and Serco shall further comply with the terms of any programme agreed or determined in accordance with Clause 22.2 of the Project Agreement. Summit will not agree to any such programme or amend any such programme without the prior written consent of Serco, not to be unreasonably withheld or delayed.

18.5 Serco Termination Rights

Subject to Clause 18.7, if:-

18.5.1 there are sums due and payable under this Agreement by Summit to Serco (which sums are not in dispute) which sums have not been paid within 30 days following receipt by Summit of written notice of non-payment from Serco and provided that Serco shall also have served a second written notice of non-payment specifying the intention to terminate this Agreement which second written notice may not be served prior to the 20th day following service of the written notice of non-payment referred to above and the amount of such sums equals or exceeds:-

18.5.1.1 in the case of sums which are referable to amounts which Summit is entitled to recover from the Trust under the DBFO Contracts, and which have not been recovered by Summit from the Trust, £100,000 Indexed from Financial Close (exclusive of VAT); or

18.5.1.2 in the case of sums which are referable to amounts which Summit is entitled to recover from the Trust under the DBFO Contracts and which have been recovered by Summit from the Trust, £5,000 Indexed from Financial Close (exclusive of VAT); or

18.5.1.3 in the case of sums which are not referable to amounts which Summit is entitled to recover from the Trust under the DBFO Contracts, £5,000 Indexed from Financial Close (exclusive of VAT);

and provided that in circumstances where the Trust has become entitled to terminate the DBFO Contracts pursuant to Clause 22.1.1 of the Project Agreement (act of insolvency) the 30 day period referred to in Clause 18.5.1 above shall be deemed to be a 7 day period, and Serco shall not be required to serve a second written notice;

18.5.2 control (as defined in Section 416 of the Income and Corporation Taxes Act 1988) of Summit becomes vested in a person who is, or persons acting in concert amongst whom is, a direct competitor of Serco (and provided that, in the event of any termination of this Agreement in such circumstances no compensation, damages or other payment of whatsoever nature shall be paid to Serco (without prejudice to Clause 19.8))

then, whilst any such Termination Event (specified in Clauses 18.5.1 or 18.5.2) is subsisting in any such case, without prejudice to any of its other rights or remedies, Serco may within six months of the happening of such event (or such longer period as may be agreed) terminate this Agreement by notice in writing having immediate effect or on such notice (not exceeding three months) as it may at its option determine (but provided that in the event of any termination pursuant to Clause 18.5.2 not less than 6 months notice shall be given) and the terms of Clauses 19 and 20 and any other provisions of this Agreement as to rights and obligations on termination shall apply.

18.6 Summit and Serco's rights under this Clause 18 are in addition and without prejudice to any other rights or remedies Summit or Serco may have, including without limitation but subject to the provisions of Clause 23 any claim for the amount of any loss or damage suffered by Summit or Serco on account of the acts or omissions of Serco or Summit, as the case may be whether pursuant to any guarantee given in accordance with the terms of this Agreement or otherwise, but subject always as provided in this Agreement.

18.7 Summit and Serco acknowledge that their rights of termination are subject to the terms of the Services Direct Agreement and any exercise by the Trust or Financiers of their rights under any such direct agreement.

18.8 Summit and Serco confirm that they have no rights to terminate this Agreement save as set out in Clause 6.2, in this Clause 18 and in Clause 21.5.

18.9 Termination of individual Services

18.9.1 If the Trust terminates the provision by Summit of any one or more Services under the DBFO Contracts (whether under Provision 15, Provision 17, under the Change Provisions or otherwise) then that Service or Services shall thereupon immediately

cease to be provided by Serco under this Agreement, Serco shall cease to be entitled to payment for that Service or Services under Part 2 of the Schedule and the provisions of Clause 19.6 shall apply.

18.9.2 If, in respect of any Service, 90 or more Service Penalty Points are accumulated in any period of 12 consecutive months, Summit will be entitled by written notice to Serco given within three months thereafter to terminate the provision by Serco of that Service under this Agreement and, if any such notice is given, Serco shall cease to provide that Service under this Agreement from the date specified in such notice, Serco shall cease to be entitled to payment for that Service under Part 2 of the Schedule and the provisions of Clause 19.6 shall apply.

18.9.3 Without prejudice to Clause 18.1.2, Summit may terminate the provision of any one of the Services by notice in writing to Serco within four months of the happening of such event if Serco commits a material breach (not otherwise listed in this Clause 18.9) of its obligations in respect of that Service under this Agreement, a material breach for this purpose being a material and substantial breach of the terms of this Agreement in relation to that Service which is not dealt with and cannot be dealt with by the award of Service Penalty Points but which has a material adverse effect on the carrying out, by the Trust, of clinical activities from the Site or where such breach has or will have a materially adverse effect on Summit and in respect of which:-

18.9.3.1 notice is given by Summit to Serco within 120 days of becoming aware of the breach giving reasonable details of the matter complained of; and

(i) if capable of remedy Serco has not commenced and thereafter completed remedial action within a reasonable period from the date of receipt of the notice from Summit as specified in the notice; or

(ii) if irremediable Serco has not compensated Summit (in terms which are reasonably satisfactory to Summit) for the loss or damage it shall have incurred as a consequence of such breach within a reasonable period from the date of receipt of the notice from Summit as specified in the notice; and

18.9.3.2 the issue of whether a material breach has occurred and/or whether the remedy period given to Serco is reasonable has (in the case of any dispute) first been resolved by the Dispute Resolution Procedure.

18.10 Termination of Agreement by reference to Penalty Points

Subject to Clause 18.7, if there are accumulated in respect of Serco in any period of twelve consecutive months a number of Service Penalty Points which equals or exceeds the Summit Threshold Points (see Provision 15.8 of the General Provisions) then Summit will be entitled pursuant to and subject to Clause 18.1 to terminate this Agreement.

19. CONSEQUENCES OF EARLY TERMINATION/EXPIRY

19.1 In the event of this Agreement terminating or expiring in either case on any early termination of the DBFO Contracts, Serco shall observe, perform and comply with, and procure that its Permitted Sub-contractors observe, perform and comply with, the provisions of Clauses 23.1.1 and 23.1.4 (other than Clause 23.1.4(e)) of the Project Agreement to the extent they relate to the Services and the performance of Serco's obligations hereunder at such time or times and in such manner as to ensure compliance by Summit with the provisions of those Clauses.

19.2 On any expiry of this Agreement at the end of the Term, Serco shall provide such assistance as the Trust may require, in accordance with Clause 25.5.3 of the Project Agreement, to ensure an orderly transfer of responsibility for the provision of the Services or equivalent services to be provided by the Trust or a new service provider thereafter.

19.3 On any early termination or on the expiry of this Agreement without any early termination of the DBFO Contracts:-

19.3.1 Serco shall deliver to Summit all documents and data in the possession or control of Serco which relate to the performance, monitoring, management and reporting of the Services and its obligations hereunder (and which shall at the request of Summit be delivered in electronic file format or other electronic media to the extent such documents and data exist in such medium), excluding Proprietary Information of Serco, but including all documents, manuals, certificates, drawings, log books and

other such items made available by the Contractor in relation to the Hospital and held by Serco for the purpose of the Estates Maintenance Service:

- 19.3.2 the responsibility for the provision of the Services shall be transferred from Serco and shall vest in Summit or its nominee and Serco shall have no further right or obligation to provide the Services;
- 19.3.3 Summit may, at its option, require Serco or its Permitted Sub-contractors to transfer to Summit or its nominee any materials or equipment relating to the provision of the Services at a price to be agreed and, in default of agreement, at their market value, as independently valued and on the basis that Serco warrants that it has good title to such materials and equipment save that Transferring Related Materials will transfer at no cost and, save where such termination is caused by Serco breach, Serco may at its option require Summit (or the incoming service provider) to acquire such equipment and materials at a price to be agreed or at their market value provided that such items are not redundant or obsolete, excessive in quantity and in reasonable condition and suitable and required for performance of the Services;
- 19.3.4 Serco will ensure that there is removed from the Site all materials and equipment belonging to Serco or its Permitted Sub-contractors which are not to be acquired by Summit or its nominee under Clause 19.3.3 and will, and will ensure that its Permitted Sub-contractors and their employees, vacate the Site;
- 19.3.5 Serco shall do all such other reasonable acts or things necessary to accomplish a smooth transition of the management of the Services to the new service provider;
- 19.3.6 save as required or permitted in terms of Clause 19.3.1, each party shall, within thirty days of such expiry or early termination, return all documentation, statements and other materials (and all copies) supplied under or in connection with Serco's performance of the Services which contains Confidential Information of the other party or the Trust (or its sub-contractors) and, if requested, either party shall certify in writing to the other that it has fully complied in all respects with this provision after the return of such documentation;

- 19.3.7 if Summit so elects any contract entered into by Serco in respect of this Agreement shall be novated or assigned to Summit or such other person as Summit may elect with effect from the expiry or termination of this Agreement and upon such election Serco shall take all necessary steps and execute such documents as and when necessary to give effect to such novation or assignation to Summit or such other person and Serco shall indemnify Summit or such other person in respect of any liability arising from any breach of contract prior to such novation or assignation.
- 19.4 In order to facilitate the requirements of Clause 19.3.7 Serco undertakes to Summit that with effect from the date hereof, it will ensure that any contract it enters with any Permitted Sub-contractor:
- 19.4.1 will contain an undertaking by the party or parties contracting with Serco to novate or assign the benefit and burden of any such contract to Summit (or as it may direct) if so requested by Serco (and in this respect, Serco shall only make such request to any such contracting party if so requested by Summit) immediately prior to the expiry or termination of this Agreement;
- 19.4.2 will not contain any terms which would have the effect of depriving Summit (or its nominee) of all or a substantial part of the benefit of any such novated or assigned contract or of imposing on it obligations which are more onerous than those imposed on Serco.
- 19.5 On the expiry or termination of this Agreement, Serco shall indemnify Summit (and/or, at its direction, the Trust) on demand and hold them harmless in relation to all losses, actions, claims, demands, costs, charges and expenses arising out of any action or claim by any person in relation to the termination of its contract with Serco or a Permitted Sub-contractor as a result of the expiry or termination of this Agreement save where the termination of this Agreement is otherwise than due to Serco default.
- 19.6 Serco shall, at no cost to Summit, provide such assistance and comply with such timetable as the Trust may require, or as Summit may reasonably require, for the purpose of ensuring an orderly transfer of responsibility for provision of a Service upon the transfer of responsibility for a particular Service from Summit under Provision 17 or Serco under Clause 18.9, as the

case may be, or the deletion of a Service under the Change Provisions. Such assistance may include, (without limitation) so far as permitted by law:-

- 19.6.1 delivery of documents and data in the possession or control of Serco which relate to performance, monitoring, management and reporting of that Service (and which shall at the request of Summit be delivered in electronic file format or other electronic media to the extent such documents and data exist in such format) but excluding Proprietary Information of Serco provided that Summit shall permit Serco, its agents and representatives reasonable access to such documents subsequent to such transfer, where in the possession or under the control of the Trust, to the extent such access is made available by the Trust;
- 19.6.2 delivery of data relating to the terms and conditions of employment and employment records of those of Serco's employees who may be affected by the Employment Regulations and/or the Directive upon any transfer of responsibility for the provision of a Service;
- 19.6.3 the transfer of any materials or equipment relating to the provision of that Service at a price to be agreed or, failing agreement, at their market value as independently valued or otherwise the removal of such materials and equipment from the Site (save that Transferring Related Materials will transfer at no cost).
- 19.7 Serco undertakes that it shall not knowingly do or omit to do anything which may be reasonably likely to adversely affect the ability of the Trust or Summit to ensure an orderly transfer of responsibility for provision of a Service or the Services.
- 19.8 Termination of this Agreement shall not affect any rights and obligations under this Agreement in relation to antecedent breach as at the date of termination or which are expressed to survive the termination of this Agreement and shall not affect this Clause 19 or Clauses 10.1.2, 10.17, 14, 15.8, 20 and 23, which shall remain in full force and effect.
- 19.9 Where, following termination of this Agreement, compensation may be recoverable pursuant to Clause 24 of the Project Agreement, Serco shall provide to Summit such information as Summit may reasonably request to enable it to calculate the amount of any compensation so recoverable.

19.10 If Summit proposes to terminate this Agreement pursuant to Clause 18.1. Summit shall, having regard (acting reasonably) to the urgency with which it requires to substitute Serco with a new Approved Service Provider taking account, for these purposes, the level of the Serco Residual Cap and the extent and speed at which it may be reducing, undertake either a market testing exercise on the same terms as described in Provision 12 of the General Provisions (but without inviting Serco to retender) or a different bona fide competitive tendering exercise. If the contractual terms on which such tender is based taken as a whole are more onerous than those to which Serco is subject under this Agreement, then to the extent Summit incurs additional costs as a result of such more onerous terms, the sums recoverable under Clause 23.4 shall be reduced to that extent..

20. COMPENSATION

20.1 Save as otherwise expressly provided in this Clause 20, Serco shall not be entitled to any compensation, damages or any other payment of whatsoever nature on expiry or termination (for whatever reason) of this Agreement but without prejudice to the provisions of Part 5 of the Schedule and to Clause 19.8.

20.2 If this Agreement is terminated prior to Contractual Practical Completion, other than in terms of Clauses 18.1, 18.3, 18.5.2, 18.10 or 21.5 or termination of the DBFO Contracts as a result of or in connection with any breach of this Agreement by Serco or any act or omission of Serco or any person for whom Serco is responsible in terms of this Agreement, then Serco shall be entitled to compensation as a result of such termination equal to the aggregate of (i) all amounts (if any) owing or accrued to Serco under this Agreement up to the date of termination and (ii) Serco's irrecoverable reasonable costs arising from the tendering, negotiation and entering into of this Agreement to the extent not already reimbursed by Summit and/or the Promoters less (iii) any prepayments received by Serco which relate to the period after the date of termination or payment deductions accrued but not yet incurred up to the date of termination.

20.3 If this Agreement:-

20.3.1 is terminated by Serco pursuant to Clause 18.5.1; or

20.3.2 terminates under Clause 6.2, other than as a result of or in connection with (i) breach of this Agreement by Serco or any act or omission of Serco or any person for whom it is responsible in terms of this Agreement, or (ii) termination of the DBFO Contracts under Clause 26.7 or 26.8 of the Project Agreement;

in either case on or after Contractual Practical Completion then Summit shall pay to Serco the Serco Compensation Amount calculated in accordance with and as provided in Section A of Part 5 of the Schedule.

20.4 If this Agreement:-

20.4.1 is terminated pursuant to Clause 21.5 (Force Majeure); or

20.4.2 terminates under Clause 6.2 as a result of termination of the DBFO Contracts under Clause 26.7 or 26.8 of the Project Agreement;

in either case on or after Contractual Practical Completion then Summit shall pay to Serco the Serco Compensation Amount calculated in accordance with and as provided in Section B of Part 5 of the Schedule.

20.5 Amounts payable under this Clause 20 shall be payable by Summit within forty days of agreement or determination of the applicable sum or in circumstances where there is no termination of the DBFO Contracts, after 20 Business Days after the date of termination of this Agreement or the date of agreement or determination of the applicable sum, whichever is the later.

20.6 Where termination of this Agreement occurs as a result of or contemporaneously with the DBFO Contracts, Serco shall not be entitled to receive in respect of the amounts payable to it pursuant to this Clause 20 any amounts greater than those which Summit is entitled to recover from the Trust and which are referable to the payments due to Serco under this Clause 20 pursuant to Clause 24 of and Schedule 10 to the Project Agreement (as agreed or determined thereunder) (but without prejudice to Serco's right to pursue claims for any reduction or shortfall directly against the Trust pursuant to Clause 22.6 as applicable).

- 20.7 The final date for payment of any sum which becomes due pursuant to this Clause 20 shall be as set out in Clause 20.5 above.
- 20.8 Within five days after the date upon which payment becomes due pursuant to this Clause 20 (or would have become due if Serco had carried out its obligations under this Agreement and no set-off or abatement was permitted by reference to any sum claimed to be due under one or more other contracts (but without prejudice to any other provision of this Agreement)) Summit shall provide a notice specifying the amount if any of the payment made or proposed to be made and the basis upon which such amount has been calculated.
- 20.9 The payments made pursuant to Clauses 20.2, 20.3 and 20.4 are in full and final settlement of any liability of Summit for the acts, omissions or events which are the grounds of termination and Serco shall not be entitled to any other compensation, damages or payment of whatsoever nature in respect of such but without prejudice to Clause 19.8.
21. **FORCE MAJEURE/SUSPENSION EVENTS**
- 21.1 Neither party shall be in breach of an obligation under this Agreement to the extent it is unable to perform or is delayed in performing that obligation in whole or in part by reason of Force Majeure or a Suspension Event (or the consequences thereof) provided that Serco shall only be relieved of liability to the extent that Summit is entitled to be relieved from liability under the Project Agreement in relation to the provision of the Services. Serco shall be entitled to any extension of time for performance as is granted to Summit under the DBFO Contracts in respect of any obligation under the DBFO Contracts delegated to Serco under this Agreement.
- 21.2 If either party shall seek to rely on this Clause 21, it shall as soon as reasonably practicable give notice to the other with all available particulars of the act or matter claimed as a Force Majeure event or a Suspension Event. The party so affected shall take all reasonable steps to remedy or mitigate the failure to perform and keep the other party informed of the steps so being taken.
- 21.3 If a Force Majeure or a Suspension Event occurs then payment will be dealt with under paragraph 7 of Part 2 of the Schedule.

21.4 If Serco is unable as a result of the event of Force Majeure or the Suspension Event, to provide any of the Services, Summit may at its own cost obtain the affected Services from any third party until Serco resumes the provision of the affected Services. Serco shall give such assistance and information to that third party which is reasonably necessary to enable that third party to provide the affected Services (and shall procure like co-operation from each Permitted Sub-Contractor) but neither Serco nor its Permitted Sub-Contractors shall in so doing be obliged to reveal any commercially sensitive information or make available any Proprietary Information.

21.5 If either party is unable to perform all or any material part of its obligations under this Agreement as a consequence of Force Majeure for a continuous period in excess of nine months, either party may, following consultation with a view to resolving the matter for a period of not less than 60 days, terminate this Agreement by giving one month's prior notice in writing and the compensation provisions in Clause 20 shall apply.

22. INDEMNITIES

22.1 Serco shall indemnify Summit and/or, (at Summit's direction,) any person for whom Summit is responsible in terms of this Agreement or the Trust or any person for whom the Trust is responsible in terms of the DBFO Contracts on demand and hold them harmless against all costs, damages, losses, claims, demands, expenses and liabilities (including reasonable legal and other professional expenses) incurred by them:-

22.1.1 as a direct result of any claim for or in respect of the death or personal injury of any person employed or engaged by Summit or any person for whom Summit is responsible in terms of this Agreement or the Trust or any person for whom the Trust is responsible in terms of the DBFO Contracts or any other person in each case if and to the extent that it is caused by Serco or any person for whom Serco is responsible in terms of this Agreement;

22.1.2 in repairing or reinstating or replacing any assets owned by or in the possession of Summit or any person for whom Summit is responsible in terms of this Agreement or the Trust or any person for whom the Trust is responsible in terms of the DBFO Contracts which have been lost or damaged if and to the extent that such loss or damage has been caused by Serco or any person for whom Serco is responsible in terms of this Agreement;

- 22.1.3 as a direct result of any Prosecution against Summit or any person for whom Summit is responsible in terms of this Agreement or the Trust or any person for whom the Trust is responsible in terms of the DBFO Contracts brought against them as a result of the breach or non-performance of any obligations of Serco under this Agreement;
- 22.1.4 in respect of any increase in insurance premiums or policy excesses as a result of any claims made on account of any matter for which Serco is responsible under the indemnities in this Clause 22.1;
- 22.1.5 as a result of any damages or compensation payable to any workmen or other person in the employment of Serco or any person for whom it is responsible in terms of this Agreement;
- 22.1.6 as a result of a breach by Serco or any person for whom it is responsible in terms of this Agreement of its obligations under this Agreement including, but not limited to any costs, losses and liabilities suffered by Summit under or in connection with the Project Documents, including (without limitation) any reduction or deductions of sums payable to Summit by the Trust pursuant to the DBFO Contracts, any increase in the amounts payable by Summit under the Finance Facilities Agreements including for these purposes the inter-company loan agreement between Summit and the Subsidiary and any costs, losses or expenses arising as a result of the acceleration of Financial Indebtedness; and
- 22.1.7 as set out in Clauses 3.10, 4.2, 10.2.3, 10.17, 15.6, 19.5, 23.4, and Part 8 of the Schedule;

provided always that:

- (a) Serco will not be obliged to pay more than once for the same costs, loss or damage;
- (b) in the event that any costs, loss or damage are incurred by any person for whom Summit is responsible under this Agreement or the Trust or any person for whom the Trust is responsible in terms of the DBFO Contracts which is recoverable under any indemnity in or referred to in this Clause 22.1, then Summit shall either be entitled to

recover those costs or that loss or damage from Serco hereunder on behalf of and as agent for that person or shall direct Serco to, in which case Serco shall, indemnify the relevant person directly in respect of those costs or that loss or damage.

22.2 Subject to Clause 22.3, Summit shall indemnify Serco (or, at the direction of Serco, its Permitted Sub-contractors) on demand and hold them harmless against all costs, damages, losses, claims, demands, expenses and liabilities (including reasonable legal and other professional expenses) incurred by them:-

22.2.1 as a direct result of any claim for or in respect of the death or personal injury of any person employed or engaged by Serco or its Permitted Sub-contractors or any patients or visitors to the Hospital or any other person if and to the extent that it is caused by Summit or any person for whom Summit is responsible in terms of this Agreement or the Trust or any person for whom the Trust is responsible in terms of the DBFO Contracts;

22.2.2 in repairing or reinstating or replacing any assets which are owned by or in the possession of Serco or its Permitted Sub-contractors which have been lost or damaged if and to the extent that such loss or damage has been caused by Summit or any person for whom Summit is responsible in terms of this Agreement or the Trust or any person for whom the Trust is responsible in terms of the DBFO Contracts;

22.2.3 as a direct result of any Prosecution brought against Serco or any Permitted Sub-contractor as a result of the breach or non-performance of Summit's obligations under this Agreement or the Trust's obligations under the DBFO Contracts;

22.2.4 as a result of the breach or non-observance by the Trust or any persons for whom it is responsible in terms of the DBFO Contracts of any of its obligations under the DBFO Contracts;

22.2.5 as a result of a breach by Summit or any person for whom it is responsible in terms of this Agreement of its obligations under this Agreement; and

22.2.6 as set out in Clauses 12.5, 15.7 and paragraph 3 of Part 8 of the Schedule;

provided always that:-

- (a) Serco shall, to the extent that any such matter arises where Summit is liable to indemnify Serco or any of its Permitted Sub-contractors in terms of Clauses 22.2.1, 22.2.2 or 22.2.3 claim under the relevant insurance policy (or policies) effected and maintained by Summit or Serco in terms of Part 3 of the Schedule and use all reasonable endeavours to pursue such claims and, to the extent that such recovery is made, Summit's liability under this Clause 22.2 shall be reduced accordingly or, to the extent Summit has already indemnified Serco or its Permitted Sub-contractors, Serco shall reimburse such amounts to Summit not to exceed the amount paid by Summit provided that Summit shall be obliged to indemnify Serco for all reasonable costs incurred in connection with making such claims but without prejudice to Serco's rights under this Clause 22.2 to the extent that no recovery is made under such insurance (including to the extent of any policy excesses);
- (b) Summit shall not be obliged to pay more than once for the same costs, loss or damage;
- (c) in the event that any costs, loss or damage are incurred by any Permitted Sub-contractor which are recoverable under any indemnity in or referred to in this Clause 22.2, then Serco shall either be entitled to recover that loss or damage from Summit hereunder on behalf of and as agent for such Permitted Sub-contractor or shall direct Summit to, in which case Summit shall, indemnify the Permitted Sub-contractor directly in respect of those costs or that loss or damage;
- (d) in the case of Clause 22.2.4 the liability of Summit shall be limited to the additional costs reasonably and properly incurred by Serco and its Permitted Sub-Contractors in the performance of Serco's obligations under this Agreement.

22.3 To the extent that any liability or obligation of Summit whether under Clause 22.2 or otherwise arising pursuant to this Agreement relates to any act or omission or default of the Trust or any person for whom the Trust is responsible in terms of the DBFO Contracts or any act or omission or default of a sub-contractor of Summit (other than Serco), including, without limitation, the Approved Service Provider providing the Equipment Services and/or the Contractor, Serco shall be entitled to recover from Summit (under any indemnity set out

or referred to in Clause 22.2 or otherwise as a result of any claim arising pursuant to this Agreement) only to the extent of and no more than the Recovery Amount. In this Clause 22.3, the "Recovery Amount" means the amount (net of any costs of recovery properly incurred which have not been recovered by Summit from the Trust or such sub-contractor, or Serco, provided that for these purposes, costs incurred at Serco's direction or in complying with Serco's directions shall be deemed to have been properly incurred) which Summit is entitled to recover under and in accordance with the DBFO Contracts or the relevant sub-contract (as agreed or determined thereunder), as the case may be, in respect of the event or circumstances giving rise to Summit's obligation to indemnify Serco under this Agreement or any claim by Serco against Summit hereunder. Summit may satisfy any of the indemnities set out or referred to in Clause 22.2 by procuring that another person indemnifies Serco directly in respect of any such claim. The conduct of any proceedings by or on behalf of Summit against the Trust or any such sub-contractor as referred to above shall be carried out in accordance with Clause 22.6 below.

- 22.4 Where either party makes a claim under any indemnity set out or referred to in this Clause 22, that party shall take all reasonable steps to avoid or mitigate the costs, loss and/or damage in respect of which such claim is made.
- 22.5 Subject to Clauses 22.3 and 22.6, if any claim is made or action brought against either party ("the Indemnified") by any third party arising out of the matters indemnified under this Clause 22, the other party ("the Indemnifier") shall be promptly notified thereof and may at its own expense conduct all negotiations for the settlement thereof and any litigation or other proceedings that may arise therefrom. The Indemnified shall not, unless and until the Indemnifier has failed within a reasonable period in the circumstances to take over the conduct of the negotiations, litigation or other proceedings, make any settlement or admission in respect of such claim or action. The Indemnifier shall be responsible for all costs associated with the conduct of such negotiations, litigation or other proceedings and shall further indemnify the Indemnified from and against all costs, liabilities and expenses which may be suffered or incurred by the Indemnified in respect thereof. The Indemnifier shall keep the Indemnified fully informed of the conduct of all negotiations, litigation or other proceedings and the Indemnified shall provide all reasonable assistance, at the cost of the Indemnifier (but excluding the costs of reasonable management time), to the Indemnifier for the purpose of contesting such claim or action and in connection with such negotiations, litigation or other proceedings. Serco agrees that Summit may further pass the conduct of

any such claims or actions to its Approved Service Providers, Permitted Sub-contractors, the Contractor or the Trust in which case, subject as aforesaid, Serco shall provide all reasonable assistance to such Approved Service Providers, Permitted Sub-contractors, the Contractor or the Trust in accordance with this Clause.

22.6 In circumstances where Serco's entitlement to recover from Summit under any indemnity or otherwise pursuant to this Agreement is limited in terms of Clause 22.3, the following provisions shall apply:-

22.6.1 Serco shall notify Summit of its claim against Summit without avoidable delay and of its intention to conduct a claim in accordance with Clause 22.6.2 below against the Trust or the person for whom the Trust is responsible in terms of the DBFO Contracts or the relevant sub-contractor as appropriate (and in any event within 1 month of becoming aware of the occurrence of the event giving rise to such claim) and shall supply a copy of the relevant documents to Summit;

22.6.2 subject to the provisions of this Clause, on the giving of the notice pursuant to Clause 22.6.1, Serco shall be entitled, at its costs, to conduct the claim against the Trust or the person for whom the Trust is responsible in terms of the DBFO Contracts or the relevant sub-contractor as appropriate in the name of Summit and shall have the conduct of any incidental negotiations and Summit shall give Serco or its nominee all reasonable co-operation, access and assistance, at the cost of Serco, for the purposes of the conduct of such claim provided that Summit is indemnified to its reasonable satisfaction in respect of any costs, expenses and liabilities it may suffer or incur as a result of the conduct of the claim by Serco and Serco shall keep Summit fully informed and shall consult with Summit about the conduct of any such claim;

22.6.3 if, in the reasonable opinion of Summit, it becomes apparent that the claim relates to wider issues affecting more than one of Summit and/or Summit's sub-contractors then Summit may notify Serco that it is taking over the conduct of such claim and of any incidental negotiations and, upon receipt of such notice, Serco shall take all steps reasonably necessary to transfer the conduct of such claim to Summit and shall provide Summit with all reasonable co-operation, access and assistance for the purposes of such claim. Summit shall keep Serco fully informed and shall consult with Serco about the conduct of such claims and shall use all reasonable endeavours

to pursue such claim and Serco's right to indemnification shall include all reasonable costs incurred by it in the conduct of the claim by it until transfer of the conduct of the claim to Summit:

22.6.4 if Serco fails to give notice to Summit that it wishes to conduct a claim pursuant to Clause 22.6.2 within the one month period referred to in Clause 22.6.1 above, Summit shall be entitled to conduct such claim and to defend, compromise or settle such claim as it sees fit.

23. LIABILITIES/REMEDIES

23.1 Subject to Clause 23.2, the maximum aggregate liability of Serco in respect of (i) all claims under Clauses 4.2, 10.2.3, 10.17, 22.1.4 (to the extent arising otherwise than as a result of Serco breach), 22.1.6, and 23.4, (ii) all deductions made under paragraphs 2 to 5 (inclusive) of Part 2 of the Schedule and (iii) additional costs agreed or determined under Clause 23.3 shall be limited to and shall in no event exceed £2,000,000 (Indexed from April 1996) provided that:-

23.1.1 there shall be disregarded or added back in for the purposes of calculating this limit on liability any amounts recovered under any insurance policy or from a third party and Serco shall use all reasonable endeavours to effect such recovery and shall promptly notify Summit of any such recovery;

23.1.2 deductions under paragraph 4 (No Substantive Service) and 5 (Self help) of Part 2 of the Schedule shall be reduced (for the purposes of calculating this limit on liability) by an amount equal to any net saving in Serco's costs relating to the matter the subject of deduction;

23.1.3 there shall be disregarded or added back in for the purpose of calculating this limit on liability costs the subject of any claim to the extent these would have been incurred by Serco if the circumstances giving rise to the claim had not arisen;

and the maximum aggregate remaining liability of Serco in terms of this Clause at any time and from time to time, taking into account at such time claims and deductions made and costs incurred, adjustments made or to be made and indexation, is referred to in this Agreement as the "Serco Residual Cap". Serco shall provide to Summit such information

and evidence and access to such records as Summit may reasonably require to determine the amount of the Serco Residual Cap from time to time including, without limitation, information relating to all costs referred to in this Clause 23.1. Serco shall further notify Summit in writing with each invoice submitted in terms of paragraph 8 of Part 2 of the Schedule its calculation of the amount of the Serco Residual Cap at that time (but, for the avoidance of doubt, Serco's calculation may be disputed at any time by Summit). Any such dispute shall be determined in accordance with the Dispute Resolution Procedure.

23.2 If at any time this Agreement has become terminable by Summit on account of Serco default in circumstances where Serco could reasonably be treated as having constructively abandoned its responsibilities under this Agreement, the Serco Residual Cap shall thereupon be deemed to become £3,000,000 (Indexed from April 1996) and, for the avoidance of doubt, no account shall be taken in ascertaining the amount of the Serco Residual Cap of any liabilities incurred by Serco prior to that point in time.

23.3 Serco shall notify Summit from time to time in writing of the amount of any additional costs incurred by it in performing the Services as a result of the occurrence of a Legislative Change requiring a change in the Output Specification, other than an Eligible Change, and shall provide to Summit all information and evidence as Summit may reasonably require to substantiate such notification. The parties shall endeavour in good faith to agree the amount of such additional costs but, failing such agreement within ten Business Days of receipt by Summit of such notice from Serco, either party may refer the matter to the Dispute Resolution Procedure for determination.

23.4 If:-

23.4.1 this Agreement is terminated by Summit under Clause 18; or

23.4.2 this Agreement terminates under Clause 6.2 as a result of a breach of this Agreement by Serco or any act or omission of Serco or any person for whom Serco is responsible in terms of this Agreement; or

23.4.3 Summit terminates the provision by Serco of any one or more Services under Clause 18.9;

then Serco shall indemnify Summit on demand from and against all losses, liabilities, claims, costs and expenses suffered or incurred by Summit as a result of, or in connection with, the termination of this Agreement or such Service or Services, as the case may be, including, without limitation, costs in relation to obtaining a replacement service provider to perform the Service or Services on the terms of this Agreement as are additional to those which would have been incurred by Summit pursuant to this Agreement but for termination of this Agreement or the Service or Services, as the case may be and any costs, losses and liabilities suffered by Summit under or in connection with the Project Documents, including (without limitation) any reductions or deductions of sums payable to Summit by the Trust pursuant to the DBFO Contracts, any increase in the amounts payable by Summit under the Finance Facilities Agreements including for these purposes the inter-company loan agreement between Summit and the Subsidiary and any costs, losses or expenses arising as a result of the acceleration of Financial Indebtedness.

23.5 Summit shall not be liable to Serco for any loss of profit, loss of business or financing costs suffered or incurred by Serco or any person for whom it is responsible in terms of this Agreement as a result of any breach of this Agreement by Summit.

23.6 Serco shall not be liable to Summit for any costs, losses or liabilities under the Finance Facilities Agreement suffered or incurred by Summit or any person for whom it is responsible in terms of this Agreement as a result of any breach of this Agreement by Serco provided that the provisions of this Clause 23.6 shall not apply to any claims brought under the Clauses referred to in Clause 23.1(i) of this Agreement

23.7 Each party shall take all reasonable steps to mitigate any loss it may suffer as a result of the performance or failure to perform by the other party of this Agreement.

24. AVAILABILITY

24.1 Without prejudice to Serco's obligations under this Agreement, Serco shall so perform its obligations under this Agreement that none of the Affected Areas as defined in Part A of the Schedule to the General Provisions shall at any time be Unavailable as a result (wholly or partly) of any of the following:-

24.1.1. failure by Serco properly to carry out its obligations under this Agreement in respect of Estates Maintenance Services;

- 24.1.2 any other breach of this Agreement or act or omission on the part of Serco, or any person for whom it is responsible under this Agreement.
- 24.2 Without prejudice to the other provisions of this Agreement, if any Affected Area becomes Unavailable, Serco shall discharge its obligation in relation to Estates Maintenance Services so as to minimise the Unavailability and to remedy the Unavailability as soon as reasonably practicable.
- 24.3 Serco shall promptly copy to Summit any notices served upon Summit or Serco (at the Help Desk or otherwise) pursuant to the DBFO Contracts.

25. DISPUTE RESOLUTION PROCEDURE

The provisions of Part 9 of the Schedule shall apply with regard to any difference or dispute (“a Dispute”) of whatever nature between Summit of the one part and Serco of the other part arising under the Agreement (including, without limitation, any question of interpretation).

26. NOTICES

- 26.1 Any notice or other communication to be given by one party to another under, or in connection with the matters contemplated by this Agreement shall be communicated as follows:-

26.1.1 if to Summit: Summit Healthcare (Law) Limited
c/o Dr. William Moyes
The British Linen Bank Limited
PO Box 49
4 Melville Street
Edinburgh EH3 7NZ
Fax No: 0131 - 243 - 8391

Copy to: Mr M. J. Collard, McAlpine Healthcare Limited, Eaton
Court, Maylands Avenue, Hemel Hempstead, Herts HP2
7TR
Fax No: 01442 - 230024

26.1.2 if to Serco: Mr John Jeffery
Serco Limited
Alderney House
No. 4 Sandy Lane
Teddington
Middlesex TW11 0DU
Fax No: 0181 614 3737

Copy to: Mr D. Smith, Serco Health Limited, Alderney House, No. 4
Sandy Lane, Teddington, Middlesex TW11 0DU
Fax No: 0181 614 3737

or, in either case, to such other addresses and/or facsimile number in the United Kingdom and/or marked for such other attention as may from time to time be specified by the relevant party to the other, by notice given in accordance with this Clause 26, for the purposes of this Clause 26.1.

26.2 Any notice or other communication to be given by one party to the other under, or in connection with the matters contemplated by this Agreement shall, unless otherwise specified, be in writing and shall be given by letter delivered by hand or sent by first class pre-paid post or recorded delivery or registered post or by facsimile transmission and shall be deemed to have been received:-

26.2.1 in the case of delivery by hand prior to 4.30pm on a Business Day, when delivered and in any other case on the Business Day following the date of delivery; or

26.2.2 in the case of first class pre-paid post or recorded delivery or registered post, on the second Business Day following the day of posting; or

26.2.3 in the case of facsimile where the transmission occurs prior to 4.30pm on a Business Day, on acknowledgement by the addressee's facsimile receiving equipment and in any other case on the Business Day following the day of acknowledgement by the addressee's facsimile receiving equipment.

27. LAW AND JURISDICTION

This Agreement shall be governed by and construed in accordance with the Law of Scotland and the parties irrevocably submit to the non-exclusive jurisdiction of the Court of Session, Scotland and waive any plea of forum non conveniens. The submission in this Clause 27 shall not preclude proceedings in any other court of competent jurisdiction subject always as provided in the Dispute Resolution Procedure.

28. 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 24 of that Act.

29. GENERAL

29.1 The rights and obligations under this Agreement may not be assigned, transferred, sub-contracted or otherwise disposed of in whole or in part by either party without the prior written consent of the other except:-

29.1.1 to the extent expressly provided in this Agreement;

29.1.2 in the case of Summit, by way of a fixed and/or floating charge or charges given to any Financier, as security for any Financial Indebtedness under the Finance Facilities Agreements; and

29.1.3 in terms of the Services Direct Agreement.

29.2 No amendment to this Agreement shall have effect unless agreed in writing signed by a duly authorised representative of each party. Each party acknowledges that it does not enter into

this Agreement in reliance on any representation, warranty or other undertaking by any party not expressly set out or referred to in this Agreement.

- 29.3 No delay by or omission of either party in exercising any right, power, privilege or remedy under this Agreement shall operate to impair that right, power, privilege or remedy or be construed as a waiver. Any single or partial exercise of any such right, power, privilege or remedy shall not preclude any other or further exercise or the exercise of any other right, power, privilege or remedy.
- 29.4 Nothing in this Agreement shall be construed as establishing or implying a partnership, joint venture or agency.
- 29.5 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.
- 29.6 Each party shall at the request of the other execute any additional documents and do any other acts or things which may reasonably be required to give effect to this Agreement.
- 29.7 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 or under the Dispute Resolution Procedure.
- 29.8 This Agreement together with all provisions of the DBFO Contracts referred to in or incorporated by reference into this Agreement constitutes the entire agreement of the parties in relation to the subject matter of this Agreement and supersedes any prior negotiations, proposals, agreements and representations (whether written, oral or implied) relating thereto between the parties or their respective professional advisers.
- 29.9 No announcement shall be made by either party in connection with this Agreement without the prior written consent of the other, not to be unreasonably withheld or delayed, save as required by law or the requirements of any recognised stock exchange on which the Bonds are traded at any time.

- 29.10 All financial obligations arising in the performance of Serco's obligations under this Agreement shall be the sole responsibility of Serco, except as expressly stated to the contrary in this Agreement.
- 29.11 Except where expressly authorised in writing by Summit, Serco shall not hold itself out as the agent of Summit or the Trust and shall have no power to bind or pledge the credit of or otherwise have any dealings on behalf of either of them. Serco shall not say or do anything that may lead any other person to believe that Serco is acting as the agent of the Trust or Summit.
- 29.12 Subject to Clause 29.1, this Agreement shall enure for the benefit of and be binding on the respective permitted successors in title and permitted assignees of each party, who shall procure that each such transferee executes an agreement with the other party by which the transferee agrees to be bound by this Agreement.
- 29.13 Any sum payable under this Agreement not paid by the due date (or, where payable on demand, on that demand being made) shall (unless otherwise stated or a different rate is specified) bear interest at the Interest Rate calculated on a daily basis with quarterly rests from the due date until the date of actual payment, after as well as before judgement or decree, provided that in any case where it is determined that Summit is entitled to any sum which it would have been entitled to deduct from the Serco Payment or by which Summit would have been entitled to reduce the Serco Payment had the same not been disputed, interest will be payable upon such sum at the Bond Rate calculated on a daily basis with quarterly rests from the date of such Serco Payment until the due date for payment following upon such determination.
- 29.14 29.14.1 Subject to Clause 29.14.3, all references to amounts in this Agreement are references to those amounts exclusive of any VAT which is or may be properly chargeable in relation to any supply for which they form the consideration.
- 29.14.2 (a) Each party shall pay to the other party an amount equal to any VAT properly chargeable in respect of any supply made to it under this Agreement against delivery of a valid VAT invoice in respect of that supply which, in all material respects, complies with the requirements of Part III of the Value Added Tax Regulations 1995.

(b) If the amount of the Serco Payment is adjusted pursuant to Part 2 of the Schedule (or under any other provision of this Agreement) or if a sum of money shall become due for payment by or to Summit any monies payable shall have added to them a sum equal to any appropriate adjustment in respect of the VAT chargeable by reference to the final value of the supply of any goods and/or services under this Agreement and a credit note shall be issued where appropriate for VAT purposes.

29.14.3 (a) Where any cost, fee, expense or disbursement is to be indemnified or reimbursed to any party or to be taken into account in any computation, in each case, under this Agreement, the amounts to be indemnified, reimbursed or deducted shall be taken to be the amount of that cost, fee, expense or disbursement net of any VAT chargeable thereon to the extent such VAT is recoverable as input tax by the recipient of any supply to which the cost, fee, expense or disbursement relates.

(b) Where (i) any cost, fee, expense or disbursement referred to in Clause 29.14.3(a) above includes an amount in respect of VAT chargeable thereon and (ii) any party (acting reasonably) certifies that it is unable to recover such VAT as input tax from H M Customs & Excise (such certificate to be conclusive and binding, save in the case of manifest error) the cost, fee, expense or disbursement shall, to the extent so certified, be reimbursed, indemnified or taken into account in any computation (as the case may be) together with an amount equal to any VAT chargeable thereon.

29.15 Summit and Serco shall, in carrying out their respective obligations under this Agreement, act at all times in good faith.

30. CORRUPT GIFTS AND PAYMENT OF COMMISSION

30.1 Serco warrants that in entering this Agreement it has not (and to the best of its knowledge none of its Permitted Sub-contractors nor the Guarantor have) done any of the following (hereafter "prohibited acts"):-

- 30.1.1 offered, given or agreed to give any director, member, employee or representative of the Trust any gift or consideration of any kind as an inducement or reward:-
- 30.1.1.1 for doing or not doing (or for having done or not having done) any action in relation to the obtaining or performance of this Agreement or the DBFO Contracts; or
- 30.1.1.2 for showing or not showing favour or disfavour to any person in relation to this Agreement or the DBFO Contracts;
- 30.1.2 entered into this Agreement in connection with which commission has been paid or has been agreed to be paid by it or on its behalf, or to its knowledge, to any director, member, employee or representative of the Trust unless before the Execution Date particulars of any such commission and of the terms and conditions of any such agreement for the payment thereof have been disclosed in writing to the Trust and Summit.
- 30.2 Nothing in this Clause 30 shall prevent the Guarantor, Serco or its Permitted Sub-contractors from paying any proper commission or bonus to their employees pursuant to their terms of employment.
31. **SET OFF**
- Subject as otherwise expressly provided in this Agreement or as required by law, all sums due under this Agreement shall be paid in full without set-off, counter-claim, withholding or other deduction save that there may be deducted therefrom any sums which have been determined pursuant to the Dispute Resolution Procedure or by a competent court to be due and payable or previously agreed to be due and payable.
- 31.2 If any sum, other than interest, payable by either party to the other party in accordance with this Agreement pursuant to any indemnity obligation or otherwise pursuant to or in connection with any breach of contract shall be subject to a charge to taxation in the hands of the recipient, the sum payable shall be increased to such sum as will ensure that after payment of such taxation the recipient shall be left with a sum equal to the sum that it would have received in the absence of such charge to taxation, provided that the payer shall not be required to make an increased payment (a "Tax Payment") under this Clause 31.2 to the

extent that the Tax Payment represents taxation chargeable in respect of the profit element due to the recipient in respect of any amounts payable by either party to the other party pursuant to this Agreement provided further that this Clause shall not apply to payments to be made by Summit under Clause 20 nor to increase any sum payable beyond any limit on that payment expressly provided for in this Agreement.

32. NEW SERVICES

Nothing in this Agreement shall prevent either the Trust or Summit from entering into arrangements with third parties for the provision of services which are not Services, and neither the Trust nor Summit is obliged to offer the provision of such services to Serco first or at all provided that, where the Trust consults with Summit, Summit shall consult with Serco with regard to the Trust's requirements for such services where it is given sufficient time by the Trust to do so.

33. INVALIDITY

33.1 If any of Clauses 3.5, 20.6, 22.3, and Paragraph 8.5 of Part 2 to the Schedule of this Agreement is or are held to be or are rendered void or ineffective or will otherwise be unenforceable on the part of Summit by or as a result of any Applicable Law then the parties hereby agree that any such clause or clauses of this Agreement so held or rendered shall be of no further force and effect and this Agreement shall be construed and interpreted as if such clauses do not form part of this Agreement.

33.2.1 If, in respect of any amount to which Clauses 3.5, 20.6, 22.3, and paragraph 8.5 of Part 2 of the Schedule of this Agreement applies, the restrictions to entitlement referred to in Clauses 3.5, 20.6, 22.3, and paragraph 8.5 of Part 2 of the Schedule of this Agreement are held to be or are rendered void or ineffective or will otherwise be unenforceable on the part of Summit (an "Act Event"), then Serco and Summit agree that, notwithstanding the other provisions of this Agreement, the due date for payment of any Additional Amount under this Agreement shall be sixty (60) days after the date that, but for this provision, such amount would have been payable.

33.2.2 For the purposes of this Clause 33.2, an "Additional Amount" is an amount equal to the difference between the amount that Serco is entitled to receive under this Agreement and the amount that Serco would have been entitled to recover under this Agreement if the restrictions to entitlement referred to in Clauses 3.5, 20.6, 22.3, and paragraph 8.5 of Part 2

of the Schedule of this Agreement had not been held to be or rendered void, ineffective or otherwise unenforceable, as determined by Summit's Contract Officer acting reasonably and with reference to any relevant rates or prices set out in this Agreement.

IN WITNESS WHEREOF this Agreement consisting of this and the preceding 66 pages together with the Schedule is executed as follows:-

SUBSCRIBED for and on behalf of
SUMMIT HEALTHCARE (LAW) LIMITED

at LONDON on
the 16th day of June 1998 by
one of its directors in the presence of:-

Alan D. Cobden Witness [Signature] Director
ANDREW MONT CAMPBELL Full Name MICHAEL JOHN COLLARD Full Name
20 CASTLE TOWER Address
EDINBURGH

SUBSCRIBED for and on behalf of
SERCO LIMITED

at LONDON on
the 16th day of June 1998 by
one of its directors in the presence of:-

[Signature] Witness [Signature] Director
EDWARD MARSTON Full Name JOHN D. M. JEFFERY Full Name
126 KING STREET Address
62 CANTON STREET BARRY RITZ PA

This is the Schedule referred to in the Services Sub-Contract between Summit Healthcare (Law) Limited and Serco Limited

THE SCHEDULE

PART 1

SERVICES DURING COMMISSIONING PROCEDURE

Section A

1. Serco shall, during the Commissioning Period at the Hospital, undertake the following matters:-
 - (a) a deep clean and, where appropriate, clinical cleaning being the cleaning to be carried out following the builders' clean in order to bring the Hospital to the standard of cleanliness required in the Output Specification ("Deep Clean"). For the avoidance of doubt the Deep Clean will be a single event occurring prior to the Services Commencement Date (or if the Commissioning Services are delayed in the circumstances detailed in Part 7 of the Schedule to the Project Agreement prior to the Operational Date) and not a recurring event;
 - (b) the same obligations as the Estates Maintenance Services (but excluding the Performance Measurement System) ("Interim Estates Services")
 - (c) security services to the extent of four persons during the day and evening and two persons at night, including receipt/responsibility for keys and responsibility for permitting access to the Hospital to persons permitted access by Summit in accordance with a programme drawn up by Summit and notified to Serco daily at least 24 hours in advance, compliance by its security personnel with that programme such that, without prejudice to the foregoing, Serco shall not permit or refuse access other than in accordance with that programme unless otherwise instructed by the Summit Contract Officer ("Interim Security Services"); and
 - (d) such other matters and services as Summit may request including matters and services requested of Summit after 90 days from the Contractual Practical Completion Date up to the Operational Date ("the Additional Services").

2. Serco shall further during the Commissioning Period (without the right to additional payment therefor):-
 - (a) install a computerised Planned Preventative Maintenance System and prepare hard copy log books in such form as may be approved by Summit acting reasonably;
 - (b) receive from the Trust the Autocad Station at the Site;
 - (c) make available its staff for training on systems by the Contractor on the basis of a programme to be agreed.

Section B

In consideration of performance by Serco of its obligations under Clause 4.1 and Section A of this Part of the Schedule, Summit shall in respect of the Commissioning Period make payment to Serco as follows:-

- (a) Serco shall not be entitled to any additional payment in respect of the Deep Clean;
- (b) the additional sum of £19,889 (Indexed from 1 April 1996) in respect of Interim Security Services;
- (c) the sum of £214,941 (Indexed from 1 April 1996) in respect of the Interim Estates Services plus the cost incurred by Serco of all Components irrespective of their cost during the Commissioning Period in accordance with and subject to the other provisions of Part 6 of the Schedule to this Agreement; and
- (d) the sum of £45,000 (Indexed from 1 April 1996) in respect of the consumables and management of the above services; and
- (e) the costs properly incurred by or on behalf of Serco in the provision of the Additional Services (excluding any profit) as demonstrated to Summit on an open book basis ("the **Additional Costs**") plus a margin of 10% of the Additional Costs provided that Serco shall, and shall procure that its sub-contractors shall, use all reasonable endeavours to minimise the Additional Costs consistent with its obligations under this Agreement and provided that no

Additional Costs shall be payable in respect of any Additional Services requested by Summit as a result of any breach by Serco of its obligations hereunder.

Within five Business Days after the end of each calendar month during the Commissioning Period (or within five Business Days of expiry of the Commissioning Period, as the case may be) Serco shall provide an invoice to Summit for the amounts due to Serco in respect of the preceding calendar month (being the amounts referred to in paragraphs (b)-(d) of Section B as apportioned on a pro-rata basis between each month of the Commissioning Period (or part thereof) together with such Additional Costs as defined in paragraph (e) above incurred by Serco in the preceding month and Serco shall provide to Summit all supporting information and evidence of such amounts due by Summit as Summit may reasonably require. Summit will pay such invoice within ten Business Days thereafter including any VAT (if applicable) due thereon.

The final date for payment of any sum which becomes due pursuant to this Section B shall be the date on which Serco is entitled to terminate this Agreement as a result of an event referred to in Clause 18.5.

Within five days after the date upon which payment becomes due pursuant to this Section B (or would have become due if Serco had carried out its obligations under this Agreement and no set-off or abatement was permitted by reference to any sum claimed to be due under one or more other contracts) (but without prejudice to any other provision of this Agreement) Summit shall provide a notice specifying the amount if any of the payment made or proposed to be made and the basis upon which such amount has been calculated.

Section C

Without prejudice to Clause 11.2.6, Serco shall not be responsible for any failure to perform its obligations under Section A above to the extent that such failure arises from:-

- (a) Serco's inability to obtain appropriate access for its personnel for training and access for personnel of the Trust prior to and during the Contractor's commissioning of the plant and the Hospital;
- (b) Serco's inability to obtain access to the Hospital to witness the testing and commissioning of the plant and equipment and provided that (after the Transition Commencement Date) Serco shall make available appropriate personnel to witness such in accordance with the

Validation/Testing schedule developed in accordance with the requirements of paragraph 1.1 of Part 5 of the schedule to the Development Agreement;

- (c) Summit's failure to provide reasonable training on the operation of the plant in accordance with the proposal referred to in Clause 3.11.2 commensurate with the requirements of an experienced facilities management provider (and provided that Serco shall make appropriate personnel available for such training);
- (d) Summit's failure to implement the Validation/Testing schedule referred to above; and
- (e) if Summit or any persons for whom it is responsible in terms of this Agreement interferes with Serco in the performance of its obligations in terms of this Part 1 of the Schedule,

save in each case as a result of any act or omission of Serco or as a result of any breach by it of its obligations hereunder.

PART 2
PAYMENT

1. **Serco Payment**

Subject to the provisions of paragraphs 2 to 7 (inclusive) of this Part 2 and the other provisions of this Agreement, Summit shall pay to Serco in respect of each Month during the Initial Term in accordance with the provisions of this Part 2, the sum ("the Serco Payment") being the aggregate of the following amounts (each adjusted so far as applicable by the Change Provisions) for that Month:-

- 1.1 the Indexed Services Total less the Management Portion ("the Serco Capacity Element"); and
- 1.2 the Usage Element (excluding the Utilities Payment) less the Management Portion ("the Serco Usage Element");

provided that, if any Service ceases to be provided by Serco under this Agreement, Serco shall cease to be entitled to payment for that Service and the necessary adjustments shall be made to this Clause and provided further that no deductions shall be made under paragraphs 2 to 6 (inclusive) unless and until the same shall have been agreed by Serco or determined to be due under the Disputes Resolution Procedure applicable to Disputes between the Trust and Summit under the DBFO Contracts.

2. **Performance Deductions - Unavailability**

Summit shall be entitled to deduct from the Serco Payment the amount of any Unavailability Deductions arising as a result of breach of Serco's obligations under this Agreement or otherwise recover such Unavailability Deductions from Serco which recovery shall be made at Summit's discretion either by deducting such amount from the Serco Payment payable in respect of any subsequent Month or Months (which amount shall be taken into account and deducted on the relevant invoice(s) to be provided by Serco in accordance with paragraph 8.1 below) or by recovery of such amount as a debt due from Serco which amount shall become due and payable by Serco within 5 days of written demand in respect thereof by Summit.

3. **Performance Deductions - Performance Measurement System**

Summit shall be entitled to reduce the Serco Payment applicable in any Month by the PMS Deduction for that Month or otherwise recover the PMS Deductions from Serco which recovery shall be made at Summit's discretion either by deducting such amount from the Serco Payment payable in respect of any subsequent Month or Months (which amount shall be taken into account and deducted on the relevant invoice(s) to be provided by Serco in accordance with paragraph 8.1 below) or by recovery of such amount as a debt due from Serco which amount shall become due and payable by Serco within 5 days of written demand in respect thereof by Summit.

4. **Performance Deductions - No Substantive Service**

Summit shall be entitled to reduce the Serco Payment applicable in any Month by the aggregate of all Relevant Deductions in respect of the Month or Months to which the Period or Periods relate calculated in accordance with the procedure for calculating such deductions set out in paragraph 9 of Part A to the Schedule to the General Provisions (any allocation of such deductions between Months being on a pro rata basis) or otherwise recover all Relevant Deductions from Serco which recovery shall be made at Summit's discretion either by deducting such amount from the Serco Payment payable in respect of any subsequent Month or Months (which amount shall be taken into account and deducted on the relevant invoice(s) to be provided by Serco in accordance with paragraph 8.1 below) or by recovery of such amount as a debt due from Serco which amount shall become due and payable by Serco within 5 days of written demand in respect thereof by Summit.

5. **Self Help**

Summit shall be entitled to reduce the Serco Payment applicable in any Month by the aggregate of all costs incurred by Summit under Provision 16.2 of the General Provisions or under Clause 10.18 in respect of that Month or otherwise recover such costs from Serco which recovery shall be made at Summit's discretion either by deducting such amount from the Serco Payment payable in respect of any subsequent Month or Months (which amount shall be taken into account and deducted on the relevant invoice(s) to be provided by Serco in accordance with paragraph 8.1 below) or by recovery of such amount as a debt due from Serco which amount shall become due and payable by Serco within 5 days of written demand in respect thereof by Summit.

6. **Industrial Action**

Summit shall be entitled to reduce the Serco Payment applicable in any Month by any amounts deducted from the Unitary Payment by the Trust in accordance with paragraph 9.9 of Part A of the Schedule to the General Provisions in that Month or otherwise recover such amounts from Serco which recovery shall be made at Summit's discretion either by deducting such amount from the Serco Payment payable in respect of any subsequent Month or Months (which amount shall be taken into account and deducted on the relevant invoice(s) to be provided by Serco in accordance with paragraph 8.1 below) or by recovery of such amount as a debt due from Serco which amount shall become due and payable by Serco within 5 days of written demand in respect thereof by Summit.

7. **Force Majeure**

During any period when paragraph 10.3 of Part A of the Schedule to the General Provisions applies, Serco shall:-

- (a) for the first six weeks thereof be entitled, in substitution for any amounts otherwise due to it pursuant to paragraph 1 of this Part 2, to all costs reasonably, properly and necessarily incurred by Serco in respect of the period in question in performing the Services in compliance with this Agreement excluding, for the avoidance of doubt, all loss of profit of Serco and its Permitted Sub-contractors; and
- (b) thereafter be entitled to payment in terms of paragraph 1 of this Part 2 disapplying any Additional Unavoidable Services Operating Costs as referred to in paragraph 10 of Part A of the Schedule to the General Provisions except to the extent such Additional Unavoidable Services Operating Costs constitute costs incurred by Serco; and

Serco shall have an obligation to mitigate its costs incurred in performing the Services and, in doing so, shall comply with the instructions of the Trust.

8. **Payment Procedure**

- 8.1 Serco shall provide Summit as soon as reasonably practicable and in any event within 5 Business Days of the final day of each Month with an invoice for the Serco Payment applicable for that Month itemising the amount of each of the Serco Capacity Element and

the Serco Usage Element and any amounts to be deducted therefrom pursuant to paragraphs 2 to 6 (inclusive) of this Part 2.

- 8.2 Summit shall pay to Serco the amounts due to Serco pursuant to this Part 2 on or prior to the date falling five Business Days after the end of the Month following the Month to which the payment relates or, if later, within 15 Business Days after receipt by Summit of the invoice issued pursuant to paragraph 8.1.
- 8.3 Each of Summit and Serco shall have the right at reasonable hours and on giving reasonable notice to the other to examine the books and records of the other, or, in the case of Serco, any relevant Permitted Sub-contractor, to the extent necessary to verify the accuracy of any information provided pursuant to this Part 2 and Serco shall permit the Trust to examine its books and records, and those of its sub-contractors where the Trust so requires in terms of paragraph 12.5 of Part A of the Schedule to the General Provisions.
- 8.4 Within 5 Business Days after the expiry or termination of this Agreement, Serco will pay to Summit any overpayment of the Serco Payment as a consequence of any deductions under paragraphs 2 to 6 (inclusive) not having been made.
- 8.5 Notwithstanding the foregoing provisions of this Part 2, Serco shall not be entitled to receive, in respect of amounts payable to it pursuant to this Part 2, any amounts greater than those which Summit is entitled to recover from the Trust and which are referable to the payments due to Serco pursuant to this Part 2 in accordance with Paragraph 12 of Part A of the Schedule to the General Provisions (as agreed or determined thereunder) (but without prejudice to Serco's right to pursue claims for any reduction or shortfall directly against the Trust pursuant to Clause 22.6 as applicable).
- 8.6 The final date for payment of any sum which becomes due pursuant to paragraph 8.2 of this Part 2 of the Schedule to this Agreement shall be the date on which Serco is entitled to terminate this Agreement as a result of an event referred to in Clause 18.5.
- 8.7 Within five days after the date upon which payment becomes due hereunder (or would have become due if Serco had carried out its obligations under this Agreement and no set-off or abatement was permitted by reference to any sum claimed to be due under one or more other contracts) (but without prejudice to any other provision of this Agreement) Summit shall

provide a notice specifying the amount if any of the payment made or proposed to be made and the basis upon which such amount has been calculated.

9. **Change**

It is envisaged that any adjustments to payments under the DBFO Contracts consequent upon a Change the subject of Clause 10.5 will be made to the Indexed Services Total and/or the Usage Element but, if this is not the case, then appropriate adjustments shall be made to paragraph 1 of this Part 2.

PART 3

INSURANCE

SECTION A - SUMMIT INSURANCE

1. Insured Risks

1.1 Subject to paragraph 6, Summit shall effect and maintain in full force and effect the following insurances during the period commencing on the Contractual Practical Completion Date and ending on the expiry of the Initial Term:-

1.1.1 all risks insurance for the buildings and all other insurable assets of Summit and Serco comprised in the Hospital and the Site to their full replacement value, naming Summit and amongst others Serco as appropriate, as the insured parties;

1.1.2 at least six months business interruption cover;

1.1.3 third party legal liability insurance in respect of loss or damage to any property or death of or injury to any person with a minimum amount of cover for each occurrence of at least £50,000,000, (Indexed from Financial Close) and naming Summit and amongst others Serco, as appropriate, as the insured parties;

1.1.4 employers' liability insurance for Summit only to comply with the Employer's Liability (Compulsory Insurance) Act 1969 or any amendment or re-enactment thereof;

1.1.5 such other insurances as are required by law to be taken out by Summit.

2. Insurance Terms

2.1 All insurances required to be effected under paragraph 1 of Section A of this Part 3 shall be effected with a reputable insurer(s), in such form and on such terms as Serco has approved (acting reasonably) under this paragraph 2 provided that it shall be deemed unreasonable for Serco to withhold its consent to (i) any of the terms envisaged in the Insurance Report prepared for Summit by Sedgwicks dated March 1998 and copied to Serco prior to the Execution Date or (ii) any insurances so far as taken out in accordance with the requirements of the Collateral Deed. Not less than 14 days (save in case of emergency when such notice

as is practicable will be given) before any insurances are effected under paragraph 1 of Section A of this Part 3, Summit shall give notice to Serco of:-

2.1.1 the identity of the insurer(s); and

2.1.2 a summary of the principal terms and conditions of the proposed insurances (including the amounts of any excesses) or any revision to those insurances;

but shall not, for the avoidance of doubt, unless requested by Serco and such policy documents are available at that time be required to submit the policy documents.

2.2 Each policy or contract shall contain provision for 30 days prior written notice of cancellation or non renewal to be given to Serco by the insurers.

3. Further Summit Obligations

3.1 Summit shall as soon as reasonably practicable provide to Serco a copy of the insurance policy(ies), a copy of the receipt for the premium for the current period of insurance and all notices and certificates of renewal or other evidence reasonably satisfactory to Serco of renewal of the appropriate insurance policies.

3.2 Summit and Serco shall and shall procure that any persons for whom they are responsible in terms of this Agreement shall:-

3.2.1 duly perform its obligations under and not knowingly fail to comply with the terms of all policies or other contracts of insurance; and

3.2.2 in particular, but without limitation, insofar as reasonably practicable shall not knowingly do or omit to do anything by which any such policy or contract may be or become void or voidable at the instance of any insurer(s) or which would entitle any insurer(s) to refuse to pay any claim.

3.3 Save as otherwise expressly provided, the subsistence of any insurances under this Part 3 shall not relieve Serco from any of its obligations or liabilities to Summit under this Agreement.

4. **Application Of Proceeds**

The proceeds of any claim to which Serco is entitled under any insurance required to be taken out under paragraph 1 above shall be applied in satisfaction of the third party claim in reinstatement of the damage or in reimbursement of the specific insured loss unless otherwise agreed in writing by Summit, any of its other sub-contractors named as insured on the relevant policy, Serco, Financiers and the Trust or as otherwise required pursuant to the Finance Facilities Agreements.

5. **Costs**

Serco shall be responsible for payment (limited to £500 (Indexed from Financial Close per claim) of all excesses under the insurance policies for physical loss of or damage to property taken out under paragraph 1.1.1 of this Section A but shall not, subject as provided in Clause 22.1.4, be responsible for payment of any part of the premium for such insurance policies.

6. **Market Availability**

Notwithstanding the foregoing provision of this Section A, Summit shall not be in breach of its obligations under this Agreement in respect of:-

6.1 insurances which are the subject of this Section A but are not maintained by Summit;

(a) for so long as Summit ceases to be required to insure that risk in terms of Clause 26 of the Project Agreement;

(b) for so long as Summit ceases to be required to maintain such insurance in terms of paragraph 6 of Part A of the Third Schedule to the Collateral Deed;

in which case Summit shall not be required to take out that insurance for either Summit, Serco or its Permitted Sub-contractors.

SECTION B- SERCO INSURANCE

1.1 **Insured Risks**

1.1 Serco shall effect and maintain in full force and effect or procure that its sub-contractors effect and maintain in full force and effect the following insurances during the period

commencing on Contractual Practical Completion Date and ending on the expiry of the Initial Term:-

1.1.1 employers' liability insurance to comply with the Employer's Liability (Compulsory Insurance) Act 1969 any statutory orders made thereunder or any amendment or re-enactment thereof and which is to include a waiver of subrogation against Summit and its contractors, sub-contractors, employees and agents;

1.1.2 such other insurances as are required by law to be taken out by Serco or its sub-contractors.

2. Insurance Terms

2.1 All insurances required to be effected under paragraph 1 of Section B of this Part 3 shall be effected with a reputable insurer(s), in such form and on such terms as Summit has approved (acting reasonably) under this paragraph 2. Accordingly, not less than 14 days (save in case of emergency when such notice as is practicable will be given) before any insurances are effected under paragraph 1 of Section B of this Part 3, Serco shall submit to Summit for approval (such approval not to be unreasonably withheld or delayed):-

2.1.1 the identity of the insurer(s); and

2.1.2 a summary of the principal terms and conditions of the proposed insurances (including the amount of any excesses) or any revision to those insurances;

but shall not, for the avoidance of doubt, unless requested by Summit and such policy documents are available at that time be required to submit the policy documents.

2.2 Each policy or contract shall contain provision for 30 days prior written notice of cancellation or non renewal to be given to Summit by the insurers.

3. Further Serco Obligations

3.1 Serco shall as soon as reasonably practicable provide to Summit a schedule of the principal terms of the insurance policy(ies), a copy of the receipt for the premium for the current period of insurance and all notices and certificates of renewal or other evidence reasonably satisfactory to Summit of renewal of the appropriate insurance policies.

3.2 Serco shall and shall procure that its sub-contractors shall:-

3.2.1 duly perform its obligations under and not knowingly fail to comply with the terms of all policies or other contracts of insurance; and

3.2.2 in particular, but without limitation, insofar as reasonably practicable shall not knowingly do or omit to do anything by which any such policy or contract may be or become void or voidable at the instance of any insurer(s) or which would entitle any insurer(s) to refuse to pay any claim.

3.3 Save as otherwise expressly provided, the subsistence of any insurances under this Section B of this Part 3 shall not relieve Serco from any of its obligations or liabilities to Summit under this Agreement.

4. Application Of Proceeds

The proceeds of any claim under any insurance required to be taken out under paragraph 1 of this Section B shall be applied in satisfaction of the third party claim or reinstatement of the damage unless otherwise agreed in writing by Serco and Summit.

5. General

5.1 So far as reasonably practicable, Serco shall, and shall procure that its sub-contractors shall, comply with such claims management procedure as Summit may put in place from time to time and as notified to Serco.

5.2 Subject to compliance by Summit with its obligations under Section A of this Part 3, Serco and its sub-contractors shall be deemed to be satisfied with any insurance taken out by Summit on their behalf.

5.3 Each party shall give to the other prompt notification of any claim with respect to any of the insurance policies referred to in this Part 3 accompanied by full details of the incident giving rise to such claim and shall afford each other all such assistance as may be required for the preparation and negotiation of insurance claims.

- 5.4 Serco and Summit shall comply with all the conditions of such insurance policies and all requirements of insurers in connection with the settlement of claims, the recovery of losses and prevention of accidents, and each shall bear at its own cost the consequences of any failure on its part so to do.
- 5.57 Serco shall, and shall procure that its Permitted Sub-contractors shall, disclose to Summit at not less than monthly intervals all information which may be material in relation to the insurances which Summit has arranged under this Agreement and the DBFO Contracts upon which it or such persons are respectively named as insured until the expiry of such insurances and shall permit Summit to forward all such information to the relevant insurers. Summit shall disclose to Serco when reasonably required all information which may be material in relation to the insurances which Serco has arranged under paragraph 1.1.3 of this Section B and shall permit Serco to forward all such information to the relevant insurers.

PART 4

JOINT OPERATING GROUP

1. General

The provisions of this Part 4 shall regulate participation by Summit and Serco in the Joint Operating Group.

2. Liaison

2.1 Summit and Serco agree that at least three days prior to each meeting of the Joint Operating Group they shall meet to discuss the items on the agenda for that meeting of the Joint Operating Group.

2.2 Serco and Summit undertake to each other that they will act in concert in relation to all issues on which, under paragraph 2.1, they have agreed to do so.

3. Representative on Joint Operating Group

Summit shall procure that one nominee of Serco shall be appointed as a representative to the Joint Operating Group and, if appropriate, procure the removal of any such nominee and appointment of another nominee in his place at the request of Serco.

PART 5

COMPENSATION

SECTION A - SUMMIT BREACH

If this Agreement is terminated in the circumstances envisaged in Clause 20.3 then the Serco Compensation Amount will be calculated according to the following formula:-

$$SCA = a + b + \left(\frac{c}{24} \times 10\% \times 2d \right)$$

where

SCA means the Serco Compensation Amount

- a means the Serco Breakage Costs;
- b means all amounts due and owing or accrued under this Agreement but unpaid at the date of actual termination less all amounts pre-paid which relate to a period after the date of actual termination and all payment deductions accrued but not yet incurred up to the date of actual termination;
- c means the lesser of 24 and the number of whole months remaining until the expiry of the Initial Term; and
- d means the Serco Payment for the previous twelve months less any deductions or reductions made during that period pursuant to paragraphs 2 to 6 inclusive of Part 2 of the Schedule to this Agreement.

Serco Breakage Costs means all costs and liabilities reasonably, properly and necessarily incurred by Serco as a consequence of the termination of this Agreement provided that Serco will (and will use all reasonable endeavours to procure that its Permitted Sub-contractors will) take all reasonable steps to minimise the amount of such costs or damages.

SECTION B - FORCE MAJEURE

If this Agreement is terminated in the circumstances envisaged in Clause 20.4, then the Serco Compensation Amount will be calculated according to the following formula:-

$$SCA = a + b$$

as defined above.

PART 6

ESTATES MAINTENANCE

1. Definitions

In this Part 6 of the Schedule, the following words and expressions shall have the following meanings:-

Asset Renewal Plan means the five year rolling plan to be prepared by Summit pursuant to paragraph 3.1;

Component means any item of Group 1 equipment (or any part or parts thereof) and/or the Hospital or any part or parts thereof (but excluding any materials);

Component Threshold means £2,500 (Indexed from April 1996);

Estates Repair means any work of repair, replacement and/or reinstatement of or to the Hospital and/or Group 1 equipment which is able to be carried out as a discrete task and not comprising Planned Preventative Maintenance, Statutory and Mandatory Inspecting and Testing, First Line Maintenance and excluding the renewal of assets as set out in the Asset Renewal Plan;

Qualifying Serco Estates Repair means a Serco Estates Repair for which either (i) the prime cost of a Component necessary to effect such repair exceeds the Component Threshold or (ii) the prime cost of 5 or less of the same Components all of which are necessary to effect such repair (but in each case excluding VAT) exceeds the Component Threshold;

Serco Estates Repair means any Estates Repair the cost of which, including the prime cost of Components, labour (but excluding the costs of any management time or the costs of personnel engaged in the Estates Maintenance Services in so far as such Estates Repair can be carried out without conflicting with Serco's obligations pursuant to paragraph 2.1 below), plant, materials, sub-contract work, professional fees (if any) and a 10% margin (but in each case excluding any VAT) does not exceed the Relevant Amount;

Summit Estates Repair means any Estates Repair the cost of which, including the prime cost of Components, labour (but excluding the costs of any management time or the costs of

personnel engaged in the Estates Maintenance Services in so far as such Estates Repair can be carried out without conflicting with Serco's obligations pursuant to paragraph 2.1 below), plant, materials, sub-contract work, professional fees (if any) and a 10% margin (but in each case excluding any VAT) exceeds the Relevant Amount:

Relevant Amount means Five thousand Pounds sterling (£5,000) (Indexed from April 1996).

2. Estates Maintenance Service

2.1 In compliance with Clause 5.2, Serco shall save as expressly otherwise provided in this Part 6 observe, perform and comply with the obligations of Summit in relation to the Estates Maintenance Service under the Services Agreement, at such time or times and in such manner as to ensure compliance by Summit with such obligations.

2.2 Serco shall undertake all Planned Preventative Maintenance, Statutory and Mandatory Inspecting and Testing, First Line Maintenance and Serco Estates Repairs in accordance with the Output Specification for the Estates Maintenance Services in each case at no additional cost to Summit save as provided in Clause 2.3.

2.3 In the case of a Qualifying Serco Estates Repair, Summit shall pay to Serco the prime cost of the Component or Components which exceed the Component Threshold, provided that such prime cost of the Component or Components has been notified in advance (except in the case of an emergency when Serco shall be entitled to take appropriate temporary measures) to Summit and Summit has agreed with such cost, such agreement not to be unreasonably withheld or delayed.

2.4 Serco shall be responsible for undertaking in accordance with and subject to the provisions of paragraph 4, all Summit Estates Repairs as may from time to time become necessary in order to ensure compliance by Summit with its obligations in relation to the Estates Maintenance Service under the Services Agreement.

3. Asset Renewal Plan/PPM Programme

3.1 Summit shall be responsible for the preparation of an Asset Renewal Plan dealing with the renewal and/or replacement of Components which plan shall be based on the estimate of asset maintenance cycles and life expectancies as referred to in Part 4 of the Specification and Summit shall copy the Asset Renewal Plan to Serco at least 12 weeks prior to the

Services Commencement Date. Summit shall further update the Asset Renewal Plan annually and copy the updated Asset Renewal Plan to Serco prior to 1 November in each year. The preparation and updating of the Asset Renewal Plan from time to time shall be undertaken in consultation with Serco and Serco shall provide all assistance and information in relation thereto as Summit may reasonably request. Serco shall, within 10 Business Days of receipt from Summit of the Asset Renewal Plan and each update of the Asset Renewal Plan notify Summit in writing if it does not agree with the Asset Renewal Plan which it shall be entitled to do by reason only that it reasonably believes that a Component requires renewal and/or replacement prior to the date specified for such in the Asset Renewal Plan as a result of its useful economic life having expired such that the cost to Serco of performing its obligations in relation to the Estates Maintenance Service is materially increased. (Without prejudice to Clause 25) the parties shall in good faith endeavour to resolve any such dispute but failing any agreement within 20 Business Days of receipt by Serco of such Asset Renewal Plan either party may refer the matter to the Dispute Resolution Procedure provided that Summit shall not in any case be obliged to renew and/or replace a Component provided it (i) agrees to reimburse Serco's additional costs reasonably and necessarily incurred in performing its obligations in relation to the Estates Maintenance Service and provided that Serco will use all reasonable endeavours to mitigate such costs and (ii) Summit would not as a result of failure to renew and/or replace such Component be in breach of the Services Agreement.

Following agreement of the Asset Renewal Plan in accordance with the foregoing procedures of this Clause Summit shall put such Plan to the Trust for agreement in accordance with the terms of the Output Specification.

- 3.2 3.2.1 No later than 24 weeks prior to the Services Commencement Date Serco shall deliver to Summit the draft PPM Programme for the period from the Contractual Practical Completion Date (and through the Services Commencement Date) until 31 March in the next following year together with such supporting documents as Summit may reasonably require, and (without prejudice to Clause 25) the parties shall consult together in good faith to agree that PPM Programme within 6 weeks after delivery of the same by Serco. If such PPM Programme is not agreed within such period either Party may refer the matter or matters in dispute to the Disputes Resolution Procedure.

- 3.2.2 Serco shall issue the agreed PPM Programme to Summit by the Contractual Practical Completion Date. The Estates Interim Services shall be carried out in accordance with such PPM Programme.
- 3.2.3 Serco shall have the right to propose variations and/or amendments to such PPM Programme on receipt and review of the documents received in accordance with Clause 11.6.3 of this Agreement and the Asset Renewal Plan in accordance with paragraph 3.1 and without prejudice to Clause 25 the parties shall consult together in good faith to agree such variation/amendments. If such variations/amendments are not agreed by 6 weeks prior to the Services Commencement Date either party may refer any matters in dispute to the Dispute Resolution Procedure.
- 3.3 Prior to 1 January in each year following the Services Commencement Date, Serco shall deliver to Summit the draft PPM Programme for the period from 1 April until 31 March in the next following year or the immediately following year, as the case may be, together with such supporting documents as Summit may reasonably require and the parties shall (without prejudice to Clause 25) consult together in good faith to agree the PPM Programme. If the PPM Programme is not agreed by 1 February in each year following Services Commencement Date either party may refer any matters in dispute to the Dispute Resolution Procedure. The PPM Programme shall take into account the relevant Asset Renewal Plan agreed or determined under paragraph 4.

Following agreement of the PPM Programme in accordance with the foregoing provisions of this Clause Summit shall put such programme to the Trust for agreement in accordance with the requirements of the Output Specification.

4. Additional Work

- 4.1 Summit may, subject to giving reasonable notice, require Serco to undertake asset renewal in accordance with the Asset Renewal Plan (as amended in accordance with any requirements of the Trust in the course of agreeing such in accordance with the Output Specification) and shall pay the cost thereof to Serco in accordance with the provisions of paragraph 6.
- 4.2 If Serco, in implementation of its obligations under paragraph 2, is required to undertake a Summit Estates Repair, it shall promptly notify Summit in writing as soon as it becomes aware of the requirement for such work giving full details of the circumstances and an estimate of the cost. In the event of a dispute, as to whether or not such work falls within the

definition of a Summit Estates Repair either party may subject to paragraph 4.4 refer the matter to the Disputes Resolution Procedure. Serco shall be entitled to an additional payment from Summit in respect of such work in accordance with the provisions of paragraph 6.

4.3 Any work which

- (i) Summit requires Serco to undertake in accordance with Clause 4.1 above; or
- (ii) Serco is required to carry out pursuant to Clause 4.2 above

shall be referred to as "Additional Work".

4.4 Pending agreement or determination under paragraph 4.2, unless paragraph 4.5 applies, Serco shall undertake or continue to undertake Additional Work in compliance with its obligations under paragraph 2 and/or 4.1 but without prejudice to Serco's rights under this Part 6.

4.5 Summit may at any time and from time to time notify Serco in writing to cease carrying out any item of Additional Work in which case Serco shall cease carrying out such work in accordance with the notice from Summit and Serco shall comply with Summit's reasonable instructions in relation thereto but shall otherwise have no further responsibility for such Additional Work or any consequences resulting from the carrying out or any delay or failure in the carrying out of such Additional Work where such consequences result from Summit's instruction to cease carrying out such work but without prejudice to the outcome of any reference to the Dispute Resolution Procedure under paragraph 4.2 or any rights or remedies of Summit in respect of other delay or failure by Serco to comply with its obligations in relation to the Estates Maintenance Services. If, prior to receipt of a notification pursuant to this paragraph 4.5, Serco has, in carrying out Additional Work pursuant to paragraph 4.4, reasonably incurred any additional costs specifically in relation to such Additional Work then (save where notification has been served in circumstances where Serco is in breach of its obligations pursuant to paragraph 2) if agreed or determined that such work falls within the definition of Additional Work, Serco shall be entitled to be paid such costs, the amount to be agreed between the parties or determined by reference to the Dispute Resolution Procedure.

5. **Additional Work Undertaken by Summit**

In terms of paragraph 4.5 or paragraph 6, Summit may at its option itself undertake or procure the undertaking of any Additional Work and Serco shall provide all such assistance and information as Summit may reasonably require in this regard including but not limited to making available Personnel engaged in the Estates Maintenance Services and plant and consumables held by Serco for the purposes of or used in the Estates Maintenance Service. If in providing such assistance and information Serco reasonably incurs any additional costs which specifically relate to the provision of such assistance and information then it shall be entitled to be paid such costs subject to it having used all reasonable endeavours to minimise the amount of such costs. The amount of any payment to be made to Serco hereunder shall be as agreed between the parties.

Amounts agreed or determined pursuant to paragraphs 4 and 5 above shall become payable within 10 Business Days of the date of agreement or determination thereof.

6. **Implementation of Additional Work**

Unless paragraph 4.5 applies, Serco shall undertake (or procure the undertaking of) the Additional Work (where relevant as agreed or determined) in accordance with the Services Agreement and the following provisions shall apply except in the case of an emergency when Serco shall be permitted to take appropriate temporary measures):-

6.1 Serco shall as and when Summit may reasonably require submit to Summit for approval a specification, method statement and scope of work for each task of Additional Work (such specification to comply with the Services Agreement and that part of the Output Specification relating to the Estates Maintenance Service and to be in accordance with all Applicable Laws) and Serco and Summit shall seek to agree, without prejudice to the other provisions of this part 6 of the Schedule to this Agreement, a price for the Additional Work;

6.2 if so required by Summit, Serco shall submit to Summit for approval a list of tenderers to undertake the Additional Work, to which Summit may add;

6.3 Serco shall if so required procure quotations for the Additional Work and shall itself submit a quotation to Summit for such Additional Work which quotations shall in

either case be disclosed to Summit and accompanied by reasonably detailed supporting evidence;

- 6.4 if Summit shall exercise its right under paragraph 5 Summit may itself enter into a contract with a third party (including, any tenderers referred to in paragraph 6.2) for the relevant part of the Additional Work (but without prejudice to Serco's obligations under this Part 6), and in such case Serco shall provide such assistance as Summit may reasonably require to monitor compliance by such third party with the provisions of any contract so entered into by Summit (subject to payment of Serco's reasonable charges in respect thereof to be agreed between the parties) which amounts shall become payable within 10 days of the date of agreement and Summit shall supply to Serco copies of all invoices paid to any such tenderer;
- 6.5 Serco shall consult with Summit in the appointment of any tenderer hereunder to carry out any Additional Work and shall not appoint any such tenderer or undertake the work itself without the prior written consent of Summit;
- 6.6 if Summit shall not exercise its rights under paragraph 5, upon completion of such Additional Work (as certified by Summit's Contract Officer) Serco shall submit to Summit Serco's invoice (including any VAT, if applicable, thereon) for an amount no larger than the agreed price or quotation referred to above (plus any agreed variations) (setting out to Summit's reasonable satisfaction all the details of the work carried out and the cost incurred thereby) Summit shall pay such invoice within 10 Business Days thereafter;
- 6.7 the final date for payment of any sum which becomes due pursuant to this Part 6 of the Schedule to this Agreement shall be the date on which Serco is entitled to terminate this Agreement as a result of an event referred to in Clause 18.5; and
- 6.8 within five days after the date upon which payment becomes due pursuant to this Part 6 of the Schedule to this Agreement (or would have become due if Serco had carried out its obligations under this Agreement and no set-off or abatement was permitted by reference to any sum claimed to be due under one or more other contracts) (but without prejudice to any other provision of this Agreement) Summit

shall provide a notice specifying the amount if any of the payment made or proposed to be made and the basis upon which such amount has been calculated;

PROVIDED ALWAYS that Summit shall not be obliged to compensate Serco in respect of (i) any work, materials, labour or overhead costs forming part of the Additional Work if due to a failure on the part of Serco to include any (or adequate) provisions in respect thereof in the PPM Programmes or (ii) due to a failure by Serco to undertake its obligations under this Part 6 or (iii) labour costs of Personnel engaged in the Estates Maintenance Services and Serco shall, and shall use all reasonable endeavours to procure that its sub-contractors shall, minimise the costs of the Additional Work consistent with its obligations hereunder including making available Personnel engaged in the Estates Maintenance Service to undertake such Additional Work where reasonably practicable.

7. Serco shall give to Summit not less than 10 Business Days' notice of the date upon which it requires Summit's Contract Officer to certify the completion of any work carried out as part of the Additional Work. Serco shall allow, *inter alia*, Summit and any technical adviser appointed by it or its financiers to inspect and to make reasonable representations which shall be acted upon by Serco to the reasonable satisfaction of Summit. Summit reserves the right to reject any goods, plant, materials or equipment which are not in accordance with the agreed specification of the Additional Works. When the Additional Work has been completed in accordance with this Agreement to the reasonable satisfaction of Summit and any such technical adviser, Summit's Contract Officer shall within not more than 5 Business Days after Serco's notice certify the same by written notice to Serco.
8. Title in any materials, goods, plant or equipment intended to form part of the Additional Work shall vest in Summit upon such materials, goods, plant or equipment having been placed on the Site, or, if earlier on the date of payment by Summit for such materials, goods, plant and/or equipment. Risk in all such materials, goods, plant or equipment intended to form part of the Additional Work shall remain with Serco until such materials, goods, plant or equipment have been incorporated into the Hospital and certified by Summit's Contract Officer in accordance with paragraph 7. If any materials, goods, plant or equipment have been rejected by Summit in accordance with paragraph 7 then title in such rejected materials, goods, plant or equipment shall revert to Serco.

9. Serco warrants that there will be no legal or equitable encumbrance over any materials, goods, plant or equipment title in which has vested in Summit in accordance with paragraph 8. Serco shall indemnify and keep indemnified Summit against any losses or claims arising out of any breach of this warranty.

10. Serco shall use all reasonable endeavours to procure warranties from any supplier or manufacturer of any materials, goods, plant or equipment which forms part of the Additional Work and Serco shall take all reasonable steps to:-
 - 10.1 enforce such warranties as and when reasonably necessary; and
 - 10.2 ensure that the benefit of such warranties (so long as they remain valid) are assignable without restriction to Summit or to such person as Summit may nominate.

11. Paragraphs 7 to 10 (inclusive) shall not apply if and to the extent that Summit itself enters into the contract for the relevant Additional Work in accordance with paragraph 6.4.

12. To the extent that the Construction (Design and Management) Regulations 1994 ("the CDM Regulations") are applicable to any work carried out under this Agreement in order for Serco to comply with its obligations as to maintenance:
 - 12.1 Serco shall perform or procure the performance of all obligations, requirements and duties arising under the CDM Regulations in respect of that work;
 - 12.2 Serco will perform the duties and obligations of the principal contractor and the planning supervisor for the purposes of the CDM Regulations; and
 - 12.3 Summit will perform the duties and obligations of the client for the purposes of the CDM Regulations and deliver a duly executed declaration to the Health & Safety Executive pursuant to Regulation 4(1) of the CDM Regulations.

PART 7
DESIGN ASSUMPTIONS

DESIGN ASSUMPTIONS

FM Management Facilities

This is the requirement of the facilities management office functions.

Facilities and equipment required.

- The Facilities management offices require dedicated offices for the following personnel:

F.M. Contract Manager	12.25m ²
Financial Manager	12.25m ²
Personnel Manager	9.10m ²
Risk Management	9.10m ²
Training Officer	9.10m ²
Records Room	9.10m ²

- Additional open plan accommodation is required to accommodate a further 2 people- 24.8m².
- Access to conference rooms
- A bay for beverage preparation
- Easy access to male/female toilet facilities.
- All office accommodation should have suitable points to the I.T. network.
- All office accommodation should have telephone points and handsets.

- All the above accomodation should have suitable furniture and fittings.

Car Parking

Service Overview

To provide a free car park for patients and visitors to the Trust. Trust/Summit staff will park free of charge in controlled areas.

Facilities and Equipment required.

- Road signage and markings to inform and to direct traffic effectively around the site.
- Roadway design that permits access at all times to "Blue Light" routes for permitted vehicles.
- Staff car park entrance/exit to have access barrier.
- All entrance and exit barriers to include a voice intercom help button, linked to the main security console. All barriers to have a remote operation facility.
- Car Parks and roadways to be adequately lit to provide personal safety and security and to permit the operation of CCTV cameras.
- All car park areas to be provided with suitable type and number of grit bins.
- All surfacing/roadway makeup to be suitable for the traffic flows and volume.
- Car parks to have appropriate falls/drainage to prevent surface ponding.
- Road and path design to enable full and unrestricted access for the disabled/elderly.

Grounds Maintenance

Service Overview

It is intended to subcontract the majority of the grounds maintenance duties, however there will be a dedicated on-site presence of 1 or 2 groundsmen to undertake minor daily tasks.

Facilities and Equipment to be provided.

- There will be a requirement for dedicated office accommodation of 8.7m².
- Staff will require suitable changing/shower facilities, comprising cloakroom, W. C and a shower.
- An appropriate dedicated messing facility will be required.
- A secure covered area of approx 45m² will be required for storing vehicles and equipment. Within this area a suitable hose and reel for washing vehicles and equipment is required. Access is required via 3 metre wide roller shutter doors.
- A separate room of approx 25m² to be serviced suitable for its purpose as a machinery equipment store/workshop is required.
- A dedicated fertiliser store with a sealed floor, drain, dilution and washdown facilities is required.
- A dedicated chemical store with a sealed floor, drain, dilution and washdown facilities is required.
- A secure external compound area will be required with access and working lighting. This to be adjacent to the storage area described above. Within the compound an external bulk storage facility is required for road gritting materials.

- Suitable salt/grit bins will be provided at all pedestrian access points, along the "blue light" routes and key roadways not less than 100 metres apart. Bins to be located at any road incline/change in level.
- All landscaped areas will minimise maintenance obligations and will enable easy access for required maintenance.

Domestic Services

Service Overview

To provide a cleaning service throughout the hospital. Additionally, to prepare and serve beverages to patients.

Facilities and Equipment to be provided.

- All wards/departments to be provided with a cleaners room (DSR) consisting of hot and cold water to a low level sink and not being less than 2.23m². The room should have hand washing facilities, a suitable lockable cupboard and shelving.
- There will be a requirement for 7 zonal offices/stores of approx 13.3m². Separate secure storage within these areas is required for chemicals.
- All ward, department, stairs and common areas will have a suitable number of low level power points spaced in order to allow safe working practices.
- All surfaces to be selected in accordance with the relevant HTM. Trust control of infection policy and to facilitate ease of cleaning.
- All external/internal glazed areas should be accessible for cleaning, using safe and reasonable methods.
- Atrium or high level glazed areas will have suitable access systems to facilitate safe internal cleaning methods.

- Changing/shower facilities are required for both male and female staff.

Linen & Laundry

Service Overview

A fully managed linen rental service will be provided to wards and departments with a daily "top up" service to linen cupboards.

Facilities and Equipment Required

- Staff will use F.M. changing facilities.
- At all wards/departments two linen cupboards each of not less than 1.5 metres width and 600mm depth are required. The cupboards should have shelving at height intervals of 80cm.
- Soiled, segregated linen to be held in the disposal hold at each ward/department (refer to portering assumptions).

Clean linen.

- To be not less than 75m² to include a supervisors office. The area to have heating to keep linen dry and lighting suitable for linen inspection activities. The area should have access to IT/telecommunications systems. It should be adjacent to the delivery bay but segregated from the soiled linen area.
- The area will have not less than 50 linear metres of appropriate linen storage racking.
- A dedicated sewing room of not less than 17m² is required with equipment to allow measuring, alteration and marking of uniforms to be undertaken. Within the area a discrete changing facility is required.

- A dedicated uniform issue room of approx. 21m² is required with uniform dispensing counter and suitable storage.
- The above clean linen rooms to be interlinked.

Soiled linen hold

- This area to be not less than 31m² to be suitably ventilated and finishes to allow thorough cleaning. This should be adjacent to the delivery bay.

Patient Owned Clothing Laundry

- This area not to be less than 29m². To include services, equipment and finishes suitable for the laundering, drying, finishing and storage of patient clothing.

Portering (including waste)

Service Overview

- The portering service will be responsible for the internal movement of goods and patients around the hospital.

Facilities and Equipment required

- All portering staff will use the facilities management changing facilities.
- A dedicated portering base will be required of approximately 13 m² to include beverage making facilities.
- A porters control office will be required with access to ward order comms, IT and telecom systems and will be approximately 12m². An additional porters base is required within the A&E Department.
- An electric tug charging facility suitable for 2 units will be required.

- Appropriate wall protection at skirting and dado levels will be placed along all corridors and hospital streets.
- Floor finishes should be suitable for electric tug traffic at level zero. At all other levels flooring should be suitable for trolley traffic.
- All corridors to be used for deliveries should have protected corners. Tug delivery routes should have tug turning circles. The main service corridor should enable two way tug traffic movement. Doors on tug traffic routes to have hold open facilities and all doors where trolley movement could be expected should have suitable protection and be robust.
- A dedicated mail room with "pigeon hole" system, sorting benches, an area for a franking machine and with suitable environmental conditions is required - this area to be approximately 41m². A suitable secure point is required for Post Office and out of hour deliveries.

Waste

- All ward/departments will require disposal holds to accommodate storage of:
 - Dirty linen
 - Soiled (infected) linen
 - Domestic waste
 - Clinical waste
 - Recyclable waste (if required)
- All disposal holds will require suitable drainage to enable wash downs to be undertaken.
- An internal refuse/waste hold adjacent to the loading bay is required where waste can be stored prior to removal to the central waste compound.

- A hard standing area adjacent to the loading bay is required for the parking of a clinical waste storage/transporter.
- An external waste compound adjacent to the loading bay is required for the storage of domestic waste. This area should be suitable for the location of skips, compactor and waste containers. The area should have services including lighting, power for the compactor, wash down facilities and should be secure including vermin proof.

Security Services:

- All alarms are duplicated in the security room and switchboard.
- All access areas have CCTV coverage to fully meet the Developed Specification.
- Lighting levels and CCTV cameras meet legal requirements.
- The number of viewing screens provided minimises the viewing rotation sequence as far as is practical.
- Provide a secure security room to a minimum area of 25m².

Estates Maintenance Services:

- The engineering design solution is in full compliance with the Developed Specification.
- There is safe and appropriate access to all components and plant provided within the Specification. The Approved Service Provider will supply any specialist handling equipment they require.
- The BMS system will monitor the environment and, energy consumption within the Hospital

- All plant and building fabric has been designed to allow/ensure safe and suitable access, including routes of access, for maintenance, removal and/or replacement. The Approved Service Provider will supply any suitable access equipment they require.
- The designer has fully complied with their obligations under CDM Regulations
- All engineering systems shall be designed to allow all required zonal close/drain downs to meet the Trusts operational requirements as detailed in the contract.
- All goods lifts shall be provided with a manual key override and are suitable for the distribution of all goods that would reasonably be expected within a hospital
- The design has taken into account the Design Life Criteria as referred to in Part 4 of the Specification and has had due regard to the requirements of economic maintenance.
- All plant, equipment, components and systems to be fully year 2000 compliant
- Estates manager Office - 8m²
- Estates meeting Rooms - 8m²
- Estates Management office - 75m²
- Estates Workshops of minimum area 170m² will be fitted with all equipment as detailed in the Room Data Sheets
- All workshops will be designed to ensure a safe working environment for all staff
- The Heating and Ventilation Systems are monitored and controlled through the BMS system. Other plant and equipment alarms are interfaced with the BMS.
- Insofar as is practical and subject to the company continuing to trade commitments will be obtained from plant and equipment suppliers regarding spares availability, servicing and after sales support.

Switchboard Services:

- Provide a communications room of minimum area of 30m²
- The switchboard will allow the installation of an Auto Attendance Facility
- Provide 3 No. Telephonists stations and 1 No Supervisor stations
- Communications Room to be secure and have remote door release facility.

PART 8

EMPLOYEES

1. Serco shall observe, perform and comply with the obligations of Summit under Clause 16 of the Project Agreement in each case at such time or times and in such manner as to ensure compliance by Summit with the terms of Clause 16 of the Project Agreement to the intent and effect that, and both parties shall use all reasonable endeavours to procure that, pursuant to the Employment Regulations and/or the Directive the contracts of employment between the Trust and/or Hospital Hygiene Limited and the Employees will have effect on or after the Transition Commencement Date as if originally made between Serco and the Employees but the parties agree that the provisions of Clause 16 shall apply irrespective of whether or not the Employment Regulations and/or the Directive apply to transfer the contracts of employment of the Employees to Serco as aforesaid.
2. Serco shall indemnify Summit (or, at its direction, any of its sub-contractors other than Serco) from and against all costs, expenses, claims, liabilities, losses and damages of any nature whatsoever suffered or incurred by Summit or its sub-contractors by or in relation to or in connection with the Employees or any other Personnel of Serco or its sub-contractors whenever arising or made (including after termination of this Agreement) save to the extent (a) that a recovery is made by Summit under any indemnity granted by the Trust under Clause 16 of the Project Agreement or (b) caused by any act or omission (but for the avoidance of doubt excluding any termination of this Agreement in accordance with its terms) of Summit or any person for whom it is responsible in terms of this Agreement.
3. Subject to Clause 22.3, Summit shall indemnify Serco (or, at the direction of Serco, its Permitted Sub-contractors) on demand and hold them harmless against all costs, damages, losses, claims, demands, expenses and liabilities (including reasonable legal and other professional expenses) incurred by them as a result of any breach by the Trust of its obligations to Summit and/or any Approved Service Provider under Clause 16 of the Project Agreement, including for these purposes, any breach of warranty or indemnity given by the Trust thereunder.
4. Notwithstanding the provisions of paragraph 1, Serco shall not be obliged to observe, perform and comply with the obligations of Summit to the Trust as set out in Clauses 16.11.1 and 16.18.4 of the Project Agreement.

PART 9

Dispute Resolution

SECTION 1: NEGOTIATION BETWEEN THE PARTIES

If a Dispute arises under, out of or in connection with this Agreement then, except where a Dispute is expressly stated in this Agreement to be referable to an Expert, the parties may agree to refer the Dispute to an official of Summit (nominated from time to time for that purpose by Summit, failing which, the Chief Executive of Summit) and an official of Serco (nominated from time to time for that purpose by Serco, failing which, the Chief Executive of Serco), who shall meet and use their reasonable endeavours to negotiate (in good faith) to resolve the Dispute, and whose unanimous decision shall be binding on the parties.

SECTION 2: DISPUTE RESOLUTION PROCEDURE

1. REFERRAL TO EXPERT FOR ADJUDICATION

1.1 If either party does not agree to use the procedure referred to in Section 1 above, or if the procedure referred to in Section 1 above does not resolve a Dispute arising under, out of or in connection with this Agreement within ten (10) days of the date of referral, or if a Dispute is expressly stated in this Agreement to be referable to an expert and/or a dispute resolution procedure, then either party may refer such Dispute to an adjudicator agreed between the parties or appointed in accordance with the procedure specified in paragraph 2 below (the "Expert") for adjudication in accordance with the procedure specified in paragraph 2 below.

2. ADJUDICATION PROCEDURE

2.1 Any Dispute arising under this Agreement which is referred to the Expert for adjudication shall be adjudicated in accordance with the ORSA Adjudication Rules - 1998 Version 1.2 (the "Adjudication Rules"), provided always that:-

- (a) all references to the Adjudicator in the Adjudication Rules shall be deemed and treated as a reference to the Expert as defined in Section 2, paragraph 1.1 above.
- (b) the following words shall be deleted from the Adjudication Rules:
 - (i) "Contract' means the agreement which includes the agreement to adjudicate in accordance with these Rules" in lines 2 to 4 of Rule 2 ;
 - (ii) "of £100" in line 5 of Rule 7(i);
 - (iii) "an arbitrator appointed pursuant to the Contract and/or" in lines 3 and 4 of Rule 16;
 - (iv) "or arbitration" in line 3 of Rule 31;
 - (v) "or arbitration" in line 6 of Rule 31;
- (c) Rule 1(i) shall be deleted from the Adjudication Rules;
- (d) Rule 1(ii) shall be deleted from the Adjudication Rules;
- (e) the party giving written notice pursuant to Rule 3(i) shall, at the same time, also give a copy of the notice to the Adjudicator;
- (f) notwithstanding Rules 14 and 33, no party shall, save in the case of bad faith on the part of the Adjudicator make any application whatsoever to a competent court in relation to the conduct of the Adjudication or the decision of the Adjudicator until after the Contractual Practical Completion Date or the alleged Contractual Practical Completion Date of the Works or termination or alleged termination of this Agreement, unless and until the prior written consent of both Summit and Serco has been obtained;
- (g) notwithstanding Rules 14 and 33, no party shall make any application whatsoever to a competent court in relation to the conduct of the Adjudication or the decision of the

Adjudicator after that date being the later of, ninety (90) days from the decision of the Adjudicator or ninety (90) days from the Contractual Practical Completion Date:

- (h) notwithstanding Rules 14 and 33, no party shall make any application whatsoever to a competent court in relation to the conduct of the Adjudication or the decision of the Adjudicator unless it shall involve the pursuit of a claim or a counterclaim of a monetary value in excess of £150,000 (Indexed from Financial Close), or in the case of claims or counterclaims of a lesser monetary value arising out of the same facts and circumstances, an aggregate monetary value of £300,000 (Indexed from Financial Close), on a net present value basis using a discount rate of the Bond Rate;
- (i) Rule 19(x) and Rule 19 (xiii) shall be deleted from the Adjudication Rules;
- (j) Rule 21(v) shall be deleted from the Adjudication Rules;
- (k) Rule 24 shall be deleted from the Adjudication Rules;
- (l) Rule 28 shall be deleted from the Adjudication Rules;
- (m) Rule 32 shall be deleted from the Adjudication Rules;
- (n) the following Rules shall be inserted in the Adjudication Rules;
 - (i) "1A. The following rules meet the requirements of adjudication procedure as set out in section 108 of the Housing Grants, Construction and Regeneration Act 1996; Part I of the Scheme for Construction Contracts (Scotland) Regulations 1998 shall thus not apply".
 - (ii) "2A. "Contract" means this Agreement and shall include the agreement to adjudicate in accordance with these Rules."
 - (iii) "2B. "Chairman of ORSA" means the President for the time being of ORSA, or such other officer as is authorised to deputise for him;

- (iv) "2C. "ORSA" means the Law Society of Scotland;
- (v) "19A. The Adjudicator shall only reach his decision after holding an oral hearing, and with or without having endeavoured to facilitate an agreement between the parties".
- (vi) "19B. Upon becoming aware that the dispute is the same or arises out of substantially the same facts as a dispute which has previously been referred to adjudication under the Contract, the Adjudicator shall immediately resign."
- (vii) "21A. The Adjudicator may require any Party to pay or make contribution to, the legal costs of another Party arising in the Adjudication, and/or the legal costs of any party to a dispute arising under, out of, or in connection with any other contract between any Party and that third party which relates to the Contract (the "Related Dispute") where the adjudication of the Related Dispute has been consolidated or joined with the Adjudication of the Dispute between the Parties (the "Consolidated Adjudication"), to the extent that the legal costs of that third party arise in respect of the Related Dispute during the period in which the Related Dispute is consolidated or joined with the Dispute between the Parties.
- (viii) "24A. Save as aforesaid, the Parties shall be jointly responsible for the Adjudicator's fees and expenses including those of any specialist consultant appointed under 19(viii) (the "Costs of Adjudication"), the Adjudicator shall have the discretion to make directions to require any Party to pay or make contribution to the Costs of Adjudication and/or the fees and expenses of any adjudicator and specialist consultant appointed in relation to the Consolidated Adjudication. If no such directions are made, the Parties shall bear the Costs of Adjudication in equal shares, and if any Party has paid more than such equal share, that Party shall be entitled to contribution from other Parties accordingly."
- (ix) "28A. Every decision of the Adjudicator shall be implemented without delay. The Parties shall be entitled to such reliefs and remedies as are set out

in the decision, and shall be entitled to summary enforcement thereof, regardless of whether such decision is or is to be the subject of any challenge or review. No Party shall be entitled to raise any right of set-off, counterclaim or abatement in connection with any enforcement proceedings. The Parties agree and bind themselves to each other to docket every decision with their consent and to registration of the Adjudicator's decision in the Books of Council and Session for execution."

- (x) "30A. All information, data or documentation disclosed or delivered by a Party to the Adjudicator in consequence of or in connection with his appointment hereunder shall be treated as confidential by the Adjudicator and each Party to the Adjudication (save as otherwise agreed between the Parties) and shall be returned to the owner on completion of the Adjudication proceedings."

- (xi) "32A. These Rules shall be governed by and construed in accordance with the law of Scotland and the Parties irrevocably submit to the non-exclusive jurisdiction of the Courts of Session, Scotland and waive any plea of forum non conveniens."

SECTION 3: RELATED DISPUTES

1. CONSOLIDATION OF DISPUTES

- 1.1 In the event of a Dispute arising under, out of or in connection with this Agreement which in the opinion of Summit relates to a dispute or potential dispute ("Related Dispute") arising under, out of, or in connection with any other contract between Summit and a third party (all such contracts being referred to as the "Related Contracts"), and where the Related Dispute has been referred to an adjudicator for determination under an adjudication procedure ("the Related Procedure") which meets the requirements set out in section 108 of the Housing Grants, Construction and Regeneration Act 1996 and is in all material respects equivalent to the adjudication procedure in this Part 9 of the Schedule, Summit may or may procure that the other party to the Related Dispute shall as soon as practicable, and in any case within fourteen (14) days of the referral of the Dispute to the Expert, give to the Expert conducting

the adjudication under this Agreement and also to the other parties to the Dispute and the Related Dispute the particulars set out in paragraph 1.2 below.

1.2 The particulars referred to in paragraph 1.1 above are:-

- (a) a copy of the Related Contract;
- (b) a preliminary statement from Summit and/or, as the case may be, the other party to the Related Dispute setting out:-
 - (i) the basis and grounds for consolidation of the Related Dispute and the Dispute;
 - (ii) the cases of the parties to the Related Dispute;
 - (iii) any relief sought by the parties to the Related Dispute; and
 - (iv) a list of any documents served in relation to the Related Dispute.

Any such particulars sent by Summit to the Expert and the other parties to the Dispute shall be sent at the same time to the other party to the Related Dispute.

1.3 On receiving the particulars set out in paragraph 1.2 above prior to the Contractual Practical Completion Date and within fourteen (14) days of the referral of the Dispute to the Expert, the Expert shall, at the request of Summit, immediately order consolidation of the Dispute and the Related Dispute and shall have the authority and the power referred to in paragraph 1.10 below .

1.4 On receiving the particulars set out in paragraph 1.2 above on or after the Contractual Practical Completion Date and within fourteen (14) days of the referral of the Dispute to the Expert, the Expert shall immediately request that the parties to the Dispute and the other party to the Related Dispute attend a meeting with the Expert with a view to determining whether or not the Dispute and the Related Dispute should be consolidated.

- 1.5 Summit shall use its reasonable endeavours to procure that an authorised representative of the other party to the Related Dispute shall attend the meeting with the Expert referred to in paragraph 1.4 above. Summit and Serco each agree to send an authorised representative or nominee to any meeting of this kind under this Agreement or under a Related Contract, which they may be requested to attend. The parties hereby agree that the Trust shall be entitled to attend any meeting with the Expert referred to in paragraph 1.4 above, as Summit's nominee.
- 1.6 At the meeting referred to in paragraph 1.4 above, Summit's representative (or its nominee) shall, as a preliminary matter, either:
- (a) confirm to the Expert that Summit (or its nominee) accepts the proposed consolidation of the Related Dispute with the Dispute; or
 - (b) inform the Expert that Summit (or its nominee) does not accept the proposed consolidation of the Related Dispute with the Dispute.
- 1.7 Where paragraph 1.6(a) above applies, the Expert shall immediately order consolidation of the Dispute and the Related Dispute and shall have the authority and the power referred to in paragraph 1.10 below.
- 1.8 Where paragraph 1.6(b) above applies, the Expert shall issue within one (1) day of the meeting referred to in paragraph 1.4 above his written decision, which shall not include any reasons, as to whether or not there is demonstrably no basis or ground for consolidation of the Dispute and the Related Dispute. If the Expert determines that there is demonstrably no basis or ground for consolidation of the Dispute and the Related Dispute, the Dispute and the Related Dispute shall not be consolidated. If the Expert determines otherwise, or if the Expert has failed or is unable to reach a decision within one (1) day of the meeting referred to in paragraph 1.4 above, the Expert shall immediately order consolidation of the Dispute and the Related Dispute and shall have the authority and the power referred to in paragraph 1.10 below.
- 1.9 Notwithstanding anything to the contrary, a Related Dispute shall only be consolidated with a Dispute under this Agreement if the Expert receives the particulars set out in paragraph 1.2

above within fourteen (14) days of the referral of the Dispute under this Agreement to the Expert.

- 1.10 The Expert shall have the authority and the power to consolidate the Dispute and the Related Dispute, and to direct that all procedural and/or evidential matters arising in both the Dispute and the Related Dispute are consolidated in whatever manner the Expert considers shall lead to the fair and expeditious resolution of both the Dispute and the Related Dispute and the parties (including the party to the Related Dispute) shall thereafter abide by and implement such consolidation and any such direction.
- 1.11 In the event that the Related Dispute is consolidated with the Dispute, the Expert shall reach a decision on the Dispute and the Related Dispute at the same time and in any event within twenty eight (28) days of the earlier of the referral of the Dispute or the referral of the Related Dispute, or such longer period as is agreed by the parties to the Dispute and the Related Dispute after the date that the Related Dispute has been consolidated with the Dispute. The Expert shall be entitled to extend the said period of twenty-eight (28) days by up to fourteen (14) days with the consent of the party by whom the relevant dispute was referred.
- 1.12 Without fettering or restricting the Expert's power and authority in any way, it is the intention of Summit and Serco that in the event that the Related Dispute is consolidated with the Dispute, the Expert shall, insofar as is relevant, practicable and appropriate, come to the same conclusion as to the facts and apply the same reasoning and analysis in reaching a decision on both the Dispute and the Related Dispute.
- 1.13 In the event that an adjudicator under a Related Contract ("the Related Expert") orders that a Dispute under this Agreement be consolidated with a Related Dispute with which he is dealing under the Related Contract, then:
 - (a) notwithstanding anything in the Adjudication Rules or in Section 2 above, with effect from the time of such order, the Expert shall cease to have authority or jurisdiction to determine the Dispute which shall instead be determined by the Related Expert and the appointment of the Expert under this Agreement shall cease; and

- (b) such order shall be binding on Summit and Serco and both of them shall acknowledge the appointment of the Related Expert as the adjudicator of the Dispute, with Summit procuring that the third party who is a party to the Related Contract shall with effect from the time of such order comply with the requirements of the Related Contract (including if applicable any requirement or direction of the Related Expert appointed under such Related Contract) as to the future conduct of the determination of the Dispute and the Related Dispute; and
- (c) notwithstanding Rule 24A of the Adjudication Rules, Summit and Serco shall be jointly responsible with the third party who is a party to the Related Contract for the Related Expert's fees and expenses including those of any specialist consultant appointed under the adjudication procedure in the Related Contract, in respect of the period in which the Dispute is consolidated with the Related Dispute pursuant to an order of the Related Expert (the "Consolidated Adjudication Costs"). Summit and Serco agree that the Related Expert shall have the discretion to make directions to require Summit, Serco and the third party who is a party to the Related Contract to pay or make contribution to the Consolidated Adjudication Costs in different proportions. If no such directions are made, Summit, Serco and the third party who is a party to the Related Contract shall bear the Consolidated Adjudication Costs in equal shares, and if Summit, Serco or the third party has paid more than such equal share, that party or third party shall be entitled to a contribution from the other party, parties or third party, as the case may be; and
- (d) notwithstanding anything to the contrary a Dispute under this Agreement shall only be consolidated with a Related Dispute, if the Related Expert receives particulars of the Dispute within fourteen (14) days of the referral of the Related Dispute to the Related Expert under the Related Contract.

SERVICES SUBCONTRACT

**for the Design, Build, Finance and
Operate Project for the New Law District
General Hospital, Netherton**

between

**SUMMIT HEALTHCARE (LAW)
LIMITED**

and

SERCO LIMITED

LAW HOSPITAL

BIBLE OF DOCUMENTS

CONTENTS

VOLUMES 1(A) & 1(B)

DBFO CONTRACTS

VOLUME 2

BUILDING CONTRACT AND RELATED DOCUMENTATION

VOLUME 1(A) - DBFO CONTRACTS

	Document	Parties	Dated
1.	Project Agreement	Summit/ Trust	16 June 1998
2.	General Provisions	Summit/ Trust	16 June 1998
3.	Development Agreement together with list of Headline Issues and Project Timetable	Summit/ Trust	16 June 1998
4.	Services Agreement	Summit/ Trust	16 June 1998
5.	Equipment Agreement	Summit/ Trust	16 June 1998
6.	Master Definitions Schedule	Summit/ Trust	16 June 1998

Interpretation

Account Bank	Lloyds Bank plc
Ambac	Ambac Insurance UK Limited
Auditors	KPMG
BLB	The British Linen Bank Limited
BLIL	British Linen Investments Limited
Bond Trustee	Royal Exchange Trustee Nominees Limited
Chesterton	Chesterton plc trading as Cyril Sweett Project Consultants
Edison	Edison Capital (Netherlands) Investments B.V.
Edison Europe	Edison Capital Europe Limited
Health Adviser	Rawlinson Kelly Whittlestone
HK	Hulley & Kirkwood Consulting Engineers Limited
Independent Engineer	Alexander Gibb
Insurance Broker	Sedgwicks
Insurance Consultant	Willis Corroon
Investment Manager	Hill Samuel Asset Management Limited
Lead Manager	Morgan Stanley & Co International Limited
Listing Agent	Morgan Stanley & Co International Limited
Listing Agent's Agent Managers	Ashurst Morris Crisp Barclays Bank plc, CIBC Wood Gundy plc and Swiss Bank Corporation
MHL	McAlpine Healthcare Limited
Newarthill	Newarthill plc
Paying Agent	Bankers Trust Luxembourg S.A.
PFIL	PFI Investors Limited
Principal Paying Agent	Bankers Trust Company
PTP	Percy Thomas Partnership (Architects) Limited
Rating Agencies	Standard & Poor's Ratings Services, a division of the McGraw- Hill Companies Inc and Moody's Investors Service Inc
Security Trustee	Royal Exchange Trust Company Limited
Serco	Serco Limited
Serco Group	Serco Group plc
Siemens	Siemens Healthcare Services Limited
Siemens plc	Siemens plc
SRMcA	Sir Robert McAlpine Limited
Summit	Summit Healthcare (Law) Limited
Summit Finance or Issuer	Summit Finance (Law) PLC
Summit Holdings	Summit Holdings (Law) Limited
Summit Holdings Shareholders	PFIL, BLIL, Edison
TC	Thorburn Colquhoun Limited
Technical Adviser	Alexander Gibb
Trust	Law Hospital NHS Trust

DATED 16 JUNE 1998

PROJECT AGREEMENT

**for the Design, Build, Finance and Operate Project for
the New Law District General Hospital at Netherton**

between

LAW HOSPITAL NATIONAL HEALTH SERVICE TRUST (1)

and

SUMMIT HEALTHCARE (LAW) LIMITED (2)



McGRIGOR DONALD
SOLICITORS

**Pacific House
70 Wellington Street
GLASGOW G2 6SB
Tel: 0141 248 6677
Fax: 0141 221 1390**

**(DLS/LAW:LAWPRO23.AGR)
14 June 1998
FAS 4833**

INDEX

RECITALS	1
PART 1 - GENERAL	1
1 Definitions and interpretation	1
2 Agreements	2
3 Conditions	2
3.1 Conditions Precedent	2
3.2 Fulfilment of Conditions Precedent	5
3.3 Services Commencement Date	5
3.4 Summit Representations and Warranties	6
3.5 Trust Representations and Warranties	7
4 Duration	9
PART 2 - FUNDING ARRANGEMENTS AND PERFORMANCE GUARANTEE	9
5 Responsibility for funding	9
6 Effect of an Unplanned Liability	10
7 Performance Guarantee	11
PART 3 - GENERAL OBLIGATIONS OF THE PARTIES	11
8 Trust's obligations	11
9 Summit's obligations	13
10 Other Summit obligations	13
PART 4 - ORGANISATION, INFORMATION AND CO-OPERATION MATTERS	17
11 Joint Operating Group	17
12 Confidentiality	20
13 Alterations in Trust's Functions	21
14 Provision of management and financial information	21
15 Additional information, reports and inspections	21
PART 5 - EMPLOYEES AND TRANSITIONAL ARRANGEMENTS	22
16 Employees	22

17	Transitional Arrangements	41
17.1	Provision of Transition Services	41
17.2	Employees, Training and Commissioning	43
17.3	Payment	43
17.4	Sub-Contracting	45
17.5	Relationship with the Services	45
17.6	Resolution of Disputes	46
PART 6 - INFORMATION REQUIREMENTS		46
18	Information requirements re. third parties	46
PART 7 - COMMERCIAL OPERATIONS AND PARTIAL HANDBACK		47
19.1	Grant of Commercial Operation Rights	47
19.2	Partial Handback	47
PART 8 - INTELLECTUAL PROPERTY		48
20	Licence of Intellectual Property	48
21	Security of Data	50
PART 9 - EARLY TERMINATION AND STEP-IN RIGHTS		51
22	Events entitling early termination of the DBFO Contracts ("Termination Events")	51
23	Consequences of Termination	59
24	Compensation upon early termination	62
PART 10 - HANDBACK AT END OF TERM		64
25	Handback	64
PART 11 - MISCELLANEOUS		67
FORCE MAJEURE/SUSPENSION EVENTS		67
26	Force Majeure/Suspension Events	67
27	Indemnities and Remedies	75
PART 12 MISCELLANEOUS		82
28	Dispute Resolution Procedure	82
29	Notices	82
30	Law and jurisdiction	84
31	Restrictive Trade Practices Act	85

32	Corrupt Gifts	85
33	General	87
	The Schedule - Part 1	92
	DBFO Contracts (Clause 3)	92
	The Schedule - Part 2	93
	Dispute Resolution (Clause 28)	93
	The Schedule - Part 3	100
	Trust Objection Procedure	100
	The Schedule - Part 4	102
	Summit Constitution	102
	Section 1	102
	(Summit Share Ownership)	102
	Section 2	104
	(Summit Board of Directors)	104
	The Schedule - Part 5	105
	Insurances (Clauses 8.5 and 10.2)	105
	Part A - Summit Insurance	105
	1 Insured Risks	105
	2 Insurance terms	105
	3 Further Summit obligations	106
	4 Trust's right to insure	107
	5 Application of proceeds	107
	6 Claims	107
	Part B - Trust Insurance	107
	The Schedule - Part 6	108
	Information	108
	Section 1	108
	Information to be supplied by the Trust to Summit	108
	Section 2	109
	Information to be supplied by Summit to the Trust	109
	The Schedule - Part 7	110
	Commissioning Procedure	110
	The Schedule - Part 8	113
	Part 8A - Employee Assumptions	113
	Part 8B - Wages Assumptions	113
	The Schedule - Part 9	114
	The Redundancy Procedure (Clause 16.3.4(a))	114
	The Schedule - Part 10	115
	Compensation upon early termination	115
	Section 1	115

Summit Default - Pre-Practical Completion	115
Section 2	117
Summit Default - Post Practical Completion	117
Section 3	120
Force Majeure	120
Section 4	122
Trust Default	122
The Schedule - Part 11	125
Liaison Procedures	125
The Schedule - Part 12	127
Secretary of State's Policies Letter	127
The Schedule - Part 13	133
Termination Notice to Scottish Office	133
The Schedule - Part 13	134
Termination Notice to Scottish Office	134
Termination Notice to Scottish Office	135

AN AGREEMENT

between

- (1) **LAW HOSPITAL NATIONAL HEALTH SERVICE TRUST**, a body corporate established by an order (S.I. 1993 No 2929 (S.263)) as amended by amendment orders (S.I. 1995 No 741 (s.67) and (S.I. 1998 No 926 (S50)) made by the Secretary of State under Section 12A of the National Health Service (Scotland) Act 1978 (the "Trust"); and
- (2) **SUMMIT HEALTHCARE (LAW) LIMITED**, an incorporated company registered in Scotland under No. 182649 and having its Registered Office at Saltire Court, 20 Castle Terrace, Edinburgh ("**Summit**").

RECITALS

- (A) The Trust has the functions conferred on it by the Statutory Instruments and the Act mentioned in the preamble.
- (B) In implementation of those functions, the Trust wishes to procure the provision of a new hospital at Netherton to be known as the New Law District General Hospital and of certain services in relation to that hospital.
- (C) Summit 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.

BY WHICH IT IS AGREED:-

PART 1 - GENERAL

- 1 **Definitions and interpretation**
 - 1.1 In this Agreement, including its Recitals:-
 - 1.1.1 any word or expression defined in the Master Definitions Schedule shall have that meaning in this Agreement; and
 - 1.1.2 "**Master Definitions Schedule**" means the document so entitled signed by the Trust and Summit and dated the Execution Date, as amended or supplemented at any time.

- 1.2 This Agreement shall be construed and given effect to in accordance with paragraphs 2, 3 and 4 of the Master Definitions Schedule.

2 **Agreements**

The Trust:

- (a) relying on Summit's Representations;
- (b) in consideration of the obligations and duties assumed by Summit under this Agreement and the other Project Documents to which it is a party; and
- (c) on and subject to the terms and conditions of the DBFO Contracts,

appoints Summit exclusively (subject to the terms of the DBFO Contracts including without limitation, the Change Provisions in the General Provisions) to undertake all works necessary to cause the Works to be designed, constructed, fitted out and commissioned in accordance with the terms set out in the Development Agreement and the other DBFO Contracts and thereafter throughout the Term (but subject to Clauses 22 (Early Termination), 23 (Consequences of Early Termination) and 26 (Force Majeure/Suspension Events) of this Agreement and Clause 25 (Termination of Equipment Agreement and Consequences) of the Equipment Agreement) to provide the Equipment Services and the Services in accordance with this Agreement and the other DBFO Contracts and Summit relying on the Trust's Representations accepts the foregoing appointment.

3 **Conditions**

3.1 **Conditions Precedent**

The DBFO Contracts, with the exception of Clause 2 (Agreements), the obligations in Clause 3.2, the representations and warranties in Clauses 3.4 and 3.5 and Clause 12 (Confidentiality) of this Agreement, shall not come into effect until:

3.1.1 the parties to them Execute and deliver:

- (a) the DBFO Contracts;
- (b) the Building Contract;
- (c) the Initial Finance Facilities Agreements (excluding the Standby Policy and the Standby Loan Agreement);
- (d) the Performance Guarantee;
- (e) the Parent Company Guarantee;

- (f) the Financier Direct Agreement;
- (g) the Appointments;
- (h) Collateral Warranties by each of the Contractor and the Consultants;
- (i) the Initial Equity Agreements;
- (j) the Equipment Direct Agreement executed by Siemens plc;
- (k) the Services Direct Agreement executed by Serco Limited together with a guarantee by Serco Group plc of the obligations of Serco Limited in the Agreed Form;
- (l) the Sub-Contracts relative to the provision of the Equipment Services and the Services; and
- (m) approval by the Trust of (i) Serco Limited as guaranteed by Serco Group plc and (ii) Siemens plc as Approved Service Providers;

and a Certified Copy of each of the documents listed in this Clause 3.1.1 to which the Trust is not a party has been delivered to the Trust;

- 3.1.2 all conditions (other than any conditions relating to satisfaction of the conditions to the DBFO Contracts) to the issue of the Bonds and the availability of equity funding under the Initial Equity Agreements have been fulfilled (Summit using all reasonable endeavours to procure fulfilment of the same) or waived by the Financiers or Equity providers (as the case may be) and the Trust has received evidence reasonably satisfactory to it of such fulfilment or waiver (as the case may be);
- 3.1.3 Summit has delivered to the Trust, in a form and substance reasonably acceptable to the Trust:
 - (a) a Certified Copy of the minutes of a meeting of its board of directors, duly convened and held, authorising Summit to undertake the Project and to execute and deliver the Project Documents to which it is a party;
 - (b) Certified Copies of the certificate of incorporation and memorandum and articles of association of Summit, the Subsidiary and the Holding Company (which memorandum and articles will be deemed to be in a form and substance reasonably acceptable to the Trust provided that they contain no provisions which would be a breach of the obligations under Clause 10.1);
 - (c) a certificate, dated the date on which the conditions in this Clause 3.1 (other than this sub-Clause 3.1.3(c)) are fulfilled, executed by two directors on behalf of

Summit, confirming that Summit's Representations (other than those in Clauses 3.4.3 and 3.4.4) are true, correct and not misleading as at that date;

- (d) details of any changes to the information in Section 1 or Section 2 of Part 4 of the Schedule; and
 - (e) a Certified Copy of the minutes of a meeting of the Board of Directors of each of the Subsidiary and the Holding Company duly convened and held authorising it to enter into the Finance Facilities Agreements to which it is a party;
 - (f) a letter of obligation in the Agreed Form from Summit's Solicitors;
- 3.1.4 the Trust is able to grant Summit vacant possession to the Site in accordance with Clause 8.3;
- 3.1.5 the Trust has delivered to Summit in a form and substance reasonably acceptable to Summit:
- (a) a Certified Copy of the minutes of a meeting of its board, duly convened and held, authorising the Trust to undertake the Project and to execute and deliver the documents in Clause 3.1.1 to which it is a party and approving the documents to which it is not a party;
 - (b) a certificate in the Agreed Form by or on behalf of the Secretary of State pursuant to Section 1(2) of the National Health Service (Private Finance) Act 1997;
 - (c) a Certified Copy of a letter, in the Agreed Form, addressed to the Trust, from the NHSME and a Certified Copy of a letter to the Scottish Office from H M Treasury, in each case confirming approval of the Project;
 - (d) a clarification letter addressed to Summit and the Financiers from the Secretary of State in the form of the draft reproduced in Part 12 of the Schedule;
 - (e) the Trust Information Letter;
 - (f) a certificate, dated the date on which the conditions in this Clause 3.1 (other than this sub-Clause 3.1.5(f)) are fulfilled), executed on behalf of the Trust, confirming that the representations of the Trust set out in Clause 3.5 are true, correct and not misleading as at that date;
 - (g) a letter, in the Agreed Form, from the Trust addressed to Summit and the Financiers confirming that Applicable Laws relative to procurement have been followed by it in relation to the Project;
 - (h) a letter of obligation in the Agreed Form from the Trust's Solicitors; and

- (i) a Certified Copy of a letter in the Agreed Form from Lanarkshire Health Board addressed to the Trust confirming approval of the Project; and

3.1.6 Summit and the Trust have each agreed, in their absolute discretion, the terms of the Original Financial Model, the Bond Amount, the Bond Rate, the Initial Equity Amount, and the Project Rate of Return and recorded the same in a document in the Agreed Form which shall thereupon be deemed to be incorporated into and form part of this Agreement and the other DBFO Contracts.

3.2 Fulfilment of Conditions Precedent

3.2.1 If the condition in Clause 3.1.6 is not satisfied on or prior to 22 June 1998 or such other date as the parties agree in writing, this Agreement and the other DBFO Contracts will cease to have effect from that date and, notwithstanding any other provisions of any DBFO Contract, neither party shall have liability to the other under any of the DBFO Contracts save for any breach of Clause 12 (Confidentiality) of this Agreement.

3.2.2 Each party shall use all reasonable endeavours to procure that the conditions set out in Clause 3.1 (other than Clause 3.1.6) for which it is responsible (being in respect of the Trust: Clauses 3.1.4 and 3.1.5 and the execution of the documents in Clause 3.1.1 to which it is a party (Summit being responsible for the execution of such documents by it and any third party thereto) and the remaining conditions being the responsibility of Summit) are satisfied as soon as possible after the Execution Date. If any of those conditions are not satisfied on or prior to the date occurring 8 days after the date of satisfaction of the Condition in Clause 3.1.6 or such other date as the parties agree in writing, this Agreement and the other DBFO Contracts shall cease to have effect from that date and, notwithstanding any other provisions of any DBFO Contract, neither party shall have liability to the other under any of the DBFO Contracts save for any breach of (a) this Clause 3.2, and/or (b) Clause 12 (Confidentiality) of this Agreement.

3.2.3 Within 10 Business Days after Financial Close the Trust and Summit will record the date of Financial Close and the Mandatory Date in a document in the Agreed Form

3.3 Services Commencement Date

3.3.1 Services Commencement Date shall occur automatically on the date which is ninety days after the Contractual Practical Completion Date.

3.3.2 Both Summit and the Trust will comply with their respective obligations under the Commissioning Procedure in accordance with the terms thereof. For the avoidance of doubt, failure by the Trust or Summit to comply with their respective obligations under the Commissioning Procedure shall not affect the occurrence of the Services Commencement Date.

3.4 Summit Representations and Warranties

Summit represents and warrants to the Trust that:

3.4.1 Summit:

- (a) is validly incorporated;
- (b) has the power and capacity to execute the Project Documents to which it is a party and perform its obligations and exercise its rights under them; and
- (c) has not traded at any time since its incorporation;

3.4.2 except for liabilities that have arisen from Summit preparing to enter and/or entering into this Agreement and the other Project Documents, Summit has no material obligations;

3.4.3 the information on Summit, the Subsidiary and the Holding Company in Section 1 of Part 4 of the Schedule is true and accurate and no offer or other arrangement is outstanding by which any person other than a Promoter (in relation to the Holding Company) is at the Execution Date or at any time thereafter 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 Summit, the Subsidiary or the Holding Company (including any such entitlement or obligation that may arise in exercise of an option exercisable against Summit, the Subsidiary or the Holding Company) except in terms of the Finance Facilities Agreements and/or Equity Agreement;

3.4.4 the information on the board of directors of Summit in Section 2 of Part 4 of the Schedule is true and accurate and that no offer or other arrangement by which any alteration to the constitution of the board of directors of Summit may take effect is outstanding except in terms of the Finance Facilities Agreements and/or Equity Agreement;

3.4.5 the Certified Copy of the memorandum of association and articles of association of each of Summit, the Subsidiary and the Holding Company delivered to the Trust under Clause 3.1.3 is true and accurate and that no proposals are outstanding to amend those documents which would materially adversely affect Summit's performance of or constitute a breach of its obligations under the DBFO Contracts;

3.4.6 Summit 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 Summit or any of its assets or undertakings which will materially adversely affect its performance of any of its obligations under any of the Project Documents; and

3.4.7 Summit has no subsidiaries or subsidiary undertakings other than the Subsidiary.

3.5 Trust Representations and Warranties

The Trust represents and warrants to Summit that:

- 3.5.1 the Trust is an entity formed and validly existing under the National Health Service (Scotland) Act 1978;
- 3.5.2 the Trust believes that it has the corporate power to own its assets and to carry on its business as it is now being conducted;
- 3.5.3 the Trust believes that it has full power and authority to enter into and perform its obligations under the DBFO Contracts and that fulfilment of its obligations under the DBFO Contracts is necessary and expedient for the purposes of and in connection with its functions under the National Health Service (Scotland) Act 1978;
- 3.5.4 the Trust has taken all necessary action to authorise the execution, delivery and performance of the DBFO Contracts in accordance with their terms;
- 3.5.5 the Trust believes that the DBFO Contracts constitute legal, valid and binding obligations and, subject to any necessary stamping and registration, are enforceable against the Trust in accordance with their terms;
- 3.5.6 the annual report and accounts of the Trust for the three financial years to 31 March 1997 give a true and fair view of the assets and liabilities of the Trust as at their dates and that since 31 March 1997, so far as the Trust is aware, there has been no material deterioration in the Trust's financial status;
- 3.5.7 the Trust is not engaged in any litigation or arbitration proceedings, as pursuer or defender, and, so far as the Trust is aware, there are no such proceedings pending or threatened, either by or against the Trust, in all cases which:
 - (a) in any way questions its power or authority to enter into or perform its obligations under the DBFO Contracts; or
 - (b) would have a material adverse effect on its ability to perform its obligations under the DBFO Contracts;
- 3.5.8 the Trust has disclosed to Summit, and there is listed or referred to in the Trust Information Letter, all information of which the Trust is aware in relation to the following matters and which could have a material adverse effect on the ability of either the Trust or Summit to perform their respective obligations under the DBFO Contracts:-
 - (a) all contracts, arrangements or agreements between the Trust and third parties which are of a long-term nature (that is, unlikely to have been fully performed,

in accordance with their terms, within six months after the date on which they were entered into or undertaken) or are incapable of termination in accordance with their terms by the Trust on 30 days' notice or less without compensation becoming payable to such third parties; and

- (b) all surveys carried out by the Trust in the preceding three years in relation to the Site on the basis that no warranty is given as to the accuracy of any such surveys and Summit acknowledges that it is not seeking to rely thereon;

3.5.9 the Trust has a good and marketable title to the Site; and

3.5.10 the definitions of In-patient Night, Daycase Discharge and Out-patient Attendance described by reference to the ISDS1 definitions set out in Appendix D of Part A of the Schedule to the General Provisions are those which were used by the Trust in producing the projections of patient activity which have been provided to Summit and have been incorporated in the Financial Model at the Execution Date but no warranty is given as to the accuracy of such projections.

3.6 The Trust represents and warrants to Summit that:

3.6.1 no person, other than the Trust and any third party having a right of wayleave over the Site for the passage of pipes or cables used in the provision of public utilities (electricity, gas, water, sewerage and telephone), has any right (actual or contingent) to possession, occupation or use of or interest in the Site;

3.6.2 there are no conditions, restrictions, servitudes, wayleaves, overriding interests (as defined in Section 28 of the Land Registry (Scotland) Act 1979), or similar third party rights affecting the Site which are unduly onerous except as disclosed in the titles which have been exhibited to Summit;

3.6.3 the Trust has not received notice of and is not aware of any breach of the requirements of any current or previous legislation or any regulations, orders, notices or directions made or issued under such legislation capable of enforcement as at the date of this Agreement which affect the Site;

3.6.4 the Trust is not aware of any resolution, proposal, order or act made or contemplated for the compulsory acquisition of the Site or any access to it by the local or other authority other than the compulsory purchase procedures promoted by the Scottish Office on behalf of the Trust;

3.6.5 the Trust is not aware of any planning proposals, orders, notices or statutory notices issued by the local authority or otherwise affecting the Site or any part of the Site; and

3.6.6 there are no outstanding actions, disputes or claims affecting the Site to which the Trust is a party or which are known to the Trust;

in each case, that would materially adversely affect the ability of Summit to carry out its obligations under the DBFO Contracts.

- 3.7 The warranties in Clauses 3.5.9 and 3.6 shall be deemed to be repeated by the Trust on the date (if any) on which the Trust completes its acquisition of the Sub-station Area in accordance with Clause 13.1 of the Development Agreement. For the purposes of this Clause 3.7, the Site where it is referred to in Clauses 3.5.9 and 3.6 shall be deemed to include the Sub-station Area.

4 Duration

- 4.1 The DBFO Contracts shall, subject to Clause 3.1 (Conditions Precedent), commence on the Execution Date and shall subsist until the last day of the Term subject to any provisions which are expressed to continue to have effect after the last day of the Term.
- 4.2 The Term shall be extended:
- 4.2.1 by a period, up to a maximum of six months, equal to the period between the Mandatory Date (as at the Execution Date) and the Contractual Practical Completion Date but excluding any Force Majeure Extension Periods and/or any Trust Breach Extension Periods and/or any Eligible Change Extension Periods and any Extension Period relative to the occurrence of an Insured Risk; and
- 4.2.2 as provided in Clause 26.5.

PART 2 - FUNDING ARRANGEMENTS AND PERFORMANCE GUARANTEE

5 Responsibility for funding

- 5.1 All financial obligations arising in the performance of Summit's obligations under this Agreement and the other DBFO Contracts shall be the sole responsibility of Summit, except as expressly stated to the contrary in any of the DBFO Contracts.
- 5.2.1 Any change in the identity of the Lead Financier upon a refinancing of the Finance Facilities Agreements involving repayment of all or substantially all of the Financial Indebtedness shall only be made:
- (a) if prior to Services Commencement Date, with the prior written consent of the Trust, such consent not to be unreasonably withheld or delayed; or
 - (b) if after Services Commencement Date, subject to the Trust Objection Procedure in Part 3 of the Schedule, the Trust, acting reasonably, being entitled to object to the identity of the proposed new Financier(s) only on the basis (i) of such Financier(s) financial covenant, and/or (ii) that such Financier(s) are, or have been, within the last two years, to any material extent involved in the

manufacturing or processing of tobacco and/or alcohol (save to the extent that such involvement is a minority interest for investment purposes or where such Financier(s) is no longer generally perceived to have any such involvement).

For the avoidance of doubt, nothing in this Clause 5.2, or elsewhere in the DBFO Contracts, shall be construed as placing any restriction on the identity of the Bondholders.

- 5.3 Upon any change in the identity of any Lead Financier in accordance with Clause 5.2 the Trust shall, at Summit's request, enter into a Financier Direct Agreement with any such new Lead Financier, and Summit shall promptly provide the Trust with a copy of all new Finance Facilities Agreements.
- 5.4 Except where expressly authorised in writing by the Trust or by the terms of any of the DBFO Contracts, Summit shall not hold itself out as the agent of the Trust and shall have no power to bind the Trust, pledge the credit of the Trust or otherwise have any dealings on behalf of the Trust.
- 5.5 Not later than the tenth day of each calendar month commencing on the date of satisfaction of the conditions precedent in Clause 3.1 and ending on the Services Commencement Date, Summit shall deliver to the Trust or, at the Trust's request, the Trust's Representative a report in writing:
- 5.5.1 confirming that its obligations under the Commissioning Procedure are being met in all material respects or, if not, the action being taken or proposed to be taken to resolve this; and
- 5.5.2 confirming that to the best of the knowledge, information and belief of Summit (having carried out due and diligent enquiry), Summit has not incurred any Unplanned Liabilities.
- 5.6 Summit shall, if requested, discuss such report with the Trust or the Trust's Representative and provide any such further information relating thereto as may reasonably be required by the Trust.

6 **Effect of an Unplanned Liability**

- 6.1 If an Unplanned Liability shall arise prior to the Services Commencement Date, Summit shall keep the Trust fully advised of the circumstances that led to the Unplanned Liability and the steps being taken by and/or on behalf of Summit to resolve it. Without limiting this Clause 6.1, Summit shall take all reasonable steps within its power to remove or mitigate to the fullest extent reasonably possible any Unplanned Liability.
- 6.2 The obligation in Clause 6.1 shall continue until Summit gives notice in writing to the Trust, signed by a director of Summit, confirming that the circumstances under which the Unplanned Liability arose have been resolved. That notice shall set out in

reasonable detail the manner in which and terms on which the Unplanned Liability was resolved.

7 Performance Guarantee

- 7.1 Summit shall procure the due execution and delivery of the Performance Guarantee in favour of Summit by such person as the Trust may have approved in writing as the issuer of the Performance Guarantee.
- 7.2 The benefit of the Performance Guarantee shall be assigned, as first ranking security, in terms of the Finance Facilities Agreements, the Trust having the rights in respect of the Performance Guarantee as specified in the Financier Direct Agreement.

PART 3 - GENERAL OBLIGATIONS OF THE PARTIES

8 Trust's obligations

- 8.1 The Trust shall, during the Term (unless a different period is specified):
- 8.1.1 use all reasonable endeavours to satisfy the requirements of actual and potential commissioning bodies and/or purchasers of healthcare services within the NHS;
 - 8.1.2 from the Execution Date to the end of the Term, provide appropriate information to promote the facilities and services of the Trust to actual and potential commissioning bodies and/or purchasers of healthcare services within the NHS from the Trust, seeking to secure efficient utilisation of the Trust's Facilities and, until Services Commencement Date, the Existing Sites;
 - 8.1.3 within a reasonable period after the Operational Date cease clinical activities at the Existing Sites;
 - 8.1.4 apply and monitor the application of quality control and risk management practices of the highest standard reasonably practicable, having regard to the resources that the Trust has available to it;
 - 8.1.5 act in accordance with Good Industry Practice and all Statutory Requirements and NHS Guidance applicable to it in the carrying out of clinical activities by the Trust from the Site and Existing Sites and its obligations under the DBFO Contracts;
 - 8.1.6 inform Summit promptly after the Trust becomes aware of any likely change to the status of the Trust;
 - 8.1.7 inform Summit promptly if at any time the Trust becomes unable to meet any of its financial obligations and keep Summit fully informed of any action to remedy the situation including the implementation of any recommendations and/or requirements of the Secretary of State or other Competent Authority;

- 8.1.8 ensure that it, and any person for whom it is responsible in terms of Clause 8.2 shall comply with Clause 8.4 in the giving of access to the Trust's Facilities and relevant parts or any parts thereof to Summit, its employees, agents, or other persons for whom it is responsible in terms of Clause 9.2;
- 8.1.9 ensure that it, and any persons for whom it is responsible in terms of Clause 8.2, do not interfere with Summit or its Approved Service Providers or Permitted Sub-Contractors or other persons for whom it is responsible in terms of Clause 9.2 in performing their obligations under the DBFO Contracts and/or the Sub-Contracts; and
- 8.1.10 not and shall procure that persons for whom the Trust is responsible in terms of Clause 8.2 shall not, damage or improperly use the Trust's Facilities, plant or equipment in a manner which damages and/or decreases the operating life of the Trust's Facilities, plant or equipment.
- 8.2 The Trust acknowledges that, as between the Trust and Summit, it will be responsible, pursuant to the DBFO Contracts, for the acts or omissions of its employees, agents, lessees (other than the tenant under the Head Lease), sub-lessees, sub-contractors, contractors, medical personnel, consultants, patients and patients' visitors to the Hospital to the same extent to which the Trust would be responsible under the terms of the DBFO Contracts if they were its own acts or omissions.
- 8.3 On and subject to the terms of this Agreement and of the Development Agreement, the Trust shall deliver vacant possession of the Site to Summit, so as to enable the commencement of the Works, upon satisfaction or waiver of the conditions set out in Clause 3.1.
- 8.4 The Trust shall, in accordance with Provision 9.2 of the General Provisions and the Development Agreement provide access to Summit, the Contractor, Approved Service Providers and their employees, agents, licensees and sub-contractors to the Site and the Trust's Facilities to enable them to perform their obligations under the DBFO Contracts and for any ancillary purposes envisaged under the DBFO Contracts.
- 8.5 The Trust shall effect and maintain the insurances required to be taken out by it in accordance with, and shall comply with its obligations under, Part 5B of the Schedule.
- 8.6 The Trust shall be solely responsible for securing the grant and all subsequent renewals, extensions or modifications of any permits, licences, consents and authorisations which relate to the provision of clinical services by the Trust at the Hospital and the carrying out by the Trust of any of its other functions and its obligations in relation to the Project.

9 **Summit's obligations**

9.1 Summit shall promptly inform the Trust in writing of:

- 9.1.1 any breach or default under any Sub-Contracts of which it is aware and that would be materially adverse to the Trust's interests; and
- 9.1.2 any event described in Clause 22.1 of which it is aware;

giving reasonable details of the circumstances and the steps being taken to remedy or mitigate their effect.

9.2 Summit acknowledges that, as between the Trust and Summit, it will be responsible, pursuant to the DBFO Contracts, for the acts or omissions of its employees, agents, lessees, sub-lessees, the Contractor and the Consultants, Approved Service Providers, Permitted Sub-contractors and its sub-contractors to the same extent to which Summit would be responsible under the terms of the DBFO Contracts if they were its own acts or omissions.

10 **Other Summit obligations**

10.1 Summit shall ensure that no transfer of any shares or interest in any shares in Summit or Summit's Holding Company shall be registered by Summit or Summit's Holding Company where that transfer is:

- (a) by any Promoter, prior to the first anniversary of the Services Commencement Date, save (i) with the Trust's prior written consent, (ii) to an Associated Company of that Promoter, or (iii) by way of pledge and transfer in security to the Financiers in accordance with the Finance Facilities Agreement; or
- (b) to a company or other body which, or an Associated Company of which, Summit is or ought reasonably to be aware, is or has been, within the last two years, to any material extent involved in the manufacturing or processing of tobacco and/or alcohol (save to the extent that such involvement is a minority interest for investment purposes or where such person(s) is no longer generally perceived to have any such involvement, or, with the consent of the Trust, not to be unreasonably withheld) ("**Disapproved Transferees**");

and each of Summit and the Holding Company shall include in its Articles of Association, which will provide that they will take precedence over any shareholders' agreement irrespective of the terms of such latter agreement, a provision to be approved by the Trust (such approval not to be unreasonably withheld or delayed), that no shares in it (or interests in such shares) may be held by, or on behalf of, a Disapproved Transferee and for the disenfranchisement of any Disapproved Transferee (or any person holding shares on its behalf) which comes to hold any shares (or interests in

shares) in it and the compulsory sale or transfer of any such shares (or interests in shares).

10.2 Summit shall:

- (a) procure that Insurances satisfying the Insured Risks are effected and maintained in accordance with the requirements of, and shall comply with its obligations under, Part 5A of the Schedule; and
- (b) use all reasonable endeavours to effect and maintain, for the benefit of the Trust, the Trust Business Interruption Insurance and the Trust shall, if so requested by Summit, pay Summit, within five Business Days of demand the premium for the Trust Business Interruption Insurance. Prior to effecting the Trust Business Interruption Insurance Summit shall advise the Trust of the proposed premium (Summit using reasonable endeavours to minimise same) and the Trust shall confirm to Summit if Summit is to effect the Trust Business Interruption Insurance in terms of this Clause.

10.3 Summit shall perform its obligations and exercise its rights under and observe all the terms of the Sub-Contracts to which it is a party ("**Relevant Sub-Contracts**") to the extent that such provisions are relevant to the performance of its obligations under the DBFO Contracts and, without prejudice to the foregoing, shall not:

- 10.3.1 subject, in the case of the Sub-Contract with the Contractor, to Clause 4.8.3 of the Development Agreement, terminate or permit, save where obliged to do so under the terms of the Relevant Sub-Contract, the termination of any of the Relevant Sub-Contracts without first entering a sub-contract with another sub-contractor in accordance with the DBFO Contracts; or
- 10.3.2 make or agree to any supplement, amendment or variation of any of the Relevant Sub-Contracts; or
- 10.3.3 depart from, or waive or fail to take reasonable steps to enforce any rights it may have under any of the Relevant Sub-Contracts; or
- 10.3.4 enter into or permit, save where obliged to do so under the terms of the Relevant Sub-Contract, any other party to enter into any agreement or document which would affect the interpretation or application of any of the Relevant Sub-Contracts;

in any case (referred to in this Clause 10.3) where such action or omission or failure to take such action would materially adversely affect the performance by Summit of any of its obligations under the DBFO Contracts unless:

- (a) the Trust, acting reasonably, has consented in writing on such terms as it may reasonably stipulate; or

- (b) the Trust Objection Procedure as specified in Part 3 of the Schedule has been complied with (the Trust acting reasonably in relation to any submission made by Summit pursuant to such procedure); or
- (c) pursuant to the exercise by the Financiers of their rights under the Finance Facilities Agreements, the Financier Direct Agreement and/or Financier Sub-Contract Direct Agreements in relation to the step in or novation of the Relevant Sub-Contracts as provided in the Financiers Sub-Contract Direct Agreements; or
- (d) pursuant to the Performance Guarantee.

Provided that Summit will not enter into any Relevant Sub-Contracts or amend or vary the same so as to constitute a breach of any provision of the DBFO Contracts specifically requiring express provision to be made in a Relevant Sub-Contract without the prior written consent of the Trust not to be unreasonably withheld or delayed.

- 10.4 To the extent that any action is approved by the Trust under Clause 10.3 or deemed to be approved under the Trust Objection Procedure, the Trust shall not be liable for any loss, increased cost or damage suffered by Summit or any other person except to the extent (if any) otherwise expressly provided in the DBFO Contracts.
- 10.5 Without derogating from Clauses 10.3 and 10.4, if (a) an amendment is made to any of the Relevant Sub-Contracts, (b) Summit grants a waiver or release of any of the obligations of another party under a Relevant Sub-Contract, or (c) any agreement is made which would materially affect the interpretation or application of any of the Relevant Sub-Contracts, then Summit shall deliver to the Trust a conformed Certified 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.
- 10.6 Subject to Clause 8.6, Summit shall be solely responsible for securing the grant and all subsequent renewals, extensions and modifications of any permits licences (other than Intellectual Property licences which are dealt with in Clause 20), consents and authorisations (including, but not limited to, Necessary Consents), necessary to carry out its obligations in relation to the Project and shall ensure that, as far as is legally possible, those permits are obtained in the name of Summit or, as requisite, the Approved Service Providers or Permitted Sub-Contractors. The Trust shall provide all assistance reasonably required by Summit, at Summit's cost, to secure the issue of any required permit, licence, consent or authorisation.
- 10.7 Without derogating from Summit's obligations in Clause 10.6, where the Trust is the holder of any relevant permit, licence, consent or authorisation which is capable of transfer to Summit and which would be necessary or desirable for Summit to perform its obligations under the DBFO Contracts, the Trust shall use its reasonable endeavours, at Summit's cost, to secure that transfer.

- 10.8 If any permit identified by Summit under Clauses 10.6 or 10.7 cannot legally be obtained in the name of Summit or, as requisite, the Approved Service Providers or Permitted Sub-Contractors and must identify the Trust, Summit 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.
- 10.9 Summit shall perform its obligations under the DBFO Contracts in a manner that complies with all current and relevant permits for which it is responsible.
- 10.10 Summit shall:
- 10.10.1 at all times use reasonable endeavours to carry on and conduct its affairs in a proper and efficient manner;
- 10.10.2 not engage in any business, other than entering into the Project Documents and the performance of its obligations in respect of each of them and any related or ancillary activities envisaged under the DBFO Contracts (including, if applicable, the operation of the concourse cafe on the Site or any commercial activities following the vacation by the Trust of all or part of the Site);
- 10.10.3 save for the purposes of the Project and save as provided in the Equipment Agreement not create or have outstanding any mortgage, pledge, lien, assignment, 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 (a) liens arising by operation of law which shall be released by Summit as soon as reasonably practicable, (b) under or pursuant to the Finance Facilities Agreements (as approved where requisite in accordance with Clause 5.2) or (c) title retention provisions or rights of set off arising in the normal course of business on the whole or any part of its undertaking or assets, present or future to secure any present or future obligations of Summit or of any other person;
- 10.10.4 not:
- (a) incur any Financial Indebtedness, other than for the purposes of the Project;
 - (b) form or acquire any subsidiary or subsidiary undertaking other than the Subsidiary ;
 - (c) consolidate or merge with or into any other entity or convey or transfer (whether by way of one transaction or a series of transactions) the whole or a material (in the context of its ability to continue to perform its obligations) part of its undertaking or assets (otherwise than in the normal course of business consistent with its continuing obligations under the DBFO Contracts) to any person unless pursuant to the Finance Facilities Agreements (so far as relating to conveyance or transfer by way of security) and/or the Financier Direct Agreement and/or Financier Sub-Contract Direct Agreements and/or the Performance Guarantee;

- (d) amend its memorandum and articles of association to permit (i) Summit no longer to be a single purpose vehicle, or (ii) the transfer of shares (or the beneficial ownership of or voting or other rights in shares) in breach of Summit's obligations under Clause 10.1 or
- (e) issue or allot any of its share capital to any person which it is or ought reasonably to be aware is a Disapproved Transferee;

in each case without the Trust's prior written consent, which consent will not be unreasonably withheld or delayed in the case of Clause 10.10.3. The restrictions in this Clause 10.10 shall apply, making any necessary changes, to any subsidiary or subsidiary undertaking of Summit.

PART 4 - ORGANISATION, INFORMATION AND CO-OPERATION MATTERS

11 Joint Operating Group

- 11.1 The Trust and Summit shall establish as soon as practicable after waiver or satisfaction of the conditions set out in Clause 3.1 and maintain throughout the Term a Joint Operating Group to oversee, subject to the remaining provisions of this Clause 11, the Trust's and Summit's operations in areas where their interests and responsibilities overlap, which areas shall include:
 - 11.1.1 the implementation of the DBFO Contracts;
 - 11.1.2 matters associated with design, access, staff training, commissioning and handover;
 - 11.1.3 the Transition Arrangements, the Commissioning Procedure and the Liaison Procedures;
 - 11.1.4 matters arising from any report provided by Summit to the Trust pursuant to Clause 5.5 of this Agreement;
 - 11.1.5 reviews of the Method Statements and the Specification adopted for the purpose of the Development Agreement;
 - 11.1.6 consideration of policies adopted by the Trust, Summit, Approved Service Providers and Permitted Sub-Contractors relevant to the DBFO Contracts;
 - 11.1.7 consideration of the Trust's and Summit's performance and the operation of the Performance Measurement System;
 - 11.1.8 any proposals (without prejudice to the terms of any of the provisions of any of the DBFO Contracts relating to such matters) for amendment of any of the DBFO Contracts; and

- 11.1.9 the provision of patient focused care including the Trust methodology of providing all care in the context of the DBFO Contracts;
- but excluding areas within the remit of the Technology Committee.
- 11.2 The Joint Operating Group shall comprise three representatives of the Trust and three representatives of Summit or such other number as may be agreed provided that the Trust and Summit have equal representation. A representative nominated by the Trust and a representative nominated by Summit shall alternatively (meeting by meeting) chair the Joint Operating Group.
- 11.3 Each of the Trust and Summit may appoint and remove, and appoint replacements of, its representatives on the Joint Operating Group by notice given to the other at any time. A representative on the Joint Operating Group may appoint and remove an alternate from time to time (who may be another representative on the Joint Operating Group) in the same manner. An alternate of a representative shall have the same rights and powers as his appointor (including, if the alternate is also a representative, his appointor's vote in addition to his own vote) if the latter is unavailable (whether so notified by himself or stated to be so by his alternate).
- 11.4 The Joint Operating Group shall:
- 11.4.1 review such issues relating to all day to day aspects of the performance of the DBFO Contracts (including those specified in Clause 11.1) as it shall think fit or as shall be referred to it by the Trust's Contract Officer or Summit's Contract Officer;
- 11.4.2 discuss at a strategic level any actual or anticipated changes in the Trust's market and business and any consequential changes to the DBFO Contracts which might be appropriate and desirable; and
- 11.4.3 not have authority, whether itself or in the person of any of its members, to change any DBFO Contract or make any decision binding on the parties.
- 11.5 Each of the Trust and Summit:
- 11.5.1 may accept or reject at its complete discretion any recommendation made by the Joint Operating Group;
- 11.5.2 shall not rely on any act or omission of the Joint Operating Group (or any member of it acting in that capacity) so as to give rise to any waiver or release or personal bar in respect of any right, benefit or obligation of the Trust or Summit under the DBFO Contracts; and
- 11.5.3 shall not be relieved of any liability nor have any liability, right or benefit varied by any review, discussion or recommendation of the Joint Operating Group.

- 11.6 The members of the Joint Operating Group may adopt such practices and procedures for the conduct of the activities of the Joint Operating Group (including the appointment of sub-committees) as they may think fit from time to time provided that:
- 11.6.1 recommendations and other decisions of the Joint Operating Group shall be reached by agreement of all those present at a meeting who must include at least one representative of each of the Trust and Summit;
 - 11.6.2 the Joint Operating Group shall meet at least once every three months and any member of the Joint Operating Group may convene a meeting of the Joint Operating Group at any time;
 - 11.6.3 meetings of the Joint Operating Group shall be convened on not less than ten Business Days notice, except in an emergency in which case as much notice as is reasonably practicable should be given, and notices shall be accompanied by an agenda of the items to be discussed at the meeting;
 - 11.6.4 meetings shall be duly constituted if attended by two or more members including at least one representative of each of the Trust and Summit;
 - 11.6.5 no matters shall be discussed at any meetings of the Joint Operating Group except for those items included in the agenda for that meeting without the consent in writing of all of the members of the Joint Operating Group;
 - 11.6.6 meetings of the Joint Operating Group may be held by telephone or any other form of telecommunication by which each participant can hear and speak to all other participants at the same time unless resolved otherwise by the Joint Operating Group; and
 - 11.6.7 minutes of all the decisions and meetings of the Joint Operating Group shall be taken by a representative of Summit and copies circulated within fourteen Business Days thereafter to the Trust and Summit. A full set of minutes shall be kept by Summit and shall be open to inspection by the Trust at any reasonable time upon request.
- 11.7 The Trust will invite representatives from the Joint Operating Group (including representatives of Summit) to attend meetings of the Trust's sub-committees to the extent relevant to the performance of the DBFO Contracts, and such representatives will attend if reasonably required to do so.
- 11.8 The Joint Operating Group shall not have the status of a committee of the Trust under the standing orders of the Trust.

12 Confidentiality

- 12.1 Each party shall treat all Confidential Information of the other party (and, in the case of Summit, Approved Service Providers, Permitted Sub-Contractors, the Contractor and its sub-contractors) as confidential, except as may be necessary for the performance of any obligations under the Project Documents and use all reasonable endeavours to prevent its disclosure by their respective officers, employees, agents or sub-contractors. This Clause 12 shall survive any termination of this Agreement.
- 12.2 Clause 12.1 shall not apply to Confidential Information which:
- 12.2.1 prior to its receipt by the recipient was in the possession of the recipient and at its free disposal;
 - 12.2.2 is subsequently disclosed to the recipient without any obligation of confidentiality by a third party who has not derived it directly or indirectly from the other party;
 - 12.2.3 is or becomes generally available to the public otherwise than through the act or default of the recipient or its agent or employees; or
 - 12.2.4 is required to be disclosed by Applicable Law, Competent Authority, any recognised stock exchange on which the Bonds are traded at any time, the order of any competent court, or (provided tenderers shall first agree in writing to be bound by a confidentiality undertaking substantially in the terms of this Clause 12 and subject as provided in Provision 12) Clause 16 (Employees) and Provision 12 (Market Testing) of the General Provisions; or
 - 12.2.5 is required under Clause 18 to be disclosed to bodies referred to in Clause 18.1, or is requested to be disclosed to the Trust's professional advisers, auditors, agents, or representatives, contractors or sub-contractors (provided that unless the Trust is entitled to disclose the Confidential Information by virtue of the preceding provisions of this Clause 12.2, such recipient shall first agree to be bound by a confidentiality undertaking substantially in the terms of this Clause 12).
- 12.3 Nothing in this Clause 12 shall prohibit Summit from disclosing information to its current or prospective financiers, shareholders, the Promoters, any Associated Company of Summit, any rating agency or any recognised stock exchange on which the Bonds are traded at any time, or where reasonably necessary to enable any of the Project Documents to be duly performed, to a current or prospective Contractor, Approved Service Provider or Permitted Sub- Contractor, and to its or their respective professional advisers, auditors, agents or representatives, provided that any recipient of Confidential Information contemplated by this Clause 12.3 shall first agree in writing to be bound by a confidentiality undertaking substantially in the terms of this Clause 12.
- 12.4 Nothing in this Clause 12 shall prohibit Summit from disclosing relevant information which is required to be made available by Summit or by a receiver or administrative

receiver or administrator to any person *bona fide* proposing to provide funding (whether by way of equity investment, loan or otherwise) to Summit, the Subsidiary or the Holding Company for the purpose of performing its obligations under the Project Documents, provided that any recipient of Confidential Information contemplated by this Clause 12.4 has agreed in writing to be bound by a confidentiality undertaking substantially in the terms of this Clause 12.

13 Alterations in Trust's Functions

No alteration in the Trust's functions under Applicable Laws shall cause Summit's obligations to be varied, waived, suspended or terminated, unless that variation, waiver, suspension or termination is with Summit's and the Trust's written consent. For the avoidance of doubt, nothing in this Clause 13 shall affect Summit's rights under Clause 22.9 of this Agreement.

14 Provision of management and financial information

14.1 The Trust shall provide to Summit all information to be delivered under Section 1 of Part 6 of the Schedule with the frequency and delivery timing there stipulated.

14.2 Summit shall provide to the Trust all information to be delivered under Section 2 of Part 6 of the Schedule with the frequency and delivery timing there stipulated.

14.3 Each party shall exercise all due care and diligence in the preparation of information and documents referred to in this Clause 14 and shall ensure that the same are accurate (in all material respects) and not misleading and shall ensure that at all times there shall be reasonably adequate security and retention arrangements for all such documents and information, which shall in all cases be retained by the relevant party for a period not less than required by law or seven years from receipt thereof, whichever is the greater, save with the consent of the other party, such consent not to be unreasonably withheld or delayed.

15 Additional information, reports and inspections

15.1 The Trust may request and Summit shall provide upon reasonable request, reports and information on any matter relating to the Services other than as required by Clause 14.2. Summit shall compile such reports and information with all due care and diligence and shall ensure that same are accurate (in all material respects) and not misleading.

15.2 The Trust's Contract Officer, and any other person who has previously been identified to Summit in writing as being authorised by the Trust (including, but not limited to, the Trust's Auditor and its employees), shall be entitled on reasonable notice during Normal Working Hours (except in an emergency when such notice as is practicable will be given and, if appropriate, immediate access can be obtained) during the Services Term to inspect the equipment, materials and records at the Site used by Summit, any

- Approved Service Provider and any Permitted Sub-Contractor in the provision of the Services and to test and take samples.
- 15.3 The Trust shall ensure that the Trust's Contract Officer and any such authorised representatives as are referred to in Clause 15.2 shall ensure that the inspections described in Clause 15.2 and the interviews described in Clause 15.6 are carried out in such a way as to cause as little disruption as reasonably practicable to Summit, any Approved Service Provider or any Permitted Sub-Contractor.
- 15.4 Summit shall co-operate with the Trust's Contract Officer and any person so authorised by the Trust and shall provide all reasonable assistance in order to facilitate the carrying out of the inspections referred to in Clause 15.2.
- 15.5 Summit shall use all reasonable endeavours to procure that (including making appropriate provision in all Relevant Sub-Contracts) all Approved Service Providers and Permitted Sub-Contractors in relation to the Services shall provide all reasonable assistance to the Trust to facilitate the carrying out of the inspections described in Clause 15.2.
- 15.6 Summit shall permit the Trust on reasonable notice reasonable access to key Personnel employed by it, and shall use all reasonable endeavours to permit such access to key Personnel employed by Approved Service Providers in the provisions of the Services, to enable the Trust to interview such Personnel to obtain appropriate oral explanations of such documents as are referred to in Clause 15.1.
- 15.7 Nothing in Clauses 15.1 to 15.6 shall oblige Summit (or any Approved Service Provider or Permitted Sub-Contractor) to take action or provide any access, information or assistance to the extent that such action, access, information or assistance would result in a material departure from or addition to its (or their) other obligations under the DBFO Contracts or give rise to significant costs or significant disruption to Summit (or any Approved Service Provider or Permitted Sub-Contractor).
- 15.8 The Trust shall on reasonable notice make available to Summit such information within the Trust's possession or control or which it is entitled to receive from a third party (using reasonable endeavours to procure the same) as Summit may reasonably request in such form and at such time or times as Summit may reasonably request in relation to the performance of Summit's obligations under the DBFO Contracts.

PART 5 - EMPLOYEES AND TRANSITIONAL ARRANGEMENTS

16 Employees

16.1 General

- 16.1.1 The Trust and Summit acknowledge and agree that it is their intention that pursuant to the Employment Regulations and/or the Directive the transfer of the Transition Services

from the Trust to Summit or, at Summit's direction, to an Approved Service Provider will constitute a relevant transfer and that pursuant to the Employment Regulations and/or the Directive the contracts of employment between the Trust and/or Hospital Hygiene Limited and the Employees will have effect on or after the Transition Commencement Date as if originally made between Summit or that Approved Service Provider and the Employees but the parties agree that the provisions of this Clause 16 shall apply irrespective of whether or not the Employment Regulations and/or the Directive apply provided that Summit and/or the Approved Service Provider shall not have any liability under this Clause 16 or otherwise in respect of any employees or former employees of the Trust or Hospital Hygiene Limited who do not transfer into Summit's or that Approved Service Provider's employment by operation of law or otherwise.

- 16.1.2 The Trust undertakes to Summit that it will not prior to the Transition Commencement Date subcontract the provision of any of the Services (under exception of portering services, waste services and linen services) to be provided by or on behalf of Summit as Transition Services .
- 16.1.3 The Trust agrees that Summit may subcontract (but without prejudice to Summit's obligations to the Trust hereunder) its obligations under this Clause 16 to one or more Approved Service Providers appointed in accordance with the DBFO Contracts and in any case where there is an obligation on Summit under this Clause 16, including an obligation to do or omit to do something, that will include an obligation to procure that any such Approved Service Provider does likewise, and if Summit does so sub-contract its obligations, then anything to be done under this Clause 16 by Summit in relation to the element sub-contracted may be done by an Approved Service Provider, but without prejudice to Summit's liability to the Trust.
- 16.1.4 The Trust and Summit shall use all reasonable endeavours to mitigate any liabilities for which the other may be responsible under this Clause 16 except for those liabilities which arise pursuant to sub-clauses 16.5, 16.10.1 and 16.10.2 but subject to Summit complying with the terms of such sub-clauses.
- 16.1.5 The Trust shall, not less than six months prior to the Transition Commencement Date, provide, or procure the provision to Summit and any Approved Service Provider, of:-
(a) all information in its possession or in the possession of Hospital Hygiene Limited which the Trust can reasonably obtain, or which can reasonably be obtained by the Trust from a third party relating to the Employees as Summit or an Approved Service Provider reasonably require and (b) one office at the Existing Sites and, where reasonably practicable, such access to the Employees and such other accommodation and facilities as Summit or its Approved Service Provider may reasonably require to fulfil the obligations under this Clause 16.
- 16.1.6 Two months prior to the Transition Commencement Date the Trust will provide to Summit a list setting out the identity of the Employees it is anticipated will provide the Services (and will notify Summit promptly of all changes to such list) and within 10

Business Days after the Transition Commencement Date the Trust will provide to Summit a list setting out the identity of the Employees and the Trust warrants that such list will be accurate in all material respects.

16.2 Transfer of Employees

16.2.1 At least two weeks prior to the Transition Commencement Date, or if later within 5 Business Days after notification of the identity of any Employee or as may otherwise be agreed between the parties or required by law, Summit (or an Approved Service Provider) shall send a letter to each of the Employees, in terms previously approved by the Trust, such approval not to be unreasonably withheld or delayed, confirming that, pursuant to the Employment Regulations and/or the Directive, the contracts of employment of the Employees will transfer to Summit or an Approved Service Provider with effect from the Transition Commencement Date and confirming that the period of employment which that Employee has accrued under service with the Trust or Hospital Hygiene Limited (and any other period of service which is deemed at law to be continuous with that period) and the period of employment with Summit or an Approved Service Provider shall be treated as continuous for all purposes pursuant to the Employment Regulations and/or the Directive.

16.2.2 Summit shall use all reasonable endeavours, at the request and cost (excluding Summit's and the Approved Service Provider's administration and management costs) of the Trust, with the assistance of the Trust, to ensure that the contracts of employment of the Employees transfer from the Trust and Hospital Hygiene Limited to Summit or an Approved Service Provider with effect from and including the Transition Commencement Date pursuant to the Employment Regulations and/or the Directive.

16.3 Selection of Employees for Redundancy

16.3.1 The Trust acknowledges that the number of whole-time equivalent employees and skill mix of those employees Summit envisages will be required to perform the Services is as set out in Part 8A of the Schedule ("the Employee Assumptions") and in relation to the number of those employees, Summit will, or will procure that an Approved Service Provider will, produce to the Trust, for discussion purposes, written notice of the actual numbers of employees (not the numbers of whole-time equivalent employees as specified at Part 8A of the Schedule) and hours of such employees which will be required to perform the Services, not later than four months from Financial Close and Summit shall, or shall procure that an Approved Service Provider shall, produce to the Trust full and final written notice of the actual numbers and hours of such employees not later than six months prior to the Transition Commencement Date and Part 8B of the Schedule sets out the assumed wages and other costs for those employees included within the Employee Assumptions ("Wages Assumptions").

16.3.2 The Trust and Summit shall consult and co-operate with each other in the period from Financial Close to the Transition Commencement Date with a view to the Trust managing its employees so as to deliver to Summit (or an Approved Service Provider)

on the Transition Commencement Date the requirements as to employee numbers (for the avoidance of doubt, actual Employees and not numbers of whole-time equivalent Employees) and skill mix as set out in the Employee Assumptions provided that, for the avoidance of doubt, the Trust shall be under no obligation to procure the transfer to Summit of a minimum number of Employees.

- 16.3.3 Summit shall use all reasonable endeavours during the Transition Period to procure the training of the Employees to acquire any skills necessary in the reasonable opinion of Summit or an Approved Service Provider following consultation with the Trust to meet the requirements of the Employee Assumptions and the Trust will agree, insofar as is reasonably practicable, to the Employees being released for this purpose.
- 16.3.4 (a) Within four months after the Transition Commencement Date, Summit shall, in consultation with the Trust and, in accordance with the policy set out in Part 9 of the Schedule ("**the Redundancy Policy**"), identify those Employees (if any) who are excess to or unsuitable for the requirements set out in the Employee Assumptions, applying the following criteria, namely length of service, skills/competencies and disciplinary record of the Employees, but subject to those of the Employees (but no more than are required by Summit and/or the Approved Service Provider in respect of each category of post as set out in the Employee Assumptions) who are employed by the Trust or Hospital Hygiene Limited at the Transition Commencement Date in the positions specified at Part (b) of the Employee Assumptions not being deemed by Summit or the Approved Service Provider to be excess to or unsuitable for Summit's requirements or those of the Approved Service Provider, and Summit or the Approved Service Provider shall notify the Trust in writing ("**Summit Notice**") of the Employees who are excess to or unsuitable for Summit's or the Approved Service Provider's requirements and details as to why they are excess or unsuitable for Summit or the Approved Service Provider's requirements.
- (b) If a Summit Notice is not served within four months after the Transition Commencement Date, Summit or the Approved Service Provider shall be deemed to be satisfied that there are no Employees who are excess to or unsuitable for Summit's or the Approved Service Provider's requirements.
- (c) The Trust may, within twenty one days of receipt of the Summit Notice, dispute that notice by notice in writing to Summit. The Trust may only dispute the Summit Notice on grounds that either an Employee has the requisite skills, or can reasonably be trained to acquire the requisite skills within the Transition Period, or that Summit or any Approved Service Provider has not complied with the Redundancy Policy or the terms of Clauses 16.3.3 and 16.3.4. If the Trust does not serve such a notice on Summit within that twenty one day period, it shall be deemed to have agreed to the terms of the Summit Notice.
- (d) The parties shall endeavour, within fourteen days of receipt by Summit of a notice from the Trust under Clause 16.3.4(c), to resolve any dispute failing which either

party may refer the dispute to the Dispute Resolution Procedure which shall either confirm or amend the Summit Notice and it is hereby agreed that the decision of the Expert under the Dispute Resolution Procedure is final and binding in this regard.

- (e) Employees (if any) listed in the Summit Notice, agreed, confirmed or amended as aforesaid, shall, hereinafter be referred to as "**Excess Employees**" and the remainder of the Employees shall hereinafter be referred to as "**Transferring Employees**".
- (f) Without prejudice to Clause 16.1.4, and to Summit's or any Approved Service Provider's rights under Clause 16.10.2, the parties acknowledge that during the Transition Period more Employees than the Transferring Employees will be required (1) to provide the Transition Services and (2) to provide the Services as from and after the Operational Date and (3) to comply with the Commissioning Procedure (prior to the Services Commencement Date) and Summit agrees that unless otherwise required by the Trust it will procure that the Approved Service Provider retains Excess Employees for that purpose during the Transition Period, and will not terminate the contracts of employment of such Excess Employees at any time up to the end of the Transition Period without the consent of the Trust, not to be unreasonably withheld or delayed, unless such termination is at no cost to the Trust, whilst Summit/or the Approved Service Provider still has a requirement for the work normally carried out by such Excess Employees to be so carried out and that if any of the Transferring Employees leave prior to the end of the Transition Period or if Summit and/or the Approved Service Provider require to employ more employees to provide the Services on an ongoing basis than the number specified in the written notice issued by Summit or an Approved Service Provider not later than six months prior to the Transition Commencement Date in accordance with Clause 16.3.1 Summit will or will procure that an Approved Service Provider will employ any Excess Employee on the same terms as specified in Clause 16.2.1 in preference to any third party where the Excess Employee has the requisite skills, or can reasonably be trained to acquire the requisite skills, to fill that vacancy and where any such Excess Employee consents to be and is so employed that Excess Employee shall be added to the list of Transferring Employees.

16.4 **Change in Location**

- 16.4.1 The parties shall use all reasonable endeavours to procure that the Transferring Employees accept that their employment continues with Summit and/or the Approved Service Provider with effect from the Transition Commencement Date and thereafter if they do so remain in employment that they are obliged to transfer their place of employment to the Site on or after the Services Commencement Date and, without prejudice to the foregoing, Summit or the Approved Service Provider will confirm that their employment continues at the Site on the same terms as specified in Clause 16.2.1

- 16.4.2 Where Summit and/or the Approved Service Provider is not legally entitled to require any or all of the Transferring Employees to transfer from the Existing Sites to the Site and such Transferring Employees indicate to Summit or the Approved Service Provider an intention not to transfer, Summit will or will procure that the Approved Service Provider will, make a written offer of alternative employment at the Site to such Transferring Employees, which shall, in respect of each individual Transferring Employee, be in relation to the same post as that in which he would have been employed, had Summit and/or the Approved Service Provider been so entitled to require him to so transfer, on the same terms and conditions as applied to the employment of the Transferring Employees at the Transition Commencement Date except for location and will timeously make such offers to all such Transferring Employees and assert in writing to such Transferring Employees that such offers are offers of suitable alternative employment (in terms of statute or under each Transferring Employee's contract of employment)
- 16.4.3 Summit will consult with the Trust in relation to the matters specified in Clauses 16.4.1 and 16.4.2 and keep the Trust fully advised in relation to such matters, and, insofar as reasonably practicable, will permit the Trust, insofar as it reasonably requests, to have access to any Transferring Employees who have indicated to Summit and/or the Approved Service Provider an intention not to transfer to the Site.

16.5 Trust Consent

If any Employee claims (whether by raising an action or otherwise) a redundancy payment (whether statutory or contractual) from:-

- 16.5.1 the Trust on the basis that the Employment Regulations and/or the Directive do not operate to transfer his contract of employment to Summit (or an Approved Service Provider) at the Transition Commencement Date and as notified in writing to Summit by the Trust; or
- 16.5.2 Summit and/or the Approved Service Provider as a result of the change in location from the Existing Sites to the Site;

then, in either of those circumstances, Summit shall not thereafter employ that Employee without the prior written consent of the Trust, such consent not to be unreasonably withheld or delayed. If requested by the Trust in writing (acting reasonably and subject to the availability and cost of similar employees with similar skills to that Employee in the market place) any such Employee already employed by Summit or an Approved Service Provider shall be dismissed by Summit or that Approved Service Provider, provided always that the Trust shall indemnify Summit (or, on demand by Summit, an Approved Service Provider) on demand from and against all costs, losses, claims and liabilities suffered or incurred by Summit or any Approved Service Provider as a result of Summit's obligations under this clause 16.5 (including any expenses reasonably incurred as a result of such obligations in relation to the provision of the Services).

16.6 Employee Warranties by the Trust

The Trust warrants and undertakes to Summit that:

- 16.6.1 the information already provided to Summit as listed in the Trust Information Letter is full, complete and accurate and the Trust will provide Summit with full details of all material amendments and/or variations to such information as and when made within ten days of such amendments and/or variations having been made in the period up to the Transition Commencement Date;
- 16.6.2 the information provided by it in accordance with Clause 16.1.5 will, when provided, be full, complete and accurate ;
- 16.6.3 there will not be in existence at the Transition Commencement Date any written or unwritten contract of employment with any Employee which cannot be terminated by three months' notice or less without giving rise to a claim for damages or compensation (other than a statutory or contractual redundancy payment or statutory compensation for unfair dismissal);
- 16.6.4 the Trust has and will up to the Transition Commencement Date have maintained complete personnel records in the format normally adopted by it as set out in the Trust Information Letter regarding the service of each Employee including all personnel records required to be maintained by law and will deliver these personnel records to Summit or as it may direct at the Transition Commencement Date;
- 16.6.5 without prejudice to Clause 16.8, there will not, at the Transition Commencement Date, be any current or pending negotiations with or offers to the Employees or any of them concerning the terms of their employment (including holiday entitlement and pension arrangements) other than annual pay negotiations in which the Trust engages with the trade unions recognised by the Trust which are detailed in the document referred to at numbered paragraph 3.36 of the Trust Information Letter ("**Recognised Trade Unions**") which are ongoing up to but not including the Transition Commencement Date and/or other than in the normal course of business and other than those which have been disclosed in writing to Summit or an Approved Service Provider;
- 16.6.6 the Trust will and will procure, insofar as is reasonably practicable, that Hospital Hygiene Limited will, comply with Regulation 10 of the Employment Regulations ;
- 16.6.7 the Trust has disclosed to Summit details of the terms and conditions applicable to the contracts of employment of the Employees and of all of the collective agreements which form part of the contracts of employment of the Employees or otherwise as detailed in the Trust Information Letter ("**Local Collective Agreements**") and will, in the period up to the Transition Commencement Date, disclose changes to and negotiations in respect of changes to those terms and conditions and/or Local Collective

Agreements entered into by it or further relevant local collective agreements and will inform Summit of any changes to the said agreements or any additional or alternative local collective agreements which are to be entered into by the Trust during said period;

- 16.6.8 the Trust shall not (and it shall procure that Hospital Hygiene Limited shall not) vary the terms and conditions of the contracts of employment of the Employees except insofar as is reasonably required in the normal course of the business of the Trust or, where applicable, Hospital Hygiene Limited or engage such Employees on terms and conditions materially different to those disclosed to Summit prior to Financial Close without the prior consent of Summit, not to be unreasonably withheld or delayed;
- 16.6.9 the Trust shall notify Summit at least one month in advance of the Transition Commencement Date and in the period from the date of such notice up to the Transition Commencement Date of any outstanding disputes of a material nature of which the Trust is aware or any disputes of a material nature which the Trust reasonably anticipates will arise with any of the Employees or their representatives.

16.7 **Employee Undertaking by Summit re Regulation 10**

Summit undertakes to the Trust that it will advise the Trust in writing of any measures proposed to be taken, if any, in respect of the Transferring Employees as soon as it becomes aware that it intends to take such measures and shall provide the Trust with all other information in the possession of it or its Approved Service Provider in relation to the Employees reasonably requested by the Trust as necessary to enable the Trust and/or Hospital Hygiene Limited to comply with their respective obligations in terms of Regulation 10 of the Employment Regulations.

16.8 **Adjustment to Payment Provisions**

In the event that the aggregate of all wages and other costs of the Transferring Employees at the Transition Commencement Date is different from the aggregate of all wages and other costs of the like number of Employees of the same grade in respect of the same service classifications as set out in the Wages Assumptions (as Indexed annually from 1st April 1996 to the Transition Commencement Date) then there will be an adjustment to the Payment Provisions to reflect the increased or decreased cost on the following basis:-

- 16.8.1 in respect of each Relevant Service there shall be calculated the Relevant Adjustment where:

“**Affected Employee**” means any Transferring Employee whose wage and other costs are different from those shown for a person in the same grade as such Transferring Employee in the Wages Assumptions (Indexed as aforesaid);

“**Relevant Service**” means the Service in respect of which the Affected Employee expends most time; and

"Relevant Adjustment" means the aggregate of all the monthly amounts (whether negative or positive) by which the wage and other costs of each Affected Employee varies from those shown for a person in the same grade as such Transferring Employee in the Wages Assumptions (Indexed as aforesaid).

16.8.2 The Relevant Adjustment for each Relevant Service will be split between the Capacity and Usage Element for each Month in a proportion consistent with the then split for that Relevant Service in the Financial Model, and the Calculation Tables in Part A of the Schedule to the General Provisions will be adjusted by that proportion of the Relevant Adjustment.

16.9 **Accrued Emoluments and Holiday Pay**

16.9.1 All obligations in respect of the Employees including, without prejudice to the foregoing generality, unpaid wages, benefits, pension contributions and other emoluments, tax and National Insurance payments (including PAYE), contributions to retirement benefit schemes and bonus and commission arrangements ("**financial obligations**") relative to the period prior to but not including the Transition Commencement Date shall be borne by the Trust.

16.9.2 Summit shall be responsible for all financial obligations relating to the Transferring Employees relative to the period from and including the Transition Commencement Date and all necessary apportionments shall be made.

16.9.3 In relation to entitlement to holiday pay for the Employees, the following shall apply:-

- (a) where an Employee has taken more than his proportionate holiday for the then current holiday year prior to the Transition Commencement Date, Summit shall not be obliged to make any reimbursement in respect thereof to the Trust; and
- (b) where an Employee has taken less than his proportionate holiday for the then current holiday year prior to the Transition Commencement Date, Summit shall bear the cost of such entitlement arising thereafter in full without recourse to any reimbursement from the Trust;

provided always that the Trust shall be liable for any claims relating to Frozen Annual Holiday Pay Entitlement and shall indemnify Summit (or, on demand by Summit, an Approved Service Provider) from and against any claims in respect thereof.

16.10 **Indemnities**

16.10.1 If any contract of employment of any person (not being one of the Employees) shall as a result of the operation of the provisions of the Employment Regulations and/or the Directive or by operation of law have effect as if originally made between Summit or any Approved Service Provider and such person then Summit or that Approved Service Provider shall have the right after notification to the Trust to terminate such contract

of employment forthwith without consulting such employee or considering suitable alternative employment and the Trust shall indemnify Summit (or, on demand by Summit, any Approved Service Provider) fully at all times on demand from and against all and any costs, losses, damages, claims, liabilities and expenses suffered or incurred by Summit and/or such Approved Service Provider as a result of the transfer of such contract and its termination and in the event that such termination is ruled to be ineffective, the ongoing employment of such person.

16.10.2 Subject to Clause 16.3.4(f), Summit or any Approved Service Provider shall have the right on or after the Transition Commencement Date after notification to the Trust to terminate the contract of employment of each Excess Employee (for the avoidance of doubt under exception of any Excess Employee who it is agreed or determined is added to the list of Transferring Employees pursuant to Clause 16.3.4.(f)) and the Trust shall indemnify Summit (or, on demand by Summit, any Approved Service Provider) on demand from and against all and any costs, losses, damages, liabilities, claims and expenses suffered or incurred by Summit and/or such Approved Service Provider:

- (a) in connection with such termination; and
- (b) in the event that such termination is ruled to be ineffective, the ongoing employment of such person.

16.10.3 To the extent that Summit and/or the Approved Service Provider are not indemnified or entitled to be indemnified under Clauses 16.10.1 and 16.10.2 the Trust shall indemnify Summit (or, on demand, by Summit any Approved Service Provider) on demand from and against all and any costs, losses, damages, claims, liabilities and expenses suffered or incurred by Summit or an Approved Service Provider as a result of any claim by any Employee arising under statute, contract, custom and practice or common law relating to the change of the place of his employment from the Existing Sites to the Site and including, for the avoidance of doubt, any claim for redundancy payment or unfair dismissal or enhanced redundancy payment ;

16.10.4 Summit shall indemnify the Trust on demand and hold it harmless from and against all losses, damages, costs, claims, demands, actions, fines, penalties, awards, liabilities and expenses (including reasonable legal expenses) incurred in connection with or as a result of:-

- (a) any claim or demand by any Employee arising under statute, contract, custom and practice (of which custom and practice Summit or any Approved Service Provider have been made aware by the Trust) or at common law from any act, fault or omission of Summit or an Approved Service Provider in relation to that Employee, on or after the Transition Commencement Date;
- (b) any claim, either under statute or at common law by any trade union or staff association or any other worker representatives within the meaning of the Employment Regulations and/or the Directive arising from or connected with any

failure by Summit or an Approved Service Provider to comply with their respective legal obligations to that trade union, staff association or other worker representatives whether under Regulation 10 of the Employment Regulations or under the Directive or otherwise and whether any such claim arises or has its origin before, on or after the Transition Commencement Date;

save in each case to the extent that such claim or demand arises under the circumstances set out in Clauses 16.10.1, 16.10.2, 16.10.3, 16.5 and/or 16.17 (which shall apply as provided for therein) or arises out of breach by the Trust of any of its obligations hereunder .

16.10.5 The Trust shall indemnify Summit (or, on demand by Summit, any Approved Service Provider) on demand and hold it harmless from and against all losses, costs, claims, demands, actions, fines, penalties, awards, liabilities and expenses (including reasonable legal expenses) incurred in connection with or as a result of:-

- (a) any claim or demand by any Employee or other or former employees of the Trust or any of its sub-contractors, arising either under statute, contract, custom and practice or at common law from any act, fault or omission of the Trust or any of its sub-contractors in relation to that Employee, or other or former employee of the Trust or any of its sub-contractors up to but not including the Transition Commencement Date; and
- (b) any claim, either under statute or at common law by any trade union or staff association or any other workers' representatives (whether or not recognised by the Trust) within the meaning of the Employment Regulations and/or the Directive arising from or connected with any failure by the Trust or any of its sub-contractors to comply with any legal obligations to that trade union, staff association, Employee, employee or other worker representatives whether under Regulation 10 of the Employment Regulations or under the Directive or otherwise and whether any such claim arises or has its origin before, on or after the Transition Commencement Date .

save in each case to the extent that such claim or demand arises out of breach by Summit of any of its obligations hereunder.

16.10.6.1 The Trust warrants that the terms and conditions of the employees of Hospital Hygiene Limited shall be no more onerous upon Summit and/or the Approved Service Provider than the Whitley Council terms and conditions referred to in the Trust Information Letter applicable to the respective grades of such employees.

16.10.6.2 The Trust shall indemnify Summit (or, on demand by Summit, any Approved Service Provider) on demand and hold it or such Approved Service Provider harmless from and against any or all losses, demands, claims, liabilities, costs and expenses (including legal expenses) made against, suffered or incurred by Summit and/or such Approved Service Provider in the event that

- (a) any of the Employees claims or establishes that his contract of employment has been varied in contravention of any rights or protections he has under the Employment Regulations and/or the Directive by virtue of any act or omission by the Trust and/or Hospital Hygiene Limited or by virtue of any act or omission of Summit and/or any Approved Service Provider where such act or omission is provided for in this Clause 16 (including for the avoidance of doubt any amendment to any contractual redundancy procedures or practices and any variations of the contract of employment of any Employee made with a view to complying with the Employee Assumptions); and/or
- (b) the Trust is in breach of its obligations under Clause 16.10.6.1.

16.11 Market Testing

- 16.11.1 The Trust and Summit acknowledge that as a result of any Approved Service Provider (or any successor) ceasing to be an Approved Service Provider ("**Outgoing Service Provider**") as a consequence of any Default Market Testing or the termination of the DBFO Contracts (other than solely the Equipment Agreement) or a Service Deletion Change in each case prior to the First Market Testing Date or Market Testing at the First Market Testing Date in relation to any Service or Services (each date on which any such Default Market Testing or a Service Deletion Change or First Market Testing occurs hereinafter being referred to as "**each Cessation Date**"), a transfer of the employees performing the Service or Services at the Site at each Cessation Date ("**the Cessation Employees**") may occur from the Outgoing Service Provider to an immediate successor to an Outgoing Service Provider ("**Incoming Service Provider**") pursuant to the Employment Regulations and/or the Directive but the parties acknowledge that a transfer pursuant to said Regulations/Directive may not occur. In either case the Incoming Service Provider will be required by the Trust and/or Summit to contract to take all reasonable steps to transfer the contracts of employment of the Cessation Employees (including without limitation offering employment to all Cessation Employees on the same terms and conditions as applied to the Cessation Employees at the relevant Cessation Date) to such Incoming Service Provider and Summit shall ensure that the sub-contract with the Incoming Service Provider contains such a provision (in terms approved by the Trust acting reasonably) and shall use all reasonable endeavours to enforce such a provision and a provision to the foregoing effect in terms of this Clause 16.11 will be included within the Service Direct Agreement of such Incoming Service Provider.
- 16.11.2 Where there is no transfer of the contracts of employment of the Cessation Employees pursuant to the Employment Regulations and/or the Directive as aforesaid, and on the condition that Summit has used all reasonable endeavours to procure that the contracts of employment of the Cessation Employees transfer from the Outgoing Service Provider to the Incoming Service Provider with effect from and including each Cessation Date, the Trust undertakes to indemnify Summit (or, on demand, by Summit any Approved Service Provider) in respect of redundancy payments properly made to

those of the Cessation Employees who have been continuously employed by Summit or by the Approved Service Provider in relation to the provision of any Service or Services since the Transition Commencement Date to the Default Market Testing or to termination of the DBFO Contracts (other than solely the Equipment Agreement) or to a Service Deletion Change or to the Final Market Testing Date and who were employed by the Trust or Hospital Hygiene Limited prior to the Transition Commencement Date ("**Trust Cessation Employees**") in terms of their statutory or contractual entitlement but only in terms of contractual obligations arising from the terms of the Trust Cessation Employees' contracts of employment which are no more generous to the Trust Cessation Employees than those which were in place at the Transition Commencement Date and which are referable to the period of employment of the Trust Cessation Employees or any of them with the Trust (and/or Hospital Hygiene Limited) up to but not including the Transition Commencement Date and excluding, for the avoidance of doubt, any payment referable to a period thereafter except and to the extent of any element of enhanced redundancy payment which arises on account of any of the Trust Cessation Employees' ages (save to the extent arising on account of the terms of employment in that regard extant at each Cessation Date being more generous than the terms which applied at the Transition Commencement Date).

16.12 **Non-occurrence of CPC**

- 16.12.1 If the DBFO Contracts are terminated after the Transition Commencement Date but prior to the Contractual Practical Completion Date ("**the Pre-CPC Termination Date**"), for the avoidance of doubt, the Trust and Summit acknowledge that pursuant to the Employment Regulations and/or the Directive the transfer of the Transition Services from Summit or the Approved Service Provider to the Trust or a service provider appointed by the Trust ("**Trust Service Provider**") is likely to constitute a relevant transfer and that pursuant to the Employment Regulations and/or the Directive the contracts of employment between Summit or the Approved Service Provider and the Employees who continue to be employed by Summit or an Approved Service Provider at the Pre-CPC Termination Date (together "**CPC Employees**") will have effect on or after the Pre-CPC Termination Date as if made between the Trust or any Trust Service Provider appointed and the CPC Employees. The parties shall use all reasonable endeavours to procure that the contracts of employment of the CPC Employees transfer from Summit or the Approved Service Provider to the Trust or a Trust Service Provider with effect from and including the Pre-CPC Termination Date pursuant to the Employment Regulations and/or the Directive.
- 16.12.2 The Trust undertakes to Summit that it will indemnify and keep indemnified Summit (or, on demand by Summit, any Approved Service Provider) in respect of any costs, losses, damages, claims, liabilities and expenses suffered or incurred by Summit and/or such Approved Service Provider relative to the CPC Employees arising out of the transfer to the Trust or a Trust Service Provider of the contracts of employment of the CPC Employees by virtue of the Employment Regulations and/or the Directive or where the Employment Regulations and/or the Directive do not apply to transfer the CPC Employees to the Trust or Trust Service Provider, the termination of employment of

the CPC Employees or, in the event that any such termination is ruled to be ineffective, the ongoing employment of any such person

16.13 Summit obligations at Market Testing, Expiry of the Term, Default Market Testing and Service Deletion Change

16.13.1 Summit undertakes that it shall not :-

- (a) for a period of one year prior to each Market Testing Date; and
- (b) for a period of one year prior to Expiry of the Term; and
- (c) as soon as it becomes aware that termination of the DBFO Contracts, Default Market Testing or a Service Deletion Change (in each case where these occur prior to the First Market Testing Date) is to take place until such event has been completed, effected or cancelled;

materially vary the terms and conditions of and/or increase the numbers of the employees employed at the Site in the provision of the Services without the prior written consent of the Trust, not to be unreasonably withheld provided that, for the avoidance of doubt nothing in this undertaking shall limit the rights of Summit and any Approved Service Provider to give effect to any pre-existing contractual obligations to any employees.

16.13.2 Summit shall supply or shall procure that an Approved Service Provider supplies (a) to tenderers and the Trust as part of each Market Testing under Provision 12.4; and (b) to the Trust or its nominee within the period of six months prior to Expiry of the Term or as soon as Summit becomes aware of the termination of the DBFO Contracts, a Default Market Testing, or a Service Deletion Change at the request of the Trust acting reasonably full, complete and accurate information as to the terms and conditions of employment of all employees then currently employed by Summit or any Approved Service Provider in providing the Services and such other information relating to such employees which is in the possession of Summit or any Approved Service Provider or which can reasonably be obtained by them from a third party as may be reasonably required by the Trust.

16.13.3 Summit will or will procure that an Approved Service Provider will, during the Services Term maintain complete personnel records in the format normally adopted by it regarding the service of each employee engaged in the Services including all personnel records required to be maintained by law and will deliver these personnel records to any incoming provider of the Services or as it may direct at any time during the six month period prior to the Market Testing Date or the Expiry of the Term or as soon as it becomes aware that termination of the DBFO Contracts, a Default Market Testing or a Service Deletion Change (in each case occurring prior to the First Market Test) is to take place in circumstances where those employees transfer to the Trust or a Trust Service Provider by operation of law.

- 16.13.4 Summit undertakes that there will not, at each Market Testing Date or the Expiry of the Term or upon termination of the DBFO Contracts, a Default Market Testing or a Service Deletion Change, be any current or pending negotiations with or offers to the employees engaged in the Services or any of them concerning the terms of their employment (including relative to pay, location, sick pay, holiday entitlement or pension arrangements) other than in the usual course of business.
- 16.13.5 Summit will prior to each Market Testing Date, or Expiry of the Term or as soon as it becomes aware that termination of the DBFO Contracts, a Default Market Testing or a Service Deletion Change is to take place comply with Regulation 10 of the Employment Regulations.
- 16.13.6 Summit undertakes that there will not be in existence at Market Testing Date, or Expiry of the Term or upon termination of the DBFO Contracts, a Default Market Testing or a Service Deletion Change any written or unwritten contract of employment with any employee engaged in the Services which cannot be terminated by three month's notice or less without giving rise to a claim for damages or compensation (other than a statutory or contractual redundancy payment or statutory compensation for unfair dismissal).
- 16.13.7 Summit undertakes that at any time during the period of one year up to Market Testing Date or Expiry of the Term or as soon as it becomes aware of termination of the DBFO Contracts, a Default Market Testing, or a Service Deletion Change, whichever is the earlier date, it will disclose to the Trust full and accurate details of relevant local collective agreements and will, during the period from such disclosure until such event has been completed, effected or cancelled, disclose changes to those or further relevant local collective agreements.
- 16.13.8 Summit shall notify the Trust at least one month in advance of a Market Testing Date or Expiry of the Term or as soon as it becomes aware of termination of the DBFO Contracts, a Default Market Testing, or a Service Deletion Change, whichever is appropriate, and in the period from the date of such notice until such event has been completed, effected or cancelled whichever is appropriate, of any outstanding disputes of a material nature with any of the employees engaged in the Services or their representatives.
- 16.13.9 Summit will warrant or procure that the Approved Service Provider warrants that the information provided under this Clause 16.13 will be full, complete and accurate.

16.14 Transfer of Employees to the Trust or a Trust Service Provider

Where there is a transfer pursuant to the Employment Regulations and/or the Directive of the contracts of employment of employees of Summit or its Approved Service Provider engaged in the Services ("Affected Employees") to the Trust or a Trust Service Provider then Clauses 16.13.1 through to 16.13.2 shall apply as follows:-

- 16.14.1 All obligations in respect of the Affected Employees including without prejudice to the foregoing generality, unpaid wages, benefits, pension contributions and other emoluments, tax and national insurance payments (including PAYE), contributions to retirement benefit schemes and bonus and commission arrangements ("**Transfer Financial Obligations**") relative to the period following the Transition Commencement Date but prior to but not including the date of such transfer ("**the Date of Transfer**") shall be borne by Summit or the Approved Service Provider.
- 16.14.2 All Transfer Financial Obligations relative to the period from and including the Date of Transfer shall be borne by the Trust or as directed by the Trust, the Trust Service Provider.
- 16.14.3 In relation to entitlement to holiday pay for the Affected Employees the following shall apply:-
- (a) where the employee has taken more than his proportionate holiday for the then current holiday year prior to the Date of Transfer, the Trust or the Trust Service Provider shall not be obliged to make any reimbursement in respect thereof to Summit ; and
 - (b) where the Employee has taken less than his proportionate holiday in the then current holiday year prior to the Date of Transfer, the Trust shall or shall procure that any Trust Service Provider shall bear the cost of such entitlement arising thereafter in full without recourse in any reimbursement from Summit.
- 16.14.4 Summit shall indemnify the Trust (or, on demand by the Trust, any Trust Service Provider) and hold it harmless from and against all losses, costs, claims, demands, actions, fines, penalties, awards, liabilities and expenses (including reasonable legal expenses) incurred in connection with or as a result of:-
- (a) any claim or demand by the Affected Employees or any of them or any employee or other employee or former employee of Summit or any Approved Service Provider arising either under statute, contract, custom and practice or at common law from any act, fault or omission of Summit or any Approved Service Provider or any of its sub-contractors in relation to any of the Affected Employees or other employee or former employee of Summit or any sub-contractor between the Transition Commencement Date and the Date of Transfer; and
 - (b) any claim (either under statute or at common law) by any trade union or staff association or any other workers' representatives within the meaning of the Employment Regulations and/or the Directive arising from or connected with any failure by Summit or an Approved Service Provider to comply with any legal obligations to that trade union, staff association or other worker representatives whether under Regulation 10 of the Employment Regulations or under the Directive or otherwise and whether any such claim arises or has its origin before, on or after the Date of Transfer.

save in each case to the extent that such claim or demand arises out of any breach by the Trust of any of its obligations hereunder.

16.14.5 Without prejudice to Clause 16.12, the Trust shall indemnify Summit (or, on demand by Summit an Approved Service Provider) on demand and hold it harmless from and against all losses, damages, costs, claims, demands, actions, fines, penalties, awards, liabilities and expenses (including reasonable legal expenses) incurred in connection with or as a result of:-

- (a) any claim or demand by any Affected Employee arising under statute, contract, custom and practice or at common law from any act, fault or omission of the Trust or any of its sub-contractors in relation to each such Affected Employee on or after the Date of Transfer
- (b) any claim, either under statute or at common law by any trade union or staff association or any other workers' representatives) within the meaning of the Employment Regulations and/or the Directive arising from or connected with any failure by the Trust to comply with any legal obligations to that trade union, staff association or other worker representatives whether under Regulation 10 of the Employment Regulations or under the Directive or otherwise and whether any such claim arises or has its origin before, on or after the Date of Transfer.

save in each case to the extent that such claim or demand arises out of any breach hereunder by Summit of any of its obligations

16.15 Trade Unions

The Trust has notified Summit of any trade union or any staff association or other workers representative recognised by it as detailed in the document referred to at numbered paragraph 3.13 of the Trust Information Letter and has supplied to Summit copies of all collective agreements to which it is a party in each case in relation to the Employees. Summit shall and shall procure that the Approved Service Provider shall inform and consult with any such trade union, staff association or other workers representative to the extent required by law or under any such collective agreement including without prejudice to the foregoing generality, requirements under Regulation 10 of the Employment Regulations and the Trust shall co-operate with Summit and its Approved Service Providers and provide all necessary facilities insofar as are reasonably practicable in this regard.

16.16 Minimum Period

For twenty-four calendar months from the Transition Commencement Date, Summit shall not and shall procure that the Approved Service Provider shall not dismiss any or all of the Employees (other than the Excess Employees in accordance with Clause 16.10.2) where the sole reason is redundancy. For the avoidance of doubt, this Clause 16.16 shall not apply in respect of the termination of the contract of employment of any

person under Clause 16.10.1, 16.5.2 16.11, 16.12 or in the event of Force Majeure, or the termination of any Service.

16.17 Equal Pay

"**Equal Pay Claims**" means those applications which have been issued against the Trust as at the Execution Date together with any other claims brought by the Employees or any person who is engaged by the Trust or on behalf of the Trust in the Services in the six months prior to Transition Commencement Date ("**Equal Pay Employees**") within the period of seven years from the Transition Commencement Date ("**the Period**") where such Equal Pay Employees have been continuously employed by the Approved Service Provider from and including the Transition Commencement Date and who are engaged in providing the Services (before or after the Execution Date under the Equal Pay Act 1970, Sex Discrimination Act 1975, Article 119 of the Treaty of Rome, Equal Pay Directive, the Equal Treatment Directive (the "**Equal Pay Legislation**") and whether against the Trust, Summit or any Approved Service Provider, or any other National Health Service employer and shall also include any alteration to salaries and pay scales prescribed by the Whitley Agreements detailed in the Trust Information Letter at paragraph 3.4 (or any agreements which replace the Whitley Agreements) in order to settle or compromise threatened or existing claims pursuant to the Equal Pay Legislation, or in accordance with any order of any Court or Tribunal arising from such claims (provided that any such settlement or compromise is made with the prior written agreement of the Trust which shall not be unreasonably withheld or delayed).

- 16.17.1 Subject to Clause 16.17.3, the Trust agrees to indemnify Summit (or, on demand by Summit, an Approved Service Provider) and keep Summit or such Approved Service Provider indemnified on a continuing basis for the Period against any and all costs, claims, expenses and liabilities (including for the avoidance of doubt any legal costs reasonably incurred or taxation or national insurance costs and any increased pension costs or contributions, and whether incurred by Summit or by any Approved Service Provider) which arise out of or in connection with one or more of the Equal Pay Claims and in particular:-
- (a) the cost of implementing any award of settlement or collective agreement (whether incurred by Summit or any Approved Service Provider and whether the relevant employee was an Applicant to the Industrial Tribunal or not) including but not limited to providing back pay and benefits provided to any employee which is referable to a period prior to the date upon which any policy clause or alteration in terms and conditions of employment or any alteration in salary and/or benefits becomes effective; and
 - (b) the cost of ongoing employment costs (whether incurred by Summit or any Approved Service Provider) which are attributable to any employee (whether that employee was an Applicant to the Industrial Tribunal or not) because of the insertion of any equality clause or alteration in terms and conditions of

employment or any other alteration in salary and/or benefits provided, awarded or granted to any employee, whether made pursuant to an order of the Industrial Tribunal, a settlement or collective agreement or otherwise, which would not have been incurred but for the bringing of one or more of the Equal Pay Claims. For the avoidance of doubt, ongoing employment costs will include any alterations of the terms and conditions of employment of any employee in order to maintain pay differentials and/or good industrial relations as a direct consequence of the bringing of one or more of the Equal Pay Claims.

16.17.2 Subject to Clause 16.17.3, the Trust and Summit agree:-

- (a) Summit may undertake to indemnify any Approved Service Provider in respect of the period for any or all costs, claims, expenses, demands and other liabilities which arise out of or in connection with one or more of the Equal Pay Claims or which would not have been incurred but for one or more of the Equal Pay Claims; and
- (b) if any Approved Service Provider shall make any claim covered by an indemnity given by Summit pursuant to sub-clause 16.17.2(a) above, Summit shall be indemnified by the Trust in respect of such liability in accordance with the indemnities given by the Trust in this sub-clause 16.16.1 and Summit shall be entitled to claim under such indemnities given by the Trust as if the liability were originally incurred by Summit.

16.17.3 To the extent that any liability is incurred as a consequence of an Equal Pay Claim, the Trust shall not be liable to indemnify Summit or an Approved Service Provider to the extent that such cost, claim, expense, demand or other liability incurred by Summit or an Approved Service Provider would not have arisen but for :-

- (a) any change to the terms and conditions of employment of the Employees or any of them or any other employees of Summit and/or the Approved Service Provider made by Summit or an Approved Service Provider;
- (b) any disciplinary action taken against or dismissal of the Employees or any of them by Summit or an Approved Service Provider in breach of the Trust procedures notified to Summit or the contracts of the Employees or in contravention of statute in force at the Transition Commencement Date;
- (c) any breach of the terms and conditions of employment of the Employees or any of them by Summit or an Approved Service Provider;
- (d) the employment (whether by appointment or by any other means) of any other employees by Summit and/or the Approved Service Provider other than on the terms and conditions on which each Employee would have been engaged by the Trust prior to the Transition Commencement Date;

in any event occurring on or after the Transition Commencement Date.

16.18 Pensions

- 16.18.1 Summit shall procure that with effect from or as soon as practicable after the Transition Commencement Date, taking into account all applicable legal requirements and the rules of the relevant schemes, every Transferring Employee who at the Transition Commencement Date is a member of the NHS Superannuation Scheme shall be offered in respect of service after that date membership of an Inland Revenue approved occupational pension scheme which has been certified by the Government Actuary's Department as providing benefits which are broadly comparable to those provided by the NHS Superannuation Scheme.
- 16.18.2 Each Transferring Employee shall be offered the opportunity to transfer the benefits accrued in respect of him under the NHS Superannuation Scheme to the pension scheme referred to in Clause 16.18.1. All amounts transferred to that pension scheme in respect of those benefits shall be applied only in providing additional benefits to or in respect of the Transferring Employees, in accordance with the assumption specified under the Minimum Funding Requirement Regulations and Actuarial Guidance Note GN11.
- 16.18.3 In every case where the employment of a Transferring Employee transfers from Summit or the Approved Service Provider to any other party providing the Services such other party shall be responsible (and Summit shall be responsible for so procuring) for discharging the like obligations *mutatis mutandis* in relation to such Transferring Employees as are set out in Clauses 16.18.1 and 16.18.2.

17 Transitional Arrangements

17.1 Provision of Transition Services

- 17.1.1 During the Transition Period, Summit shall provide, or procure the provision of, the Transition Services:
- (a) in accordance with the Trust's operational policies as provided pursuant to Clause 17.1.3 and all Statutory Requirements;
 - (b) in the quantities required by the actual demand of the Trust on a day to day basis;
 - (c) at all times unless otherwise agreed between the Trust and Summit; and
 - (d) at the Existing Sites as directed by the Trust and without prejudice to Summit's obligations to provide the Services and the Equipment Services from the Site from and after Services Commencement Date in accordance with the DBFO Contracts.
- 17.1.2 The Transition Services shall comprise those of the services provided by, or on behalf of, the Trust at the Existing Sites prior to the Transition Commencement Date in respect

of portering, catering, domestics, linen distribution, sewing room, switchboard, estates maintenance, disposal of clinical and non-clinical waste to central points for collection and off site disposal by the Trust's contractor and such other services as the Trust and Summit may agree. The scope and specification of the Transition Services shall be that notified by the Trust in accordance with Clause 17.1.3 (or as otherwise agreed), subject to:

- (a) Clause 17.3.4; and
- (b) any expenditure on estates maintenance in respect of mechanical/electrical items not normally held in stock costing more than £50, building repairs costing more than £100 or day works or overtime being subject to prior approval by the Trust.

17.1.3 Not less than 6 months prior to the Transition Commencement Date the Trust will provide details of the required scope and specification of the Transition Services to Summit, and the Trust and Summit will consult together as to the practical arrangements for providing the Transition Services and the Trust will provide to Summit copies of its operational policies to apply in the provision by Summit of the Transition Services. For the avoidance of doubt, the Services Agreement, the Method Statements and the Output Specification shall not apply to the Transition Services.

17.1.4 Summit shall:

- (a) use the Transferring Related Materials in the provision of the Transition Services and provide such other equipment, materials and consumables required for the provision of the Transition Services as may be agreed; and
- (b) provide all assistance to the Trust (consistent with its obligations under this Clause 17) as the Trust may reasonably request in relation to the provision of the Transition Services.

17.1.5 The Trust shall:

- (a) make available to Summit and Approved Service Providers and Permitted Sub-contractors all information and documents in the possession of the Trust as they reasonably require for the proper performance of the Transition Services at such times as they reasonably request;
- (b) provide all assistance to Summit and Approved Service Providers and Permitted Sub-contractors (consistent with its obligations under this Clause 17) as Summit may reasonably request in relation to the provision of the Transition Services;
- (c) permit Summit and Approved Service Providers and Permitted Sub-Contractors access to the Existing Sites for performance of the Transition Services consistent with the Trust's operational policies;

- (d) make available to Summit and Approved Service Providers and Permitted Sub-Contractors, for the purposes of the performance of the Transition Services, reasonable accommodation, utilities (including, but not limited to water, gas and electricity), telephones and reasonable access to photocopying facilities at the Existing Sites for the purpose solely of use in connection with the Transition Services in each case free of charge; Summit, Approved Service Providers and Permitted Sub-Contractors having due and proper regard for efficiency and economy; and
- (e) provide through its own procurement arrangements all equipment, materials and consumables required for the provision of the Transition Services save to the extent agreed to be provided by Summit in terms of Clause 17.1.4(a).

17.2 Employees, Training and Commissioning

17.2.1 Summit shall use in the provision of the Transition Services the Employees (other than the Excess Employees once identified as such unless retained for use in the Transition Services in accordance with Clause 16.3.4(f)) (but without prejudice to Clause 16.10.2) and such additional employees ("**Additional Employees**") as the Trust may approve, acting reasonably. The Trust acknowledges that the Transferring Employees will require to undertake training activities at the Site in preparation for Services Commencement Date and the Trust agrees to the release of Transferring Employees from time to time during their normal working hours for such training activities in accordance with a release programme (which will specify the number of hours and content of such training) to be prepared by Summit and to be approved by the Trust, acting reasonably.

17.2.2 The Trust acknowledges that an appropriate number of the Transferring Employees will be required by Summit to undertake duties at the Site as required under the Commissioning Procedure at the cost of Summit (as demonstrated by Summit to the Trust on an open book basis and if the amount of such costs is not agreed, as determined by the Dispute Resolution Procedure) ("**Employee Commissioning Costs**").

17.3 Payment

17.3.1 In consideration of the provision and management of the Transition Services, the Trust shall make payment to Summit of the aggregate of (together "**the Transition Payment**"):

- (a) all costs properly incurred by Summit or its Approved Service Provider (but so that any cost in respect of the same matter is not recoverable more than once) in the provision of the Transition Services and including the Management Costs excluding any profit to Summit or the Approved Service Provider and Employee Commissioning Costs as demonstrated to the Trust on an open book basis and the amount of such costs if not agreed will be determined by the Dispute Resolution Procedure ("**the Transition Costs**"); and

- (b) a management fee of 8½% of the Transition Costs subject to a maximum of £130,000 (Indexed from 1st April 1996) in respect of the period until Services Commencement Date;

provided that the Transition Costs will include:

- (i) the costs of employing the Employees (other than the Excess Employees once identified as such but including the costs of employing Excess Employees required to be used in the Transition Services in accordance with Clause 16.3.4(f) (and, without prejudice to Clause 16.10.2)), and in the case of the Transferring Employees prior to the Operational Date only, and the Additional Employees (but excluding any costs comprised in the Management Costs), but no other employees;
- (ii) the costs of all equipment, materials and consumables provided by or on behalf of Summit in the provision of the Transition Services in accordance with Clause 17.1.4(a); and
- (iii) the costs of employers and third party liability insurance and any insurance required by Applicable Laws but shall not include property damage insurance unless instructed by the Trust to effect such insurance;

Summit shall, and shall use all reasonable endeavours to procure that Approved Service Providers and Permitted Sub-Contractors shall, minimise the amount of the Transition Costs consistent with the obligations of Summit under this Clause 17.

After the Operational Date Summit will where reasonably practicable utilise (at its cost but without prejudice to the Trust's obligations under Part A of the Schedule to the General Provisions) such Transferring Employees in the provision of the Transition Services as are not required to provide the Services given that there will be a period when the Hospital will not be operating at full capacity.

On or prior to the date four months prior to Transition Commencement Date, the Trust and Summit will approve the tasks to be undertaken by its Approved Service Provider and the extent of involvement of management staff thereof and the "Management Costs" will be the actual employment costs of such management staff to perform those tasks as demonstrated on an open book basis.

- 17.3.2 For the avoidance of doubt the Deduction Provisions will not be applicable to the Transition Services.
- 17.3.3 Not less than 2 months prior to the Transition Commencement Date, Summit shall, in consultation with the Trust, produce a non-binding forecast of the projected Transition Costs during the Transition Period, broken down monthly.

- 17.3.4 The Trust may at any time, whether in light of that forecast or otherwise, vary the scope and specification of the Transition Services and/or the standards referred to in Clauses 17.1.1 or 17.1.2 provided that the Trust will not reduce the scope or specification or standards to such extent that, as a result thereof, Summit would be in breach of any Statutory Requirements or any delictual duty of care to a third party provided further that if the Trust does so reduce such scope or specification or standards at any time after the date occurring one month prior to the Transition Commencement Date, the Trust shall reimburse Summit for any abortive costs reasonably and properly incurred by it or its sub-contractors as a result (subject to an obligation on them to mitigate any such costs).
- 17.3.5 Summit shall notify the Trust as soon as reasonably practicable after it becomes aware of any likely costs in excess of that forecast, giving reasonable details of those costs and the reasons for those costs, but without prejudice to Summit's right to payment by the Trust of all Transition Costs under Clause 17.3.1.
- 17.3.6 Within five Business Days of the end of each calendar month during the Transition Period (or within five Business Days of expiry of the Transition Period, as the case may be), Summit shall issue to the Trust an invoice (being a VAT invoice, if applicable) for the Transition Payment due in respect of the immediately preceding calendar month together with such supporting documents and evidence as the Trust may reasonably require. The Trust will pay such invoice within five Business Days thereafter including any VAT (if applicable) due thereon.
- 17.4 **Sub-Contracting**
- Summit may procure the provision to the Trust of all or any part of the Transition Services and its obligations under this Clause 17 by any person approved by the Trust as an Approved Service Provider or Permitted Sub-Contractor under the General Provisions. The appointment of any such person and the provision of the Transition Services by any such person shall not diminish, release or in any way affect the obligations of Summit under this Clause 17.
- 17.5 **Relationship with the Services**
- 17.5.1 Nothing in this Clause 17, and no breach by or on behalf of Summit of its obligations under this Clause 17, shall affect Summit's rights or obligations in relation to the provision of the Services and the Equipment Services under the DBFO Contracts. In particular, but without limitation, no breach by or on behalf of Summit of its obligations under this Clause 17 shall give rise to or be counted towards any right to terminate the DBFO Contracts.
- 17.5.2 Summit shall not, during the Transition Period, change the remuneration or terms and conditions of employment of the Employees without the Trust's consent (acting reasonably but which consent will be given to implement either a change in Whitley Council rates of pay or other pre-existing contractual entitlement of the Employees) and

the remuneration and terms and conditions of the Additional Employees shall be subject to the approval of the Trust acting reasonably. This provision shall cease to apply to Transferring Employees after the Operational Date.

17.6 Resolution of Disputes

All disputes under this Clause 17 shall be referred to the Dispute Resolution Procedure.

PART 6 - INFORMATION REQUIREMENTS

18 Information requirements re. third parties

- 18.1 Subject to Clause 12, Summit shall use all reasonable endeavours (which shall include (without limitation) an obligation to include an obligation to the aftermentioned effect in any relevant contract to which it is a party and to procure that such obligation is included in any relevant contract to which it is not a party and to use all steps reasonably available to Summit to enforce such obligations) to procure all reasonable assistance (including the provision to the Trust of all information the Trust reasonably requires and, if appropriate, the attendance at meetings) from each Approved Service Provider and Permitted Sub-Contractor providing Services to enable the Trust to satisfy any requirements for information lawfully made by relevant statutory bodies, including (without limitation) the NHSME, any commissioning authority within the NHS or GP Fundholder, any Health Council, HM Treasury, the Scottish Office, the Scottish Parliament and the Scottish Executive (each once constituted), Parliament and the European Commission in relation to the Project provided that such information will not extend to any Proprietary Information of Summit or any Approved Service Provider or Permitted Sub-Contractor.
- 18.2 Subject to Clause 12 without limiting Clause 18.1, Summit (or any Approved Service Provider or Permitted Sub-Contractor providing Services) shall provide to the Trust as soon as reasonably practicable such assistance as the Trust shall reasonably require in connection with any requests properly made of the Trust by the Trust's Auditor (or its duly appointed representatives) for information associated with the giving of any audit certificate by that person, but excluding any financial information provided to Summit by the Contractor or its sub-contractors which has not otherwise been provided to the Trust or which is not in the public domain.
- 18.3 Nothing contained in Clause 18.1 or 18.2 shall oblige Summit (or any Approved Service Provider or Permitted Sub-Contractor) to take any action or provide any assistance to the extent that such action or assistance would result in a material departure from or addition to its (or their) other obligations under the DBFO Contracts or give rise to significant costs or significant disruption to Summit (or any Approved Service Provider or Permitted Sub-Contractor).

PART 7 - COMMERCIAL OPERATIONS AND PARTIAL HANDBACK

19.1 Grant of Commercial Operation Rights

- 19.1.1 The Trust shall be entitled to grant rights to third parties to operate any business within Designated Areas of the Site, in accordance with and subject always as provided in the Sub-Lease.
- 19.1.2 Summit will be entitled to retain all revenue received from non patient based catering services in accordance with the Output Specification.

19.2 Partial Handback

On each occasion (whether one or more) upon which a Partial Handback Change is implemented in accordance with Section 7 of Part D of the Schedule to the General Provisions:

- 19.2.1 the Services will cease to be supplied to the Partial Handback Area, save that the Output Specification for the Estates Maintenance Services will continue to apply to the entire Hospital and the Trust will be permitted to continue to obtain reasonable access to the Partial Handback Area under Clause 15 and Provision 2 for the purpose of auditing the provision of the Estates Maintenance Services and the provisions of the DBFO Contracts will otherwise continue to apply;
- 19.2.2 if Summit wishes to use the Partial Handback Area whether by itself or through a third party for any purpose then Summit will make written application to the Trust for its approval setting out the full details of:
- (a) the party who is to use and occupy the Partial Handback Area;
 - (b) the proposed use of the Partial Handback Area;
 - (c) the terms of such use and occupation, whether a sub-lease is to be granted, and the provisions relative thereto for payment of revenue to Summit; and
 - (d) Summit's proposals as to the basis upon which it intends to share the benefit of those revenues with the Trust;
- 19.2.3 within 10 Business Days of receiving Summit's application for approval the Trust will advise Summit in writing as to whether it accepts the proposals, Summit acknowledging that it is at the Trust's discretion whether or not to accept any such proposal;
- 19.2.4 if Summit's proposals are rejected then Summit may make a new or amended application in accordance with Clause 19.2.2 and the Trust will discuss with Summit such proposals and advise whether there is an amended basis upon which the proposals would be acceptable to the Trust; and

- 19.2.5 if the proposals are accepted by the Trust then the parties will enter into such documents as are necessary to give effect to the proposals, including a partial renunciation of the Sub-Lease *quoad* the Partial Handback Area and the amendment of the Sub-Lease to provide for any necessary rights and reservations in relation to any areas or equipment common to the Partial Handback Area and the remainder of the Hospital.

PART 8 - INTELLECTUAL PROPERTY

20 Licence of Intellectual Property

- 20.1 Summit hereby grants to the Trust, and shall procure the grant by Approved Service Providers, the Contractor and Consultants of, an irrevocable, non-exclusive, royalty-free licence during the Services Term and at all times thereafter, save as provided in Clause 20.8, to use the Relevant Intellectual Property solely for the purposes of (a) the operation of the Hospital by the Trust, and (b) making use of the Services and the Equipment Services. The Trust may not sub-licence, transfer or assign this licence without the prior written consent of Summit (such consent not to be unreasonably withheld) nor make any alterations, adaptations or additions to the subject matter of the Relevant Intellectual Property and shall procure that similar restrictions will be incorporated in the other licences envisaged by this Clause. If an Approved Service Provider is appointed otherwise than on a market testing under Provision 12.4 of the General Provisions, Summit shall not be required to procure the grant of a licence by that Approved Service Provider under this Clause 20.1 to the extent that it can satisfy the Trust, acting reasonably, that this will not adversely affect the provision of clinical services by the Trust or use of the Services by the Trust.
- 20.2 For the purposes of this Clause 20, the Relevant Intellectual Property shall be all Intellectual Property owned by, in the case of the licence by Summit in Clause 20.1 Summit, and in the case of licences to be granted thereunder, that Approved Service Provider, the Contractor or Consultant, as the case may be, whether now in existence or coming into existence during the continuance of this Agreement, developed for and relating to the design, construction, fitting out, completion, commissioning or testing of the Hospital, the provision of the Services or the Equipment Services including, for the avoidance of doubt, any software developed or supplied by Summit or an Approved Service Provider in order to fulfil any obligation of Summit under the DBFO Contracts. The Trust acknowledges that Summit or the relevant Approved Service Provider, Contractor or Consultant, as the case may be, is and will remain the sole owner of any such software or Relevant Intellectual Property and the Trust shall acquire no right, claim or interest in any such software or Relevant Intellectual Property during the continuance of this Agreement or thereafter save in terms of any licence granted under or in terms of this Clause 20.
- 20.3 In the case of Intellectual Property licensed by a third party (including a Permitted Sub-Contractor) to Summit, any Approved Service Provider, the Contractor or Consultant, Summit shall use reasonable endeavours to procure the grant by such third party of a

sub-licence to the Trust (provided that no extra cost is occasioned thereby unless the Trust agrees to pay such extra cost). Notwithstanding the foregoing, Summit will ensure that there is granted to the Trust an irrevocable, non-exclusive, royalty free licence from the IT Software Supplier and which will not terminate at the end of the Term in respect of the IT Software, including the entitlement of the Trust to utilise and manage the IT Software in accordance with the Output Specification for the Estates Maintenance Services.

- 20.4 The Trust shall comply with the reasonable instructions of Summit in relation to the use of Relevant Intellectual Property licensed under this Clause 20 including procedures to avoid infringement of any third party rights and notification of any third party claims.
- 20.5 The Trust hereby grants to Summit an irrevocable, non-exclusive, royalty free licence during the continuance of this Agreement (carrying the right to grant sub-licences to the Contractor or its sub-contractors, Approved Service Providers and Permitted Sub-Contractors to the extent required for the purposes of design, construction, fitting out, completion, commissioning or testing of the Works, the operation, maintenance or improvement of the Hospital and all ancillary buildings on the Site, the provision of the Services and the Equipment Services and performance of any other obligations under the DBFO Contracts on terms to the reasonable satisfaction of the Trust) to use all, if any, Intellectual Property owned by the Trust, whether now in existence or coming into existence during the continuance of this Agreement, for any purpose relating to the design, construction, completion, commissioning or testing of the Works, the operation, maintenance or improvement of the Hospital and all ancillary buildings on the Site, the provision of the Services and the Equipment Services and performance of any other obligations under the DBFO Contracts.
- 20.6 Summit 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 Relevant Intellectual Property licensed by Summit to the Trust under Clause 20.1 save to the extent that such infringement is due to failure by the Trust to comply with the reasonable instructions of Summit in the use of such Relevant Intellectual Property as aforesaid or use by the Trust of such Relevant Intellectual Property for a purpose for which it was not licensed under Clause 20.1. A similar provision shall be incorporated in the licences to be granted under Clause 20.1.
- 20.7 The Trust shall indemnify Summit (or, at the direction of Summit, any person to whom a sub-licence has been granted in accordance with Clause 20.5) 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 licensed by the Trust to Summit under Clause 20.5 save to the extent that such infringement is due to failure by Summit or any such person as the case may be, to comply with the reasonable instructions of the Trust in the use of such Intellectual Property or use by Summit or any such person, as the case may be, of such Intellectual Property for a purpose for which it was not licensed under Clause 20.5.

- 20.8 All licences of Relevant Intellectual Property created by or pursuant to Clause 20.1 and 20.3 shall (without cost to the Trust save as provided in Clause 20.3) survive termination or expiry of this Agreement or any other DBFO Contract (however caused) save:
- (a) in the event of vacation of the Site by the Trust at the end of the Term consequent upon termination of the Sub-Lease in accordance with Clause 9 thereof and consequent upon the giving of a Handback Vacation Notice or a Termination Vacation Notice;
 - (b) in respect of the Approved Service Provider's Proprietary Information;
 - (c) for those licences granted by any Approved Service Provider providing Equipment Services (subject as provided in the Equipment Direct Agreement); and
 - (d) where the terms of any licence procured under Clause 20.3 provide otherwise;

in which case these licences (or the appropriate part) shall automatically terminate on termination or expiry of this Agreement or any other DBFO Contract, as the case may be.

- 20.9 To the extent that any of the Relevant Intellectual Property referred to in Clause 20.2 is generated by or maintained on a computer or in any other machine readable format, Summit shall procure, at no charge to the Trust, for the duration of this Agreement the grant of a non-exclusive licence or sub-licence for and supply of any relevant software or (subject always to the provisions of the Data Protection Act 1984) database to enable the Trust or its nominee to access and otherwise use that data for the purposes set out in this Agreement.
- 20.10 Summit and the Trust shall at the reasonable request of the other (but, unless the Trust is in breach of its obligations under this Clause 20 and subject as provided in Clauses 20.3 and 20.8 at Summit's expense) execute all documents and do all such further acts which may be necessary to bring into effect or to confirm the terms of any licence created by or pursuant to this Clause 20.

21 Security of Data

Within 9 months from Financial Close, Summit shall submit to the Trust the procedures and practices which Summit proposes to adopt for maintaining security of data, materials and documents referred to in Clause 14, including arrangements for the backing up and subsequent recovery of information stored in electronically retrievable form. Such submissions shall be subject to the Trust Objection Procedure in Part 3 of the Schedule provided that the Trust may only object (pursuant to such procedure) and require alterations or additions to those procedures and practices which are adopted by Summit if in the Trust's reasonable opinion they do not accord with Good Industry

Practice. Summit shall (and shall cause each of its sub-contractors to) comply with the above procedures and practices. Summit may change the above procedures and practices subject to submitting its proposals for change to the Trust pursuant to the Trust Objection Procedure and there being no objection to the change which objection is only permitted where in the Trust's reasonable opinion the proposed change does not accord with Good Industry Practice.

PART 9 - EARLY TERMINATION AND STEP-IN RIGHTS

22 Events entitling early termination of the DBFO Contracts ("Termination Events")

Termination by the Trust

22.1 Subject to Clauses 22.4 and 22.5, if:

22.1.1 any act of insolvency occurs in respect of Summit (in the case of Clauses 22.1.1(c) and 22.1.1(d) and 22.1.1(e) only where the event has a material adverse effect on Summit's ability to perform any of its material obligations under the DBFO Contracts) and for the purposes of this Clause 22.1.1 "act of insolvency" means:

(a) a receiver, administrator, administrative receiver or liquidator being appointed:

(i) by the Security Trustee; or

(ii) by a person other than the Security Trustee and not being removed, withdrawn or discharged within 20 Business Days;

in each case, over all or a material part of the assets of Summit other than a solvent liquidation in terms which have been expressly and previously approved by the Trust in writing (acting reasonably) or the Security Trustee enforcing the security over the Head Lease granted pursuant to the Finance Facilities Agreements; or

(b) a petition being presented or a resolution being passed for the making of an administration order in respect of Summit unless a resolution is passed not to proceed with the proposed course of action or such petition is not granted (or, in the case of a petition being presented by a party other than the Lead Financier is withdrawn, set aside or discharged within 20 Business Days); or

(c) any arrangement or composition with or for the benefit of its creditors (including any voluntary arrangements as defined in the Insolvency Act 1986) being entered into by or in relation to Summit other than pursuant to any refinancing or restructuring of any of the Finance Facilities Agreements or in the course of a solvent corporate restructuring; or

- (d) any encumbrancer taking possession of or being appointed over, or any diligence (other than to found jurisdiction or on the dependence of an action), distress, arrestment, execution or other similar process being levied or enforced (and in any such case, not being withdrawn, set aside or discharged within 20 Business Days) on all or any of the assets of Summit in any such case in respect of an amount exceeding £200,000 (Indexed from Financial Close); or
- (e) Summit ceasing to carry on business, or being or becoming unable to pay its debts as they fall due within the meaning of Section 123 (1)(e) of the Insolvency Act 1986 except and for so long as Summit provides to the Trust evidence to the Trust's reasonable satisfaction that Summit is in the course of negotiation with its Financiers with a view to rescheduling or refinancing its debts or resolving the issue in question and the Trust is satisfied (acting reasonably) that such restructuring, refinancing or other resolution is likely to succeed within a reasonable time thereafter;

22.1.2 the articles of association of Summit or the Holding Company fail to comply with (or Summit fails to enforce) the provisions of Clause 10.1 and this is not remedied by Summit within three months of receipt by Summit of notice in writing from the Trust requiring this to be remedied (such remedy to include the disenfranchisement and required sale or transfer of any shares (or interests in shares) in Summit or the Holding Company acquired by any Disapproved Transferee during the period of such default);

22.1.3 Summit and its sub-contractors have not commenced carrying out the Works within three months after Financial Close, or have demonstrably ceased carrying out the Works for a period of three consecutive months ("Works" in this Clause 22.1.3 including both progress of the physical works at the Site and design development relative to the progress of the Works at that time) other than, in each such case, by reason of an Excusable Event or Events (or the consequences thereof) and Summit cannot demonstrate to the Trust's reasonable satisfaction that, at the expiry of each such three month period (a) it is using all reasonable endeavours to commence or recommence the Works (or to procure such commencement or recommencement) as soon as possible, including, without limitation, exercising any remedies available to it in that connection under the Sub-Contract with the Contractor and (b) sufficient funds are or will be available to recommence and complete the Works;

22.1.4 on three or more occasions in any five year period during the Services Term Summit commits a Material Breach (not otherwise listed in this Clause 22.1) of the DBFO Contracts, a Material Breach for this purpose being:

a material and substantial breach of any of the terms of any of the DBFO Contracts (other than the Equipment Agreement) in respect of which a Penalty Point is not and could not have been awarded but which has a material adverse effect on the carrying out, by the Trust, of clinical activities from the Site and in respect of which:

- (a) notice is given by the Trust to Summit within 120 days of the Trust becoming aware of the breach giving reasonable details of the matter complained of; and
 - (i) if capable of remedy Summit has not commenced and thereafter completed remedial action within a reasonable period from the date of receipt of the notice from the Trust which period shall be specified in the notice; or
 - (ii) if irremediable Summit has not compensated the Trust (in terms which are reasonably satisfactory to the Trust) for the loss or damage it shall have incurred as a consequence of such breach within a reasonable period from the date of receipt of the notice (which period will be specified in the notice) from the Trust; and
 - (b) the issue of whether a Material Breach has occurred and/or whether the remedy period given to Summit is reasonable has (in the case of any dispute) first been resolved by the Dispute Resolution Procedure;
- 22.1.5 1500 or more Master Penalty Points are awarded against Summit in any period of 36 consecutive months;
- 22.1.6 Summit fails to complete the Works to such a standard as would require a Certificate of Contractual Practical Completion to be issued within a period of 24 months after the Mandatory Date (as that date may be extended under Clause 4.3.4 or 4.3.5 of the Development Agreement);
- 22.1.7 the Trust is entitled to terminate the DBFO Contracts pursuant to and subject as provided in the provisions of Clause 32 (Corrupt Gifts) of this Agreement; or
- 22.1.8 (a) the Financiers apply insurance proceeds under the insurance under paragraph 1 of Part A1 of the Insurance Schedule or paragraph 1 of the Part A2 of the Insurance Schedule towards repayment of the Senior Lender Liabilities; and (b) a Default Event has occurred under Clause 18.32 of the Collateral Deed; provided that paragraph (b) shall be disregarded if Clause 18.32 is no longer in force or in substantially the same form as at Financial Close;

then, whilst any such Termination Event (specified in Clauses 22.1.1 to 22.1.7) is subsisting in any such case, without prejudice to any of its other rights or remedies, the Trust may within four months of the happening of such event (or such longer period as may be agreed) at its discretion:

- (a) serve notice in writing to Summit to terminate all of the DBFO Contracts, and which notice will have immediate effect unless the notice is suspended under the Financier Direct Agreement, in which event the notice will have effect on the termination of such suspension and in which case the terms of Clauses 23 and 24 (and the provisions of any DBFO Contract as to rights and obligations on termination) shall apply; or

- (b) serve notice of default on Summit requiring Summit at the Trust's option either:
 - (i) to rectify or remedy the breach(es) referred to in that notice of default continuing at the date of service of the notice within 30 days of that notice (or such longer period as the Trust (acting reasonably) may agree in writing is reasonable in the circumstances prevailing at the relevant time); or
 - (ii) within 14 days of that notice to put forward a reasonable programme to rectify or remedy the breach(es) continuing at the date of service of the notice, that programme to be in writing and specify the proposed rectification or remedy in reasonable detail and the latest date by which it is proposed that that rectification or remedy shall be completed, in which case the terms of Clause 22.2 shall apply.

22.2 Where Summit puts forward a programme following notice under Clause 22.1(b)(ii), the Trust shall have 28 days in which to notify Summit in writing that it does not accept that programme as reasonable, failing which the Trust shall be deemed to have accepted that programme. Where the Trust notifies Summit that it does not accept that programme, the parties shall endeavour in the following seven days to agree any necessary amendments to the programme put forward. In the absence of agreement in that seven day period, the question whether the programme is reasonable may be referred by either party to the Dispute Resolution Procedure, and the Expert shall either accept Summit's programme as reasonable or substitute such programme as he believes to be reasonable having regard to the representations of both parties.

22.3 If the breach(es) specified in a notice of default served under Clause 22.1(b) is or are not rectified or remedied:

- (a) before the expiry of the period referred to in Clause 22.1(b)(i) (if applicable); or
- (b) where Summit puts forward a programme pursuant to Clause 22.1(b)(ii) which has been either accepted by the Trust or determined by the Dispute Resolution Procedure to be reasonable, in accordance with that programme or such other programme as is agreed or determined pursuant to Clause 22.2 (unless due to Force Majeure or Suspension Event in which case the programme shall be extended by a period which is reasonable having regard to the period during which the Force Majeure or Suspension Event subsisted);

then the Trust may terminate all the DBFO Contracts, subject to Clause 22.5, by notice in writing having immediate effect, and the terms of Clauses 23 and 24 (and any provisions of any DBFO Contract as to rights and obligations on termination) shall apply.

22.4 The Trust's and Summit's rights under this Clause 22 and under Clause 23 are in addition and without prejudice to any other rights or remedies the Trust or Summit may have, including any claim for the amount of any loss or damage suffered by the Trust

or Summit on account of the acts or omissions of Summit or the Trust, as the case may be, whether pursuant to any bond or guarantee given in accordance with the requirements of this Agreement or otherwise but subject always as provided in the DBFO Contracts, including in particular Clause 27.5.1.

- 22.5 The Trust acknowledges that its rights of termination are subject to the terms of any Financier Direct Agreement and any exercise by Financiers of their rights under any Financier Direct Agreement, but so that Summit shall have no rights deriving from any Financier Direct Agreement.
- 22.6 Subject as provided in Clause 22.8 any termination of the DBFO Contracts in terms of the DBFO Contracts must be of all and not some only of the DBFO Contracts unless the parties otherwise agree in writing and save as provided in the Equipment Agreement.
- 22.7 The Trust confirms that it has no rights to terminate any of the DBFO Contracts save as set out in this Clause 22, in Clauses 26.7 and 26.8 (Force Majeure), in Clause 32 (Corrupt Gifts) and, in the case of the Equipment Agreement only, in Clause 25 of the Equipment Agreement.
- 22.8 Any reference in the DBFO Contracts to termination of the DBFO Contracts shall not prejudice the continuance in force of the Head Lease and the Sub-Lease which will continue in force subject to the termination provisions therein provided.

Termination by Summit

- 22.9 Subject to Clauses 22.4 and 22.10 if:
- 22.9.1 the Trust shall be in default of its payment obligations to Summit under the DBFO Contracts to the extent that the sum of not less than £150,000 (Indexed from Financial Close) payable under the terms of the DBFO Contracts is outstanding for more than 21 days from the date when the same is due for payment as provided in paragraph 12.3 and/or 12.4 of Part A of the Schedule to the General Provisions or, if the Trust has been in such default on at least one other occasion in the previous 12 months, a further sum of not less than £150,000 (Indexed from Financial Close) payable under the terms of the DBFO Contracts is outstanding for more than 7 days from the date when the same is due for payment as provided in paragraph 12.3 and/or 12.4 of Part A of the Schedule to the General Provisions provided that no sum will be considered outstanding if it has been withheld by the Trust as permitted in accordance with the DBFO Contracts;
- 22.9.2 the Trust commits a material and substantial breach of any of its obligations under the DBFO Contracts (other than its payment obligations) which has a material adverse effect on the carrying out by or on behalf of Summit of its obligations under the DBFO Contracts and in respect of which notice is given by Summit to the Trust in the form set out in Part 13C of the Schedule and copied to the NHSME and the Secretary of State within 120 days of Summit, becoming aware of the breach giving reasonable details of the matters complained of and:

- (a) if capable of remedy, the Trust has not commenced and thereafter completed remedial action within a reasonable period from the date of receipt of the notice from Summit which period shall be specified in the notice; or
- (b) if irremediable, the Trust has not compensated Summit (in terms which are reasonably satisfactory to Summit) for the loss or damage it shall have incurred as a consequence of such breach within a reasonable period from the date of receipt of the notice from Summit which period shall be specified in the notice; and

the issue of whether a material and substantial breach has occurred and/or the remedy period given to the Trust is reasonable and any other dispute arising out of this Clause 22.9.2 has (in the case of any dispute) first been resolved by the Dispute Resolution Procedure;

- 22.9.3 the Secretary of State, or any other minister or any other person to whom the Secretary of State or such minister has delegated his functions in relation to the Secretary of State's Policies, makes a statement to the effect that, or otherwise clearly indicates that:
- (a) the Secretary of State will not observe the Secretary of State's Policies; or
 - (b) the Secretary of State intends to act in a manner which is materially inconsistent with the Secretary of State's Policies;

or the enactment and coming into force of the Scotland Bill 1998 (or any subsidiary legislation thereunder) does not operate to transfer the Secretary of State's clarification letter delivered pursuant to Clause 3.1.5(d) to the relevant Scottish Minister at the time when that Scottish Minister becomes the Secretary of State for the purposes of this Agreement to the same effect as if such letter had been issued by that Scottish Minister at that time;

- 22.9.4 there is (i) an occurrence of a Legislative Change, or (ii) a Proposal for a Legislative Change, or (iii) any action of any Competent Authority, which shall include the decision of a court (not the subject of appeal), which:
- (a) has or would have an adverse effect upon the Trust's legal capacity or obligation to perform any of its material obligations (including financial obligations) owed to Summit or the Financiers in relation to the Project or upon the Trust's financial standing;
 - (b) has or would have an adverse effect upon the legal capacity or duty of the Secretary of State to exercise his powers or discretions or perform his duties in a way which achieves the Secretary of State's Policies or has or would have the effect that the issue or the observance of the Secretary of State's Policies is invalid

or prevents or would prevent the Secretary of State from implementing the Secretary of State's Policies; or

- (c) renders or would render the performance or exercise by Summit of any of its material rights (declaring that the right to obtain payment of the Unitary Payment in terms hereof is deemed to be material) or material obligations under the Project Documents unenforceable, void, impossible, unlawful or illegal and not merely more expensive;

and provided that in the case of Clause 22.9.4 (c) the Trust and Summit cannot agree within 20 Business Days of such Legislative Change, such Proposal for a Legislative Change or other action or decision, any variation to this Agreement and the other DBFO Contracts or other action necessary to remedy or rectify the matter. Failure to reach agreement as aforesaid shall not be subject to reference to Dispute Resolution Procedure and from the occurrence of any such Legislative Change or Proposal for a Legislative Change or action of any Competent Authority until such agreement is reached or the DBFO Contracts are terminated, Summit shall not be liable for failure to comply with its obligations under the DBFO Contracts to the extent such failure is as a result of such Legislative Change or Proposal for a Legislative Change or action of any Competent Authority.

For the purposes of this Agreement:

"Proposal" means:

- (a) in the case of a bill, the bill being introduced by the Government or receiving the support of the Government at its second reading in the first House of Parliament into which it is introduced or the bill passing a second reading in the first House of Parliament into which it is introduced or, in the case of any legislation of the Scottish Parliament after the enactment of the Scotland Bill 1998, such analogous circumstances or proceedings under the procedures adopted by the Scottish Parliament; or
- (b) in the case of subordinate legislation, the proposed statutory instrument or order being laid before Parliament in draft or, in the case of any legislation of the Scottish Parliament after the enactment of the Scotland Bill 1998, such analogous proceedings under the procedures adopted by the Scottish Parliament; or
- (c) in the case of a directive, regulation or decision of the European Union, its adoption; and

"Secretary of State's Policies" means the intentions and policy objectives set out in the Secretary of State's clarification letter reproduced in Part 12 of the Schedule;

- 22.9.5 the Detailed Decision Notice is revoked pursuant to Section 65 or Section 68 of the Town & Country Planning (Scotland) Act 1997 and the Trust is unable, within a period

of 120 days thereafter, to procure the issue of a replacement Detailed Decision Notice or otherwise remedy the situation;

- 22.9.6 the grant of planning permission in terms of the Detailed Decision Notice is the subject of Judicial Review and the Detailed Decision Notice is quashed pursuant to those or any other proceedings;
- 22.9.7 there is an assignation or transfer of the DBFO Contracts by the Trust in breach of the provisions in Clause 33.2 or the Trust is dissolved other than with the consent of Summit as provided in and in circumstances to enable a transfer in accordance with Clause 33.2; or
- 22.9.8 HM Government or any other Competent Authority sequesters, requisitions, expropriates or otherwise seizes the Hospital or the Site or any material part thereof;

then, whilst any such Termination Event (as specified in Clauses 22.9.1 to 22.9.8) is subsisting in any such case, without prejudice to any of its other rights or remedies, Summit may within six months of the happening of such event (or such longer period as may be agreed) terminate all the DBFO Contracts, by notice in writing having immediate effect, in which case the terms of Clauses 23 and 24 (and the provisions of any DBFO Contracts as to rights and obligations on termination) shall apply.

- 22.10 Summit shall be entitled to terminate this Agreement and all (but not some of) the other DBFO Contracts:
 - (a) in the case of default by the Trust in its payment obligations as specified in Clause 22.9.1, only if it has given NHSME and the Secretary of State written notice of such default in the form set out in Part 13A of the Schedule and copied such notice to the Trust and if the outstanding sums are not paid to Summit on or prior to the date 20 Business Days after receipt of such notice by NHSME and the Secretary of State and the Trust which ever is the latest; or
 - (b) in the case of any action taken or statement made as specified in Clause 22.9.3, only if it has given NHSME and the Secretary of State written notice in the form reproduced in Part 13B of the Schedule specifying such matters in reasonable detail and copied such notice to the Trust, and the NHSME or the Secretary of State has not within 20 Business Days (or, in the case of the issue or re-issue of a letter following enactment or coming into force of the Scotland Bill 1998 as specified below 40 Business Days) of receipt of such written notice by NHSME and the Secretary of State and the Trust, whichever is the latest, provided Summit with reasonably satisfactory evidence that the Secretary of State's Policies will be observed and met by the Secretary of State and the issue or re-issue of a letter in a form set out in Part 12 of the Schedule (with any necessary amendments which do not change the Secretary of State's Policies as approved by Summit acting reasonably) by the Secretary of State (including, for the avoidance of doubt

following the enactment or coming into force of the Scotland Bill 1998 the relevant Scottish Minister) will be deemed to be such satisfactory evidence; and

- (c) in the case of a Legislative Change or Proposal for a Legislative Change or other action of a Competent Authority specified in Clause 22.9.4 (a) or (b) only if it has given NHSME and the Secretary of State written notice in the form reproduced in Part 13B of the Schedule specifying such matters in reasonable detail and copied such notice to the Trust and the NHSME or the Secretary of State has not within 20 Business Days of receipt of such written notice by NHSME and the Secretary of State and the Trust, whichever is the latest, provided Summit with:
 - (i) reasonably satisfactory evidence that the effect of the Legislative Change (or the Legislative Change the subject of the Proposal) or the action of a Competent Authority is (or, in the case of a Proposal for a Legislative Change, will upon such Legislative Change taking effect be) to effect a transfer by the Trust of all of the Project Documents to which it is a party to an entity to which Summit has consented or is obliged to consent pursuant to Clause 33.2 ("Permitted Transfer"); or
 - (ii) a legally binding undertaking from the Secretary of State to Summit and the Financiers to effect a Permitted Transfer with immediate effect or, if later, with effect upon such Legislative Change or other action taking effect.

22.11 Summit confirms that it has no rights to terminate any of the DBFO Contracts save as set out in Clause 22.8, Clause 22.9 and in Clauses 26.7 and 26.8 (Force Majeure).

23 Consequences of Termination

23.1 On any termination of the DBFO Contracts, however arising the following provisions shall apply, unless the Trust elects to vacate the Site pursuant to the terms of Clause 24 in which case this Clause 23.1 shall not apply:

23.1.1 Summit shall as soon as reasonably practical, but subject to Clause 20 (Intellectual Property), deliver to the Trust all contracts, certificates, documents, records (including the Technical Records), computer programmes and related data contained on machine readable media (and title in the media on which such data is stored shall be deemed to pass to the Trust) the ownership of which is vested in Summit or its Approved Service Providers and which are utilised solely for the purposes of the Services as may be reasonably requested by the Trust but excluding any such documents containing Proprietary Information;

23.1.2 all licences of Intellectual Property from the Trust in favour of Summit shall be deemed to have terminated and the provisions of Clause 20.8 shall apply;

23.1.3 on any early termination of the Development Agreement (together with the other DBFO Contracts), without prejudice to any other remedy under the Development Agreement

or at law, but subject as provided in Clause 27, the Trust may, at its option, but without relieving Summit of its obligations and liabilities accrued under the Development Agreement relating to the period prior to such early termination:

- (a) enter the Site and expel Summit, and/or the Contractor (and/or any other sub-contractors of Summit or the Contractor or any other person acting on their instructions) as the Trust thinks fit;
- (b) itself, or through any other contractor employed (directly or indirectly) by the Trust, complete the Development either in accordance with the terms of the Development Agreement and the Specification or in such other manner as the Trust shall consider appropriate and carry out commissioning works;

23.1.4 on early termination of the Services Agreement (together with the other DBFO Contracts) (or, subject to the terms of Clause 25, on handback at the end of the Term):

- (a) the responsibility for the provision of the Services shall be transferred from Summit and shall vest in the Trust or whoever the Trust shall direct, and Summit shall have no further right or obligation to provide the Services;
- (b) the Trust may, at its option, require Summit, the Approved Service Providers or any Permitted Sub-Contractor to transfer to the Trust or to its nominee and Summit may, at its option, require the Trust to acquire any Related Materials (excluding for the avoidance of doubt Trust Related Materials) belonging to Summit or the Approved Service Provider and with the exception of Transferring Related Materials which will be transferred at nil value, at a price to be agreed between the Trust and the relevant transferor and, in default of agreement, at their market value, as independently valued provided that, in the case of the exercise by Summit of such option, such Related Materials are in an appropriate and satisfactory condition and not excessive in quantity, redundant or obsolete and reasonably suitable for their purpose;
- (c) the Trust may exercise its rights under the Services Direct Agreement in accordance with its terms;
- (d) Summit will ensure that all Approved Service Providers or Permitted Sub-Contractors and their employees, vacate the Site and that there is removed from the Site all Related Materials and any other materials not belonging to or to be acquired by the Trust;
- (e) Summit shall indemnify the Trust on demand and hold it harmless in relation to all losses, actions, claims, demands, costs, charges and expenses arising out of any action or claim by any person (excluding Personnel which are dealt with in Clause 16) in relation to the termination of its contract with Summit or an Approved Service Provider or a Permitted Sub-Contractor as a result of the

termination of the DBFO Contracts (save where due to Trust default and subject to Clause 24) save where expressly otherwise provided in the DBFO Contracts;

- (f) the parties shall do all such other reasonable acts or things necessary to accomplish a smooth transition of the management of the Services to the new service provider;
- (g) to the extent not dealt with under Clause 24, the Trust shall pay to Summit all outstanding amounts arising under the DBFO Contracts as and when the same fall due for payment (or would but for termination have fallen due for payment) under the terms of the DBFO Contracts; and
- (h) save as required or permitted in terms of Clause 23.1.1, each party shall, within 30 days of such expiry or early termination, return all documentation, manuals, statements and other materials (and all copies) supplied under or in connection with Summit's performance of the Services and which contains Confidential Information of the other party (or its sub-contractors) and, if requested, either party shall certify in writing to the other that it has fully complied in all respects with this provision after the return of such documentation;

23.1.5 on early termination of the Equipment Agreement (or, subject to Clause 25, on handback at the end of the Term) (whether or not along with the other DBFO Contracts):

- (a) the Trust may require Summit to transfer any or all of the Equipment owned by Summit to the Trust or to whoever the Trust directs, together with the benefit of all warranties, guarantees and third party maintenance contracts (if any) relating to that Equipment insofar as these are capable of being transferred at such price as may be agreed, or failing such agreement at market value;
- (b) the Trust may exercise its rights under the Equipment Direct Agreement in accordance with the terms thereof failing which, at the Trust's request, Summit will ensure that the Equipment (or such as is not to be retained pursuant to the Equipment Direct Agreement or Clause 23.1.5(a)) is removed from the Site; and
- (c) subject to paragraphs (a) and (b) above, each party shall, within thirty days of such expiry or early termination return all documentation, manuals, statements and other materials (and all copies) supplied under or in connection with Summit's performance of the Equipment Services which contains Confidential Information of the other party (or its sub-contractors) and, if requested, either party shall certify in writing to the other than it has fully complied in all respects with this provision after the return of such documentation.

23.1.6 Termination of the provision of any particular Service (as opposed to termination of the whole of the Services Agreement) shall be dealt with in accordance with the Services Agreement.

- 23.1.7 Nothing in Clause 23.1 shall affect the compensation payable under Clause 24 or the calculation thereof.
- 23.1.8 On early termination of all of the DBFO Contracts, howsoever arising:
- (a) if the Trust elects to vacate the Site pursuant to the terms of Clause 24 by the giving of a Termination Vacation Notice, the Sub-Lease shall terminate in accordance with Clause 9.1 of the Sub-lease; or
 - (b) otherwise, subject as provided in the Head Lease and the Sub-Lease, both the Head Lease and the Sub-Lease shall automatically terminate.

and on termination of the Headlease Summit shall execute and deliver a valid and binding renunciation of the Headlease.

- 23.2 Termination of this Agreement or any other DBFO Contract shall not affect any accrued rights and obligations under the DBFO Contracts as at the date of termination, including (without limitation) any rights of the Trust or Summit to damages or other relief subject always as provided in this Agreement and shall not affect this Clause 23 or any other clauses of the DBFO Contracts expressed to have effect following termination including without limitation, Clauses 1, 12, 16, 20, 22, 24, 25, 26, 27, 28, 29, 30, 31, 32 and 33 of this Agreement which shall remain in full force and effect.

24 Compensation upon early termination

- 24.1 If the DBFO Contracts are terminated by the Trust pursuant to Clause 22 (other than Clause 22.1.7) prior to Contractual Practical Completion then the Compensation Amount will be calculated in accordance with the provisions of Section 1 of Part 10 of the Schedule.
- 24.2 If the DBFO Contracts are terminated by the Trust pursuant to Clause 22 (other than Clause 22.1.7) on or after Contractual Practical Completion then the Compensation Amount will be calculated in accordance with the provisions of Section 2 of Part 10 of the Schedule.
- 24.3 If the DBFO Contracts are terminated by Summit pursuant to Clause 22 then the Compensation Amount will be calculated in accordance with the provisions of Section 4 of Part 10 of the Schedule.
- 24.4 If the DBFO Contracts are terminated pursuant to Clause 26.7 or 26.8 (Force Majeure), or Clause 22.1.7, then the Compensation Amount will be calculated in accordance with the provisions of Section 3 of Part 10 of the Schedule.

- 24.5 If the DBFO Contracts are terminated pursuant to Clause 32.5 (Corrupt Gifts) then the Compensation Amount will be calculated in accordance with Section 5 of Part 10 of the Schedule.
- 24.6 Each of Summit and the Trust shall in good faith seek to agree the Compensation Amount failing which agreement within 30 days of the Termination Date, the Dispute Resolution Procedure shall apply.
- 24.7 The Trust shall pay the Compensation Amount to Summit after agreement or determination of the applicable sum within 30 days thereafter as a single lump-sum payment with interest thereon accruing since the Termination Date at the Bond Rate.
- 24.8 If the Trust elects following termination of the DBFO Contracts to vacate the Site by the giving of a Termination Vacation Notice the Trust shall thereupon be entitled to deduct the Alternative Use Value from any payments made to Summit under this Clause 24 but only in so far as and to the extent that the Trust has already paid to Summit the Senior Lender Liabilities plus interest thereon at the Bond Rate since the Termination Date; where "Alternative Use Value" means the open market value of Summit's leasehold interest in the Site, including, for these purposes, all buildings and other heritable property thereon as at the Termination Date of the DBFO Contracts assuming a willing assignor and a willing assignee and on the basis that the assignor was not entitled to use the Site as a hospital at that date and on the basis of the Head Lease in the Post Operational Period.
- 24.9 In addition to the Compensation Amount, the Trust will also pay to the Inland Revenue on behalf of Summit Group (hereafter defined) such amount ("the Tax Gross Up") if any, necessary to ensure that if the Compensation Amount is taxable in the hands of Summit or Summit is otherwise taxable in connection with the receipt of the Compensation Amount, the group of companies formed by Summit, Summit Holdings and Summit plc ("Summit Group") as a whole will be in the same overall after tax position taking into account all available reliefs, other than group relief not affecting the Summit Group, as it would have been had such payment not been subject to tax taking into account the tax which the Summit Group as a whole would otherwise have incurred if the DBFO Contracts had not terminated and the parties had continued to perform their respective obligations under the DBFO Contracts for the remainder of the Term and assuming the same tax rates throughout and so that payment will not be due until the Trust has received reasonably satisfactory evidence of the calculation of the Tax Gross Up and that it has been agreed or determined between the Inland Revenue and Summit. Summit shall not appeal any such determination by the Inland Revenue after payment of such tax has been made by the Trust.
- 24.10 The Trust shall have no right whatsoever to make any set off, counterclaim, deduction or withholding of any nature whatsoever in respect of the Compensation Amount, save to the extent that the Compensation Amount exceeds the Senior Lenders Liabilities plus interest on any such amounts unpaid since the Termination Date (and then only to the extent permitted under Provision 23 of the General Provisions).

- 24.11 Unless Clause 24.8 applies the Trust will not be liable to make any payment to Summit of any Compensation Amount until Summit shall have delivered to the Trust a validly executed and binding renunciation of the Head Lease in the form annexed to the Head Lease.

PART 10 - HANDBACK AT END OF TERM

25 Handback

- 25.1 Not less than 5 years, nor more than 5½ years prior to the then expected expiry of the Term, the Trust shall notify Summit whether or not the Trust proposes to vacate the Site on expiry of the Term.
- 25.2 If the Trust notifies Summit pursuant to Clause 25.1 by giving a Handback Vacation Notice that it wishes to vacate the Site on expiry of the Term, that decision shall be final except with the consent of Summit not to be unreasonably withheld or delayed.
- 25.3 If the Trust notifies Summit that it proposes to vacate the Site on expiry of the Term pursuant to Clause 25.1 or, with the consent of Summit under Clause 25.2 the following provisions will apply:
- 25.3.1 no later than eight weeks after expiry of the Term, the Trust shall:
- (a) itself vacate and procure its employees, agents and contractors vacate the Site; and
 - (b) procure that all property and equipment belonging to or in the proper possession of the Trust, its employees, agents or contractors is uplifted and removed from the Site and that all damage thereby caused is made good.
- 25.3.2 the Sub-lease shall terminate and the Trust shall execute and deliver such documents as are necessary to demonstrate such termination (and failure to do so timeously will be a ground for irritancy thereof);
- 25.3.3 (a) Summit may, by notice in writing to the Trust no later than six months prior to the expiry of the Term, require the Trust to transfer to Summit its heritable interest in the Site valued at market value on the basis that such heritable interest is subject to the Head Lease during the Post Operational Period and the Sub-lease has been terminated and such market value to be ascertained, if the Trust and Summit cannot otherwise agree, pursuant to the Dispute Resolution Procedure; and
- (b) failing the exercise of such option by Summit (i) the Head Lease will continue in force as therein provided or (ii) at the Trust's option it may convey to Summit

its heritable interest in the Site at no consideration and Summit will accept such conveyance.

- 25.3.4 the vacation by the Trust, its employees, agents and contractors and the termination of the Sub-lease and/or Head Lease shall not prejudice the other provisions of the DBFO Contracts nor the rights of the Trust and Summit against each other in respect of any breaches thereof including any such as relate to their respective rights and obligations on termination thereof.
- 25.4 If the Trust notifies Summit pursuant to Clause 25.1 or, with the consent of Summit, pursuant to Clause 25.2, that it does not wish to vacate the Site on expiry of the Term or fails to notify Summit pursuant to Clause 25.1 then if the Trust and Summit have not unconditionally agreed the terms and conditions upon which the Term should be extended (it being acknowledged that each of the parties will have absolute discretion as to whether and on what terms to negotiate) by the date which is four years and six months prior to the then expected expiry of the Term, the Trust shall institute a competitive tender exercise as follows, subject always to then current procurement rules applying to the Trust (or any other legally binding constraints upon the Trust upon the manner or timing of such tendering process) and to the timing of the various stages of the tendering process being determined by the Trust with a view to obtaining the most economically advantageous tender:
- 25.4.1 the Trust shall advertise its requirements for the provision of such services as it expects to require on expiry of the Term and shall invite tenderers to perform such services to standards specified in the invitation to tender for a period of at least ten years and otherwise on the terms and in a manner generally appropriate for a public procurement of services and/or works exercise at such time;
- 25.4.2 the Trust shall not invite bids except from tenderers which have demonstrated:
- (a) a satisfactory capability to perform or procure the applicable services to the standards required; and
 - (b) the ability to procure satisfactory financial substance and resources in relation to the provision of the services taking into account the services required and their relative importance to the Trust;
- 25.4.3 any successful tenderer will be selected by the Trust on the basis of evaluation criteria specified in the invitation to tender and on the grounds of the most economically advantageous offer and in so doing the Trust will adopt and apply principles of impartiality and fairness (it being acknowledged that the Trust will be entitled to compare private sector tenders with the relative costs of such service provision (or part thereof) by the Trust itself and that it will not be bound to accept any tender); and
- 25.4.4 the competitive tendering exercise will be completed at least six months prior to expiry of the Term.

- 25.5 If on expiry of the Term the Trust does not propose to vacate the Site and has so notified Summit or has failed to notify Summit pursuant to Clause 25.1 and Summit has not negotiated or been awarded a new contract to provide services to and/or works for the Trust on the Site on the date of expiry of the Term:
- 25.5.1 the Head Lease shall terminate and Summit shall execute and deliver a valid and binding renunciation of the Head Lease to demonstrate such termination (and failure to do so timeously will be a ground for irritancy thereof and will until such execution and delivery or such irritancy being effective and not open to challenge entitle the Trust to withhold the sum payable in terms of Clause 25.5.2);
- 25.5.2 the Trust shall pay to Summit the Residual Value Sum (as defined in Clause 25.6) agreed between the Trust and Summit or, in the event of disagreement, determined pursuant to the Dispute Resolution Procedure; and
- 25.5.3 Summit shall, if so requested by the Trust, provide such assistance as the Trust may reasonably require to ensure an orderly transfer of responsibility for the provision of the Services or equivalent services to be provided by the Trust or a new service provider thereafter.
- 25.6 For the purposes of Clause 25.5.2, the "Residual Value Sum" shall be calculated as follows and interest thereon shall additionally accrue at the Interest Rate in respect of the period from the date of expiry of the Term until the date of payment:
- 25.6.1 the Residual Value Sum shall not exceed £15 million. For the avoidance of doubt, this sum is nominal and accordingly will not benefit from indexation or any other increase;
- 25.6.2 subject to Clause 25.6.1, the Residual Value Sum shall be the net present value of the aggregate management fees which Summit would receive if the Term were to be extended applying the following assumptions:
- (a) the period of extension would be the longer of ten years or the contract period negotiated between the Trust and any successful tenderer pursuant to Clause 25.4;
 - (b) Summit's sole revenues during this period would be a management fee applied to all payments necessary to procure a third party or parties to perform the Services in compliance with the requirements of the DBFO Contracts applicable immediately prior to expiry of the Term on the basis that Summit does not itself directly perform any of the Services but out-sources all of them;
 - (c) the Trust and Summit shall be entitled to take account of the costs identified by tenders received during any competitive tendering process pursuant to Clause 25.4 to assist in ascertaining the amount of payments which Summit would likely require to make to third parties pursuant to Clause 25.6.2(b) acknowledging that adjustments would be necessary to reconcile differences between the services

procured under the competitive tendering process and the Services applicable immediately prior to expiry of the Term;

- (d) the management fee would be a sum equal to the Relevant Percentage (after defined) of all payments to third parties pursuant to Clause 25.6.2(b) and for this purpose the Relevant Percentage would be 7.9% or if either party considers that this percentage is out of line with margins then being applied by other equivalent entities procuring equivalent services in the market at such time then the Relevant Percentage would be that percentage agreed or determined as commonly prevalent in the market at such time for such services and evidence from the competitive tendering process pursuant to Clause 25.4. would be admissible at the Disputes Resolution Procedure to which any dispute will be referred;
- (e) the discount rate being applied to the aggregate management fees of Summit (referred to at Clause 25.6.2(b)) for the purpose of ascertaining the then net present value of such amounts as at expiry of the Term would be the Relevant Percentage as agreed or determined pursuant to Clause 25.6.2(d).

PART 11 - MISCELLANEOUS

FORCE MAJEURE/SUSPENSION EVENTS

26 Force Majeure/Suspension Events

26.1 "Force Majeure" means any of:

- 26.1.1 war, hostilities or warlike operations, (whether war be declared or not), invasion, act of foreign enemies, rebellion, revolution, insurrection, military or usurped power, civil war;
- 26.1.2 act of terrorism (or threats thereof) or insurrection civil unrest or riot, disorder or commotion, save if the same and the consequences thereof (including any business interruption caused thereby) are fully covered by the Insurances;
- 26.1.3 Contamination (as defined in Clause 26.10) which is not the responsibility of either party under Clauses 26.10.1 or 26.10.2, save if the same and the consequences thereof (including the appropriate treatment or removal thereof and any business interruption caused thereby) are fully covered by the Insurances and subject to Clause 26.10.3 (b);
- 26.1.4 ionising radiation or contamination by radioactivity from any nuclear fuel or from waste, from the combustion of nuclear fuel, radio active toxic explosion, or other hazardous properties or any explosive nuclear assembly or nuclear component thereof;
- 26.1.5 pressure waves caused by aircraft or other aerial devices travelling at sonic or supersonic speeds, articles falling from aircraft or the impact of satellites or aircraft or parts thereof;

26.1.6 any event becoming Force Majeure under Clause 26.9 or 26.10.3(b).

26.2 "Suspension Event" means any of:

26.2.1 the Insured Risks;

26.2.2 exceptional adverse weather conditions or other natural disaster in each case of overwhelming proportions;

26.2.3 strike, lock-out, labour unrest or other industrial disturbances other than one relating exclusively to the Affected Party;

26.2.4 inability to obtain gas, electricity, oil or water arising from failure on the part of the relevant provider of such service or supplies to serve the Site (whether by reason of default of the relevant provider or otherwise);

26.2.5 inability to obtain telecommunications or sewerage services arising from a failure on the part of the provider of such service to serve the Site (whether by reason of the default of the relevant provider or otherwise);

26.2.6 the circumstances set out in the proviso to paragraph 6.4 of Part A of the Schedule to the General Provisions;

in each case provided that:

(a) "Affected Party" means the party unable, (having taken all reasonable steps to avoid the Force Majeure or the Suspension Event), to perform in whole or in part its obligations under the DBFO Contracts by reason of such event (or the consequences thereof) and (i) the Trust shall be deemed not to be a contractor of Summit and Summit shall be deemed not to be a contractor of the Trust and (ii) in relation to each of the parties Affected Party includes any person for whom that party is responsible in terms of Clauses 8.2 and 9.2 of this Agreement respectively;

(b) any such event shall only be Force Majeure or Suspension Event where its occurrence is beyond the reasonable control of the Affected Party and shall not have arisen as a result of the default (whether by act or omission) of the Affected Party or a breach by the Affected Party of its obligations under the DBFO Contracts.

26.3.1 The Affected Party shall not be in breach of an obligation under this Agreement or any DBFO Contract to the extent that it is unable to perform or is delayed in performing that obligation in whole or in part by reason of Force Majeure or a Suspension Event (or the consequences thereof). If the obligation which the Affected Party is unable to perform is required to be performed by a specified time under the DBFO Contracts, then the

Affected Party shall be entitled to such extension of time for performance as is fair and reasonable in all circumstances. Nothing in this Clause 26 shall relieve the Trust of its payment obligations under the DBFO Contracts (subject as provided in Clause 26.4).

- 26.3.2 If either party shall seek to rely on this Clause 26, it shall as soon as reasonably practicable give notice to the other with all available particulars of the act or matter claimed as a Force Majeure event or a Suspension Event. The Affected Party shall take all reasonable steps to remedy or mitigate the failure to perform and keep the other party informed of the steps so being taken and Summit shall not be entitled to rely on any of the events specified in Clause 26.2.4 as relieving it from failure to perform obligations which it would have been able to perform had it complied with its obligations under the Utilities Contingency Provisions save where breach of its obligations under the Utilities Contingency Provisions is itself relieved in accordance with Clause 26.3.1.
- 26.4 If a Force Majeure or a Suspension Event occurs then payment will be dealt with under paragraphs 10 and 11 of Part A of the Schedule to the General Provisions.
- 26.5 The Term shall be extended as a consequence of any period arising after the Services Commencement Date during which Summit is unable to perform or procure performance of all or any part of its obligations under the DBFO Contracts as a consequence of a Suspension Event which is not an Insured Risk by a period or periods (subject to a maximum aggregate period of five years) equal to the duration of the period ("the SE Period") in which Summit has been unable to perform or procure performance of its obligations by reason of that Suspension Event provided that for the purpose of this Clause 26.5 there shall be deducted from the SE Period any period thereof during which the whole of the Availability Element was paid and a pro rata part of any period during which partial payment of the Availability Element was paid. For the avoidance of doubt no other extensions to the Term (other than pursuant to Clause 4.2.1) will be allowed.
- 26.6.1 Subject to Clause 27.2.2 in the event of damage to or destruction of the Hospital or any part thereof caused by an Insured Risk after the Contractual Practical Completion Date (the repair and reinstatement of damage caused by an Insured Risk prior to that date being Summit's responsibility at its cost in accordance with the Development Agreement) Summit shall as soon as reasonably practicable after the date of receipt of insurance proceeds in respect of such damage or destruction (Summit using all reasonable endeavours to recover such insurance proceeds) or if earlier, the date upon which Summit would have received such insurance proceeds if it had complied with Part 5 of the Schedule and subject to the requirements of its insurers (given on the basis that Summit has complied with its obligations as to insurance under the DBFO Contracts) repair and reinstate such damage or destruction in accordance with the provisions of the Output Specification relating to the Estates Maintenance Services and for the avoidance of doubt, Summit acknowledges that it is liable to make up any shortfall in insurance monies without recourse to the Trust. Without prejudice to the foregoing if said damage or destruction is material (in this context meaning if it requires the expenditure of more than £500,000 Indexed from Financial Close), Summit will also

carry out such reinstatement in accordance with the provisions of Part G of the Schedule to the General Provisions).

26.6.2 Summit acknowledges that on occurrence of any damage or destruction to the Hospital, the Trust may instruct an Additional Works Change.

26.6.3 If the works of reinstatement or repair in respect of damage or destruction referred to in Clause 26.6.1 ("**Relevant Works**") are not repaired or reinstated in accordance with Clause 26.6.1 or are **Constructively Abandoned**, save in either case as a result of **Relevant Delays**, the relief from Penalty Points afforded by Paragraph 7 of Part B of the Schedule to the General Provisions shall cease to apply in respect of **Unavailability Deductions** resulting from that damage or destruction, unless and until the **Relevant Works** shall cease to be **Constructively Abandoned** or Summit again complies with Clause 26.6.1; and for the foregoing purpose:

- (a) "**Constructively Abandoned**" means that Summit and its sub-contractors have not commenced carrying out the **Relevant Works** within a reasonable period after the date of receipt of the insurance proceeds in respect of such damage or destruction (Summit using all reasonable endeavours to recover such insurance proceeds) or if earlier, the date upon which such insurance proceeds would have been received if it had complied with Part 5 of the Schedule (taking into account the period reasonably required to tender for the **Relevant Works** and the Contractor to commence **Relevant Works** on the Site) or have demonstrably ceased carrying out the **Relevant Works** (including both progress of the physical works at the Site and design development relative to the progress of the **Relevant Works** at that time) for a period of three consecutive months, other than by reason of any **Relevant Delays** and Summit cannot demonstrate to the Trust's reasonable satisfaction that, at the expiry of each such period (i) it is using all reasonable endeavours to commence or recommence the **Relevant Works** as soon as possible and (ii) sufficient funds are or will be available to recommence and complete the **Works**;
- (b) "**Relevant Delays**" means the aggregate of all such delay or delays as are agreed between the parties or determined in accordance with the **Dispute Resolution Procedure** as being fair and reasonable in relation to the delay in the progress of the **Relevant Works** attributable to the **Relevant Event**;
- (c) "**Relevant Event**" means any one or more of the following events:
 - (i) any event of **Force Majeure**;
 - (ii) the implementation of any **Eligible Change** or any works required by a **Legislative Change** (irrespective of whether it is an **Eligible Change**) in accordance with the **DBFO Contracts**;

- (iii) any breach by the Trust of its obligations under the DBFO Contracts or any acts or omissions of the Trust or persons for whom it is responsible in terms of Clause 8.2 of this Agreement (including protestor activity by the Trust staff) which have an adverse effect on the progress of the Relevant Works;
 - (iv) the occurrence of an Insured Risk; or
 - (v) the discovery or presence of (including any requirement in respect of) human remains or consecrated land or unexploded bombs or munitions or fossils or antiquities;
- 26.6.4 Summit will not be responsible for reinstating damage or destruction caused by Force Majeure unless the Trust at its option, instructs a Change in respect of such repair or reinstatement.
- 26.7 If the Affected Party is unable to perform all or any material part of its obligations under any of the DBFO Contracts as a consequence of Force Majeure for a continuous period in excess of six months, either party may, following consultation with a view to resolving the matter for a period of not less than 60 days, terminate this Agreement and the DBFO Contracts by giving one months prior notice in writing and the compensation provisions in Clause 24 shall apply.
- 26.8 If any of the events in Clause 26.1.3 and/or Clause 26.1.6 occur such that this gives rise or is reasonably likely to give rise to any third party or statutory liability having a material adverse effect on the Affected Party then the Affected Party may, following consultation with a view to resolving the matter, for a period of not less than 30 days, terminate this Agreement and the other DBFO Contracts by giving one week's prior notice in writing and the compensation provisions in Clause 24 shall apply.
- 26.9 **Uninsurable Risks**
- 26.9.1 If, upon expiry or cancellation of any policy of insurance Summit is obliged to take out and maintain pursuant to Part 5 of the Schedule either:
- (a) Summit is, or will be, unable to obtain a replacement policy of insurance in respect of all the Insured Risks covered by that policy from a reputable insurer with a credit rating from Standard and Poor's Corporation (or its successors) of at least A (or its equivalent) transacting business in the United Kingdom to meet its obligations under Part 5 of the Schedule;
 - (b) the costs of such replacement policy exceed, or will exceed;
 - (i) the cost of the equivalent insurance policy at Financial Close (indexed from Financial Close) by 350% or more; or

- (ii) the cost of the equivalent insurance policy for the previous year (Indexed from the previous year) by 110% or more,

("the Insurance Threshold")

then Summit shall, as soon as practicable upon becoming aware of the same, but in any event, if practicable, at least 60 days before the expiry or cancellation of the relevant policy, notify the Trust in accordance with Clause 26.9.2.

26.9.2 The notice to be provided by Summit to the Trust under Clause 26.9.1 will contain a statement of:

- (a) in the case of Clause 26.9.1(a), the relevant Insured Risks in respect of which insurance cannot be obtained;
- (b) in the case of Clause 26.9.1 (b), the relevant Insured Risks which have caused the Insurance Threshold to be exceeded;
- (c) the premium payable in the previous year in respect of all of the relevant Insured Risks and, in the case of Clause 26.9.1(b), the proposed premium for the year in question; and
- (d) Summit's proposals as to what it considers reasonable and appropriate to mitigate, manage and control the relevant Insured Risk or Risks (which proposals may include, without limitation, proposals to amend or vary the Services and/or to alter the Hospital pursuant to the Change Provisions).

26.9.3 Following receipt of Summit's notice pursuant to Clause 26.9.2, the Trust may by notice in writing request, and Summit will, as soon as reasonably practicable following such request, provide such additional information as the Trust may reasonably require, and the Trust and Summit will use reasonable endeavours for a period of no more than 60 days to agree the relevant Insured Risks in respect of which Summit is unable to obtain insurance as specified in Clause 26.9.1(a) failing which either party may refer the relevant Dispute to the Dispute Resolution Procedure and (i) such risks agreed or determined to arise under Clause 26.9.1(a) being referred to as "**Insurance A Risks**" (ii) such risks agreed or determined to have caused the Insurance Threshold to be exceeded being referred to as "**Insurance B Risks**" Insurance A Risks and Insurance B Risks being collectively "**Uninsurable Risks**" and (iii) the premium payable as agreed or determined in the previous year in respect of all Uninsurable Risks being the "**Previous Year's Premium**".

26.9.4 The Trust shall have the option (at its sole discretion) by giving written notice to Summit within 5 Business Days following agreement or determination of the Insurance B Risks under Clause 26.9.3 ("**the Option Period**") to agree to pay, 5 Business Days prior to each date upon which Summit are due to pay the Excess so that the insurance in respect of the Insurance B Risk or Risks remains in force and the DBFO Contracts

are unaffected where "Excess" means the amount by which the aggregate of the proposed premium payable for the year in question for all Insurance B Risks exceeds the Previous Year's Premium attributable to those risks and so that in subsequent years while the Trust is still paying the Excess the Previous Year's Premium attributable to those risks will be indexed from the year in which it was originally calculated.

- 26.9.5 In the case of any Insurance B Risk or Risks if the Trust does not exercise the option to pay the Excess (as defined in Clause 26.9.4) within the Option Period then the Insurance B Risk or Risks will become an event of Force Majeure from the date of expiry of the insurance policy in respect thereof.
- 26.9.6 In the case of Insurance A Risks, the Insurance A Risks will become an event of Force Majeure from the date of expiry of the insurance policy in respect thereof.
- 26.9.7 If an Uninsurable Risk becomes an event of Force Majeure, Summit undertakes to pay to the Trust in each year of the Term during which such a risk remains uninsured, a sum equivalent to the Previous Year's Premium attributable to that Uninsured Risk Indexed annually from the date upon which such premium was last payable by Summit (or, for any part of a year, a proportionate part of such sum).
- 26.9.8 If the Uninsurable Risk at any time ceases to be an Uninsurable Risk then the Trust shall notify Summit and 60 days following such notice or, if later, the earliest practicable date upon which Summit can effect insurance in respect of such risk, such risk will cease to be an event of Force Majeure and will again become a Suspension Event but without prejudice to the further operation of this Clause 26.9.
- 26.9.9 The Trust may give notice to Summit notifying Summit that it no longer wishes to pay the Excess, in which case the Uninsurable Risk will become an event of Force Majeure from the date of expiry of the insurance policy.
- 26.9.10 If the Trust exercises its option under Clause 26.9.4 and the Trust shall not have paid the Excess prior to the date 5 Business Days prior to the date of expiry of any insurance in respect of the Uninsurable Risks then the Uninsurable Risks will become an event of Force Majeure until the date falling 5 Business Days after the date of payment of the Excess.
- 26.9.11 Pending agreement or determination of Uninsurable Risks under Clause 26.9.3, any Insured Risks the subject of notice from Summit under Clause 26.9.1 and 26.9.2 shall be treated as events of Force Majeure on expiry of the insurance in respect of such Insured Risks but without prejudice to the application of Clauses 26.9.4, 26.9.5, and/or 26.9.6 on such agreement or determination being reached.

26.10 Contamination

As between the parties, each party shall be responsible for Contamination as follows:-

- 26.10.1 the Trust shall be responsible for appropriate treatment or removal of and costs relating to Contamination arising due to an act, default or omission of the Trust or any person for whom the Trust is responsible in terms of Clause 8.2;
- 26.10.2 Summit shall (subject to the Change Provisions where applicable) be responsible for appropriate treatment or removal of and costs relating to:-
- (a) Contamination arising due to an act, default or omission of Summit or any person for whom Summit is responsible in terms of Clause 9.2;
 - (b) Contamination already existing at the Execution Date on the Site and known to Summit at that date or discovered by the carrying out of the Works and which requires appropriate treatment or removal to enable the Works to reach the Contractual Practical Completion Date; and
 - (c) Contamination already existing at the Execution Date on the Site and known to Summit at that date or discovered by carrying out the Works and which requires appropriate treatment or removal after the Contractual Practical Completion Date as a result of a Legislative Change, it being recognised that the cost thereof constitutes Capital Expenditure for the purposes of the Change Provisions;
- 26.10.3 in respect of any Contamination (whenever and howsoever arising) other than such as is described in Clauses 26.10.1 or 26.10.2 then:
- (a) if such Contamination and the consequences (including appropriate treatment or removal thereof and any business interruption caused thereby) are fully covered by the Insurances, Summit shall be responsible for appropriate treatment or removal and the costs thereof; and
 - (b) if such Contamination, and the consequences thereof (including the appropriate treatment or removal thereof and any business interruption caused thereby) are not fully covered by the Insurances, it shall be deemed to be and treated as an event of Force Majeure unless the Trust, at its option, instructs a Trust Change requiring appropriate treatment and removal of the Contamination and providing compensation for any loss of income arising through deduction in the Unitary Payment caused by such Contamination pursuant to the Change Provisions (and in which event the Trust shall be entitled to take any action it requires against the third party responsible for the Contamination (if any) and Summit shall give the Trust all assistance reasonably requested by the Trust (at the cost of the Trust) in such respect);

where "Contamination" means contamination of the Site and/or the Hospital or part thereof with a hazardous, dangerous, toxic, poisonous, radio-active, explosive, infectious or polluting substance (whether a solid, liquid, gas or micro-organism) which is likely to cause death, serious injury or illness or clinical toxicity or physical damage or harm to the Environment or to give rise to any common law or statutory nuisance.

"**Environment**" means any and all living organisms (including man), ecosystems, property and the media of air (including air in buildings, natural or man-made structures, below or above ground), water (as defined in Section 30A of the Control of Pollution Act 1974 and within drains and sewers) and land (including under any water as described above and whether above or below surface);

"**appropriate treatment or removal**" means such treatment or removal which is reasonably necessary to ensure that:

- (i) the Site will be suitable for use as a hospital; and
- (ii) the Contamination will not be likely to give rise to liability under Applicable Laws in force for the time being.

27 **Indemnities and Remedies**

Indemnities by Summit to the Trust

- 27.1 Summit shall indemnify the Trust on demand and hold it harmless against all damages, losses, liabilities, claims and expenses (including reasonable legal and other professional expenses) incurred by the Trust:-
- 27.1.1 as a direct result of any claim for or in respect of the death or personal injury of any person employed or engaged by the Trust, any patients of or visitors to the Hospital or any other person in each case if and to the extent that it is caused by Summit or any person for whom Summit is responsible in terms of Clause 9.2;
 - 27.1.2 in repairing or reinstating or replacing any assets (excluding (i) the Works and the Hospital (but including Trust Groups 2 and 3 Equipment and Trust Related Materials) and (ii) damage to the Existing Sites which could have been covered by insurance if the Trust had instructed Summit to effect such insurance under Clause 17.3) owned by or in the possession of the Trust or any person for whom the Trust is responsible in terms of Clause 8.2 which have been lost or damaged if and to the extent that such loss or damage has been caused by Summit or any person for whom it is responsible in terms of Clause 9.2;
 - 27.1.3 as a direct result of any Prosecution against the Trust arising from a breach of any Applicable Law for which Summit is responsible in terms of the DBFO Contracts brought against the Trust as a result of the breach or non-performance of any obligations of Summit under this Agreement or any other DBFO Contract;
 - 27.1.4 in respect of any increase in insurance premiums or policy excesses as a result of any claims made on account of any matter for which Summit is responsible in terms of this Clause 27.1; and
 - 27.1.5 as set out in:

- (a) Clauses 16.10.4 (Employee Indemnities), 16.14.4 (Transfer of Employees to the Trust or a Trust Service Provider), 20.6 (Intellectual Property), 23.1.4(e) (Consequences of Early Termination);
- (b) Clauses 9 (Disposal of Waste), 23.1, 25.2 and 26.4 of the Equipment Agreement;

provided always that:-

- (i) the Trust shall, to the extent that any such matter arises where Summit is liable to indemnify the Trust in terms of Clauses 27.1.1, 27.1.2 or 27.1.3, claim under the relevant insurance policy (or policies) (if any) effected and maintained by the Trust and use all reasonable endeavours to pursue such claims and, to the extent such recovery is made, Summit's liability under this Clause 27.1 shall be reduced accordingly or, to the extent Summit has already so indemnified the Trust, the Trust shall reimburse such amounts to Summit not to exceed the amount paid by Summit provided that Summit shall be obliged to indemnify the Trust for all reasonable costs incurred in connection with making such claim, but without prejudice to the Trust's rights under this Clause 27.1 to the extent that no recovery is made under any such insurance (including to the extent of any policy excesses); and
- (ii) Summit will not be obliged to pay more than once for the same loss or damage.

Indemnities by the Trust to Summit

- 27.2 The Trust shall indemnify Summit and/or, at the direction of Summit, its Approved Service Providers, the Contractor or its sub-contractors or Permitted Sub-Contractors on demand and hold it and them harmless against all damages, losses, liabilities, claims and expenses (including reasonable legal and other professional expenses), incurred by Summit or, as the case may be, its Approved Service Providers, Permitted Sub-Contractors or the Contractor or its sub-contractors:-
- 27.2.1 as a direct result of any claim for or in respect of the death or personal injury of any person employed or engaged by Summit, its Approved Service Providers, Permitted Sub-Contractors, the Contractor or its sub-contractors, any patients of or visitors to the Hospital or any other person if and to the extent that it is caused by the Trust or any person for whom the Trust is responsible in terms of Clause 8.2;
 - 27.2.2 in repairing or reinstating or replacing any assets (including the Equipment and, so far as applicable, the Hospital) which are the responsibility of, owned by or in the possession of Summit or its Approved Service Providers (or, in relation to the Approved Service Provider providing the Equipment Services, its sub-contractors) or Permitted Sub-Contractors or the Contractor or its sub-contractors or any person for whom Summit is responsible in terms of Clause 9.2 which have been lost or damaged (including damage caused in the exercise by the Trust of its rights under Provision 16.2

of the General Provisions) if and to the extent that such loss or damage has been caused by the Trust or any person for whom it is responsible in terms of Clause 8.2;

- 27.2.3 as a direct result of any Prosecution against Summit or any Approved Service Provider, the Contractor or its sub-contractors or Permitted Sub-Contractors or sub-contractors of the Approved Service Provider providing Equipment Services arising from a breach of any Applicable Law brought against such persons as a result of the breach or non-performance of the Trust's obligations under this Agreement or any other DBFO Contract;
- 27.2.4 in respect of any increase in insurance premiums or policy excesses as a result of claims made on account of any matter for which the Trust is responsible in terms of this Clause 27.2;
- 27.2.5 as a direct result of the death and/or personal injury and/or illness and/or pain and suffering suffered or alleged to have been suffered by any person or any other claim by any person as a result of the provision or failure to provide to that person any medical or clinical treatment at the Hospital or the Existing Sites or its environs or otherwise connected with services provided or intended to be provided by the Trust;
- 27.2.6 as a result of the breach or non-observance by the Trust, or any persons for whom it is responsible in terms of Clause 8.2, of any of its obligations under the DBFO Contracts;
- 27.2.7 as a direct result of Summit entering into and/or being a party to the Utilities Contracts save as provided in paragraph 2.1, 3.2 and 6.1 of Part 2 of the Schedule to the Services Agreement and save to the extent that any such liabilities arise as a result of the failure by Summit to pay sums properly due under the Utilities Contracts (save in circumstances where the Trust has failed to pay Summit the equivalent amount): and
- 27.2.8 as set out in:
- (a) Clauses 16.9.3 (Accrued Emoluments and Holiday Pay), 16.10.1, 16.10.2, 16.10.3 and 16.10.5 (Employee Indemnities), 16.11.2 (Market Testing) and 20.7 (Intellectual Property) of this Agreement; and
 - (b) Provision 19.4 (Remedy by the Trust) and paragraph 6.3 of Part A of the Schedule to the General Provisions (Unavailability);

provided always that: -

- (a) in the event that any loss or damage is incurred by any Approved Service Provider or Permitted Sub-Contractor or the Contractor or its sub-contractors which is recoverable under any indemnity in or referred to in this Clause 27.2, or any other indemnity by the Trust in favour of Summit in the DBFO Contracts then Summit shall either be entitled to recover that loss or damage from the Trust hereunder on behalf of and as agent for that Approved Service Provider or Permitted Sub-

Contractor or the Contractor or its sub-contractors or shall direct the Trust to, in which case the Trust shall, indemnify the relevant subcontractor directly in respect of that loss or damage but so that in any event the Trust will not be obliged to pay more than once for the same loss or damage;

- (b) Summit shall, to the extent that any such matter arises where the Trust is liable to indemnify Summit or any other party in terms of Clauses 27.2.1, 27.2.2 or 27.2.3, claim or shall use all reasonable endeavours to procure that such other party shall claim under the relevant insurance policy (or policies) effected and maintained by Summit in accordance with the requirements of Part 5A of the Schedule and use all reasonable endeavours to pursue such claims and, to the extent such recovery is made by Summit, the Trust's liability under this Clause 27.2 shall be reduced accordingly or, to the extent the Trust has already indemnified Summit or such person, Summit shall reimburse such amounts to the Trust not to exceed the amount paid by the Trust provided that the Trust shall be obliged to indemnify Summit, or at the direction of Summit such other person, for all reasonable costs incurred in connection with making such claims but without prejudice to Summit's rights under this Clause 27.2 to the extent that no recovery is made under such insurance (including to the extent of any policy excesses); and
- (c) the liability of the Trust to Summit and its sub-contractors under Clause 27.2.6 shall be limited to the additional costs reasonably and properly incurred by Summit, any Approved Service Provider or Permitted Sub-Contractor, the Contractor or its sub-contractors in the performance of Summit's obligations under the DBFO Contracts.

Claims

- 27.3.1 If any claim is made or action brought against either party in the case of Summit, including its subcontractors, (the "Indemnified") by any third party arising out of the matters indemnified under this Clause 27 or any other indemnity in any of the DBFO Contracts, the other party (the "Indemnifier") shall be promptly notified thereof and (save in the case of medical negligence claims which will be conducted solely by the Trust) may at its own expense conduct all negotiations for the settlement thereof and any litigation or other proceedings that may arise therefrom. The Indemnified shall not, unless and until the Indemnifier has failed within a reasonable period in the circumstances to take over the conduct of the negotiations, litigation or other proceedings, make any settlement or admission in respect of such claim or action. The Indemnifier shall be responsible for all costs associated with the conduct of such negotiations, litigation or other proceedings and shall further indemnify the Indemnified from and against all costs, liabilities and expenses which may be suffered or incurred by the Indemnified in respect thereof. The Indemnifier shall keep the Indemnified fully informed of the conduct of all negotiations, litigation or other proceedings and the Indemnified shall provide all reasonable assistance, at the cost of the Indemnifier (but excluding the costs of reasonable management time), to the Indemnifier for the purpose

of contesting such claim or action and in connection with such negotiations, litigation or other proceedings. The Trust agrees that Summit may further pass the conduct of any such claims or actions to its Approved Service Providers, Permitted Sub-Contractors or the Contractor in which case, subject as aforesaid, the Trust shall provide all reasonable assistance to such Approved Service Providers, Permitted Sub-Contractors or the Contractor in accordance with this Clause.

27.3.2 Any claim under any of the indemnities set out or referred to in this Clause 27 or elsewhere in the DBFO Contracts may be referred to the Dispute Resolution Procedure notwithstanding the on demand nature of the obligation.

27.4 Each party shall take all reasonable steps to mitigate any loss it may suffer as a result of the performance or failure of performance by the other party of any DBFO Contract or any other act or omission of the other party or its sub-contractors.

27.5 *Remedies available to the Trust*

27.5.1 Without prejudice to the provisions of Clauses 22 (other than Clause 22.4) (Events entitling early termination of the DBFO Contracts), 23.1 (Consequences of Early Termination) 24 (Compensation) and 26.7 and 26.8 (Force Majeure/Suspension Events) of this Agreement, Provision 17 (Termination) of the General Provisions, Clause 14 (Termination) of the Services Agreement and Clause 25 (Termination and Consequences) of the Equipment Agreement, the sole and exclusive financial remedies of the Trust in respect of any performance, non-performance, act, omission or breach by or on behalf of Summit of any provision of the DBFO Contracts and/or any duty arising at common law or under statute in respect of any act or omission in connection with the Project of Summit the Contractor or its sub-contractors, Approved Service Providers or Permitted Sub-Contractors shall be as follows:-

(a) the Trust's sole financial remedies are:-

- (i) under the terms of paragraph 6 of Part A of the Schedule to the General Provisions (Deductions for Non-Availability);
- (ii) under the terms of paragraph 7 of Part A of the Schedule to the General Provisions (Performance Measurement System);
- (iii) under the terms of paragraph 9 of Part A of the Schedule to the General Provisions (No Substantive Service);
- (iv) under the terms of paragraph 8 of Part A of the Schedule to the General Provisions (Equipment Services PMS);
- (v) under the terms of paragraph 5 of the Commissioning Procedure;

- (vi) as specified in Clause 6 (Installation of Equipment for Services Commencement Date and Remedies) of the Equipment Agreement;
 - (vii) as specified in paragraph 4 of Part 5A of the Schedule (Trust's right to insure);
 - (viii) as specified in Provision 16.2 (Remedy by the Trust) of the General Provisions;
 - (ix) as specified in Clauses 23 (Remedy by the Trust), 24 (Termination of contract with Approved Service Provider and consequences) and 25 (Termination of Equipment Agreement and consequences) of the Equipment Agreement;
 - (x) as specified in Provision 12.7.1 of the General Provisions;
 - (xi) as specified in paragraph 2.4 of Part 1 of the Schedule to the Services Agreement (Groups 1 to 4 Equipment);
 - (xii) as specified in paragraph 3.2 of Part 2 of the Schedule to the Services Agreement (Utilities);
 - (xiii) as specified in paragraphs 1.5 and 5.1 of Part 5 of the Schedule to the Development Agreement; and
 - (xiv) as specified in paragraphs 2.1 (n) (vii) of Section 2 and paragraph 1.13 of Section 3 of Part 2 of the Schedule;
- (b) the Trust shall be entitled to claim damages available at law for any direct losses (but excluding loss of profit or business, indirect or consequential losses) suffered by it as a result of breach by Summit of any of the following provisions only (subject always to the obligation to mitigate its losses as provided in Clause 27.4 and 16.1.4):-
- (i) Clause 16 (Employees) (excluding such damages as are recoverable by the Trust under its indemnities in that Clause 16) and failure to obtain Trust approval in terms of Clauses 17.2.1 and 17.5.2; and
 - (ii) Clause 17 (Transition Arrangements) (provided that Summit's aggregate liability shall not exceed the aggregate management fee paid to Summit under Clause 17.3.1(b));
- (c) except to the extent deducted from any payment pursuant to Section 1 of Part 10 of the Schedule, Summit shall be liable to the Trust, and so free and relieve the Trust, from and against all costs and losses properly, necessarily and reasonably incurred by the Trust under the Delay Cost Heads as a consequence of

Contractual Practical Completion not having occurred by the Mandatory Date (references in this Clause 27.5.1(c) to the Mandatory Date being construed as references to the Mandatory Date as extended in accordance with Clause 4.3 of the Development Agreement) in respect of the period from the Mandatory Date until Contractual Practical Completion or if earlier the Termination Date or the third anniversary of the Mandatory Date (the "Delay Costs"), limited as follows:-

- (i) the maximum aggregate liability of Summit to the Trust shall be £240,000 per annum;
- (ii) in respect of the first period of one month (or part thereof) from the Mandatory Date in which Contractual Practical Completion has not occurred the maximum aggregate liability of Summit to the Trust shall be £100,000, and for the remaining 11 months or parts thereof (until the first anniversary of the Mandatory Date) in which Contractual Practical Completion has not occurred, the maximum aggregate liability of Summit to the Trust shall be £12,727 per month; and
- (iii) thereafter, the maximum aggregate liability of Summit to the Trust shall be £20,000 for each month (or part thereof) in which Contractual Practical Completion has not occurred;

and for the purpose of this Clause 27.5.1(c) a period of one month means a period from the Mandatory Date until the day preceding the same date in the following calendar month and each subsequent period ending the day preceding the same date in subsequent calendar months. The Trust shall use reasonable endeavours to mitigate all such costs and losses incurred by it; and

- (d) the Trust shall, without prejudice to the foregoing, be entitled to the specific indemnities granted in its favour by Summit as specified in Clause 27.1 of this Agreement;

and any other financial remedies of the Trust including, but not limited to, any damages claim available at law whether in respect of direct, indirect or consequential loss or damage or otherwise are hereby expressly excluded whether such financial remedies arise during the continuance of or on termination, for any reason, of this Agreement or any other DBFO Contract. The parties acknowledge that careful and detailed consideration has been given to the remedies available to the parties under the DBFO Contracts in order to balance the rights, interests and expectations of the parties and to reflect a reasonable pre-estimate of the Trust's losses in relation to liquidate damages and deductions which can be made from the Unitary Payment and that the provisions of this Clause are reasonable in the circumstances.

- 27.5.2 Without prejudice to Clause 24, the Trust shall not be liable to Summit for any consequential loss suffered by Summit or its Approved Service Providers, Permitted Sub-Contractors or any person for whom Summit is responsible in terms of Clause 9.2

and arising out of any breach by the Trust of the provisions of the DBFO Contracts. Provided that, without limitation, the Trust acknowledges that costs and liabilities incurred in terms of any of the following contracts are direct losses for this purpose:

- (a) the contracts between Summit and its Approved Service Providers;
- (b) the Building Contract;
- (c) the Finance Facilities Agreements;
- (d) the Equity Agreement and any amendments thereto which do not materially alter the commercial bargain in terms of the Equity Agreement; and
- (e) any other contract or instrument entered into on reasonable commercial terms by Summit, the Subsidiary or the Holding Company, the Contractor or Approved Service Providers the terms of which are proper, necessary and reasonable for the purposes of the Project.

27.5.3 For the avoidance of doubt, the fact that Summit is entitled to a specific indemnity from the Trust in respect of any matter shall not, subject to Clause 27.5.2, prejudice Summit's rights to claim common law damages from the Trust in respect of that matter provided that the Trust shall not be obliged to pay more than once for the same loss or damage.

PART 12 MISCELLANEOUS

28 Dispute Resolution Procedure

- 28.1 The parties shall use their reasonable efforts to negotiate in good faith and settle amicably any Dispute during the Term.
- 28.2 Notwithstanding Clause 28.1 or any other provision of the DBFO Contracts any Dispute may be referred at any time by either party to the Dispute Resolution Procedure.

29 Notices

29.1 Unless otherwise specified in the DBFO Contracts any notice or other communication to be given by one party to another under, or in connection with the matters contemplated by this Agreement or any other DBFO Contract shall be communicated as follows:-

- (a) if to the Trust, to:-

Law Hospital National Health Service Trust
 Law Hospital
 Carluke
 Lanarkshire

Fax No: 01698 364133

Attention: Chief Executive

(b) if to Summit, to:-

Summit Healthcare (Law) Limited
The British Linen Bank Limited
PO Box 49
4 Melville Street
EDINBURGH
EH3 7NZ
Fax No: 0131 243 8391

Attention: Dr William Moyes, Director,

cc Mike Collard, McAlpine Healthcare Ltd, Eaton Court, Maylands
Avenue, Hemel Hempstead, Herts HP2 7TR
Fax No: 01442 230024

cc Edison Capital Europe Limited, Martin House, 5 Martin Lane,
London EC4R 0DP
Fax No: 0171 650 5040

Attention: Alan Jessop

(c) if to NHSME, to:-

The Scottish Office
Department of Health
NHS Management Executive
St Andrew's House
Edinburgh
EH1 3DG

Fax No: 0131 244 2083

Attention: Director of Finance

(d) if to the Secretary of State, to:-

The Secretary of State for Scotland
St Andrew's House
Edinburgh

EH1 2DG

Fax No: 0131 244 2083

or, in either case, to such other addresses and/or facsimile number in the United Kingdom and/or marked for such other attention as may from time to time be specified by the relevant party to the other, by notice given in accordance with this Clause 29, for the purposes of this Clause 29.1 and provided that, in the case of notices to Summit, the notice shall be valid if properly served on Summit and failure to copy the notice to the persons stated above (in paragraph (b)) will not invalidate the notice or lead to any default by or claim against the Trust.

29.2 Any notice or other communication to be given by one party to another under, or in connection with the matters contemplated by this Agreement or any other DBFO Contract shall, unless otherwise specified, be in writing and shall be given by letter delivered by hand or sent by first class pre-paid post or recorded delivery or registered post or by facsimile transmission and shall be deemed to have been received:-

- (a) in the case of delivery by hand prior to 4.30pm on a Business Day, when delivered and in any other case on the Business Day following the date of delivery; or
- (b) in the case of first class pre-paid post or recorded delivery or registered post, on the second Business Day following the day of posting; or
- (c) in the case of facsimile where the transmission occurs prior to 4.30pm on a Business Day, on acknowledgement by the addressee's facsimile receiving equipment and in any other case on the Business Day following the day of acknowledgement by the addressee's facsimile receiving equipment;

provided that an Unavailability Notice, a First Required Notice, and a No Substantive Service Notice may (in addition to the above provisions) be delivered by hand to the Help Desk at the Site and such notices shall be deemed to have been received when delivered.

30 Law and jurisdiction

The DBFO Contracts shall be governed by and construed in accordance with the law of Scotland and the parties irrevocably submit to the non-exclusive jurisdiction of the Court of Session, Scotland and waive any plea of forum non conveniens. The submission in this Clause 30 shall not preclude proceedings in any other court of competent jurisdiction, subject always as provided in Part 2 of the Schedule.

31 **Restrictive Trade Practices Act**

Any provision of the DBFO Contracts or any agreement or arrangement of which they form part which is subject to registration under the Restrictive Trade Practices Act 1976 shall not take effect until the day after particulars have been furnished to the Director General of Fair Trading pursuant to Section 24 of that Act.

32 **Corrupt Gifts.**

32.1 Summit shall not offer or give or agree to give to any person in the employ of the Trust any gift or consideration of any kind as inducement or reward for doing or for having done or forborne to do any act or showing favour or forbearing to show disfavour to any person in relation to this Agreement or the other DBFO Contracts.

32.2 Summit represents to the Trust that:

- (a) Summit has not offered or given or agreed to give any gift or consideration of any kind as an inducement or reward for doing or having done or forborne to do any act in relation to the obtaining or execution of this Agreement or the other DBFO Contracts; and
- (b) in connection with the obtaining or execution of this Agreement or the other DBFO Contracts no commission has been paid or agreed to be paid by Summit or to its knowledge on its behalf.

32.3 The Trust represents to Summit that:-

- (a) the Trust has not offered or given or agreed to give any person employed by or on behalf of Summit any gift or consideration of any kind as an inducement or reward for doing or for having done or forborne to do any act or showing favour or forbearing to show disfavour to any person in relation to this Agreement or the other DBFO Contracts; and
- (b) as at the Execution Date and so far as the Trust is aware having made all reasonable enquiries of members of its Board and the senior management personnel who have been involved in negotiations relating to the Project, the Trust has not solicited or accepted any gifts or consideration of any kind as an inducement or reward for doing or for having done or forborne to do any act or showing favour or forbearing to show disfavour to any person in relation to this Agreement or the other DBFO Contracts.

32.4 Nothing contained in Clauses 32.1 to 32.3 shall prevent an employer from paying any proper commission or bonus to its employees within their agreed terms of employment.

32.5 Subject as provided in Clauses 32.6 any material breach of Clause 32.1 or 32.2 or by Summit or the commission of any offence by Summit or any of its directors or

employees under the Prevention of Corruption Acts 1889 to 1916 in relation to this Agreement or the other DBFO Contracts shall entitle the Trust to act as follows:

- (a) if:
- (i) a conviction on indictment against Summit under the Prevention of Corruption Acts 1889 to 1916 arising from the act of any director or the chief executive (at the direction of or with the knowledge of another director or in the case of an act by the chief executive, a director) of Summit or from the acts of an agent of Summit instructed by any such two persons to commit such acts, has been obtained and such conviction is not the subject of appeal; and
 - (ii) the Secretary of State has after due and proper consideration of the circumstances formally asked the Trust in writing to exercise its rights under this Clause 32.5(a);
- if (and only if) the act, omission or default which occasioned or initiated such breach or offence occurred after Financial Close then the Trust shall be entitled to terminate this Agreement and the other DBFO Contracts in which case Clause 24.5 shall apply);
- (b) without prejudice to its other rights under this Clause 32 if a conviction on indictment against any director or the chief executive of Summit under the prevention of Corruption Acts 1889 to 1916 has been obtained and such conviction is not the subject of appeal, then the Trust shall be entitled to require Summit to dismiss such employee or director;
 - (c) without prejudice to its other rights under this Clause 32 if a conviction or indictment against any employee of Summit under the Prevention of Corruption Acts 1889 to 1916 has been obtained and such conviction is not the subject of appeal then the Trust shall be entitled to require Summit to dismiss such employee;
 - (d) without prejudice to the other rights under this Clause 32 the Trust shall be entitled to require Summit to dismiss any director or the chief executive or any employee who reports directly to the chief executive or a director of Summit who was aware of any act of corruption which gave rise to any conviction not the subject of an appeal referred to in this Clause 32.5 and who did not use his best endeavours to stop such act of corruption; and
 - (e) without prejudice to its other rights under this Clause 32 the Trust shall be entitled to require Summit to take such actions (including, if applicable, dismissal) as accords with its then current applicable disciplinary procedure against any employee of Summit who has been responsible for any act on the part of Summit which constitutes a breach of Clause 32.1 or 32.2.

- 32.6 In exercising its rights or remedies under this Clause 32 the Trust shall:
- (a) act in a reasonable and proportionate manner having regard to such matters as the gravity of, and the identity of the person performing the acts prohibited under this Clause 32 and any actions of Summit pursuant to Sub-Clause 32.5; and
 - (b) give all due consideration, where appropriate, to action other than termination of this Agreement and the other DBFO Contract under Clause 32.5 (a) including (but not limited to) requiring Summit to take the action set out in Clause 32.5(b).
- 32.7 Any Dispute relating to this Clause 32 may be referred by either party to the Dispute Resolution Procedure.
- 32.9.1 Summit shall put in place procedures requiring each of its directors and employees to certify on an annual basis that he or she has not offered to give or agreed to give to any person in the employ of the Trust any gift or consideration of any kind or an inducement or reward for doing or for having done or forborne to do any act or showing favour or forbearing to show disfavour to any person in relation to this Agreement or the other DBFO Contracts.
- 32.9.2 Summit shall permit the Trust to have access to procedures put in place by Summit pursuant to Clause 32.9.1 above following any conviction of a director or employee of an offence under the Prevention of Corruption Acts 1889 to 1916 in order that the Trust may review the same and Summit will increase the monitoring of the acts of the directors and employees.
- 33 General**
- 33.1 Summit's rights and obligations under this Agreement and the other DBFO Contracts may not be assigned, transferred, sub-contracted or otherwise disposed of in whole or in part without the Trust's prior written consent except:
- 33.1.1 to the extent expressly permitted in this Agreement or any other DBFO Contract;
 - 33.1.2 by way of a fixed and/or floating charge or charges given to any Financier, as security for any Financial Indebtedness under the Finance Facilities Agreements (but not otherwise); and
 - 33.1.3 pursuant to the Financier Direct Agreement and/or Financier Sub-Contract Direct Agreements.
- 33.2 The Trust's rights and obligations under this Agreement and the other DBFO Contracts may not be assigned, transferred, sub-contracted or otherwise disposed of (other than as permitted in the Sub-Lease) in whole or in part without Summit's prior written consent, which consent shall not be unreasonably withheld or delayed where the Trust proposes to assign or transfer all the Project Documents to which the Trust is a party to

the effect that the proposed assignee or transferee shall upon such assignation or transfer become a party to and be legally bound to perform all the obligations of the Trust under such Project Documents:

- (a) to the Secretary of State or to another National Health Service trust, a Health Authority, or a Special Health Board or the Common Services Agency for the Scottish Health Service all in accordance with the National Health Service (Residual Liabilities) Act 1996 if Summit and the Financiers are satisfied (acting reasonably) that:-
 - (i) the proposed assignee or transferee has the legal capacity, power and authorisation to become and will upon such assignation or transfer become a party to and be legally bound to perform all the obligations of the Trust under the Project Documents to which the Trust is party;
 - (ii) the proposed assignee or transferee has the financial standing (which financial standing shall take into account any evidence provided by the Secretary of State) and resources to perform the obligations of the Trust under the Project Documents to which the Trust is party, including the payment of any sums due to Summit thereunder for the remainder of the Term (including sums due following early termination thereof); and
 - (iii) the Secretary of State has issued a letter in the form of Part 12 of the Schedule in respect of the proposed assignee or transferee with any necessary amendments which do not change the Secretary of State's Policies as agreed with Summit (acting reasonably) unless the transferee is the Secretary of State; or
- (b) to the Secretary of State or any other entity forming part of the NHS (but excluding for the avoidance of doubt any privatised entity) but only if Summit and the Financiers are satisfied (in their absolute discretion) (i) that the proposed assignee or transferee has the legal capacity, power and authorisation to become and will upon such assignation or transfer become a party to, and be legally bound to perform all the obligations of the Trust under, the Project Documents to which the Trust is party; and (ii) as to the financial standing and resources of the proposed assignee or transferee.

33.3 No amendment to this Agreement or any other DBFO Contract shall have effect unless agreed in writing signed by the Chief Executive or Chairman of the Trust or other official or Director of the Trust authorised for that purpose and a director of Summit and in self proving terms. Both Summit and the Trust acknowledge that they do not enter into this Agreement or any other DBFO Contract in reliance on any representation, warranty or other undertaking by the other not expressly set out or referred to in this Agreement or any other DBFO Contract.

- 33.4 No delay by or omission of either party in exercising any right, power, privilege or remedy under this Agreement or any other DBFO Contract shall operate to impair that right, power, privilege or remedy or be construed as a waiver. Any single or partial exercise of any such right, power, privilege or remedy shall not preclude any other or further exercise or the exercise of any other right, power, privilege or remedy.
- 33.5 Nothing in any DBFO Contract shall be construed as establishing or implying a partnership or joint venture.
- 33.6 If any provision in this Agreement or any other DBFO Contract shall be or become illegal, invalid or unenforceable, the effectiveness of the remaining provisions of the DBFO Contracts shall not be prejudiced or impaired.
- 33.7 Each party shall at the request of the other execute any additional documents and do any other acts or things which may reasonably be required to give effect to this Agreement or any other DBFO Contract.
- 33.8 Each party shall be responsible for paying its own costs and expenses in relation to the preparation, execution and implementation of this Agreement and the other DBFO Contracts, except where expressly provided to the contrary and except for any award of costs or expenses by a competent court or under the Dispute Resolution Procedure.
- 33.9 Subject to Clauses 33.1 and 33.2, this Agreement and the other DBFO Contracts shall enure for the benefit of and be binding on the respective permitted successors and permitted assignees of each party, who shall procure that each such transferee executes a deed with the other party by which the transferee agrees to be bound by this Agreement and the other DBFO Contracts.
- 33.10 No announcement shall be made by either party in connection with the Project or the DBFO Contracts without the prior written consent of the other, not to be unreasonably withheld or delayed, save as required by law or the requirements of any recognised stock exchange on which the Bonds are traded at any time.
- 33.11 This Agreement and the other DBFO Contracts and the Project Documents to which the Trust is a party constitute the entire agreement between the parties in respect of the Project and supersede all prior proposals, representations, agreements and negotiations (whether written, oral or implied) relating thereto between the parties or their respective professional advisers.
- 33.12 Any sum payable under the DBFO Contracts not paid by the due date (or, where payable on demand, on that demand being made) shall, (save as specified in Clauses 24.6 and 24.7.2 and unless otherwise stated), bear interest at the Interest Rate calculated on a daily basis with quarterly rests from the due date until the date of actual payment, after as well as before judgement or decree; Provided that in any case where it is determined that the Trust is entitled to any sum which it would have been entitled to deduct from an instalment of the Unitary Payment had the same not been disputed,

interest will be payable on such sum at the Bond Rate calculated on a daily basis with quarterly rests from the date of such instalment until the due date for payment following upon such determination.

- 33.13.1 Subject to Clause 33.13.3 all reference to amounts in this Agreement and/or the DBFO Contracts are references to those amounts exclusive of any VAT which is or may be properly chargeable in relation to any supply for which they form the consideration.
- 33.13.2 (a) Each party shall pay to the other party an amount equal to any VAT properly chargeable in respect of any supply made to it under this Agreement and/or the DBFO Contracts against delivery of a valid VAT invoice in respect of that supply which, in all material respects, complies with the requirements of Part III of the Value Added Tax Regulations 1995.
- (b) If the amount of the Unitary Payment is adjusted pursuant to Part A of the Schedule to the General Provisions (or under any other provision of the DBFO Contracts) or if a sum of money shall become due for payment by or to the Trust, any monies payable shall have added to them a sum equal to any appropriate adjustment in respect of the VAT chargeable by reference to the final value of the supply of any goods and/or services under this Agreement.
- 33.13.3 (a) Where any cost, fee, expense or disbursement is to be indemnified or reimbursed to any party or to be taken into account in any computation, in each case, under this Agreement and/or the DBFO Contracts, the amount to be indemnified, reimbursed or deducted shall be taken to be the amount of that cost, fee, expense or disbursement net of any VAT chargeable thereon to the extent such VAT is recoverable as input tax by the recipient of any supply to which the cost, fee, expense or disbursement relates.
- (b) Where (i) any cost, fee, expense or disbursement referred to in Clause 33.13.3(a) above includes an amount in respect of VAT chargeable thereon and (ii) any party (acting reasonably) certifies that it is unable to recover such VAT as input tax from HM Customs & Excise (such certificate to be conclusive and binding, save in the case of manifest error) the cost, fee, expense or disbursement shall, to the extent so certified, be reimbursed, indemnified or taken into account in any computation (as the case may be) together with an amount equal to any VAT chargeable thereon.

33.14 Both the Trust and Summit shall, in carrying out their respective obligations under the DBFO Contracts, act at all times in good faith.

IN WITNESS WHEREOF these presents consisting of this and the preceding 90 pages are, together with the Schedule annexed hereto, executed as follows:-

Subscribed for and on behalf of
LAW HOSPITAL NATIONAL
HEALTH SERVICE TRUST

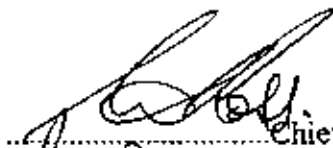

at Glasgow
on the 16th day of June 1998
by Ian Andrew Ross
Chief Executive
and James Gemmell Dunbar
Chairman

in the presence of :

Witness: 

Name: Alexander Alexander Orr


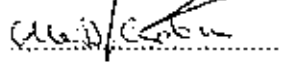
Address: 69-73 Queen Street
Edinburgh

 Chief Executive
 Chairman

Subscribed for and on behalf of
SUMMIT HEALTHCARE (LAW) LIMITED

at London
on the 16th day of June 1998
by Michael John Collier
Director, and David ...

Director/Secretary

 Director
 Director/Secretary

Long Church W. House
POBY CHRISTIE
56 SOUTH TRINITY ROAD
EDINBURGH

This is the Schedule referred to in the Project Agreement for the Design, Build, Finance and Operate Project for the New Law District General Hospital, Netherton between Law Hospital National Health Service Trust and Summit Healthcare (Law) Limited.

The Schedule - Part 1

DBFO Contracts (Clause 3)

1. This Agreement
2. The Development Agreement
3. The General Provisions
4. The Services Agreement
5. The Head Lease
6. The Sub-Lease
7. The Equipment Agreement
8. The Master Definitions Schedule

The Schedule - Part 2

Dispute Resolution (Clause 28)

SECTION 1: NEGOTIATION BETWEEN THE PARTIES

If a Dispute arises under, out of or in connection with this Agreement or the other DBFO Contracts, then, except where a Dispute is expressly stated in this Agreement or the other DBFO Contracts to be referable to an Expert, the parties may agree to refer the Dispute to an official of Summit (nominated from time to time for that purpose by Summit, failing which, the Chief Executive of Summit) and an official of the Trust (nominated from time to time for that purpose by the Trust, failing which, the Chief Executive of the Trust), who shall meet and use their reasonable endeavours to negotiate (in good faith) to resolve the Dispute, and whose unanimous decision shall be binding on the parties

SECTION 2: DISPUTE RESOLUTION PROCEDURE

1 Referral to Expert for Adjudication

1.1 If either party does not agree to use the procedure referred to in Section 1 above, or if the procedure referred to in Section 1 above does not resolve a Dispute arising under, out of or in connection with this Agreement or the other DBFO Contracts within ten (10) days of the date of referral, or if a Dispute is expressly stated in this Agreement or the other DBFO Contracts to be referable to an expert and/or Dispute Resolution Procedure, then either party may refer such Dispute to an adjudicator agreed between the parties or appointed in accordance with the procedure specified in paragraph 2 below (the "Expert") for adjudication in accordance with the procedure specified in paragraph 2 below.

2 Adjudication procedure

2.1 Any Dispute arising under this Agreement or the other DBFO Contracts which is referred to the Expert for adjudication shall be adjudicated in accordance with the ORSA Adjudication Rules - 1998 Version 1.2 (the "Adjudication Rules"), provided always that:-

- (a) all references to the Adjudicator in the Adjudication Rules shall be deemed and treated as a reference to the Expert as defined in Section 2 paragraph 1.1 above.
- (b) the following words shall be deleted from the Adjudication Rules:
 - (i) "'Contract" means the agreement which includes the agreement to adjudicate in accordance with these Rules" in lines 2 to 4 of Rule 2

- (ii) "of £100" in line 5 of Rule 7(i);
 - (iii) "an arbitrator appointed pursuant to the Contract and/or" in lines 3 and 4 of Rule 16;
 - (iv) "or arbitration" in line 3 of Rule 31;
 - (v) "or arbitration" in line 6 of Rule 31;
- (c) Rule 1(i) shall be deleted from the Adjudication Rules;
 - (d) Rule 1(ii) shall be deleted from the Adjudication Rules;
 - (e) the party giving written notice pursuant to Rule 3(i) shall, at the same time, also give a copy of the notice to the Adjudicator;
 - (f) notwithstanding Rules 14 and 33, no party shall, save in the case of bad faith on the part of the Adjudicator make any application whatsoever to a competent court in relation to the conduct of the Adjudication or the decision of the Adjudicator until after the Contractual Practical Completion Date or the alleged Contractual Practical Completion Date of the Works or termination or alleged termination of this Agreement or the other DBFO Contracts, unless and until the prior written consent of both Summit and the Trust has been obtained;
 - (g) notwithstanding Rules 14 and 33, no party shall make any application whatsoever to a competent court in relation to the conduct of the Adjudication or the decision of the Adjudicator after that date being the later of, ninety (90) days from the decision of the Adjudicator or ninety (90) days from the Contractual Practical Completion Date;
 - (h) notwithstanding Rules 14 and 33, no party shall make any application whatsoever to a competent court in relation to the conduct of the Adjudication or the decision of the Adjudicator unless it shall involve the pursuit of a claim or a counterclaim of a monetary value in excess of £150,000 (Indexed from Financial Close) or in the case of claims or counterclaims of a lesser monetary value arising out of the same facts and circumstances an aggregate monetary value in excess of £300,000 (Indexed from Financial Close), in each case calculated on a net present value basis using a discount rate of the Bond Rate;
 - (i) Rule 19(x) and Rule 19(xiii) shall be deleted from the Adjudication Rules;
 - (j) Rule 21(v) shall be deleted from the Adjudication Rules;
 - (k) Rule 24 shall be deleted from the Adjudication Rules;
 - (l) Rule 28 shall be deleted from the Adjudication Rules;

- (m) Rule 32 shall be deleted from the Adjudication Rules:
- (n) the following Rules shall be inserted in the Adjudication Rules;
 - (i) "1A. the following rules meet the requirements of adjudication procedure as set out in section 108 of the Housing Grants, Construction and Regeneration Act 1996; Part I of the Scheme for Construction Contracts (Scotland) Regulations 1998 shall thus not apply"
 - (ii) "2A. "Contract" means this Agreement and/or the other DBFO Contracts and shall include the agreement to adjudicate in accordance with these Rules."
 - (iii) "2B. "Chairman of ORSA" means the President for the time being of ORSA or such other officer as is authorised to deputise for him;"
 - (iv) "2C. "ORSA" means the Law Society of Scotland;"
 - (v) "19A. The Adjudicator shall only reach his decision after holding an oral hearing, and with or without having endeavoured to facilitate an agreement between the parties"
 - (vi) "19B. Upon becoming aware that the dispute is the same or arises out of substantially the same facts as a dispute which has previously been referred to adjudication under the Contract, the Adjudicator shall immediately resign."
 - (vii) "21A. The Adjudicator may require any Party to pay or make contribution to, the legal costs of another Party arising in the Adjudication, and/or the legal costs of any party to a dispute arising under, out of, or in connection with any other contract between any Party and that third party which relates to the Contract (the "Related Dispute") where the adjudication of the Related Dispute has been consolidated or joined with the Adjudication of the dispute between the Parties (the "Consolidated Adjudication"), to the extent that the legal costs of that third party arise in respect of the Related Dispute during the period in which the Related Dispute is consolidated or joined with the dispute between the Parties."
 - (viii) "24A. Save as aforesaid, the Parties shall be jointly responsible for the Adjudicator's fees and expenses including those of any specialist consultant appointed under 19(viii) (the "Costs of Adjudication"), the Adjudicator shall have the discretion to make directions to require any Party to pay or make contribution to the Costs of Adjudication and/or the fees and expenses of any adjudicator and specialist consultant appointed in relation to the Consolidated Adjudication. If no such directions are made, the Parties shall bear the Costs of Adjudication in equal shares, and

if any Party has paid more than such equal share, that Party shall be entitled to contribution from other Parties accordingly

- (ix) "28A. Every decision of the Adjudicator shall be implemented without delay. The parties shall be entitled to such reliefs and remedies as are set out in the decision, and shall be entitled to summary enforcement thereof, regardless of whether such decision is or is to be the subject of any challenge or review. No party shall be entitled to raise any right of set-off counterclaim or abatement in connection with any enforcement proceedings. The parties agree and bind themselves to each other to docket every decision with their consent and to registration of the Adjudicator's decision in the Books of Council and Session for execution."
- (x) "30A. All information, data or documentation disclosed or delivered by a Party to the Adjudicator in consequence of or in connection with his appointment hereunder shall be treated as confidential by the Adjudicator and each party to the Adjudication (save as otherwise agreed between the parties) and shall be returned to the owner on completion of the Adjudication proceedings."
- (xi) 32A. These Rules shall be governed by and construed in accordance with the law of Scotland and the parties irrevocably submit to the non-exclusive jurisdiction of the Courts of Session, Scotland and waive any plea of forum non conveniens".

SECTION 3: RELATED DISPUTES

1 Consolidation of Disputes

- 1.1 In the event of a Dispute arising under, out of or in connection with this Agreement or the other DBFO Contracts which in the opinion of Summit relates to a dispute or potential dispute ("**Related Dispute**") arising under, out of, or in connection with any other contract between Summit and a third party (all such contracts being referred to as the "**Related Contracts**") and where the Related Dispute has been referred to an adjudicator for determination under an adjudication procedure ("**the Related Procedure**") which meets the requirements set out in section 108 of the Housing Grants, Construction and Regeneration Act 1996 and is in all material respects equivalent to the adjudication procedure in this Part 2 of the Schedule, Summit may or may procure that the other party to the Related Dispute shall as soon as practicable, and in any case within fourteen (14) days of the referral of the Dispute to the Expert, give to the Expert conducting the adjudication under this Agreement or the other DBFO Contracts and also to the other parties to the Dispute and the Related Dispute the particulars set out in paragraph 1.2 below.
- 1.2 The particulars referred to in paragraph 1.1 above are:

- (a) a copy of the Related Contract;
- (b) a preliminary statement from Summit and/or, as the case may be, the other party to the Related Dispute setting out:-
 - (i) the basis and grounds for consolidation of the Related Dispute and the Dispute;
 - (ii) the cases of the parties to the Related Dispute;
 - (iii) any relief sought by the parties to the Related Dispute; and
 - (iv) a list of any documents served in relation to the Related Dispute.

Any such particulars sent by Summit to the Expert and the other parties to the Dispute shall be sent at the same time to the other party to the Related Dispute.

- 1.3 On receiving the particulars set out in paragraph 1.2 above prior to the Contractual Practical Completion Date and within fourteen (14) days of the referral of the Dispute to the Expert, the Expert shall, at the request of Summit, immediately order consolidation of the Dispute and the Related Dispute and shall have the authority and the power referred to in paragraph 1.10 below.
- 1.4 On receiving the particulars set out in paragraph 1.2 above on or after the Contractual Practical Completion Date and within fourteen (14) days of the referral of the Dispute to the Expert, the Expert shall immediately request that the parties to the Dispute and the other party to the Related Dispute attend a meeting with the Expert with a view to determining whether or not the Dispute and the Related Dispute should be consolidated.
- 1.5 Summit shall use its reasonable endeavours to procure that an authorised representative of the other party to the Related Dispute shall attend the meeting with the Expert referred to in paragraph 1.4 above. Summit and the Trust each agree to send an authorised representative or nominee to any meeting of this kind under this Agreement and any of the other DBFO Contracts or under a Related Contract, which they may be requested to attend. The parties hereby agree that the Trust shall be entitled to attend any meeting of the kind referred to in paragraph 1.4 above, in relation to a Related Contract as Summit's nominee.
- 1.6 At the meeting referred to in paragraph 1.4 above, the Trust's representative shall, as a preliminary matter, either:
 - (a) confirm to the Expert that the Trust accepts the proposed consolidation of the Related Dispute with the Dispute; or

- (b) inform the Expert that the Trust does not accept the proposed consolidation of the Related Dispute with the Dispute.
- 1.7 Where paragraph 1.6(a) above applies, the Expert shall immediately order consolidation of the Dispute and the Related Dispute and shall have the authority and the power referred to in paragraph 1.10 below
- 1.8 Where paragraph 1.6(b) above applies, the Expert shall issue within one (1) day of the meeting referred to in paragraph 1.4 above his written decision, which shall not include any reasons, as to whether or not there is demonstrably no basis or ground for consolidation of the Dispute and the Related Dispute. If the Expert determines that there is demonstrably no basis or ground for consolidation of the Dispute and the Related Dispute, the Dispute and the Related Dispute shall not be consolidated. If the Expert determines otherwise, or if the Expert has failed or is unable to reach a decision within one (1) day of the meeting referred to in paragraph 1.4 above, the Expert shall immediately order consolidation of the Dispute and the Related Dispute and shall have the authority and the power referred to in paragraph 1.10 below.
- 1.9 Notwithstanding anything to the contrary, a Related Dispute shall only be consolidated with a Dispute under this Agreement or the other DBFO Contracts if the Expert receives the particulars set out in paragraph 1.2 above within fourteen (14) days of the referral of the Dispute under this Agreement or the other DBFO Contracts to the Expert.
- 1.10 The Expert shall have the authority and the power to consolidate the Dispute and the Related Dispute and to direct that all procedural and/or evidential matters arising in both the Dispute and the Related Dispute are consolidated in whatever manner the Expert considers shall lead to the fair and expeditious resolution of both the Dispute and the Related Dispute and the parties (including the party to the Related Dispute) shall thereafter abide by and implement such consolidation and any such direction.
- 1.11 In the event that the Related Dispute is consolidated with the Dispute, the Expert shall reach a decision on the Dispute and the Related Dispute at the same time and in any event within twenty eight (28) days of the earlier of the referral of the Dispute or the referral of the Related Dispute, or such longer period as is agreed by the parties to the Dispute and the Related Dispute after the date that the Related Dispute has been consolidated with the Dispute. The Expert shall be entitled to extend the said period of twenty-eight (28) days by up to fourteen (14) days with the consent of the party by whom the relevant dispute was referred.
- 1.12 Without fettering or restricting the Expert's power and authority in any way, it is the intention of Summit and the Trust that in the event that the Related Dispute is consolidated with the Dispute, the Expert shall, insofar as is relevant, practicable and appropriate, come to the same conclusion as to the facts and apply the same reasoning and analysis in reaching a decision on both the Dispute and the Related Dispute.

- 1.13 In the event that an adjudicator under a Related Contract ("**the Related Expert**") orders that a Dispute under this Agreement or the other DBFO Contracts be consolidated with a Related Dispute with which he is dealing under the Related Contract, then:
- (a) notwithstanding anything in the Adjudication Rules or in Section 2 above, with effect from the time of such order, the Expert shall cease to have authority or jurisdiction to determine the Dispute which shall instead be determined by the Related Expert and the appointment of the Expert under this Agreement or the other DBFO Contracts shall cease; and
 - (b) such order shall be binding on Summit and the Trust and both of them shall acknowledge the appointment of the Related Expert as the adjudicator of the Dispute, with Summit procuring that the third party who is a party to the Related Contract shall with effect from the time of such order comply with the requirements of the Related Contract (including if applicable any requirement or direction of the Related Expert appointed under such Related Contract) as to the future conduct of the determination of the Dispute and the Related Dispute; and
 - (c) notwithstanding Rule 24A of the Adjudication Rules, Summit and the Trust shall be jointly responsible with the third party who is a party to the Related Contract for the Related Expert's fees and expenses including those of any specialist consultant appointed under the adjudication procedure in the Related Contract, in respect of the period in which the Dispute is consolidated with the Related Dispute pursuant to an order of the Related Expert ("**the Consolidated Adjudication Costs**"). Summit and the Trust agree that the Related Expert shall have the discretion to make directions to require Summit, the Trust and the third party who is a party to the Related Contract to pay or make contribution to the Consolidated Adjudication Costs in different proportions. If no such directions are made, Summit, the Trust and the third party who is a party to the Related Contract shall bear the Consolidated Adjudication Costs in equal shares, and if Summit, the Trust or the third party has paid more than such equal share, that party or third party shall be entitled to a contribution from the other party, parties or third party, as the case may be; and
 - (d) notwithstanding anything to the contrary a Dispute under this Agreement or the other DBFO Contracts shall only be consolidated with a Related Dispute, if the Related Expert receives particulars of the Dispute within fourteen (14) days of the referral of the Related Dispute to the Related Expert under the Related Contract.
- 1.14 Notwithstanding anything to the contrary, in the Adjudication Rules and paragraphs 1.1 to 1.12 above, Summit shall pay the Trust's reasonable costs arising from the consolidation of the Dispute and the Related Dispute in circumstances where Summit has requested the Expert to order consolidation of the Dispute and the Related Dispute and it is subsequently determined by the Expert that there was no basis or ground for Summit to request the Expert to order consolidation of the Related Dispute and the Dispute.

The Schedule - Part 3

Trust Objection Procedure

- 1 Where any provision of any DBFO Contract provides for submission of any document(s) or proposed course of action by Summit to the Trust with an opportunity for the Trust to object to/approve the document(s) or proposed course of action then the following provisions shall apply:-
 - (a) a submission shall be made to the Trust ("**the Submission**") by Summit with full details of the relevant document(s) or proposed course of action together with all supporting documents, information and data;
 - (b) subject to paragraph 3 below, within ten Business Days of receipt of the Submission, the Trust shall return the Submission to Summit endorsed "no comment" or "approved" or (subject to paragraph 4 below) "comments" as appropriate;
 - (c) if the Trust fails to return the Submission endorsed as provided in paragraph (b) within that ten day period (as extended, if applicable, under paragraph 3), the Submission shall be deemed to have been returned to Summit marked "no comment" and/or "approved";
 - (d) Summit may proceed to implement the document(s) or proposed course of action the subject of any Submission returned, or deemed to have been returned, marked "no comment" and/or "approved".
- 2 If the Trust returns the Submission marked "comments", Summit shall, in light of those comments made available in terms of paragraph 4 below:-
 - (a) amend the document(s) or proposed course of action in accordance with the Trust's comments in which case Summit may proceed to implement the document(s) or proposed course of action as so amended and shall copy the Submission with the amended document(s) or proposed course of action to the Trust within ten Business Days of receipt of the Trust's comments; or
 - (b) revise the document(s) or proposed course of action and resubmit them to the Trust in accordance with paragraph 1 in which case the provisions of paragraph 1 shall apply to the amended Submission as if it was an entirely new Submission; or
 - (c) if it disagrees with the Trust's comments or disputes the Trust's right to make those comments in terms of paragraph 4 below, Summit may refer the Dispute to the Dispute Resolution Procedure; and

- (d) in any case where a Dispute is referred to the Dispute Resolution Procedure, or in case of emergency, Summit may proceed to implement the document(s) or proposed course of action or temporary measures similar or relating thereto to the extent Summit considers reasonably necessary in order to perform its obligations under the DBFO Contracts during the period of such referral or emergency, as the case may be, but without prejudice to any resulting recommendations or the outcome of the Dispute Resolution Procedure, without thereby being in breach of any of the provisions of the DBFO Contracts.
- 3 If the Trust so requests, within five Business Days of the receipt of the Submission, Summit shall submit any further or other information, data or documents which may be reasonably required by the Trust for a full appreciation of the implications of a Submission and the period of ten Business Days referred to in paragraph 1(b) shall not commence until the Trust has received all such information, data or documents.
- 4 The expression "raise comments" in this paragraph 4 shall be construed to mean "raise comments or make objections" unless the contrary appears from the context. The Trust may raise comments in relation to any Submission on such grounds for objecting or raising comments as are expressly stated in the relevant provisions or clause or if no such grounds are expressly stated on such grounds as are reasonable in the context of the relevant provision or clause and the Trust shall provide to Summit at the same time as it returns the Submission marked "comments" details of its comments, the reasons for its comments, if appropriate any resulting amendments it wishes Summit to make to the document(s) or proposed course of action and all supporting documents. The Trust shall further provide to Summit such other data, information or documents as Summit requests to give Summit a full appreciation of those comments.
- 5 For the avoidance of doubt, a reference in any DBFO Contract to the Trust having no objection to a document(s) or proposed course of action means unless otherwise expressly stated in the relevant clause or provision that such document(s) or proposed course of action shall have been submitted to the Trust in accordance with paragraph 1 above and returned (or deemed returned) with an endorsement "no comment" and/or "approved" or returned with an endorsement "comments" in which case the document(s) or proposed course of action has or have been amended in accordance with those comments.

The Schedule - Part 4**Summit Constitution****Section 1****(Summit Share Ownership)****A On Execution Date:-**

Company	Shareholder	Issued Share Capital
Summit Holdings (Law) Limited	British Linen Investments Limited	£6,250
	PFI Investors Ltd	£6,250
Summit Healthcare (Law) Limited	Summit Holdings (Law) Ltd	£12,500
Summit Finance (Law) plc	Summit Healthcare (Law) Ltd	£49,999 (25% paid up)
	Nominee Shareholder for Summit Healthcare (Law) Ltd	£1 (25% paid up)

B. On Financial Close:-

Company	Shareholder	Issued Share Capital
Summit Holdings (Law) Ltd	British Linen Investments Ltd	£40,000
	PFI Investors Ltd	£40,000
	Edison Capital (Netherlands) Investments BV	£20,000
Summit Healthcare (Law) Limited	Summit Holdings (Law) Ltd	£100,000

Summit Finance
(Law) Plc

Summit Healthcare (Law)
Limited

£49,999

Nominee Shareholder for
Summit Healthcare (Law)
Limited

£1

Section 2**(Summit Board of Directors)**

On Execution Date and on Financial Close:-

Company	Directors
Summit Holdings (Law) Limited	Dr William Moyes Mike Collard Robert Woolf
Summit Healthcare (Law) Ltd	Dr William Moyes Mike Collard Robert Woolf
Summit Finance (Law) plc	Dr William Moyes Mike Collard Robert Woolf

The Schedule - Part 5

Insurances (Clauses 8.5 and 10.2)

Part A - Summit Insurance

1 Insured Risks

1.1 At its sole expense, Summit shall, either itself or, as appropriate, through the Contractor, any Approved Service Provider or any Permitted Sub-Contractor, effect and maintain the following insurances:

1.1.1 During the period commencing on the date on which Summit takes possession of the Site and ending on the Contractual Practical Completion Date:

- (a) the insurances specified in the Insurance Schedule referable to that period; and
- (b) such other insurances as are required by law to be taken out by Summit

1.1.2 During the period commencing on the Contractual Practical Completion Date and ending on the expiry of the Term:

- (a) the insurances specified in the Insurance Schedule referable to that period; and
- (b) if available, a separate Trust Business Interruption Insurance subject to the terms of Clause 10.2(b);
- (c) such other insurances as are required by law to be taken out by Summit.

2 Insurance terms

2.1 All insurances required to be effected under paragraph 1 of Part A of this Part 5 shall be effected with a reputable insurer(s), in such form as the Trust has approved (acting reasonably) under this paragraph 2. Accordingly, not less than 14 days (save in case of emergency when such notice as is practicable will be given) before any insurances are effected under paragraph 1 of Part A of this Part 5, Summit shall submit to the Trust for approval in accordance with the Trust Objection Procedure (such approval not to be unreasonably withheld or delayed):

2.1.1 the identity of the insurer(s); and

2.1.2 a summary of the principal terms and conditions of the proposed insurances or any revision to those insurances, (but shall not, for the avoidance of doubt, be required to submit the policy documents unless the Trust so requests and they are available at that time).

- 2.2 Each policy or contract of insurance shall contain:
- 2.2.1 provision for the Trust to be co-assured as set out in the Insurance Schedule.
 - 2.2.2 in respect of insurances to be taken out by Summit in terms of Part A of this Part 5 where the Trust is not co-assured, a waiver of subrogation as against the Trust provided that (a) Summit is able to obtain such a waiver of subrogation against the Trust (using all reasonable endeavours to do so) and (b) if the cost of obtaining such a waiver of subrogation in any year significantly increases the Trust, unless it elects not to proceed with the waiver or any part thereof within 10 Business Days of being notified by Summit of such increased costs, pays to Summit such increased cost; and
 - 2.2.3 provision for 30 days prior written notice of cancellation or non-renewal to be given to the Trust by the insurers; and
 - 2.2.4 a multiple insured and assignation clause as required by the Collateral Deed.
- 3 **Further Summit obligations**
- 3.1 Summit shall as soon as reasonably practicable provide to the Trust a copy of the insurance policy(ies), a copy of the receipt for the premium for the current period of insurance and all notices and certificates of renewal or other evidence reasonably satisfactory to the Trust of renewal of the appropriate insurance policies.
 - 3.2 Summit shall and shall procure that those persons for whom Summit is responsible under Clause 8.2 shall:
 - (a) duly perform its obligations under and comply with the terms of all policies or other contracts of insurance; and
 - (b) in particular, but without limitation, insofar as reasonably practicable and subject as required by a Change shall not knowingly do or omit to do anything by which any such policy or contract may be or become void or voidable at the instance of any insurer(s) or which would entitle any insurer(s) to refuse to pay any claim.
 - 3.3 Save as otherwise expressly provided, the subsistence of any insurances under this Part 5A shall not relieve Summit from any of its obligations or liabilities to the Trust under the DBFO Contracts, save to the extent that an actual recovery is made by the Trust under any such insurance in satisfaction of the relevant obligation.
 - 3.4 The Trust undertakes that so far as reasonably practicable it will not knowingly do or omit to do anything which renders the insurance effected (of which it is aware) void or voidable or which would by itself entitle the insurers to refuse to pay a claim.

4 Trust's right to insure

If Summit is in default of its obligations under this Part 5A, and the Trust has given Summit written notice of such default and Summit has failed to remedy such default within 10 Business Days of receipt of such notice, the Trust may take out the relevant insurance and the costs of that insurance shall be paid to the Trust by Summit within 5 Business Days of written demand.

5 Application of proceeds

- 5.1 The proceeds of any claim under any insurance required to be taken out under paragraph 1 above shall be applied in satisfaction of the claim, loss or damage as the case may be, subject to the Financiers Direct Agreement.
- 5.2 Summit shall procure the endorsement, at all times, on all policies or other contracts of insurance required to be taken out under paragraph 1 above of a loss payee clause giving effect to paragraph 5.1 of this Part 5A.

6 Claims

In exchange for payment of the Compensation Amount, pursuant to Clause 24, Summit shall, subject to the requirements of the Financiers Direct Agreement, make available to the Trust all documents, reports and information required by the Trust to enable the Trust to pursue and be the sole party to obtain proceeds from any claims in respect of physical loss or damage to property for which the Trust is an insured party or is or could benefit from the Insured Risks (but without prejudice to any monies which have been received into the Insurance Proceeds Account) and shall, if required by the Trust (but subject to the Financiers Direct Agreement) assign or transfer to the Trust all its rights in relation to such Insured Risks (but without prejudice to any monies which have been received into the Insurance Proceeds Account).

Part B - Trust Insurance

At its sole expense, the Trust shall effect and maintain such insurances as are required by Statutory Requirements to be taken out by the Trust and shall exhibit evidence of such insurances to Summit. If the Trust takes out property damage and/or public liability insurance, the Trust shall use all reasonable endeavours to procure that each such policy or contract of insurance shall contain a waiver of subrogation against Summit, the Approved Service Providers and Permitted Sub-Contractors provided that any significant costs in respect thereof will be paid by Summit within 5 Business Days of written demand, unless it elects not to proceed with the waiver or any part thereof within 10 Business Days of being notified by the Trust of such increased costs.

The Schedule - Part 6

Information

Section 1

Information to be supplied by the Trust to Summit

Information to be provided	Frequency and scheduled delivery date
Forecast levels of annual activity agreed with Purchasers	March (for following financial year)
Actual activity statistics (all patient unit data)	Monthly (within 5 Business Days of the start of each month in respect of the previous month)
Annual Reports and Accounts	As published.
Management Accounts (summary format)	Monthly
Standing Financial Instructions	On appointment and amendments issued thereafter
Standing Orders	On appointment and amendments issued thereafter
Purchasers Quality Standards and Trust's Performance	Monthly
Patient Surveys	As completed
Patient Charter Standards (waiting times)	Monthly performance position
Staff Briefing Letter/Newsletter	Monthly
Summary of Litigation against the Trust	As appropriate
Trust Implementation Plan	Annually
Information provided/available to general public	As issued

Section 2**Information to be supplied by Summit to the Trust**

Information to be provided	Frequency and scheduled delivery date
Annual Reports and Accounts of Summit	As published
Management Accounts (summary format) of Summit	Monthly
Terms and conditions of Personnel engaged in the Services	On appointment and updated as reasonably required.

The Schedule - Part 7

Commissioning Procedure

- 1 During the Commissioning Period Summit shall carry out the Summit Commissioning Activities shall permit the Trust to carry out the Trust Commissioning Activities and shall comply with the provisions of this Part 7 so far as applicable to it.
- 2 During the Commissioning Period the Trust shall carry out the Trust Commissioning Activities and shall comply with the provisions of this Part 7 so far as applicable to it.
- 3 Each of Summit and the Trust shall co-operate with each other in scheduling their respective commissioning activities pursuant to this Part 7, to ensure that they can be carried out as efficiently and effectively as reasonably practicable and to provide appropriate security and identification arrangements. Without prejudice to the foregoing generality, each of Summit and the Trust shall agree prior to the commencement of the Commissioning Period a programme for carrying out such commissioning activities to cause as little disruption as reasonably practicable to either party and such programme will include a list of times and periods at which the Trust require to obtain access to the Hospital ("**Scheduled Periods**") a detailed programme to enable Summit to complete a deep clean as part of the Summit Commissioning Activities of the Hospital prior to Services Commencement Date and if such programme is not agreed either party may refer any matter which is not agreed for determination by the Dispute Resolution Procedure. Each of Summit and the Trust shall carry out their respective commissioning activities in accordance with such programme as amended by either party from time to time with the consent of the other, such consent not to be unreasonably withheld or delayed.
- 4 The Commissioning Period (being initially the period of ninety days after the Contractual Practical Completion Date) will be extended by such period or periods as Summit and the Trust agree or as is determined pursuant to the Dispute Resolution Procedure as being fair and reasonable to enable the Trust to carry out any of the Trust Commissioning Activities which it has been unable to carry out because Summit, otherwise than to the extent caused by a breach by the Trust of its obligations under this Part 7, has not performed the Trust Assistance Services or has otherwise been in breach of its obligations under this Part 7 other than in paragraph 6 on the basis that the Trust shall use all reasonable endeavours to minimise any such period or periods including by re-scheduling, where appropriate, the Trust Commissioning Activities and/or the programme referred to in paragraph 3 of this Part 7.
- 5 If the Commissioning Period is extended pursuant to paragraph 4 of this Part 7 then in respect of such extended period or periods (which will be deemed to commence on Services Commencement Date):

- 5.1 the Trust shall be entitled to deduct from the Availability Element of the Unitary Payment £20,000 for each Business Day or part thereof comprised therein;
- 5.2 no Capacity Element of the Unitary Payment will be payable by the Trust;
- 5.3 no Services will be provided while the Commissioning Period continues and the Commissioning Procedure will continue to apply; and
- 5.4 the Trust shall pay to Summit the Unavoidable Operating Costs under deduction (subject to the proviso aftermentioned) of any amounts ("**the Equipment Deduction Amounts**") comprised within such costs which Summit is due to pay to its Approved Service Provider in relation to the Equipment Services.

Provided that the maximum aggregate deduction from the Availability Element pursuant to paragraph 5.1 when combined with any deductions from the Availability Element which the Trust has made or has become entitled to make under Clause 6.7 of the Equipment Agreement and the Equipment Deduction Amounts referred to in paragraph 5.4 shall be limited to and not exceed £500,000 ("**the Limit**") and if and to the extent that the Limit shall have been exceeded the Trust shall thereafter cease to deduct the Equipment Deduction Amounts from Summit's Unavoidable Operating Costs pursuant to paragraph 5.4.

- 6 Summit will give reasonable consideration to any request by the Trust for it to provide other services (not being Trust Assistance Services) at the cost of the Trust to assist the Trust in carrying out the Trust Commissioning Activities on a basis and at a cost to be agreed at the time and so that a failure to agree will not be subject to reference to the Dispute Resolution Procedure.

- 7 In this Part 7:

"**Trust Commissioning Activities**" means those commissioning activities not involving the treatment of patients, but including the storage of equipment and other items within the Hospital reasonably required to be carried out by or on behalf of the Trust during the Commissioning Period at the Hospital to ensure that on and after the Services Commencement Date the Trust will be able properly to perform its clinical activities at the Hospital;

"**Summit Commissioning Services**" means (i) those activities reasonably required at the Hospital during the Commissioning Period to ensure that on or after the Services Commencement Date Summit will be able properly to perform its obligations under the DBFO Contracts which relate to the Services Term; and (ii) the Trust Assistance Services;

"**Trust Assistance Services**" means to the extent which is reasonably necessary to enable the Trust to perform the Trust Commissioning Activities :-

- (i) the provision of access (including without limitation access and use of the Trust's offices within the Hospital) at all reasonable times (it being acknowledged that the Trust may require to carry out its Trust Commissioning Activities outwith Normal Working Hours) to the Hospital (and each part thereof) to the Trust, its staff and contractors and any other persons authorised by the Trust on a non-exclusive basis during the Scheduled Periods or at any other time on reasonable notice given by the Trust to Summit;
- (ii) the provisions of light, heating, water, cleaning, sewerage and power and an appropriate number of internal telephone lines an operational IT system within the Hospital (but only to the extent to which the same will be the responsibility of Summit after the Services Commencement Date) temporary ISDN and DPNSS links for data and voice telecommunications between the Site and the Existing Site at Law on the basis that the line rental is to be paid by Summit up until the Services Commencement Date, and thereafter by the Trust;
- (iii) the provision of appropriate security for the Hospital to provide adequate protection to the persons at the Site and property within the Hospital having regard to the fact that the Hospital is not operational; and
- (iv) the provision of a safe environment within the Hospital which does not breach any Statutory Requirement applicable to the occupation of the Hospital for carrying out the Trust Commissioning Activities.

The Schedule - Part 8**Part 8A - Employee Assumptions (Clause 16.3.1)**

The Employee Assumptions are separately annexed.

Part 8B - Wages Assumptions (Clause 16.3.1)

The Wages Assumptions are separately annexed.

The Schedule - Part 9

The Redundancy Procedure (Clause 16.3.4(a))

The Redundancy Policy is separately annexed

The Schedule - Part 10

Compensation upon early termination (Clause 24)

Section 1

Summit Default - Pre-Practical Completion

- 1 If the DBFO Contracts are terminated by the Trust pursuant to Clause 22 prior to Contractual Practical Completion then the Compensation Amount will be calculated in accordance with the following formula:

$$CA = (a - b) \times 90\% - c$$

where:

- 2 CA means the Compensation Amount;
- 3 a means the sum of £130,000,000 plus, if any, the aggregate of the Additional Capital and the Holding Costs in respect of any Eligible Changes to which paragraph 7.2 of Section 2 of Part D of the Schedule to the General Provisions has applied prior to the Termination Date.
- 4 b means the sum which it would cost the Trust to complete the Works including for the purpose any Eligible Change to which 7.2 of Section 2 of Part D of the Schedule to the General Provisions has applied prior to the Termination Date within a reasonable timescale so as to comply with Summit's obligations to the Trust pursuant to the Development Agreement and achieve Contractual Practical Completion within that timescale (irrespective of whether or not the Trust does actually complete the Hospital to the original specification) and such sum will be determined in the absence of agreement, by reference to the Disputes Resolution Procedure and in calculating such sum the following assumptions shall apply, but on no account shall any adjustments to take into account the provision of paragraphs (b), (c), (d) and (f) below exceed 30% of the sum it would cost the Trust to complete the Works in accordance with the foregoing and paragraph (a) below:-
- (a) that the Works (to the extent not previously built) will be procured through a competitive tender by the Trust under one contract with a contractor at arms length on the open market within a reasonable timescale to a standard and on conditions equivalent to Summit's outstanding obligations under the Development Agreement (except as expressly provided in this Section 1);
 - (b) that such contractor will be paid by way of monthly staged payments and will accept liability for the design and construction of the Works (to the extent not previously built) in a manner consistent with the Contractor's obligations under

the Building Contract but excluding liability for latent defects at that time in the Works to the extent previously built;

- (c) that such contractor will be required to provide bonds or guarantees for the same percentage of the cost of the outstanding works equivalent to those provided by the Contractor (whether to Summit or third parties) and will be liable to pay liquidated and ascertained damages to the Trust for a reasonable period of delay following the due date for completion (as extended on the normal basis for Excusable Delays) calculated on the basis of a reasonable pre estimate at that time of the Trust's losses for late completion, excluding any financing costs other than a notional amount calculated as interest at a rate agreed or determined as the lowest rate which H M Government could reasonably be expected to borrow funds over that period on the Compensation Amount during that period of delay;
- (d) that the Trust's costs will include the costs (including reasonable administrative costs and fees) of retendering the Works (to the extent not previously built) to such third party;
- (e) that all amounts which the Trust actually receives from any insurances effected by Summit will be applied against the Trust's costs; and
- (f) that the Trust's costs will not include any financing costs, other than a notional amount calculated as rolled-up interest at a rate agreed or determined as the lowest rate which H M Government could reasonably be expected to borrow funds over that period on the Compensation Amount and the cost (to the extent incurred) of the outstanding works (excluding, for the avoidance of doubt, the effect of this paragraph (f) on the Compensation Amount) from the date of payment up until the date of completion of the outstanding works; and

5 c means the Delay Costs due and payable under clause 27.5.1 (as limited thereunder) to the extent to which payment has not been received by the Trust.

Section 2

Summit Default - Post Practical Completion

- 1 If the DBFO Contracts are terminated by the Trust pursuant to Clause 22 on or after Contractual Practical Completion then the Compensation Amount will be calculated in accordance with the following formula:

$$CA = a - b$$

where:

- 2 CA means the Compensation Amount;
- 3 a means 90% of the Contract NPV; and
- 4 b means the Pre Termination Adjustments;
- 5 "Contract NPV" means the Net Contract Amount discounted back on a semi annual basis for net present value purposes to the Termination Date on the basis of a discount rate equal to the Project Rate of Return;
- 6 "Net Contract Amount" means Future Revenues minus Future Costs;
- 7 "Future Revenues" means the amount which the Trust would have to pay by way of the Unitary Payment and other payments (if any) due under the DBFO Contracts to Summit plus the amount of any sums which Summit would be entitled to receive in terms of paragraph 9(f) below for the period commencing on the Termination Date until the Expiry of the Term (assuming no early termination) on the basis of the Payment Assumptions and as projected (using the Financial Model) at the Termination Date;
- 8 "Future Costs" means the cost (excluding for the avoidance of doubt any liability of Summit under the Finance Facilities Agreements) which would be incurred by the Trust in itself providing or procuring that the obligations of Summit under the DBFO Contracts are satisfied (including for the avoidance of doubt reinstating any damage caused by an Insured Risk prior to the Termination Date) taking into account an obligation on the Trust to mitigate such cost but on the basis that an equivalent outcome for the Trust would be achieved as if Summit had complied in full with all of the obligations of Summit under the DBFO Contracts (irrespective of whether the Trust actually will incur those costs or provides the same or different Services) on the basis of the Cost Assumptions and all as projected (using the Financial Model) at the Termination Date;
- 9 "Payment Assumptions" means as at the Termination Date:
- (a) the DBFO Contracts have not terminated and will not do so until the then Expiry of the Term (assuming no early termination);

- (b) Summit will comply with all its future obligations under the DBFO Contracts such that there are no future deductions under the Deduction Provisions;
- (c) there will be no Eligible Changes throughout the remainder of the Term;
- (d) the levels of activity as regards Inpatient Nights, Day case discharges and Outpatient Attendances, Breakfasts, Lunches and Suppers and tonnes of clinical and non-clinical waste will be those which are projected in the Financial Model at the Termination Date;
- (e) Summit will continue to provide all of the Services and (if applicable) Equipment Services which it is providing at the Termination Date until the next scheduled Market Testing Date whereupon Summit will cease to provide all Services other than the Estates Maintenance Services and the Equipment Services but notwithstanding this will continue to receive from the Trust the Management Portion (included within both the Capacity Element and Usage Element relative to all of the Services which it is providing at the Termination Date) in addition to, for the avoidance of doubt, the Availability Element of the Unitary Payment and the remainder of the Capacity Element in respect of the Estates Maintenance Services and Equipment Services;
- (f) Summit will continue to receive the benefit of any rental income it is receiving (for its own account and in respect of which it is not to account to the Trust) from tenants then occupying space in the Hospital which has been the subject of a Partial Handback Change or income from members of the public pursuant to the Catering Service or any other third party revenues to which Summit is properly entitled in accordance with the DBFO Contracts at such time, in each case Indexed from the Termination Date on the basis of paragraph (g) below; and
- (g) the Index will increase annually at 3%;

10 "Cost Assumptions" means, as at the Termination Date:

- (a) the actual costs (including reasonable administrative costs and fees and the retendering costs) which the Trust incurs, or would incur, in obtaining through a competitive tender from a new provider (the "New Provider") at arms length on the open market the Services and the Equipment Services and on the basis that the Index will increase annually at 3%;
- (b) the New Provider will assume in tendering that there are no latent defects in the Hospital at the Termination Date;
- (c) the new contract is on equivalent terms and conditions as the DBFO Contracts (except as to the amount of the Unitary Payment due by the Trust) and on the basis that the five year period referred to in Capital Legislative Change runs from Financial Close in terms of the DBFO Contracts (and not the new contract);

- (d) the New Provider will cease to incur the cost of providing all Services, other than Estates Maintenance Services and Equipment Services, upon the next scheduled market testing date;
- (e) all amounts which the Trust actually receives from any insurance(s) effected by Summit will be applied against the Future Costs; and
- (f) taxation is incurred as projected by the Financial Model at the Termination Date notwithstanding that the Trust may itself not be subject to taxation

11 **"Pre Termination Adjustments"** means the sum (whether a positive or negative number) being (1) the aggregate of (a) all deductions which fall to be made under the Deduction Provisions in respect of the period prior to the Termination Date (but which have not been so deducted and do not relate to a period in respect of which the Trust is no longer entitled to make deductions) and for this purpose the procedures (including any necessary reference to Dispute Resolution Procedure) for calculating and ascertaining such deductions will be carried out and completed albeit after the Termination Date and (b) all pre-payments of the Unitary Payment which have been made by the Trust and which relate to the period after the Termination Date under deduction of (2) all outstanding payments or accruals of the Unitary Payment due to or accruing to Summit and relating to the period prior to the Termination Date.

Section 3

Force Majeure

- 1 If the DBFO Contracts are terminated pursuant to Clause 26.7 or 26.8 then the
2 Compensation Amount will be calculated according to the following formula provided
3 that the Compensation Amount will in no event be less than the Senior Lender Liabilities
4 and the Approved Equity Amount:

$$CA = a + b + (c - d)$$

where:

- 2 CA means the Compensation Amount;
- 3 a means the Senior Lender Liabilities;
- 4 b means the Approved Equity Amount;
- 5 c means the Breakage Costs;
- 6 d means the Pre-Termination Adjustments;
- 7 "Senior Lender Liabilities" means the Total Outstanding Amount less the amount of
any Available Assets;
- 8 "Total Outstanding Amount" means at the Termination Date the sum certified (save
in the case of manifest or mathematical error) in writing by the Lead Financier as being
the aggregate net amount of the Financial Indebtedness of the Subsidiary and/or Summit
to the Financial Providers (or any of them) under or pursuant to the terms of the Finance
Facilities Agreements (including any costs associated with the early repayment of the
Financial Indebtedness by reason of the termination of this Agreement in accordance
with its terms) on the basis that the principal advanced thereunder has been no greater
than the principal amount referred to in the definition of Approved Financiers Amount,
the interest rate payable except in case of default has been no greater than the Approved
Rate and the default rate of interest, any broken funding costs, banking fees, payments,
costs and expenses are no greater than under the Initial Finance Facilities Agreements
or otherwise on reasonable market terms; and
- 9 "Available Assets" means the aggregate on the Termination Date (1) of all credit
balances on the Debt Service Reserve Account, the Maintenance Reserve Account, and
the Escrow Account (under deduction of any amounts, as at the Termination Date, owing
to or accrued to creditors properly, reasonably and necessarily incurred by Summit in
connection with the Project but which cannot be discharged by Summit from the
Operating Account, and excluding therefrom the Equity and sums due to any Finance

Providers) and amounts standing to the credit of each of the said accounts (subject as aforesaid) shall include Authorised Investments (as defined in the Accounts Agreement) which form part of any of such accounts (as determined pursuant to the Accounts Agreement); and (2) the credit balance on the Insurance Proceeds Account under deduction of any amounts in respect of which Summit is to account to any third party (other than a Financial Provider or provider of Equity).

Section 4

Trust Default

1 If the DBFO Contracts are terminated by Summit pursuant to Clause 22 then the Compensation Amount will be calculated in accordance with the following formula (provided that the Compensation Amount payable pursuant to this Section 4 shall not in any event be less than the Senior Lenders Liabilities plus the Breakage Costs):

$$CA = a + b + c - d$$

where:

2 CA means the Compensation Amount;

3 a means the Total Outstanding Amount;

4 b means the Contract NPV;

5 c means the Breakage Costs;

6 d means the Pre Termination Adjustment;

7 "Contract NPV" means the sum (whether a positive or a negative number) equal to the Future Return, discounted back on a semi annual basis for net present value purposes to the Termination Date at 15% per annum;

8 "Future Return" means the amounts which Summit would pay (net of any taxes) to the Holding Company as follows:-

- (i) dividends on ordinary share capital;
- (ii) coupon paid on Coupon Bearing Investment;
- (iii) capital repayment of Coupon Bearing Investment;

all from the Termination Date until the Expiry of the Term (assuming no early termination) projected (using the Financial Model) at the Termination Date;

9 "Total Outstanding Amount" and "Senior Lenders Liabilities" have the meanings given to them in Section 3 of this Part 10 of the Schedule;

10 "Pre Termination Adjustments" has the meaning given to it in Section 2 of this Part 10 of the Schedule; and

- 11 **"Coupon Bearing Investment"** means the Summit Coupon Bearing Investment Sum as defined in the Collateral Deed.

Section 5

Corrupt Gifts

- 1 If the DBFO Contracts are terminated pursuant to Clause 32.5 then the Compensation Amount will be calculated according to the following formula (provided that the Compensation Amount payable pursuant to this Section 5 shall not in any event be less than the Senior Lender Liabilities):

$$CA = a + b - c$$

where:

- 2 CA means the Compensation Amount;
- 3 a means the Senior Lender Liabilities;
- 4 b means the Unaffected Breakage Costs;
- c means Pre Termination Adjustments
- 5 "Senior Lender Liabilities" has the meaning given to it in Section 3
- 6 "Unaffected Breakage Costs" means Breakage Costs under deduction of any sum payable by Summit to any person or persons who or the director of whom has been jailed or convicted in the action which has resulted in the conviction of Summit or a director referred to in Clause 32.5 (a); and
- 7 "Pre Termination Adjustments" has the meaning given to it in Section 2 of this Part 10 of the Schedule.

The Schedule - Part 11

Liaison Procedures

Liaison Procedures

- 1 These Liaison Procedures set out the basis upon which the provision of the Services by Summit, its Approved Service Providers and Permitted Sub-Contractors will be scheduled, consistent with Summit's obligations under the DBFO Contracts and in particular the terms of :
 - 1.1 Provision 3.4 of the General Provisions regarding the formulation of operational policies; and
 - 1.2 the Output Specification.
- 2.1 In relation to each Service three months prior to Service Commencement Date, Summit will submit for approval by the Trust (a) the proposed Operational Procedures and Schedules for that Service which will require to be consistent with paragraph 1 above and the Trust acknowledges that Summit will require to be given sufficient access to enable it to perform its obligations under the DBFO Contracts (b) the PMS Checklists and (c) Summit's proposals with appropriate supporting documentation in relation to any matters which require to be agreed in accordance with the Output Specification or (as part of the Operational Procedures and Schedules) the Services Monitoring Procedures provided that if and to the extent that Summit or its Approved Service Provider cannot perform any obligation which should have been performed in respect of the Services under the DBFO Contracts due to the Approved Service Provider in respect of Equipment Services remedying any failure in respect of the Equipment then such obligation will be suspended until access can be obtained to the relevant area when the relevant obligation will be carried out and the failure to perform the obligation during such period of suspension will not give rise to a service failure under the Deduction Provisions.
- 2.2 Within 15 Business Days after receipt of the documents referred to in paragraph 2.1, the Trust will provide comments thereon to Summit and either party may at any time refer any matters in dispute for determination to the Dispute Resolution Procedure.
- 3 Summit will carry out or procure that the Services are carried out in accordance with the Operational Procedures and Schedules as amended from time to time in accordance with paragraph 4 and in accordance with paragraph 5 and 6.
- 4 Either party may at any time and from time to time propose amendments to the Operational Procedures and Schedules for any Service in a manner which is consistent with paragraph 1 above and on the basis that the Trust acknowledges that Summit will require to be given sufficient access to enable it to perform its obligations under the DBFO Contracts by written notice to the other party who will act reasonably in

considering such amendments and either party may at any time refer any matter in dispute for determination to the Dispute Resolution Procedure.

- 5 Notwithstanding the foregoing provisions the Trust will be entitled to refuse access to any area of the Hospital where:
 - 5.1 such area is required to enable the Trust to provide treatment which is urgently required such refusal of access to be only for so long as and to the extent that it is required so to treat patients;
 - 5.2 there is an outbreak of infection in such area;
 - 5.3 there is a major accident or incident which necessitates such area being used as a temporary mortuary;
 - 5.4 any patients of the Trust in such area may pose a serious threat to the physical well being of Personnel;
 - 5.5 a patient is the subject of media attention, and patient confidentiality may be breached if the member of Personnel in respect of whom the Trust proposed to refuse access is permitted access to such area;
 - 5.6 any member of Personnel is related to a patient of the Trust who is located in such area, in which case such member of Personnel may be refused access.
- 6 On each occasion on which the Trust refuse access under paragraph 5 above, Summit will for so long as access is refused be relieved of all obligations relating to the provision of the Services in relation to the area to which access has been so refused and Summit will use all reasonable endeavours to reprogramme its activities to minimise the impact on the Services during and after the period while the access is refused by the Trust.

The Schedule - Part 12

Secretary of State's Policies Letter

To:

Summit Healthcare (Law) Limited
Summit Finance (Law) plc
AMBAC Insurance UK Limited
Royal Exchange Trustee Nominees Limited; and
Royal Exchange Trust Company Limited

21 May 1998

I am aware that Summit Healthcare (Law) Ltd is the nominated preferred bidder for the new Law District General Hospital PFI project and that shortly it will enter into contract documentation relating to the same. I am also aware that financing for the project is up to £140m which is to be raised by the issue of secured bonds due 2028 which will be guaranteed by AMBAC Insurance UK Limited, together with a further standby loan facility of up to £6m. The financing will be non-recourse to the shareholders of the project company.

In recognition of the foregoing, I thought it would be helpful if I wrote to clarify the statutory responsibilities of the Secretary of State for Scotland in relation to the NHS in Scotland in general and to NHS Trusts in particular.

The enclosed paper sets out those statutory responsibilities and also some of the financial obligations of NHS Trusts; the strict financial controls under which NHS Trusts operate; and the range of remedial actions which are open to the Secretary of State to ensure Trusts continue to meet their financial objectives.

In particular, you should note that all PFI projects valued at £4 million and above are scrutinised and approved on my behalf by the NHS Management Executive and that PFI schemes for IT valued at £1 million and above and non-IT schemes valued at £10 million and above are also scrutinised by and must receive Treasury approval. Approval will not be given for any project unless it is economically sound; demonstrates value for money against the public sector comparator by delivering, throughout its contractual life, ongoing efficiency savings in line with Government objectives; its financial terms, including ongoing costs and termination arrangements, are acceptable; it is both affordable and consistent with the financial objectives for the NHS Trust; there are clearly identified benefits for patients; and it is, therefore, in the

interests of the health service to enter into and perform the project contracts. Accordingly, the full business case for the new Law Hospital PFI project has been approved.

My Department's legal advice has always been that NHS Trusts have the power to enter into PFI contracts under National Health Service (Scotland) Act 1978. The matter has been put beyond doubt by the National Health Service (Private Finance) Act 1997. This Act explicitly states that an NHS Trust has power to enter into an "externally financed development agreement". A contract will constitute an externally financed development agreement when it has been certified as such by the Secretary of State. The Secretary of State may so certify if:

- a. in his opinion the purpose or main purpose of the agreement is the provision of facilities in connection with the discharge by the Trust of any of its functions; and
- b. a person proposes to make a loan, or provide any form of finance for, another party in connection with the agreement.

The Act further explicitly states that an NHS Trust may enter into an agreement with a person who falls within b. above in relation to the externally financed development agreement.

The issue of a certificate in respect of a PFI contract therefore removes any doubt concerning a Trust's *vires* to enter into that contract. However, the Act expressly declares that the absence of a certificate is not to be taken as invalidating a PFI contract; and, as I have mentioned above, our advice is that Trusts have always had powers to contract in this way.

The NHS Management Executive, acting on behalf of the Secretary of State, seeks to ensure that NHS Trusts are always able to fulfil their responsibilities. The Secretary of State has a range of powers available to him in this regard, including increased financial support for Health Boards or Trusts, management changes, mergers and dissolution. It is important to make clear that the intention of the distinction between Health Boards as strategic planners and Trusts as the deliverers of health care within the NHS is not to affect adversely the position of third party creditors and that all valid third party claims have been, and will continue in the future to be, paid. Accordingly, although the Secretary of State has wide duties of consultation in respect of Trust mergers and dissolutions and cannot fetter his discretion as to how he exercises his powers, if any Trust were unable to meet its obligations (including its liabilities to its PFI contractors or their financiers), the Secretary of State would intervene in a timely manner to ensure that either the Trust itself, or any body to which its liabilities are transferred (including for this purpose, the Secretary of State for Scotland) in accordance with the relevant legislation, is in a position to meet its liabilities on time and in full.

The proposition that the Secretary of State would stand by and do nothing in circumstances where an NHS Trust was unable to meet its obligations is untenable given the statutory responsibilities of the Secretary of State for Scotland.

Finally, the principles of public accountability and of public law require the Secretary of State always to act reasonably in the exercise of his statutory powers.

Pursuant to Clause 49 of the Scotland Bill (when enacted), the functions of the Secretary of State under the National Health Service (Scotland) Act 1978, The National Health Service (Residual Liabilities) Act 1996 and The National Health Service (Private Finance) Act 1997 will transfer to the First Minister on the date appointed under the Act for the coming into force of that section and the taking up of office by the First Minister. My Department's legal advice is that the clarification and guidance contained in this letter as regards the statutory responsibilities of the Secretary of State for Scotland in relation to the NHS in Scotland in general and to NHS Trusts in particular would be equally applicable to the First Minister and that such First Minister would have equivalent duties.

While nothing in this letter or the enclosed paper should be construed by you as a guarantee by the Secretary of State of the obligations or liabilities of any NHS body, nor as a restriction on the way in which the Secretary of State would exercise his discretionary powers in any particular case, I hope you will find them a helpful guide to the statutory responsibilities of the Secretary of State and the powers available to him.

THE DUTIES AND POWERS OF THE SECRETARY OF STATE FOR SCOTLAND AND THE OBLIGATIONS OF NHS TRUSTS

Statutory Responsibilities of the Secretary of State

- 1 The principal statutory responsibilities of the Secretary of State are set out in the National Health Service (Scotland) Act ("the 1978 Act"). That Act:
 - places a fundamental duty on the Secretary of State to continue "to promote in Scotland a comprehensive and integrated health service ... and for that purpose to provide or secure the effective provision of services in accordance with the provisions of [that] Act." (Section 1(1))
 - places a duty on the Secretary of State to provide throughout Scotland to such extent as he considers necessary to meet all reasonable requirements, various types of accommodation and services. (Section 36)
- 2 Many of the Secretary of State's functions under the 1978 Act have been delegated to Health Boards. Since the coming into force of the National Health Service and Community Care Act 1990 ("the 1990 Act") Health Boards have been able to discharge their function of providing services by making arrangements with NHS Trusts under NHS Contracts (Section 17A of the 1978 Act).
- 3 The functions and duties retained by the Secretary of State are carried out on his behalf and in his name by officials in the Management Executive for the NHS in Scotland (The "ME"), which for legal purposes, is equivalent to the Secretary of State.

Statutory Obligations of NHS Trusts

- 4 The statutory obligations of NHS Trusts are set out in the 1978 Act and secondary legislation made under that Act. In particular:
 - "An NHS Trust shall carry out effectively, efficiently and economically the functions for the time being conferred on it by an order or under section 12A(1) and by the provisions of this Schedule ... " (Paragraph 6(1) of Schedule 7A to the 1978 Act)
 - "Every NHS Trust shall ensure that its revenue is not less than sufficient, taking one financial year with another, to meet outgoings properly chargeable to revenue account." (Section 12F(1) of the 1978 Act)
- 5 The NHS Trusts Guidance for Finance Managers sets out the financial responsibilities of NHS Trusts, their boards and senior officers and requires the adoption of and

adherence to adequate Standing Orders and Standing Financial Instructions. A model set of Standing Financial Instructions is provided in the Manual.

- 6 NHS Trusts are, by statute, obliged to comply with directions given by the Secretary of State in the preparation of their annual report and annual accounts. The NHS Trusts Manual for Accounts, issued to all Trusts' Directors of Finance, gives guidance in meeting this obligation. The annual report and accounts conform to a standard comparable to that required of private sector companies under the Companies Acts and to Generally Accepted Accountancy Practice (GAAP). NHS Trusts must publish their annual report and their Audited Annual Accounts must be presented to public meetings.
- 7 In common with other similar institutions, Trusts are expected to have robust internal audit arrangements and an audit committee chaired by a non-executive director. The Accounts Commission have overall responsibility for the audit of the accounts of each Trust. The Commission audits many accounts itself and directs the work of appointed external auditors for other Trusts. The National Audit Office is responsible for auditing the consolidated accounts of NHS Trusts and laying them before Parliament.

Accountability of NHS Trusts

- 8 NHS Trusts are directly accountable to the Secretary of State, who delegates to the Chief Executive of the ME responsibility for the supervision of Trust performance. The Chief Executive of the ME is accountable both to the Secretary of State and, in his accounting officer role, directly to Parliament. A similar dual accountability applies to the Chief Executive of Trusts, who are responsible both to their boards and, via the Chief Executive of the ME, to Parliament.
- 9 All Chief Executives of NHS Trusts are answerable to Parliament through the Chief Executive of the ME for the propriety and regularity of public finances in the NHS; for the keeping of proper accounts; for prudent and economical administration; for the avoidance of waste and extravagance; and for the efficient and effective use of all the resources in their charge.

Financial monitoring and scrutiny

- 10 In order to fulfil his statutory obligations, the Secretary of State needs to monitor and manage the NHS and is given wide powers for this purpose.
- 11 The financial performance of Trusts is monitored on a systematic basis by the ME acting on behalf of the Secretary of State. In order to allow this monitoring to take place, NHS Trusts must prepare a Financial Plan which must be submitted to the ME for review. Checks ensure that Trusts are planning to meet their financial duties; and the financial position of the Trust and its forward plans are scrutinised in the context of its overall service objectives. This ascertains whether the Trust is capable of

delivering its objectives within the resources available to it, and require a careful scrutiny of past as well as projected performance. As part of this monitoring, Trusts must report on their position as regards their statutory financial duties.

- 12 The ME monitors the in-year performance of individual Trusts against their Annual Plans. Trust Directors of Finance are responsible for providing the ME with timely and accurate monitoring reports on a monthly basis, in a form which the ME determines. The ME carries out an analysis of the Trust's reported financial position to ascertain whether the Trust is meeting its financial duties.
- 13 The NHS Trusts that enter into PFI schemes are subject to the guidance contained in the ME's Scottish Capital Investment Manual, which sets out the structured and disciplined approach to capital investment in the NHS. A three stage approach is followed, culminating in the presentation of a full business case. A business case must demonstrate convincingly that the project is economically sound (through an option appraisal); is financially viable (affordable to the Trust and purchasers); and will be well managed. In addition, a business case for any investment should show that the proposal has clearly identified benefits for patients and is supported by purchasers. All PFI schemes are assessed by the ME, with schemes above £4 million being very closely scrutinised. PFI schemes for IT valued at £1 million and above and non-IT schemes valued at £10 million and above are also scrutinised by and must receive approval from HM Treasury.

Control of NHS Trusts in financial difficulties

- 14 If a Trust does run into financial problems, it is expected to draw up a robust recovery plan for approval and monitoring by the ME. This plan must also be externally validated. The ME reviews the Trust's progress formally, and further measures may be taken if adequate progress is not made.
- 15 NHS Trusts may, where appropriate, negotiate contracts for PFI projects which give financiers rights to certain information - such as that provided to the ME in monitoring returns. Such information would be provided to financiers by the Trust concerned; and would enable financiers to make representations to the ME or the Secretary of State.

The NHS (Residual Liabilities) Act 1996

- 16 The Secretary of State has a statutory power to dissolve an NHS Trust if he considers it appropriate in the interests of the health service to do so or on the application of the NHS Trust concerned. (Paragraph 25 of Schedule 7A of the 1978 Act). In that event of an NHS Trust ceasing to exist, the NHS (Residual Liabilities) Act 1996 provides that liabilities have to be transferred to another NHS Trust; a Health Board; a Special Health Board; or the Secretary of State.

The Schedule - Part 13**Part A****Termination Notice to Scottish Office**

This Notice is issued pursuant to the Project Agreement between Law Hospital NHS Trust and Summit Healthcare (Law) Limited and gives written notice of the intention of Summit Healthcare (Law) Limited to terminate the Agreement and the other DBFO Contracts for reason of Trust default as noted below. Failure to respond to this Notice may result in a claim for compensation being made under the Agreement.

To: [Secretary of State/NHSME/Trust]

[Date]

Dear Sir(s)

**Law Hospital PFI
Termination Notice**

This Notice is issued pursuant to Clause 22.10(a) of the Project Agreement dated [] 1998 between Law Hospital NHS Trust and Summit Healthcare (Law) Limited.

Summit hereby gives notice that the Trust is in default of its payment obligations under the DBFO Contracts. [*Insert details of default specifying the amount outstanding, date of invoice, due date for payment and annex copies of relevant invoices*].

If such outstanding sums, as specified above, are not paid to Summit by [*insert last date for payment*], Summit will be entitled to exercise its rights to terminate the DBFO Contracts and may claim payment of the Compensation Amount pursuant to Clause 24.3 of the Project Agreement.

Words and expressions used in this Notice shall have the same meaning ascribed to them in the Project Agreement, unless the context otherwise requires.

Yours faithfully

The Schedule - Part 13**Part B****Termination Notice to Scottish Office**

This Notice is issued pursuant to the Project Agreement between Law Hospital NHS Trust and Summit Healthcare (Law) Limited and gives written notice of the intention of Summit Healthcare (Law) Limited to terminate the Agreement and the other DBFO Contracts for reason of Trust default as noted below. Failure to respond to this Notice may result in a claim for compensation being made under the Agreement.

To: *{Secretary of State/NHSME/Trust}*

[Date]

Dear Sir(s)

**Law Hospital PFI
Termination Notice**

This Notice is issued pursuant to Clause 22.10(b) (c) of the Project Agreement dated [] 1998 between Law Hospital NHS Trust and Summit Healthcare (Law) Limited.

Summit hereby gives notice of an event of default under Clause 22.9.3/22.9.4 of the Project Agreement as follows:-

{insert details of relevant event}

If Summit has not received evidence reasonably satisfactory to it, as specified in Clause 22.10.3(b) 22.10.3(c)(i)/22.10.3(c)(ii) by *{insert date}*, Summit will be entitled to exercise its rights to terminate the DBFO Contracts and may claim payment of the Compensation Amount pursuant to Clause 24.3 of the Project Agreement.

Words and expressions used in this Notice shall have the same meaning ascribed to them in the Project Agreement, unless the context otherwise requires.

Yours faithfully

The Schedule - Part 13**Part C****Termination Notice to Scottish Office**

This Notice is issued pursuant to the Project Agreement between Law Hospital NHS Trust and Summit Healthcare (Law) Limited and gives written notice of the intention of Summit Healthcare (Law) Limited to terminate the Agreement and the other DBFO Contracts for reason of Trust default, as noted below. Failure to respond to this Notice may result in a claim for compensation being made under the Agreement.

To: [Secretary of State/NHSME/Trust]

[Date]

Dear Sir(s)

**Law Hospital PFI
Termination Notice**

This Notice is issued pursuant to Clause 22.9.2 of the Project Agreement dated { } 1998 between Law Hospital NHS Trust and Summit Healthcare (Law) Limited.

Summit hereby gives notice that the Trust has committed a material and substantial breach of its obligations under the DBFO Contracts. *[Insert details of default specifying in reasonable detail the nature of the default and whether it is remediable]*

If the Trust has not *[remedied the default/compensated Summit [delete as applicable]* by *[Insert date of expiry of reasonable period]*, Summit will be entitled to exercise its rights to terminate the DBFO Contracts and may claim payment of the Compensation Amount pursuant to Clause 24.3 of the Project Agreement.

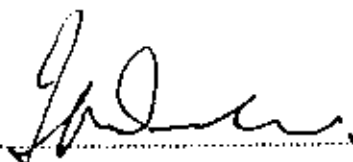

Words and expressions used in this Notice shall have the same meaning ascribed to them in the Project Agreement unless the context otherwise requires.


Yours faithfully

ATTACHMENTS TO THE PROJECT AGREEMENT

The following are the attachments which are referred to in and form part of the Project Agreement dated 16 June 1998 between Law Hospital National Health Service Trust ("the Trust") and Summit Healthcare (Law) Limited ("Summit"):-

1. The Schedule Part 8A : Employee Assumptions
2. The Schedule Part 8B : Wages Assumptions
3. The Schedule Part 9 : The Redundancy Procedure


.....

.....
For the Trust *Andrew Alexander Orr*
68-73 Queen Street
Edinburgh
Dated 16 June 1998


.....
Alan D. Cohen
For Summit Healthcare
.....
For Summit *Rory Christie* Witness
RORY CHRISTIE
56 SOUTH TRINITY ROAD
EDINBURGH
Dated 16 June 1998

LAW HOSPITAL NHS TRUST - EMPLOYEE ASSUMPTIONS

TITLE OF POST	JOB PURPOSE	EMPLOYEES		HOURS WORK	
		NUMBER Whole Time Equivalent	FULL/PART TIME	MON- FRI	SAT- SUN
Part a					
* Contract Mgr.	Control and manage all aspects the contract, services and customer liaison on behalf of Serco	1.0	F	39.00	
* Personnel Officer	To manage a wide range of staff and payroll related issues.	1.0	F	39.00	
* Finance Manager	Responsible for the preparation and collation of all financial information.	1.0	F	39.00	
* Hotel Services Manager	Overall management and control of the linen, domestic, portering, transport, waste and security services.	1.0	F	39.00	
* Risk manager	Responsible for all Health and Safety issues and training. Coordinate and carry out required audit inspection programs.	1.0	F	39.00	
* PMS Administrator	Correlate, verify, agree and report the PMS information. Monitor the overall system and liaise with the Trust where modifications are required.	1.0	F	39.00	
* Operations & Maintenance Manager	Responsible for planning, organising and managing the maintenance of the hospital. (Will provide AP support)	1.0	F	37.50	
Part b					
Finance Assistant	Carry out all invoicing, production of monthly P & L, sale/purchase ledger etc.	1.0	F	39.00	
Administrator	Carry out all clerical duties within a general office including maintaining data bases.	3.5 WTE 1.0 3.0	F F TBC	39.00 37.50 10.00	
Building & Grounds Maintenance Manager.	Responsible for the management and direction of the Building and Grounds Maintenance Department. (Will provide AP support)	1.0	F	37.50	
Joiner	Carry out a wide range of repair and maintenance tasks.	2.0	F	37.50	
Gardener	The day to day up keep of the Hard and Soft Landscaping.	1.0	F	37.50	
Mech. Mgr.	Responsible for the management and direction of the Mechanical Engineering Department. (Will provide AP support)	1.0	F	37.50	

TITLE OF POST	JOB PURPOSE	NUMBER Whole Time Equivalent	FULL/PART TIME	MON- FRI	SAT- SUN
Elec. Mgr.	Responsible for the management and direction of the Electrical Engineering Department. (Will provide AP support)	1.0	F	37.50	
Mechanical Supervisor (On shift)	Direct and control staff under his/her supervision while working with staff on a wide range of maintenance tasks including AP duties.	1.0	F	37.50	
Electrical Supervisor (On shift)	Direct and control staff under his/her supervision while working with staff on a wide range of maintenance tasks including AP duties.	1.0	F	37.50	
Tradesmen, skilled	Direct and control staff under their supervision while working with staff on a wide range of maintenance task.	6.0	F	37.50	
Tradesmen, semi- skilled	Carry out a wide range of maintenance tasks.	4.0	F	37.50	
Technician (on shift)	Multi-skilled carrying out a wide range of maintenance tasks.	6.0	F	37.50	
Porter Coordinator	Directs and controls the movement of porters to meet the needs of the hospital	4.0	F	37.50	
Porter	To carry out general portering duties both programmed and reactive to meet the needs of the hospital <i>and patients.</i>	5.6 WTE 6.0 1.00 3.0 morn 3.0 after 4.0 day 4.0 even 3.0 night	F F F TBC TBC F F F	27.85 39.00 40.00 29.00 29.00 29.86 29.86 29.40	11.16 16.00 10.00 9.14 9.14 9.60
Accident & Emergency Porter	To carry out general portering duties both programmed and reactive to meet the needs of the hospital in general but in A & E specifically.	4.2 WTE	F	28.56	5.72
Security Officer	Patrol and monitor site in attempt to provide a safe and secure environment	5.0	TBC	24.00 day 12.00 night	14.40
Catering Manager	Manage and control all aspects of the catering service to ensure staff, patient and visitor satisfaction.	1.0	F	40.0	
Head Chef	Supervise, <i>control and monitor</i> food production. Set and control the food quality standards.	1.0	F	40.0	
Production Manager	Direct and control the issue of food from the kitchen.	1.0	F	40.0	
Chef	Supervise and control the preparation and cooking processes.	3.0	F	40.0	16.00

TITLE OF POST	JOB PURPOSE	NUMBER Whole Time Equivalent	FULL/PART TIME	MON- FRI	SAT- SUN
Cooks	Preparation and cooking of meals.	2.0	F	32.33	6.66
		3.0	F	40.00	16.00
Belt /Wash-up	Presenting plated meals and loading food trolleys. Clean returned food trolleys and operate the dish washers.	3.0	TBC	35.00	14.00
		2.0	TBC	20.00	8.00
		6.0	TBC	35.00	14.00
Store Keeper	Carry out day to day ordering, control incoming goods and stock control with the head chef.	1.0	F	39.0	
Restaurant Supervisor	Control, <i>direct and monitor</i> the staff within the restaurant and cafe whilst working with them to maintain the smooth and efficient operation of the facilities.	2.0	F	30.0	12.00
General Assistant	Operate within the kitchen, restaurant and cafe providing support to all aspects of the service including till and cash reconciliation to ensure the efficient operation of the facility.	4.0	TBC	17.50	7.00
		1.0	TBC	40.00	16.00
		3.0	TBC	25.00	10.00
		4.0	TBC	30.00	12.00
		4.0	TBC	32.00	
		2.0	TBC	26.25	10.50
Linen Supervisor	Control and monitor the issue and receipt of laundry to the wards and subcontractor.	1.0	F	37.50	
Laundry Operator	Separate and issue laundry, operate within the patient laundry.	1.0	F	37.50	
		2.0	F	21.50	16.00
Switchboard Supervisor	Control, <i>direct and monitor</i> staff on the switchboard and help desk. Maintain the telecom and pager data base.	1.0	F	37.50	
Switchboard Operator	Operate the telecom switchboard, bleeps system etc. and coordinate communications during alarms. Provide cover to help desk.	7.1 WTE	TBC	30.89 day 3.07 night	8.12
Help Desk Operator	Coordinate communications and notifications for service requests. Provide cover to switchboard.	1.9 WTE	TBC	27.85	11.16
Driver	Provide a delivery service to and from the hospital and local GPs.	2.0	F	32.0	3.00
Domestic Team Leader	Direct, <i>control and monitor</i> staff within their zone and carry out general cleaning duties.	8.0	F	27.19	10.88
Cleaner (Shift Team Leader)	Direct, control and monitor staff on the shift and carry out general cleaning duties.	2.0	TBC	25.0	10.00
General Domestic (Residences)	Maintain occupant and inventory registers, carry out general domestic duties including cleaning and preparation of continental breakfast.	1.0	TBC	15.00	6.00
		2.5 WTE	TBC	37.50	

TITLE OF POST	JOB PURPOSE	NUMBER Whole Time Equivalent	FULL/PART TIME	MON- FRI	SAT- SUN
Cleaner	Carry out general domestic duties including periodic duties and preparation and serving of beverages.	38.2 WTE 12.0 3.0 night	TBC TBC TBC	30.57 20.00 20.00	8.40 6.00 12.00

Note no automatic transfer to the posts indicated thus *. Serco is however willing to consider Trust employees.

Employee Cost Assumptions

Serco's employee cost assumptions within its financial model are based on information provided by the Trust for the pay year 1996/97. The following rates of pay are based at 1/4/96 and include a 2% wage award for the year commencing 1/4/96.

1. Ancillary Staff

This group includes all Hotel Services Staff and Gardeners, excluding Managers and Cooks. All are on Whitley Council Terms and Conditions.

- 1.1 All these staff are on ancillary Scale B points 5-9, which equates to an hourly rate of £3.46 - £3.60. Serco has assumed the mid point of £3.53 for all these staff.
- 1.2 Domestic and Catering staff are paid a bonus of 5% - 10%. Staff are guaranteed 5% and can receive up to a further 5%. Serco has assumed that all staff receive the guaranteed bonus of 5% on the basic wage above.
- 1.3 Gardening staff are paid a bonus of 20% which is calculated on a frozen hourly rate of : Senior Gardener - £2.44, others - £2.32.
- 1.4 Supervisors are on Ancillary Grade 1, which equates to an hourly rate of £3.822. Supervisors receive the same bonus as their staff as 1.2 above, ie Serco has assumed the 5% guaranteed bonus of hourly rate applicable to Supervisors.
- 1.5 Senior Gardener is on Ancillary Grade IV which equates to an hourly rate £4.481. The bonus is calculated as 1.3 above.
- 1.6 Other terms and conditions for Ancillary staff:

	On Entry	5 Years	10 Years
Annual Leave	20 Days	23 Days	25 Days
Public Holidays	10 Days	10 Days	10 Days
Standard Week	39 Hrs	39 Hrs	39 Hrs

Premium Rates

Saturday	Rate x 1.5
Sunday	Rate x 2.0
Public Holiday	Rate x 2.0
Mon-Fri overtime	Rate x 1.5
Night Duty	Rate x 1.33
Rotating Shifts	+ 10 spine points
Alternating Shifts	+ 6 spine points

Serco has assumed an average annual leave entitlement of 23 days.

Serco has assumed the above Premium Rates except that rotating and alternating shifts have been calculated on the basis of a 10% premium on the basic hourly rate.

2. Administrative and Clerical Staff

This group includes Cooks and the Deputy Hotel Services Manager and Assistant. All are on Whitley Council Terms and Conditions.

2.1 Cooks are on A & C Grade 3 £9261 - £10753 per annum which equates to an hourly rate of £4.80 - £5.57. Serco has assumed the mid point rate of £5.19 per hour.

2.2 Deputy Hotel Services Manager is on A & C Grade 5 £13044 - £15868 which equates to an hourly rate £6.76 - £8.22. Serco does not have this equivalent post in its structure.

2.3 Assistant Hotel Services Manager is on A & C Grade 4 £10753 - £13044 which equates to an hourly rate of £5.57 - £6.76. Serco has assumed the mid point rate of £6.165

2.4 Other terms and conditions

Annual Leave As per Ancillary Staff, except that Grade 7 receives 3 extra days at each point. Serco has assumed an average entitlement of 23 days.

Premium Rates (Grades 1-5)

Public Holidays	10 days
Standard Week	37 Hrs
Saturday	Rate x 1.5 after noon
Sunday	Rate x 2.0
Public Holidays	Rate x 2.0
Overtime M-F	Rate x 1.5

3. Estates Staff

This group comprises all estates officers, on Whitley Council Terms and Conditions.

EO Grade 2 £14962 - £18203

EO Grade 3 £18931 - £22145

EO Grade 4 £23033 - £25908

Annual Leave as per Ancillary Staff apart from EO 4 which attracts 3 extra days at each point. Serco has assumed an average entitlement of 23 days.

There are 10 Public holidays and the Standard week is 37hours.

Overtime is based on time in lieu or rates as above.

4. Works Staff

This group comprises all Joiners, Painters, Electricians, Chargehands, Labourers and Maintenance Assistants. All are on Whitley Council Terms and Conditions.

4.1 The hourly rates are:

Chargehands	£7.04
Joiner	£6.66
Painter	£6.66
Electrician	£6.66
Maintenance Ass	£4.96
Labourer	£4.88

Serco has assumed the above rates where applicable, Serco has additionally allowed for positions of shift technicians at a rate of £8.13 per hour.

4.2 Other terms and conditions

Annual Leave	As Ancillary
Public Holidays	10
Standard Week	39 Hours

Premium Rates

Saturday	Rate x 1.5
Sunday	Rate x 2.0
Public Holidays	Rate x 2.0
Night Duty	Rate x 1.33
Rotating Shift	41p per hour
Alternating Shift	25p per hour
On-call	42p per hour (2.0 on PH)

5. Senior Managers

This covers the Hotel Services Manager and Estates Manager. The salaries and pay awards for senior managers are controlled by the Remuneration Committee of the Trust Board.

Hotel Services Manager SM Grade 2 £17368 - £21710

Estates Manager SM Grade 5 £26656 - £33322

Progression through the range is solely based on performance and once an individual reaches a point near the maximum, superior or outstanding performance can attract a non consolidated bonus of up to 20% on top of salary. The maximum which has ever been paid is 9%.

Annual leave entitlement is 25 days rising to 30 days after 10 years service.

Serco has assumed that these positions exist within its structure, however it reserves the right to appoint existing Serco personnel to these key positions.

6. Porters

As at 21st April 1998 Bateman Healthcare notified the following:

Tupe Staff	Hospital Hygiene Staff
1 Snr Supervisor	1 Supervisor
1 Supervisors	15 Porters
19 Porters	1 Clerical Assistant
1 Manager	

Serco has assumed that the supervisory and portering staff will be offered terms and conditions to harmonise with those of Ancillary staff shown at 1. Serco has assumed a basic rate of £3.53 per hour.

7. Telecomms

Serco has assumed that telephonists are paid an hourly rate of £3.67 per hour with a bonus of 5%.

Serco has assumed that the telecomm Supervisor is paid a rate of £5.84 per hour and is on terms and conditions appropriate for A & C grade 4.

Serco has an additional position of Help Desk Operator on an hourly rate of £4.53 plus a bonus of 5%.

8. Pensions

Based on information provided by Mr G Walker dated 13th March 1998 the following percentages have been assumed for employees participating in the Superannuation scheme:

Employee Group	% in scheme
A & C grade 2	nil
A & C grade 3	73
A & C grade 4	100
A & C grade 5	100
All estates staff	100
Catering assistants	10
Domestic Assistants	6
Domestic Supervisors	50
Linen Assistants	50
Storemen	100
Telephonists	44

THE REDUNDANCY PROCEDURE

SUMMIT HEALTHCARE (LAW) LIMITED ("The Employer")

THE MANAGEMENT OF CHANGE

1. INTRODUCTION

- 1.1 The Employer has a genuine wish to safeguard, as far as possible, the employment security of staff in times of change.
- 1.2 Whenever practicable consideration will be given to voluntary redundancy or reduction in temporary or agency staff when the Employer considers this to be appropriate as an alternative to compulsory redundancy.

2. GENERAL POLICY STATEMENT

- 2.1 In achieving the aim of providing effective FM Services within available resources, the Employer recognises a responsibility to individual employees and groups of employees who may be affected by any changes.
- 2.2 Where change is needed, the Employer will seek to retain staff in employment as far as practicable.
- 2.3 Consultation will take place with staff and recognised staff organisations where such changes are contemplated in accordance with the legal requirements.
- 2.4 This Policy will be operated at all times in accordance with current Employment Law, including consultation obligations, consultation periods, information to be provided; search for suitable vacancies, trial periods; time off to seek alternative employment, etc.

3. REDUCTIONS IN ESTABLISHMENT: SECURITY OF EMPLOYMENT

- 3.1 Staff and their representatives, will be advised of the posts affected by any proposed redundancy and of the timetable for achieving any proposed redundancy.
- 3.2 The Employer will consult with Law Hospital NHS Trust to identify any suitable vacancies within the Hospital, bringing these to the notice of the affected staff.
- 3.3 Training in any post will be provided as the Employer considers necessary.

4. REDUCTION IN ESTABLISHMENT: REDUNDANCY

- 4.1 Staff who are made redundant will be eligible for redundancy payments as per legal requirements and may be eligible for superannuation and compensation benefits on early retirement.

- 4.2 Members of staff who cannot be found suitable alternative employment at the Site will be de facto redundant and will be interviewed and advised of their entitlements and any other benefits which could accrue to them.
- 4.3 Any member of staff who is aggrieved by any matter arising from the operation of the above policy will have a right of appeal in terms of the Employer's redundancy policy or procedures as amended from time to time.