

**THE LANARKSHIRE PRIMARY CARE NATIONAL HEALTH
SERVICE TRUST**

and

STONEHOUSE HOSPITALS LIMITED

PROJECT AGREEMENT

**for the development of the site of Stonehouse
Hospital and provision of services**

27 June 2003

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The Lanarkshire Primary Care National Health Service Trust Stonehouse Hospital

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PROJECT AGREEMENT

BETWEEN:

- (1) THE LANARKSHIRE PRIMARY CARE NATIONAL HEALTH SERVICE TRUST having its principal place of business at Trust Headquarters, Strathclyde Hospital, Airbles Road, Motherwell ML1 3BW (the "Trust"); and
- (2) STONEHOUSE HOSPITALS LIMITED (registered number SC251033) and having its registered office at Eldo House, Monkton Road, Prestwick, Ayrshire KA9 2PB ("Project Co").

WHEREAS:

- A. The Trust wishes to redevelop its facilities on the Site in order to improve the quality and efficiency of the services provided by the Trust.
- B. Accordingly, the Trust invited tenders from interested persons for the financing, design, and construction of and the provision of certain services in connection with the design, building, financing and maintenance of the Facilities and the provision of facilities management and other services at the Facilities (the "Project").
- C. Proposals were submitted on behalf of Project Co in response to the Trust's invitation. Following negotiations, it appears to the Trust to be expedient for the purpose of, or in connection with, the discharge of its functions to enter into this Agreement, which sets out the terms and conditions upon which Project Co will carry out the Project.
- D. The Project has been approved by the Scottish Executive Health Department on behalf of the Scottish Ministers.
- E. The Agreement is entered into under the Government's Private Finance Initiative (the "PFI").
- F. The Agreement is excluded from the application of Part II of the Housing Grants, Construction and Regeneration Act 1996 by operation of paragraph 4 of the Construction Contracts (Scotland) Exclusion Order 1998 (S.1.1998/686).

- G. The Trust was established in Scotland by virtue of The Lanarkshire Primary Care National Health Service Trust (Establishment) Order 1998 (SI 1998/2732(S.157)) made by the Secretary of State for Health on 30 October 1998 pursuant to Sections 12A(1) and (4) of and paragraphs 1, 3, 4, 5 and 6(2)(d) of Schedule 7A to the National Health Service (Scotland) Act 1978, as amended by virtue of The Lanarkshire Primary Care National Health Service Trust (Amendment) Order 1999/89 (Scottish SI) made by the Scottish Ministers pursuant to section 12A(1) and (4) of, and paragraphs 1 and 3(1)(b) and (c) of Schedule 7A to the said National Health Service (Scotland) Act 1978, The Lanarkshire Primary Care National Health Service Trust (Amendment) Order 2001/356 (Scottish SI) made by the Scottish Ministers pursuant to Section 12A (1) and 105(6) and (7) of and paragraphs 1 and 3 (1)(c) of Schedule 7A to the said National Health Service (Scotland) Act 1978 and The Lanarkshire Primary Care National Health Service Trust (Amendment) Order 2003/259 (Scottish SI) made by the Scottish Ministers pursuant to Section 12A (1) and (4) and 105(6) of and paragraphs and 3(1)(b) of Schedule 7A to the said National Health Service (Scotland) Act 1978.

NOW IT IS AGREED as follows:

PART A: PRELIMINARY

1. Interpretation

This Agreement shall be interpreted according to the provisions of Part 1 of the Schedule (*Definitions and Interpretation*).

2. Execution and Delivery of Documents

On or prior to execution of this Agreement:

- (a) Project Co shall deliver to the Trust the documents referred to in Section 1 of Part 2 of the Schedule (*Completion Documents*) (unless the requirement to deliver any such document is waived by the Trust by written notice to Project Co); and
- (b) the Trust shall deliver to Project Co the documents referred to in Section 2 of Part 2 of Schedule (*Completion Documents*) (unless the requirement to deliver any such document is waived by Project Co by written notice to the Trust).

3. Commencement and Duration

This Agreement shall commence on the date of execution of this Agreement and Project Co's right and obligation to carry out the Project Operations shall terminate automatically on the expiry of the Project Term unless previously terminated in accordance with the provisions of this Agreement.

4. Project Documents

Ancillary Documents

4.1 Project Co shall perform its obligations under, and observe (insofar as falling to be observed by Project Co) all of the provisions of, the Project Documents to which it is a party and shall not:

- (a) terminate or agree to the termination of all or part of any Ancillary Document;
- (b) make or agree to any material variation of any Ancillary Document;
- (c) in any material respect depart from its obligations (or waive or allow to lapse any rights it may have in a material respect), or procure that others in any material respect depart from their obligations (or waive or allow to lapse any rights they may have in a material respect), under any Ancillary Document; or
- (d) enter into (or permit the entry into by any other person of) any agreement replacing all or part of (or otherwise materially and adversely affecting the interpretation of) any Ancillary Document,

unless the proposed course of action (and any relevant documentation) has been submitted to the Trust's Representative for review under Part 10 of the Schedule (*Review Procedure*) and there has been no objection in accordance with paragraph 3(b) of Part 10 of the Schedule (*Review Procedure*) within twenty (20) Business Days of receipt by the Trust's Representative of the submission of the proposed course of action (and any relevant documentation), or such shorter period as may be agreed by the parties (acting reasonably) and, in the circumstances specified in Clause 4.1(a), Project Co has complied with Clause 50.5 (*Assignment, Sub-contracting and Changes in Control*).

Changes to Funding Agreements and Refinancing

4.2 In relation to any Funding Agreement only, Project Co shall be free, at any time, to enter into, terminate, amend, waive its rights and generally deal with its Funding Agreements on such terms and conditions as it sees fit provided that (at the time such action is contemplated and

effected) the same will not materially and adversely affect the ability of Project Co to perform its obligations under the Project Documents or this Agreement and provided further that any amendment or variation of a Funding Agreement which constitutes a Refinancing shall be carried out in accordance with the provisions of Part 29 of the Schedule (*Refinancing*) and subject to the Trust receiving its agreed share of the Refinancing Gain.

- 4.3 Without prejudice to Clause 4.2 (*Funding Agreements and Refinancing*), Project Co shall liaise with the Trust in accordance with the Liaison Procedure, and shall use all reasonable endeavours to provide the Trust with a copy of the relevant agreement in settled draft form, not less than ten (10) Business Days before it enters into any Funding Agreement (other than the Initial Funding Agreements).

Delivery

- 4.4 Without prejudice to the provisions of this Clause, if at any time an amendment is made to any Project Document, or Project Co enters into a new Project Document (or any agreement which affects the interpretation or application of any Project Document), Project Co shall deliver to the Trust a certified copy of each such amendment or agreement within ten (10) Business Days of the date of its execution or creation, certified as a true copy by an officer of Project Co.

5. The Project Operations

Scope

- 5.1 Subject to, and in accordance with, the provisions of this Agreement, Project Co shall have the right and the obligation to perform its duties under this Agreement at its own cost and risk without recourse to the Trust except as otherwise expressly provided in this Agreement.

General standards

- 5.2 Without prejudice to Clause 5.1 and Clause 39 (*Changes in Law*), Project Co shall at its own cost be solely responsible for procuring that the Project Operations are at all times performed:
- (a) in compliance with all Law and Consents (including without limitation the giving of notices and the obtaining of any such Consents) and so as not to prejudice the renewal of any such Consents;
 - (b) in a manner that is not likely to be injurious to health or to cause damage to property;

- (c) except to the extent expressly stated to the contrary in the Trust's Construction Requirements or the Output Requirements, in compliance with all applicable NHS Requirements;
- (d) in so far as not in conflict with an express obligation of Project Co under this Agreement, or where in relation to a matter there is no express obligation or standard imposed on Project Co under this Agreement, in accordance with Good Industry Practice;
- (e) in a manner consistent with the Trust discharging its statutory duties and/or other functions undertaken by it as the same may be notified to Project Co from time to time; and
- (f) in a manner consistent with the Quality Plans;

In the event that any ambiguity, uncertainty, dispute or discrepancy arises in the nature and scope of Project Co's obligation under this Clause 5.2, the provisions of this Clause 5.2 will be given meaning and have effect in descending order of precedence set out in this Clause 5.2.

Trust's Undertaking

5.3 The Trust undertakes to Project Co that it shall:

- (a) subject to the provisions of this Agreement, comply with all Laws, NHS Requirements and Consents applicable to it which relate to the Project Operations;
- (b) not wilfully impede Project Co in the performance of its obligations under this Agreement (having regard always to the interactive nature of the activities of the Trust and of Project Co and to the Trust's use of the Facilities to provide the Clinical Services and any other operations or activities carried out by the Trust on or at the Site for the purposes contemplated by this Agreement or any other of the Trust's statutory functions);
- (c) inform Project Co as soon as reasonably practicable if at any time it becomes unable to meet any of its financial obligations and in such case inform, and keep Project Co informed, of any course of action to remedy the situation recommended or required by the Scottish Executive, NHS Lanarkshire or other competent authority; and
- (d) to the extent permitted by Law, supply to Project Co within sixty (60) Business Days of their publication, a copy of the NHS Lanarkshire Annual Report and the accounts for Stonehouse Hospital,

provided that, to avoid doubt, nothing in this Clause shall in any way fetter the discretion of the Trust in fulfilling its statutory functions.

Co-operation

5.4 Each party agrees to co-operate, at its own expense, with the other in the fulfilment of the purposes and intent of this Agreement. To avoid doubt, neither party shall be under any obligation to perform any of the other party's obligations under this Agreement.

5.5 Without prejudice to the generality of Clause 5.4 (*Co-operation*), the parties shall liaise with a view to ensuring that the requirements of the Patients Charter are met in respect of the operation of the Facilities but that (in the case of Project Co) having regard to the nature and extent of the Services.

5.6

5.6.1 Not later than 4 months prior to the Completion Date, the Trust shall produce a statement summarising its intended working arrangements ("the Trust's Proposed Arrangements") regarding performance of services to be carried out at the Facilities by Trust Parties ("the Trust's Retained Services") and shall submit the same for discussion in the Liaison Committee. Without prejudice to the foregoing generality, the Trust's Proposed Arrangements shall set out essential information regarding the Trust's Retained Services, such as the frequency at which each of the Trust's Retained Services will be carried out, the areas within which the Trust's Retained Services will be carried/to which the Trust's Retained Services will apply, the intended hours of working and the number of Trust Parties likely to be involved in the performance of each of the Trust's Retained Services.

5.6.2 Project Co shall review the Trust's Proposed Arrangements against Project Co's intended working arrangements regarding performance of the Services ("Project Co's Proposed Arrangements") and in particular (but without limitation) shall seek to identify areas where there may be conflict between each of the Trust's Proposed Arrangements and Project Co's Proposed Arrangements and/or where the manner or method of working set out in the Trust's Proposed Arrangements may cause delay and/or disruption to the performance of the Services or where the manner or methods of working set out in the Project Co's Proposed Arrangements may cause delay or disruption to the performance of the Trust's Retained Services ("Interface Areas").

- 5.6.3 Project Co shall provide details of the Interface Areas to the Trust within 1 month of receipt by Project Co of the Trust's Proposed Arrangements, together with Project Co's proposals regarding the manner or method of performance of the Trust's Retained Services and/or the Services in a way as to remove and/or mitigate the risks associated with such Interface Areas ("Project Co's Draft Joint Working Arrangements").
- 5.6.4 The parties shall discuss Project Co's Draft Joint Working Arrangements in the Liaison Committee and each party undertakes to act reasonably in seeking to agree the same, having regard to Good Industry Practice. In the event that Project Co's Draft Joint Working Arrangements are not agreed by the date falling 1 month prior to the Completion Date, either party may refer the matter for determination under the Dispute Resolution Procedure at any time thereafter.
- 5.6.5 Following agreement or determination of Project Co's Draft Joint Working Arrangements pursuant to Clause 5.6.4, such arrangements shall comprise the Joint Working Arrangements and each party shall comply with their respective obligations pursuant to the same. Without prejudice to the foregoing generality, the Trust undertakes to procure that the Trust's Retained Services are performed in accordance with the Joint Working Arrangements and Project Co undertakes to procure that the Services are performed in accordance with the Joint Working Arrangements.

PART B: GENERAL PROVISIONS

6. General Obligations and Responsibilities of Project Co

No other business

- 6.1 Project Co shall not engage in any business or activity other than the business or activities related to, and conducted for, the purpose of the Project.

Project Co Parties

- 6.2 Project Co shall not be relieved or excused of any responsibility, liability or obligation under this Agreement by the appointment of any Project Co Party. Project Co shall, as between itself and the Trust, be responsible for the selection, pricing, performance, acts, defaults, omissions, breaches and negligence of all Project Co Parties. All references in this Agreement to any act, default, omission, breach or negligence of Project Co shall be construed accordingly to include any such act, default, omission, breach or negligence of a Project Co Party.

Safety

- 6.3 Project Co shall throughout the progress of the Works and the conduct of the other Project Operations have full regard for the safety of all persons on the Site (whether lawfully or not) and shall keep the Site, the Works and the Facilities in an orderly state, appropriate in accordance with Good Industry Practice, to avoid danger to such persons. Project Co shall take such measures including fencing of the Site where appropriate as are reasonable in accordance with Good Industry Practice to prevent access onto the Site and/or the Facilities of any persons not entitled to be there.

7. Warranties

- 7.1 Project Co warrants to the Trust that as at the date of execution of this Agreement:
- (a) The details of Project Co set out in Section 1 of Part 27 of the Schedule (*Project Co Information*) are true, complete and accurate in all respects, the share capital of Project Co is wholly and beneficially owned by the parties as set out therein and save to the extent provided in the Funding Agreements no other person has any option or other rights to call for the issue or transfer to it of any share or loan capital of Project Co;

- (b) Project Co is a limited liability company, duly incorporated, validly existing under the laws of Scotland and possesses the capacity to sue and be sued in its own name;
- (c) Project Co has full power and authority to enter into this Agreement and the Project Documents and to carry out Project Co's obligations thereunder;
- (d) The entry into and performance by Project Co of this Agreement or any of the Project Documents does not conflict with any Law;
- (e) The entry into and performance by Project Co of this Agreement or any of the Project Documents does not conflict with any document which is binding upon it or any of its assets to the extent that such conflict would be reasonably likely to have a materially adverse effect on the ability of Project Co to perform its obligations under this Agreement;
- (f) Project Co has not traded since its incorporation or incurred any liabilities, other than in terms of this Agreement, the Project Documents or the Sub-Contracts;
- (g) The Funding Agreements set out the basis on which Project Co will obtain debt funding facilities for the Project;
- (h) The copies of the Project Documents which Project Co has delivered to the Trust are certified copies and there are not in existence any other agreements or documents replacing or relating to any of the Project Documents which would materially affect the interpretation or application of any of the Project Documents;
- (i) Project Co has not taken any action nor have any steps been taken or legal proceedings been started or threatened against it for winding-up, dissolution or re-organisation, the enforcement of any Security Interest over its assets or for the appointment of a receiver, administrative receiver, or administrator, trustee, judicial factor or similar officer of it or of its assets;
- (j) No Project Co Event of Default has occurred and no circumstances have arisen which may give rise to any Project Co Event of Default;
- (k) No action, litigation, arbitration or administrative proceedings have been commenced, or, to the best of its information, knowledge and belief following the making of all reasonable inquiry, are pending or threatened, against Project Co and nor is there subsisting any unsatisfied judgement, decree or award given against it by any court, arbitrator or other body;
- (l) No Security Interest exists over its assets, revenues or share capital other than as may be created pursuant to the Funding Agreements;

- (m) Project Co has not carried out and will not carry out any act or omission which will hinder or prevent the Trust from performing its obligations save to the extent that Project Co is authorised or permitted to do so under this Agreement and shall have due regard to the financial or other consequences of any of its deliberate acts or omissions.

7.2 Each of the warranties contained in Clause 7.1 above shall be separate and independent and, save as expressly provided to the contrary, shall not be limited by reference to any of them or by any other provisions of this Agreement.

8. Indemnities and Liability

Project Co indemnities to Trust

8.1 Project Co shall indemnify and keep the Trust indemnified at all times from and against all Direct Losses sustained by the Trust in consequence of:

- (a) any claim for, or in respect of, the death and/or personal injury of any employee of, or person engaged by, Project Co or any Project Co Party notwithstanding any act or omission of the Trust or any Trust Party;
- (b) any claim for, or in respect of, the death and/or personal injury of any third party (other than a person referred to in Clause 8.2(a) (*Trust Party employees*)) arising out of, or in the course of, the Project Operations, save to the extent caused (or contributed to) by any Unreasonable Act by the Trust or any Trust Party, breach of any express provision of this Agreement by the Trust or any Trust Party or any deliberate act or omission of the Trust or any Trust Party;
- (c) any physical loss of or damage to any assets or other property belonging to the Trust arising by reason of any act or omission of Project Co or any Project Co Party, save to the extent that such loss or damage arises out of the breach of any express provision of this Agreement by the Trust or any Trust Party or any deliberate act or omission of the Trust or any Trust Party; and
- (d) any loss of or damage to property or assets of any third party arising by reason of any act or omission of Project Co or any Project Co Party, save to the extent that such loss or damage arises out of the breach of any express provision of this Agreement by the Trust or any Trust Party or any deliberate act or omission of the Trust or any Trust Party.

Trust indemnities to Project Co

8.2 The Trust shall indemnify and keep Project Co indemnified at all times from and against all Direct Losses sustained by Project Co in consequence of:

- (a) any claim for, or in respect of, the death and/or personal injury of any employee of, or person engaged by, the Trust or any Trust Party notwithstanding any act or omission of Project Co or any Project Co Party;
- (b) any claim for, or in respect of, the death and/or personal injury of any third party (other than a person referred to in Clause 8.1(a) (*Project Co and Project Co Party employees*)) arising by reason of any act or omission of the Trust or any Trust Party in the course of the provision of the Clinical Services, any Unreasonable Act by the Trust or any Trust Party, breach of any express provision of this Agreement by the Trust or any Trust Party or any deliberate act or omission of the Trust or any Trust Party, save to the extent caused (or contributed to) by any act or omission of Project Co or any Project Co Party;
- (c) any physical damage to any part of the Facilities or any assets or other property of Project Co or any Project Co Party arising by reason of any breach of any express provision of this Agreement by the Trust or any Trust Party or any deliberate act or omission of the Trust or any Trust Party, save to the extent caused (or contributed to) by any act or omission of Project Co or any Project Co Party; and
- (d) any loss of or damage to property or assets of any third party arising by reason of any breach of any express provision of this Agreement by the Trust or any Trust Party or any deliberate act or omission of the Trust or any Trust Party, save to the extent caused (or contributed to) by any act or omission of Project Co or any Project Co Party.

Provided that in the case of Clause 8.2 (c) and (d) there shall be excluded from the indemnity given by the Trust any liability for the occurrence of risks against which Project Co is bound to insure under this Agreement.

Conduct of claims

8.3 This Clause shall apply to the conduct, by a party from whom an indemnity is sought under this Agreement, of claims made by a third person against a party having (or claiming to have) the benefit of the indemnity. The party having, or claiming to have, the benefit of the

indemnity is referred to as the "Beneficiary" and the party giving the indemnity is referred to as the "Indemnifier". Accordingly:

- (a) if the Beneficiary receives any notice, demand, letter or other document concerning any claim for which it appears that the Beneficiary is, or may become entitled to, indemnification under this Agreement, the Beneficiary shall give notice in writing to the Indemnifier as soon as reasonably practicable and in any event within twenty (20) Business Days of receipt of the same;
- (b) subject to paragraphs (c), (d) and (e) below, on the giving of a notice by the Beneficiary pursuant to paragraph (a) above, where it appears that the Beneficiary is or may be entitled to indemnification from the Indemnifier in respect of all (but not part only) of the liability arising out of the claim, the Indemnifier shall (subject to providing the Beneficiary with an indemnity to its reasonable satisfaction against all costs and expenses that it may incur by reason of such action) be entitled to dispute the claim in the name of the Beneficiary at the Indemnifier's own expense and take conduct of any defence, dispute, compromise, or appeal of the claim and of any incidental negotiations. The Beneficiary shall give the Indemnifier all reasonable co-operation, access and assistance for the purposes of considering and resisting such claim;
- (c) with respect to any claim conducted by the Indemnifier pursuant to paragraph (b) above:
 - (i) the Indemnifier shall keep the Beneficiary fully informed and consult with it about material elements of the conduct of the claim;
 - (ii) the Indemnifier shall not bring the name of the Beneficiary into disrepute; and
 - (iii) the Indemnifier shall not pay or settle such claims without the prior consent of the Beneficiary, such consent not to be unreasonably withheld or delayed;
- (d) the Beneficiary shall be free to pay or settle any claim on such terms as it thinks fit and without prejudice to its rights and remedies under this Agreement if:
 - (i) the Indemnifier is not entitled to take conduct of the claim in accordance with paragraph (b) above; or
 - (ii) the Indemnifier fails to notify the Beneficiary of its intention to take conduct of the relevant claim within twenty (20) Business Days of the notice from the Beneficiary under paragraph (a) above or notifies the Beneficiary that it does not intend to take conduct of the claim; or

- (iii) the Indemnifier fails to comply in any material respect with the provisions of paragraph (c) above;
- (e) the Beneficiary shall be free at any time to give notice to the Indemnifier that it is retaining or taking over (as the case may be) the conduct of any defence, dispute, compromise or appeal of any claim (or of any incidental negotiations) to which paragraph (b) above applies. On receipt of such notice the Indemnifier shall promptly take all steps necessary to transfer the conduct of such claim to the Beneficiary, and shall provide to the Beneficiary all reasonable co-operation, access and assistance for the purposes of considering and resisting such claim. If the Beneficiary gives any notice pursuant to this paragraph, then the Indemnifier shall be released from any liability under its indemnity under Clause 8.1 or Clause 8.2 (as the case may be) and, without prejudice to any accrued liabilities, any liability under its indemnity given pursuant to paragraph (b) in respect of such claim;
- (f) if the Indemnifier pays to the Beneficiary an amount in respect of an indemnity and the Beneficiary subsequently recovers (whether by payment, discount, credit, saving, relief or other benefit or otherwise) a sum which is directly referable to the fact, matter, event or circumstances giving rise to the claim under the indemnity, the Beneficiary shall forthwith repay to the Indemnifier whichever is the lesser of:
 - (i) an amount equal to the sum recovered (or the value of the saving or benefit obtained) less any out-of-pocket costs and expenses properly incurred by the Beneficiary in recovering the same; and
 - (ii) the amount paid to the Beneficiary by the Indemnifier in respect of the claim under the relevant indemnity,provided that there shall be no obligation on the Beneficiary to pursue such recovery and that the Indemnifier is repaid only to the extent that the amount of such recovery aggregated with any sum recovered from the Indemnifier exceeds any loss sustained by the Beneficiary (including for this purpose indirect or consequential losses or claims for loss of profits which are excluded by this Agreement from being recovered from the Indemnifier); and
- (g) any person taking any of the steps contemplated by paragraphs (a) - (e) of Clause 8.3 shall comply with the requirements of any insurer who may have an obligation to provide an indemnity in respect of any liability arising under this Agreement.

Mitigation – indemnity claims

- 8.4 To avoid doubt the provisions of Clause 66 (*Mitigation*) apply to any indemnity given under this Agreement and any such indemnity shall not extend to Direct Losses which could have been reduced or avoided by the Beneficiary complying with the provisions of such Clause.

Taxation

- 8.5 If any payment by one party under an indemnity in this Agreement is subject to income tax or corporation tax (or any tax replacing them) in the hands of the recipient, the recipient may demand in writing to the party making the payment that the payment shall be increased by such amount as would ensure that, after taking into account any such tax payable in respect of such additional amount, the recipient receives and retains a net sum equal to the amount it would have otherwise received had the payment not been subject to such tax. In relation any such additional amount payable to Project Co, Project Co and the Trust shall have the same right and obligations as would apply to a Relevant Tax Liability under Clause 48.7 (c) and Clauses 48.6 to 48.11 (inclusive) shall mutatis mutandis to the payment of the additional amount. The party making the payment shall pay such additional amount within ten (10) Business Days of receipt of such demand.

Excusing Causes

- 8.6 If an Excusing Cause interferes adversely with, or causes a failure of, the performance of the Project Operations and provided that the effect of such Excusing Cause is claimed within ten (10) Business Days of the date on which Project Co became aware (or ought reasonably to have become so aware) of the occurrence of the Excusing Cause or such longer period as agreed between the parties (acting reasonably), then (subject to Clauses 8.8 (*Insured exposure*) and 8.9 (*Mitigation of Excusing Clause*)) to the extent such failure or interference arises as a result of such Excusing Cause:
- (a) such failure by Project Co to perform, and any poor performance of, any affected Service shall not constitute a breach of the provisions of this Agreement by Project Co;
 - (b) such interference shall be taken account of in measuring the performance of any affected Service in accordance with the Performance Monitoring System, which shall be operated as though the relevant Service had been performed free from such adverse interference; and

- (c) such interference shall be taken account of in operating the Availability Deduction Mechanism which shall be operated as though any Non-Availability resulting from such interference had not occurred so that Project Co shall be entitled to payment under this Agreement as if there had been no such interference with the Project Operations.

8.7 For the purpose of Clause 8.6, an Excusing Cause means:

- (a) any breach of any express provision of this Agreement by the Trust or any Trust Party (unless, and to the extent, caused or contributed to by Project Co or any Project Co Party);
- (b) any deliberate act or omission of the Trust or of any Trust Party or any failure by the Trust or a Trust Party (having regard always to the interactive nature of the activities of the Trust and of Project Co) to take reasonable steps to carry out its activities in a manner which minimises undue interference with Project Co's performance of the Project Operations, save where:
 - (i) (and to the extent) caused or contributed to by Project Co or any Project Co Party;
 - (ii) the Trust or Trust Party is acting in accordance with a recommendation or instruction of Project Co or any Project Co Party;
 - (iii) any such act or omission giving rise to such failure was within the contemplation of the parties or was otherwise provided for in this Agreement;
or
 - (iv) the consequences of any such deliberate act or omission or other acts or omissions giving rise to such failure would have been prevented by the proper performance of Project Co's obligations under this Agreement;
- (c) the outbreak of any Medical Contamination unless and to the extent that such outbreak, or the effects of such outbreak, are caused (or contributed to) by Project Co or any Project Co Party including, without limitation, any failure to comply with procedures (or Trust instructions) relating to control of infection or to take all reasonable steps to mitigate the effect of such Medical Contamination provided that nothing contained in this Clause 8.7(c) shall oblige Project Co to carry out services in addition to and/or different in nature to the Services;
- (d) the implementation of any action taken by the Trust or any Trust Party, or any suspension of Project Co's obligation to deliver any or any part of the Services, or the

compliance by Project Co with instructions given by the Trust, in each case in the circumstances referred to in Clause 29.7 to 29.9 (inclusive) ; or

- (e) the carrying out of any Small Works in accordance with the terms of this Agreement during the period of time agreed between the Trust and Project Co.

The Trust undertakes to notify Project Co forthwith in the event that it becomes aware of an outbreak of Medical Contamination affecting the Facilities.

Insured exposure

- 8.8 Without prejudice to Clause 36 (*Insurance*) and subject to the provisions in Clause 36.13 relating to Uninsurable Risk, Project Co shall not be entitled to any payment which would not have been due under this Agreement but for Clause 8.6 (*Excusing Causes*) to the extent that Project Co is or should be able to recover under any policy of insurance required to be maintained in accordance with this Agreement (whether or not such insurance has in fact been effected or, if effected, has been vitiated as a result of any act or omission of Project Co (or any Project Co Party), including but not limited to non-disclosure or under-insurance) or any other policy of insurance which Project Co has taken out and maintained.

Mitigation of Excusing Cause

- 8.9 Project Co shall take all reasonable steps to mitigate the consequences of an Excusing Cause on Project Co's ability to perform its obligations under this Agreement. To the extent that Project Co does not take such steps, Project Co shall not be entitled to, and shall not receive, the relief specified in Clause 8.6 (*Excusing Causes*).
- 8.10 To avoid doubt, Clause 8.7(b) (*Acts of the Trust*) shall not impose a general obligation on the Trust to take (or to procure that any Trust Party takes) such steps and shall apply (and be construed) solely for the purpose of establishing whether an Excusing Cause has occurred.

9. Limits on Liability

Exclusions

- 9.1 The indemnities under this Agreement shall not apply and (without prejudice to the Trust's rights under the Deduction Mechanisms) there shall be no right to claim damages for breach of this Agreement, in delict or on any other basis whatsoever to the extent that any loss claimed by either party is for loss of profits, loss of use, loss of production, loss of business or loss of business opportunity or is a claim for consequential loss or for indirect loss of any nature ("Indirect Losses") suffered or allegedly suffered by either party. The Trust agrees that,

notwithstanding the foregoing, any losses of Project Co arising under the Construction Contract and the Service Contracts as originally executed (or as amended in accordance with and subject to Clause 4.1 (*Ancillary Documents*)) which are not Indirect Losses shall not be excluded from such a claim solely by reason of this Clause.

- 9.2 The Trust shall not be liable in delict to Project Co or any Project Co Party in respect of any negligent act or omission of the Trust or any Trust Party relating to or in connection with this Agreement and Project Co shall use best endeavours to ensure that no Project Co Party shall bring such a claim against the Trust. Project Co has accepted this on the basis that it and each Project Co Party will cover the risk of negligent acts or omissions by insurance or in such other manner as it (or they) may think fit.

Sole remedy

- 9.3 Subject to:
- (a) any other express right of the Trust pursuant to this Agreement; and
 - (b) the Trust's right to claim, on or after termination of this Agreement, the amount of its reasonable costs, losses, damages and expenses suffered or incurred by it as a result of rectifying or mitigating the effects of any breach of this Agreement by Project Co save to the extent that the same has already been recovered by the Trust pursuant to this Agreement or has been taken into account to reduce any compensation payable by the Trust pursuant to Clause 48 (*Compensation on Termination*),

the sole remedy of the Trust in respect of a failure to provide the Services in accordance with this Agreement shall be the operation of the Deduction Mechanisms.

- 9.4 Nothing in Clause 9.3 shall prevent or restrict the right of the Trust to seek interdict or a decree of specific implement or other discretionary remedies of the court.
- 9.5 Notwithstanding any other provision of this Agreement, neither party shall be entitled to recover compensation or make a claim under this Agreement, the Leases or any other agreement in relation to the Project in respect of any loss that it has incurred (or any failure of the other party) to the extent that it has already been compensated in respect of that loss or failure pursuant to this Agreement, the Leases or otherwise.

10. Trust's Data

No liability

- 10.1 Subject to Clause 7 (*Warranties*), the Trust shall not be liable to Project Co for and Project Co shall not seek to recover from the Trust (or from any Trust Party) any damages, losses, costs, liabilities or expenses which may arise (whether in contract, delict or otherwise) from the adoption, use or application of the Disclosed Data by, or on behalf of, Project Co or any Project Co Party.

No warranty

- 10.2 Subject to Clause 7 (*Warranties*), the Trust gives no warranty or undertaking of whatever nature in respect of the Disclosed Data and, specifically (but without limitation), the Trust does not warrant that the Disclosed Data represents all of the information in its possession or power (either during the conduct of the tender process for the Project or at the time of execution of this Agreement) relevant or material to or in connection with the Project or the obligations of Project Co under this Agreement or under any of the Project Documents. Also, subject to Clause 7 (*Warranties*), the Trust shall not be liable to Project Co in respect of any failure to disclose or make available to Project Co (whether before, on or after the execution of this Agreement) any information, documents or data, nor any failure to review or to update the Disclosed Data, nor any failure to inform Project Co (whether before, on or after execution of this Agreement) of any inaccuracy, error, omission, defects or inadequacy in the Disclosed Data.

Project Co investigation

- 10.3 Subject to Clause 7 (*Warranties*), Project Co acknowledges and confirms that:
- (a) it has conducted its own analysis and review of the Disclosed Data and has, before the execution of this Agreement, satisfied itself as to the accuracy, completeness and fitness for purpose of any such Disclosed Data upon which it places reliance; and
 - (b) it shall not be entitled to and shall not (and shall procure that no Project Co Party shall) make any claim against the Trust or any Trust Party whether in contract, delict or otherwise including, without limitation, any claim in damages, for extensions of time or for additional payments under this Agreement on the grounds:
 - (i) of any misunderstanding or misapprehension in respect of the Disclosed Data; or

(ii) that incorrect or insufficient information relating to the Disclosed Data was given to it by any person, whether or not a Trust Party,
nor shall Project Co be relieved from any obligation imposed on, or undertaken by, it under this Agreement on any such ground.

11. Representatives

Representatives of the Trust

- 11.1 The Trust's Representative shall be Jim Loudon, East Kilbride Local Health Care Cooperative General Manager, or such other person appointed pursuant to this Clause. The Trust's Representative shall exercise the functions and powers of the Trust in relation to the Project Operations which are identified in this Agreement as functions or powers to be carried out by the Trust's Representative. The Trust's Representative shall also exercise such other functions and powers of the Trust under this Agreement as the Trust may notify to Project Co from time to time.
- 11.2 The Trust's Representative shall be entitled at any time, by notice to Project Co, to authorise any other person to exercise the functions and powers of the Trust delegated to him pursuant to this Clause, either generally or specifically. Any act of any such person shall, for the purposes of this Agreement, constitute an act of the Trust's Representative and all references to the "Trust's Representative" in this Agreement (apart from this Clause) shall be taken as references to such person so far as they concern matters within the scope of such person's authority.
- 11.3 The Trust may by notice to Project Co change the Trust's Representative. The Trust shall (as far as practicable) consult with Project Co prior to the appointment of any replacement for the Trust's Representative, taking account of the need for liaison and continuity in respect of the Project. Such change shall have effect on the date specified in the written notice (which date shall, other than in the case of emergency, be such date as will not cause material inconvenience to Project Co in the execution of its obligations under this Agreement).
- 11.4 During any period when no Trust's Representative has been appointed (or when the Trust's Representative is unable through illness, incapacity or any other reason whatsoever to carry out or exercise his functions under this Agreement) the Trust shall carry out the functions which would otherwise be performed by the Trust's Representative.
- 11.5 No act or omission of the Trust, the Trust's Representative or any officer, employee or other person engaged by the Trust shall, except as otherwise expressly provided in this Agreement:

- (a) in any way relieve or absolve Project Co from, modify, or act as a waiver or personal bar of, any liability, responsibility, obligation or duty under this Agreement; or
 - (b) in the absence of an express order or authorisation under Part 22 of the Schedule (*Variation Procedure*), constitute or authorise a Variation,
- provided that nothing in this Clause 11.5 shall preclude any claim of breach of Contract by Project Co against the Trust.

11.6 Except as previously notified in writing before such act by the Trust to Project Co, Project Co and Project Co's Representative shall be entitled to treat any act of the Trust's Representative which is authorised by this Agreement as being expressly authorised by the Trust and Project Co and Project Co's Representative shall not be required to determine whether an express authority has in fact been given.

Representative of Project Co

- 11.7 Project Co's Representative shall be Ian Kent, Mackenzie Partnership, 20 North Claremont Street, Glasgow or such other person appointed pursuant to this Clause. Project Co's Representative shall have full authority to act on behalf of Project Co for all purposes of this Agreement. Except as previously notified in writing before such act by Project Co to the Trust, the Trust and the Trust's Representative shall be entitled to treat any act of Project Co's Representative in connection with this Agreement as being expressly authorised by Project Co and the Trust and the Trust's Representative shall not be required to determine whether any express authority has in fact been given.
- 11.8 Project Co may by notice to the Trust change Project Co's Representative. Where Project Co wishes to do so it shall by written notice to the Trust propose a substitute for approval, taking account of the need for liaison and continuity in respect of the Project. Such appointment shall be subject to the approval of the Trust (not to be unreasonably withheld or delayed).
- 11.9 Project Co's key Works personnel are identified in Part 4 of the Schedule (*Key Works Personnel*). Project Co shall, as far as it is within Project Co's control, ensure that such persons retain their involvement in the Works and, in particular, will not, for the duration of the Works, require or request any of them to be involved in any other project on behalf of Project Co or any of the Shareholders or its or their Associated Companies if, in the reasonable opinion of the Trust, this would adversely affect the Project.

12. Liaison

Liaison Committee

- 12.1 The Trust and Project Co shall establish and maintain throughout the Project Term a joint liaison committee (the "Liaison Committee"), consisting of three (3) representatives of the Trust (one of whom shall be appointed Chairman) and three (3) representatives of Project Co which shall have the functions described below.
- 12.2 The functions of the Liaison Committee shall be:
- (a) to provide a means for the joint review of issues relating to all day to day aspects of the performance of this Agreement;
 - (b) to provide a forum for joint strategic discussion, considering actual and anticipated changes in the market and business of the Trust, and possible variations of this Agreement to reflect those changes or for the more efficient performance of this Agreement; and
 - (c) in certain circumstances, pursuant to Part 26 of the Schedule (*Dispute Resolution Procedure*), to provide a means of resolving disputes or disagreements between the parties amicably.
- 12.3 The role of the Liaison Committee is to make recommendations to the parties, which they may accept or reject at their complete discretion. Neither the Liaison Committee itself, nor its members acting in that capacity, shall have any authority to vary any of the provisions of this Agreement or to make any decision which is binding on the parties (save as expressly provided in Part 26 of the Schedule (*Dispute Resolution Procedure*)). Neither party shall rely on any act or omission of the Liaison Committee, or any member of the Liaison Committee acting in that capacity, so as to give rise to any waiver or personal bar in respect of any right, benefit or obligation of either party.
- 12.4 The parties shall appoint and remove their representatives on the Liaison Committee by written notice delivered to the other at any time. A representative on the Liaison Committee may appoint and remove an alternate (who may be another representative of that party) in the same manner. If a representative is unavailable (and the other party's representatives may rely on the alternate's statement that the representative is unavailable) his alternate shall have the same rights and powers as the representative.

Procedures and practices

- 12.5 Subject to the provisions of this Agreement, the members of the Liaison Committee may adopt such procedures and practices for the conduct of the activities of the Liaison Committee as they consider appropriate from time to time and:
- (a) may invite to any meeting of the Liaison Committee such other persons as its members may agree (in accordance with Clause 12.6); and
 - (b) receive a review report from any person agreed by its members.
- 12.6 Recommendations and other decisions of the Liaison Committee must have the affirmative vote of all those voting on the matter, which must include not less than one (1) representative of the Trust and not less than one (1) representative of Project Co.
- 12.7 Each member of the Liaison Committee shall have one (1) vote. The Chairman shall not have a right to a casting vote.
- 12.8 The Liaison Committee shall meet at least once each quarter (unless otherwise agreed by its members) and from time to time as necessary. Any member of the Liaison Committee may convene a meeting of the Liaison Committee at any time.
- 12.9 Meetings of the Liaison Committee shall be convened on not less than ten (10) Business Days' notice (identifying the agenda items to be discussed at the meeting) provided that in emergencies a meeting may be called at any time on such notice as may be reasonable in the circumstances.
- 12.10 Where the Liaison Committee decides it is appropriate, meetings may also be held by telephone or another form of telecommunication, by which each participant can hear and speak to all other participants at the same time.
- 12.11 Minutes of all recommendations (including those made by telephone or other form of telecommunication) and meetings of the Liaison Committee shall be kept by Project Co and copies circulated promptly to the parties, normally within five (5) Business Days of the making of the recommendation or the holding of the meeting. A full set of minutes shall be open to inspection by either party at any time, upon request.

13. Trust Emergency Plan

- 13.1 The parties shall comply with the provisions of the Trust Emergency Plan.
- 13.2 The parties shall liaise with each other in accordance with the Liaison Procedure in order periodically to review and update the Trust Emergency Plan.

PART C: LAND ISSUES

14. Nature of land interests

Grant of Leases

14.1 The Trust shall grant to Project Co and Project Co shall accept the Head Lease incorporating the following provisions:-

14.1.1 the date of entry under the Head Lease shall be the date of execution of this Agreement and the Head Lease shall endure until the expiry of the Project Term; and

14.1.2 the rent payable under the Head Lease shall be £1 *per annum* (if asked).

14.2 Project Co shall grant to the Trust and the Trust shall accept the Sub Lease incorporating the following provisions:

14.2.1 the date of entry under the Sub Lease shall be the Actual Completion Date and the Sub Lease shall endure until the expiry of the Project Term; and

14.2.2 the rent payable under the Sub Lease shall be £1 *per annum* (if asked).

14.3 The Trust shall prepare and deliver engrossments of the Head Lease and the Sub Lease as soon as practicable after the date of this Agreement and Project Co shall execute and return the same to the Trust within fifteen (15) Business Days of receipt. The Head Lease and Sub Lease will then be executed by the Trust and (subject to Project Co's compliance with Clause 14.4 below) stamped (if necessary) and registered in the Land Register of Scotland and in the Books of Council and Session. An extract of the Head Lease and Sub Lease shall be provided for Project Co's use as soon as received from the Keeper of the Registers.

14.4 Project Co shall pay to the Trust within five (5) Business Days of demand the stamp duty (if any) payable on the Head Lease and Sub Lease and the costs of registering the Head Lease and Sub Lease in the Land Register and the Books of Council and Session and obtaining three extracts of each.

14.5 Project Co confirms that it has inspected the Title Deeds or has had adequate opportunity to inspect the Title Deeds and is satisfied in all respects with regard to:

14.5.1 the content, validity and completeness thereof;

14.5.2 the marketability of the Trust's title to the Site;

14.5.3 the extent of the Site; and

14.5.4 the nature of any conditions affecting the Site,

and Project Co hereby waives any claim which it might otherwise have against the Trust now or in the future in respect of any matter which would or ought to be disclosed by an inspection of the Title Deeds or otherwise in respect of the Title Deeds or the marketability of the Site.

Early Termination or Expiry of Agreement

14.6 As at the expiry of the Project Term, the Head Lease and Sub Lease will be deemed to be at an end and Project Co's right, title and interest in the Facilities will be deemed transferred to the Trust.

15. The Site

15.1 The condition of the Site shall be the sole responsibility of Project Co. Accordingly (without prejudice to any other obligation of Project Co under this Agreement), Project Co shall be deemed to have:

- (a) carried out a Ground Physical and Geophysical Investigation and to have inspected and examined the Site and its surroundings and (where applicable) any existing structures or works on, over or under the Site;
- (b) satisfied itself as to the nature of the Site Conditions, the ground and the subsoil, the form and nature of the Site, the loadbearing and other relevant properties of the Site, the risk of injury or damage to property affecting the Site, the nature of the materials (whether natural or otherwise) to be excavated and the nature of the design, work and materials necessary for the execution of the Works;
- (c) satisfied itself as to the adequacy of the rights of access to and through the Site and any accommodation it may require for the purposes of fulfilling its obligations under this Agreement (such as additional land or buildings outside the Site);
- (d) satisfied itself as to the possibility of interference by persons of any description whatsoever (other than the Trust), with access to or use of, or rights in respect of, the Site, with particular regard to the owners of any land adjacent to the Site; and
- (e) satisfied itself as to the precautions, times and methods of working necessary to prevent any nuisance or interference, whether public or private, being caused to the Trust or to any third parties.

15.2 To avoid doubt, Project Co accepts full responsibility for all matters referred to in Clause 15.1 and, subject to Clause 7 (*Warranties*), Project Co shall:

- (a) not be entitled to make any claim against the Trust of any nature whatsoever save, if applicable, as expressly provided in Clause 41 (*Delay Events*)), on any grounds including (without limitation) the fact that incorrect or insufficient information on any matter relating to the Site was given to it by any person, whether or not a Trust Party; and
- (b) be responsible for, and hold the Trust harmless from, cleaning up and otherwise dealing with any Contamination at the Site so that it shall at all times comply with its obligations under this Agreement including (without limitation) complying with, at its own cost, any applicable Laws and any Consents, orders, notices or directions of any regulatory body (whether made against the Trust or Project Co).

16. Consents and Planning Approval

16.1 Project Co shall be responsible for:

- (a) obtaining all Consents which may be required for the performance of the Project Operations; and
- (b) implementing each Consent within the period of its validity in accordance with its terms.

Notwithstanding the foregoing the Trust acknowledges and agrees that it shall be responsible for applying for the fire certificate in respect of the Facilities.

PART D: DESIGN AND CONSTRUCTION

17. The Design, Construction and Commissioning Process

Overall Responsibility

17.1 Project Co shall carry out the Works:

- (a) so as to procure satisfaction of the Trust's Construction Requirements;
- (b) in accordance with Project Co's Proposals; and
- (c) in accordance with the terms of this Agreement.

To avoid doubt, the obligations in paragraphs (a), (b) and (c) are independent obligations. In particular:

- (i) the fact that Project Co has complied with Project Co's Proposals shall not be a defence to an allegation that Project Co has not satisfied the Trust's Construction Requirements; and
- (ii) the fact that Project Co has satisfied the Trust's Construction Requirements shall not be a defence to an allegation that Project Co has failed to comply with Project Co's Proposals.

Design responsibility

17.2 Project Co warrants that it has used, and will continue to use, the degree of skill and care in the design of the Facilities that would reasonably be expected of a competent professional designer experienced in carrying out design activities of a similar nature, scope and complexity to those comprised in the Works.

NHS Construction Projects – Corporate Identity and Signage

17.3 The parties acknowledge that the Trust may, from time to time, be required to procure the erection of hoarding, site boards, plaques and/or other signage in connection with the Project. Where requested by the Trust acting reasonably, Project Co shall procure the erection and maintenance of such hoarding, site boards, plaques and/or other signage as the Trust may require.

- (a) The size, design, information disclosed, position and materials used in connection with such hoarding, site boards, plaques or other signage shall be approved by the Trust, such approval not to be unreasonably withheld.

- (b) For the purposes of this Clause 17.3, the Trust shall be deemed to be acting reasonably where any proposals made by it and/or any approvals exercised by it conform with any relevant guidance issued to NHS Trusts by the Scottish Executive or NHS Lanarkshire in relation to such matters whether by Health Service Circular or otherwise.

Where any request made by the Trust pursuant to this Clause 17.3 relates to the replacement of any existing hoarding, site boards, plaques and/or signage at the Facilities and/or the Site, the same shall constitute and be treated as a Trust Works Variation for the purpose of Section 1 of Part 22 of the Schedule and the provisions of Clause 40 shall apply thereto. Where any such request relates to the provision of an entirely new hoarding, site board, plaque and/or signage, the same shall constitute and be treated as a Trust Additional Works Variation for the purposes of Section 1 of Part 22 of the Schedule and the provisions of Clause 40 shall apply thereto,

Trust design approval

- 17.4 The Trust confirms that, as at the date of this Agreement, it has reviewed such of Project Co's Proposals as have been initialled by the Trust and that, subject to any qualifications and/or comments notified by the Trust to Project Co in writing, such proposals satisfy the Trust's requirements in respect of Clinical Functionality, so far as can reasonably be determined given the level of detail of Design Data which has been disclosed to the Trust.
- 17.5 Project Co shall develop and finalise the design and specification of the Works and the Trust shall review the Reviewable Design Data in accordance with Part 10 of the Schedule (*Review Procedure*) and the provisions of this Clause:
- (a) Project Co shall submit the Reviewable Design Data and the design of any Variations developed in accordance with the procedure set out in Part 22 of the Schedule (*Variation Procedure*) to the Trust's Representative for review under Part 10 of the Schedule (*Review Procedure*). Project Co shall not commence or permit the commencement of construction of the part or parts of the Facilities to which such Reviewable Design Data relates until it has submitted the appropriate Reviewable Design Data and is entitled to proceed with construction in accordance with paragraph 3(c) of Part 10 of the Schedule (*Review Procedure*);
- (b) with effect from the date at which any item of Reviewable Design Data is or becomes an Approved RDD Item in accordance with Part 10 of the Schedule (*Review*

Procedure), such Approved RDD Item shall for the purposes of this Agreement be deemed to have satisfied the requirements of the Trust in the manner and to the extent set out in Appendix 1, Table A of Part 10 of the Schedule (*Review Procedure*);

- (c) Project Co shall allow the Trust's Representative, at any time, a reasonable opportunity to view any items of Design Data, which shall be made available to the Trust's Representative as soon as practicable following receipt of any written request from the Trust's Representative; and
- (d) Project Co shall procure that the Contractor establishes and maintains a computerised design database which Project Co and the Trust's Representative may access remotely by computer to view drawings comprised within the Design Data (including Reviewable Design Data) and electronically store and/or print copies of such Design Data. In the event of the Trust's Representative being unable to access such design database, Project Co shall procure that it is made available for inspection by the Trust's Representative, or any other person authorised by the Trust's Representative.

Rectification of Project Co's Proposals

17.6 Without prejudice to Clause 17.1, if it should be found that Project Co's Proposals do not fulfil the Trust's Construction Requirements, Project Co shall at its own expense amend Project Co's Proposals and rectify the Works or any part affected. Such amendment and rectification shall have the effect that:

- (a) Project Co's Proposals shall satisfy the Trust's Construction Requirements; and
- (b) following the amendment or rectification, the structural, mechanical and electrical performance of the Facilities will be of an equivalent standard of performance to that set out in Project Co's Proposals prior to their amendment or rectification (for the purpose of this comparison disregarding the fault which required the amendment or rectification to be made).

18. Right of Access of Trust's Representative

Access to Site

18.1 Project Co shall procure that:

- (a) subject to complying with all relevant safety procedures, which shall include any relevant health and safety plans for the construction of the Facilities, the Contractor's

Site Rules from time to time and any reasonable directions with regard to site safety that may be issued by or on behalf of the Contractor's Site Manager from time to time, the Trust's Representative shall have unrestricted access at all reasonable times during normal working hours to:

- (i) view the Works at the Site on reasonable prior notice appropriate to the circumstances, provided that the notice procedures in this paragraph shall not apply to the right of access for the Trust's Representative and his staff and visitors to the office and other facilities provided at the Site for his use; and
 - (ii) subject to obtaining the consent of the relevant manufacturer or supplier (which Project Co agrees to use all reasonable endeavours to obtain), visit any site or workshop where materials, plant or equipment are being manufactured, prepared or stored for use in the Works for the purposes of general inspection and of attending any test or investigation being carried out in respect of the Works;
- (b) the Trust's Representative shall have such rights of access to the Site in an emergency as he (acting reasonably) considers suitable in the circumstances; and
- (c) monthly progress meetings and site meetings are held and that the Trust's Representative shall have the right to attend such monthly progress meetings and site meetings and to attend such other meetings as the Trust's Representative may reasonably request.

Increased monitoring

- 18.2 If, following any viewing, visit or inspection made pursuant to Clause 18.1(a) (*Access to Site*), it is discovered that there are defects in the Works or that Project Co has failed to comply with the Trust's Construction Requirements or Project Co's Proposals, the Trust may (without prejudice to any other right or remedy available to it) by notice to Project Co increase the level of its monitoring of Project Co until such time as Project Co shall have demonstrated to the satisfaction of the Trust that it is capable of performing and will perform all its obligations under this Agreement. Project Co shall compensate the Trust for any reasonable additional costs incurred by the Trust as a result of such increased monitoring.

Right to Open Up

- 18.3 Subject to Clause 18.4, the Trust's Representative shall have the right at any time prior to the Actual Completion Date to request Project Co to open up and inspect any part or parts of the Works where the Trust's Representative reasonably believes that such part or parts of the Works is or are defective and Project Co shall comply with such request.
- 18.4 Prior to exercising his right pursuant to Clause 18.3 above, the Trust's Representative shall notify Project Co of his intention to exercise such right, setting out detailed reasons.
- 18.5 If, following the exercise by the Trust's Representative of his right pursuant to Clause 18.3, the inspection shows that the relevant part or parts of the Works are not defective, any delay caused to the Works by the exercise of such rights shall, subject to (and in accordance with) the provisions of Clause 41 (*Delay Events*), be treated as a Delay Event.
- 18.6 If, following the exercise by the Trust's Representative of his right pursuant to Clause 18.3, the inspection shows that the relevant part or parts of the Works is or are defective, Project Co shall rectify and make good such defect(s) and any consequence of such rectification and/or making good defect(s) shall be carried out by Project Co at no cost to the Trust and Project Co shall not be entitled to any extension of time in relation to such rectification and making good of the Works.
- 18.7 If, following the exercise by the Trust's Representative of his right pursuant to Clause 18.3, the Trust's Representative is of the opinion that the inspection shows that the relevant part or parts of the Works is or are defective and Project Co does not agree with such opinion, the matter shall be determined in accordance with Part 26 of the Schedule (*Dispute Resolution Procedure*).
- 18.8 Without prejudice to the rights of the Trust's Representative pursuant to this Clause 18 the parties acknowledge that the exercise of such rights shall not in any way affect the obligations of Project Co under this Agreement save as expressly set out in this Clause 18.

Safety during Construction

- 18.9 The provisions of Section 2 of Part 8 of the Schedule (*Construction Matters*) shall apply to matters of safety.

19. Programme and Dates for Completion

Dates for Completion

19.1 Project Co shall complete the Works by the Completion Date. Without prejudice to Clauses 44 (*Project Co Events of Default*), 46 (*Non-Default Termination*), 47 (*Effect of Termination*) and 48 (*Compensation on Termination*), the Trust shall not be entitled to claim liquidated or general damages in respect of any delay which elapses between the Completion Date and the Actual Completion Date.

The Programme

19.2 Any Programme submitted in accordance with the provisions set out below shall be prepared in accordance with Good Industry Practice and shall be in sufficient detail so as to enable the Trust's Representative to monitor the progress including all commissioning activities and likely future progress of the Works.

19.3 The initial Programme is set out at Part 9 of the Schedule (*The Programme*). Any change to the Programme shall only be made in accordance with this Clause and Part 10 of the Schedule (*Review Procedure*). Project Co shall promptly submit to the Trust's Representative a copy of any version of the Programme varied in accordance with this Clause and Part 10 of the Schedule (*Review Procedure*).

19.4 If it appears to the Trust's Representative at any time that the actual progress of the Works has significantly fallen behind the Programme, then the Trust's Representative shall be entitled to require Project Co to submit to the Trust's Representative a report identifying the reasons for the delay and, unless the event causing the delay is still subsisting and it is not possible to predict with any certainty when the delay might come to an end, require Project Co (at the Trust's option):

- (a) to produce and submit to the Trust's Representative in accordance with Part 10 of the Schedule (*Review Procedure*) a revised Programme showing the manner and the periods in which the Works will be carried out to ensure completion; and/or
- (b) to produce and submit to the Trust's Representative in accordance with Part 10 of the Schedule (*Review Procedure*) a revised Programme showing the steps which are to be taken to eliminate or reduce the delay.

Notification of early completion

- 19.5 Project Co shall notify the Trust's Representative if at any time the actual progress of the Works is significantly ahead of the Programme so that Project Co anticipates that the Actual Completion Date will be earlier than the Completion Date. The Trust's Representative shall be entitled to require Project Co to produce and submit to the Trust's Representative, in accordance with Part 10 of the Schedule (*Review Procedure*) a revised Programme showing the manner and the periods in which the works will be carried out and what the revised date for completion would be to enable the parties to consider (at their absolute discretion):
- (a) whether to agree an earlier date for completion; and
 - (b) what modifications (if any) will be required to the Agreement in order to accommodate such earlier date for completion.

20. Not Used

21. Not Used

22. Pre-Completion Commissioning and Completion

Final Commissioning Programme

- 22.1 Not less than six (6) months before the Completion Date the Trust shall provide Project Co with a draft of the Final Commissioning Programme as jointly developed by the Trust and Project Co in accordance with the provisions of Clauses 22.2 and 22.3. Project Co shall provide the Trust with comments on the draft Final Commissioning Programme submitted to it no later than four (4) months before the Completion Date. The parties shall, within ten (10) Business Days of receipt by the Trust of Project Co's comments agree the terms of the Final Commissioning Programme provided that the Trust may by prior notice to Project Co change the scope and time of the Trust's Commissioning and reimburse Project Co its reasonable costs incurred as a result of such change in scope or time. If the parties are unable to agree the Final Commissioning Programme or the change in scope or time of the Trust's Commissioning three (3) months before the Completion Date the matter shall be referred for determination in accordance with Part 26 of the Schedule (*Dispute Resolution Procedure*).
- 22.2 The Final Commissioning Programme shall be in accordance with the Outline Commissioning Programme and shall impose no greater or more onerous obligations on the Trust than those set out in the Outline Commissioning Programme (unless otherwise agreed by the Trust in its absolute discretion). The Final Commissioning Programme shall then replace the Outline Commissioning Programme.

- 22.3 The Final Commissioning Programme shall describe the steps necessary, the party responsible for taking each of such steps and the timing and sequence of each of such steps to ensure:
- (a) that Project Co's Pre-Completion Commissioning and the Trust's Commissioning will not delay the Actual Completion Date from occurring by the Completion Date; and
 - (b) that Project Co's Post Completion Commissioning and the Trust's Post Completion Commissioning is completed by the Commissioning End Date.
- 22.4 The parties shall procure that the steps that they are responsible for carrying out and completing pursuant to the Final Commissioning Programme include, in the case of Project Co's activities, the activities described at paragraph 7 of the Trust's Construction Requirements.
- 22.5 Project Co shall notify the Trust's Representative of the date when Project Co (acting reasonably) considers that the Works will be complete in accordance with the Trust's Construction Requirements and this Agreement not less than three (3) months prior to such anticipated completion. Such notification shall trigger the activities of the Trust's Representative under this Clause.
- 22.6 The parties each undertake to co-operate with the Trust's Representative to ensure that the Trust's Representative is familiar with all necessary aspects of the Project for the purposes of its role as described in this Clause.

Commissioning prior to Completion Date

- 22.7 Project Co shall:
- (a) undertake Project Co's Pre-Completion Commissioning in accordance with the Final Commissioning Programme; and
 - (b) permit the Trust to undertake the Trust's Commissioning including permitting specialist contractors engaged by the Trust to deliver and install information technology, x-ray and telecommunications equipment on such dates as agreed between the Trust and Project Co, in accordance with the Final Commissioning Programme.
- 22.8 Project Co shall give written notice to the Trust's Representative and the Trust of the commencement of Project Co's Pre-Completion Commissioning and shall ensure that the Trust's Representative is invited to witness all of, and is provided with all information he or she may reasonably require in relation to, Project Co's Pre-Completion Commissioning and

that the Trust's Representative is invited to comment on Project Co's Pre-Completion Commissioning.

- 22.9 Project Co shall (or shall procure that the Contractor shall) give the Trust access to the Facilities at such times as may be set out in the Final Commissioning Programme to enable the Trust to undertake the Trust's Commissioning in accordance with the Final Commissioning Programme for the period prior to completion.

Pre-Completion inspection

- 22.10 Project Co shall give the Trust's Representative not less than ten (10) Business Days' notice and not more than twenty (20) Business Days' notice of the date upon which Project Co considers that the Works will be complete and the tests on completion to be performed in accordance with the Final Commissioning Programme will be carried out. The Trust's Representative shall be entitled to inspect the Works on the date or dates reasonably specified by Project Co in accordance with this Clause, and to attend any of the tests on completion. Project Co shall, if so requested, accompany the Trust's Representative on any such inspection.

Pre-Completion matters

- 22.11 The parties shall procure that the Trust's Representative, within ten (10) Business Days of any inspection made pursuant to Clause 22.10, notifies Project Co and the Trust of any outstanding matters (including, without limitation, the repetition of any of the tests on completion which are required to be carried out and passed in accordance with the Final Commissioning Programme) which are required to be attended to before the Works can be considered to be complete in accordance with the Trust's Construction Requirements and Project Co's Proposals. Project Co shall attend to such matters and shall, if necessary, give the Trust's Representative further notices in accordance with Clause 22.10 (but dealing only with matters raised in the notification under this Clause) so that the procedures in Clause 22.10 and this Clause are repeated as often as may be necessary to ensure that all outstanding matters in relation to the Works are attended to.

Completion certificate

- 22.12 The Trust's Representative shall, when he is satisfied that completion has occurred in accordance with this Agreement, issue a Certificate of Practical Completion to that effect

stating the date upon which, in his opinion, the Actual Completion Date occurred. Subject to Clause 22.15 (*Snagging*) and 22.16 (*Defects*), the issue of the Certificate of Practical Completion shall, in the absence of manifest error, bad faith or fraud, be conclusive evidence for the purpose only of ascertaining the Payment Commencement Date, that the Actual Completion Date has occurred on the date stated in such certificate.

- 22.13 The Trust's Representative shall issue the Certificate of Practical Completion notwithstanding that there are Snagging Matters. Where there are Snagging Matters, the Trust's Representative shall, within five (5) Business Days of the date of issue of the Certificate of Practical Completion, issue a Snagging Notice which shall specify the Snagging Matters to be completed by Project Co.
- 22.14 Following the issue of a Snagging Notice, Project Co shall, in consultation with the Trust's Representative and in such manner as to cause as little disruption as reasonably practicable to the Trust's Post Completion Commissioning and the Trust's use of the Facilities, rectify all Snagging Matters within five (5) Business Days of the issue of the Snagging Notice or such longer period as agreed between the Parties (acting reasonably).
- 22.15 If, within ten (10) Business Days of the issue of the Snagging Notice or such longer period as agreed between the Parties (acting reasonably), Project Co has failed to rectify the Snagging Matters specified in the Snagging Notice the Trust may by itself (or engage others to) carry out the works necessary to rectify the Snagging Matters, at the risk and cost of Project Co.
- 22.16 The issue of the Certificate of Practical Completion shall in no way affect the obligations of Project Co under this Agreement including in respect of any Defects.

As-built specification

- 22.17 As soon as it is available, after the issue of the Certificate of Practical Completion, Project Co shall provide to the Trust a copy of the as-built building specification, together with all site layout plans, 1:200 drawings, 1:50 drawings, typical room layouts and range of finishes, typical fittings and materials and typical details.

23. Post-Completion Commissioning

Commissioning

- 23.1 Project Co and the Trust shall, within 2 Business Days following the Actual Completion Date, or within such other period as may be agreed between the Parties (acting reasonably) at the time of agreement of the Final Commissioning Programme in accordance with Clause 22.1,

respectively undertake and complete Project Co's Post-Completion Commissioning and the Trust's Post Completion Commissioning, in accordance with the Final Commissioning Programme. Both parties shall, at all times, and in particular in the period between the Actual Completion Date and the Commissioning End Date, use reasonable endeavours to assist the other party to ensure compliance with the Final Commissioning Programme.

Information

23.2 Project Co shall ensure that the Trust's Representative is provided with all the information he may reasonably require in relation to Project Co's Post-Completion Commissioning and the Trust shall ensure that Project Co is provided with all information Project Co may reasonably require in relation to the Trust's Post Completion Commissioning.

23.3 If the Trust's Representative, acting reasonably, makes any comment in relation to the carrying out of Project Co's Post-Completion Commissioning, such comments shall be taken into account by Project Co and if Project Co acting reasonably makes any comment in relation to the carrying out of the Trust's Post Completion Commissioning such comment shall be taken into account by the Trust.

Operational Manuals

23.4 With effect from the Commissioning End Date and throughout the remainder of the Project Term, Project Co shall at all reasonable times make available on the Site to the Trust's Representative all operation and maintenance manuals.

24. Fossils and Antiquities

Property

24.1 As between the parties, all fossils, antiquities, and other objects having artistic, historic or monetary value and human remains which may be found on or at the Site are or shall become, upon discovery, the absolute property of the Trust.

Discovery

24.2 Upon the discovery of any such item during the course of the Works, Project Co shall:

(a) immediately inform the Trust's Representative of such discovery;

- (b) take all steps not to disturb the object and, if necessary, cease any Works in so far as the carrying out of such Works would endanger the object or prevent or impede its excavation; and
- (c) take all necessary steps to preserve the object in the same position and condition in which it was found.

Action

- 24.3 The Trust shall procure that the Trust's Representative promptly, and in any event within ten (10) Business Days, issues an instruction to Project Co specifying what action the Trust's Representative requires Project Co to take in relation to such discovery.
- 24.4 Project Co shall promptly and diligently comply with any instruction issued by the Trust's Representative referred to in Clause 24.3 above (except and to the extent that such instruction constitutes a Trust Works Variation pursuant to (Clause 24.6 below in respect of which the provisions of Part 22 of the Schedule (*Variation Procedure*) shall apply), at its own cost.
- 24.5 If directed by the Trust's Representative, Project Co shall allow representatives of the Trust to enter the Site for the purposes of removal or disposal of such discovery Provided That such entry shall be subject to the Trust complying with all relevant safety procedures, which shall include any relevant health and safety plans for the construction of the Facilities, the Contractor's Site Rules from time to time and any reasonable directions with regard to site safety that may be issued by or on behalf of the Contractor's Site Manager from time to time.
- 24.6 If any instruction referred to in Clause 24.3 above includes a requirement for Project Co to carry out works (being any work of alteration, addition, demolition or extension or variation in the Facilities) which are not works which would be necessary for the purpose of compliance with Law or any Consents, such works shall be deemed to be a Trust Works Variation and the provisions of Part 22 of the Schedule (*Variation Procedure*) shall apply as if such instruction were a Variation Enquiry issued by the Trust in accordance with the provisions of Section 1 of Part 22 of the Schedule (*Variation Procedure*).

PART E: QUALITY ASSURANCE

25. Quality Assurance

Quality Plans and Systems

- 25.1 Project Co shall procure that all aspects of the Project Operations are the subject of quality management systems.
- 25.2 The quality management systems referred to in Clause 25.1 above shall be reflected in appropriate quality plans, the standard of which shall be consistent with BS EN ISO 9001 or 9002 (as the case may be) or any equivalent standard which is generally recognised as having replaced them (or either of them).
- 25.3 Without limitation to the generality of Clause 25.2, there shall be:
- (a) a Design Quality Plan;
 - (b) a Construction Quality Plan; and
 - (c) a Services Quality Plan for each Service,
- provided that the Design Quality Plan and the Construction Quality Plan may be incorporated into one document.
- 25.4 Project Co shall procure that the Project Operations are carried out in compliance with the Quality Plans. All Quality Plans shall be submitted to the Trust's Representative in accordance with Part 10 of the Schedule (*Review Procedure*) and Project Co shall not be entitled to implement or procure the implementation of any Quality Plan unless Project Co is entitled to proceed with such implementation pursuant to Part 10 of the Schedule (*Review Procedure*).
- 25.5 Project Co shall implement the quality management systems referred to in Clause 25.1 and shall procure that:
- (a) the Contractor implements the Design Quality Plan;
 - (b) the Contractor implements the Construction Quality Plan;
 - (c) each Service Provider implements the relevant Services Quality Plan for the Service being provided by that Service Provider.
- 25.6 Where any aspect of the Project Operations is performed by more than one contractor or subcontractor, then the provisions of this Clause (in so far as relevant or appropriate to the activities to be performed by such contractor or subcontractor) shall apply in respect of each of such contractors or subcontractors, and references in this Clause to "the Contractor" or "the Service Provider" shall be construed accordingly. To avoid doubt, this Clause shall not be

construed as requiring subcontractors of the Contractor or the Service Provider to have their own quality plans but only to comply with the Design Quality Plan and the Construction Quality Plan or the relevant aspects of the Services Quality Plan (as the case may be).

25.7 Project Co shall from time to time submit to the Trust's Representative in accordance with Part 10 of the Schedule (*Review Procedure*) any changes to any of the Quality Plans required for such Quality Plan to continue to comply with the requirements set out in Clause 25.2. The Trust's Representative may raise comments on any such proposed change only on the grounds set out in paragraph 3(f) of Part 10 of the Schedule (*Review Procedure*).

25.8 In the event that any ambiguity, uncertainty, dispute or discrepancy arises in relation to the nature and scope of Project Co's obligations under this Clause, wherever possible, the provisions of this Clause shall be interpreted and construed in such a manner as to resolve the apparent ambiguity, uncertainty, dispute or discrepancy so that all the provisions of this Clause may be given meaning and effect but, if such interpretation or construction is not possible, the provisions of this Clause shall be given meaning and effect in the following order of precedence (in descending order):

- (a) the provisions and standards referred to in Clause 25.2;
- (b) the Quality Plans referred to in Clauses 25.3;
- (c) Trust's Construction Requirements and/or Output Requirements (as the case may be);
- (d) Project Co's Proposals and/or the Method Statements (as the case may be);
- (e) Project Co's and/or the Contractor's and/or any Service Provider's quality manuals and procedures; and
- (f) Good Industry Practice.

25.9 If there is no objection under Part 10 of the Schedule (*Review Procedure*) to a change to any Quality Plan proposed pursuant to Clause 25.7, the Quality Plan shall be amended to incorporate such change.

Quality Manuals and Procedures

25.10 If any Quality Plan refers to, relies on or incorporates any quality manual or procedure, then such quality manual or procedure or the relevant parts of it shall be submitted to the Trust's Representative at the time that the relevant Quality Plan or part of (or change to) a Quality Plan is submitted in accordance with Part 10 of the Schedule (*Review Procedure*), and the contents of such quality manual or procedure shall be taken into account in the consideration

of the relevant Quality Plan or part of (or change to) a Quality Plan in accordance with Part 10 of the Schedule (*Review Procedure*).

Quality Manager

25.11 Project Co shall appoint (or shall procure the appointment of) as soon as reasonably practicable following the date of this Agreement a Quality Manager, who shall not be directly involved in the day-to-day performance of the Project Operations. The identity of the Quality Manager (and any replacement) shall be subject to the approval of the Trust's Representative (such approval not to be unreasonably withheld or delayed). Without limitation, the terms and conditions of employment of the Quality Manager shall require him to:

- (a) ensure the effective operation of the quality systems described in this Clause;
- (b) audit the quality systems at regular intervals and report the findings of such audit to the Trust's Representative;
- (c) review all quality systems at intervals agreed with the Trust's Representative to ensure their continued suitability and effectiveness;
- (d) liaise with the Trust's Representative on all matters relating to quality management;
and
- (e) report to Project Co.

Quality Monitoring

25.12 The Trust's Representative may carry out audits of Project Co's quality system (including all relevant Quality Plans and any quality manuals and procedures) at intervals of not more frequently than once every twelve (12) months and may carry out other periodic monitoring, spot checks and auditing of Project Co's quality management systems and the other quality systems referred to in this Clause. Project Co shall procure that the Trust's Representative shall have a like right in respect of the Contractor and any Service Providers. Project Co shall co-operate and shall procure that any Sub-Contractor co-operates with the Trust's Representative including providing him with all information and documentation which he reasonably requires in connection with his rights under this Clause.

PART F: NOT USED

26. Not Used

PART G: SERVICES

27. The Services

General obligations

27.1 Throughout the Operational Term, Project Co shall provide (or procure the provision by the Service Providers of) the Services:

- (a) in accordance with the terms of this Agreement;
- (b) in accordance with the Method Statements; and
- (c) as an obligation independent from, and in addition to, Clause 27.1(b), in such manner as ensures that the Output Requirements are met.

27A.1 Not later than 3 months prior to the Completion Date, Project Co shall produce detailed drafts of the Method Statements and shall submit the same for discussion in the Liaison Committee. Such detailed draft Method Statements shall be based on and shall have regard to the principals set out in Section 2 of Part 14 of the Schedule (Service Requirements).

27A.2 The parties shall discuss Project Co's proposed detailed draft method Statements in the Liaison Committee and each party undertakes to act reasonably in seeking to agree the same, having regard to Good Industry Practice. In the event that Project Co's detailed draft Method Statements are not agreed by the date falling 1 month prior to the Completion Date, either party may refer the matter for determination under the Dispute Resolution at any time thereafter.

27A.3 Following agreement or determination of Project Co's detailed draft Method Statements pursuant to Clause 27A.2, such draft shall comprise the Method Statements for the purposes of this Agreement.

Project Co Services Changes

27.2 Project Co may at any time submit to the Trust's Representative in accordance with Part 10 of the Schedule (*Review Procedure*) proposals for amendments to or substitution for the Method Statements or any part of them. If there is no comment on such proposed amendment or substitution (on the grounds set out in paragraph 3(g) of Part 10 of the Schedule (*Review Procedure*)), then the Method Statements as so amended or substituted shall be the Method Statements for the purposes of this Agreement, subject to any further amendment or substitution to which there has been no comment in accordance with Part 10 of the Schedule (*Review Procedure*).

27.3 To avoid doubt, an amendment to or substitution for the Method Statements proposed pursuant to Clause 27.2 shall not be a Qualifying Variation entitling Project Co to any payment (or other compensation) or to any relief from the performance of its obligations under this Agreement.

No disruption

27.4 Project Co shall perform the Services so as to co-ordinate with the Trust's operations on the Site and/or in the Facilities and shall take all reasonable care to ensure that it does not interfere with the operations of the Trust or any Trust Party.

28. Maintenance

Programmed Maintenance Works

28.1 No later than three (3) months prior to the Completion Date, Project Co shall submit to the Trust's Representative in accordance with Part 10 of the Schedule (*Review Procedure*) a Schedule of Programmed Maintenance for the period from the Completion Date to the expiry of that Contract Year.

28.2 Not later than three (3) months prior to the commencement of each subsequent anniversary of the Completion Date Project Co shall submit to the Trust's Representative in accordance with Part 10 of the Schedule (*Review Procedure*) a Schedule of Programmed Maintenance for the next succeeding Contract Year.

28.3 Each Schedule of Programmed Maintenance shall contain the following information (the "Programmed Maintenance Information"):

- (a) details of the proposed start and end dates for each period of Programmed Maintenance, the works to be carried out and the proposed hours of work; and
- (b) details of any effect of the Programmed Maintenance on the delivery of any of the Services and/or the activities of the Trust.

28.4 Not later than twenty (20) Business Days prior to the commencement of any quarter (being a three month period commencing on 1 April, 1 July, 1 October or 1 January), Project Co may submit to the Trust's Representative in accordance with paragraph 3(h) of Part 10 of the Schedule (*Review Procedure*) a revision to the Schedule of Programmed Maintenance for the Contract Year in which the relevant quarter falls showing the effect of the proposed changes to the Programmed Maintenance Information. If the Trust's Representative does not raise comments on such proposed revision in accordance with Part 10 of the Schedule (*Review*

Procedure), the Schedule of Programmed Maintenance as revised shall become the Schedule of Programmed Maintenance in respect of that quarter.

- 28.5 Where the Trust's Representative raises comments in respect of any Programmed Maintenance periods and/or hours of work shown in a Schedule of Programmed Maintenance in accordance with paragraph 3(h) of Part 10 of the Schedule (*Review Procedure*), he shall indicate whether, and if so when, the Programmed Maintenance can be re-scheduled and Project Co shall amend the relevant Schedule of Programmed Maintenance accordingly.

Programmed and Unprogrammed Maintenance

- 28.6 Project Co shall not carry out any Programmed Maintenance or Unprogrammed Maintenance Works save:

- (a) in accordance with a Schedule of Programmed Maintenance to which no objection has been made under Part 10 of the Schedule (*Review Procedure*) or, where comment has been raised in respect of the Programmed Maintenance periods and/or time, the Schedule of Programme Maintenance has been amended pursuant to Clause 28.5;
- (b) in accordance with the procedures set out in Clause 28.8;
- (c) in an emergency, in accordance with Clause 28.9; or
- (d) in accordance with any acceleration or deferment of the Schedule of Programmed Maintenance with which Project Co is obliged to comply in accordance with the procedures set out in Clause 28.7.

- 28.7 Notwithstanding that there has been no objection to a Schedule of Programmed Maintenance, the Trust's Representative may, at any time, require Project Co to accelerate or defer any Programmed Maintenance by giving written notice to Project Co, (unless otherwise agreed) not less than ten (10) Business Days prior to the scheduled date for carrying out such Programmed Maintenance, which notice shall set out the time and/or periods at or during which the Trust requires the Programmed Maintenance to be performed. Project Co shall notify the Trust of the amount of any additional reasonable costs which it will incur as a direct consequence of such acceleration or deferment (the "Estimated Increased Maintenance Costs"). The Trust shall, within a further period of ten (10) Business Days following receipt by the Trust of notification of the amount of the Estimated Increased Maintenance Costs, at its option, either confirm or withdraw its request to accelerate or defer the Schedule of Programmed Maintenance. If the Trust does not respond within this ten (10) Business Day

period, the request shall be deemed to have been confirmed. The Trust shall reimburse to Project Co the direct and reasonable costs actually incurred by Project Co as a consequence of such acceleration or deferment up to, but not exceeding, the amount of the Estimated Increased Maintenance Costs.

- 28.8 If, in circumstances other than an emergency, the need arises for Maintenance Works (excluding any works of a de minimis nature in respect of which the parties have agreed this clause shall not apply), which are not scheduled to be carried out as part of the Programmed Maintenance ("Unprogrammed Maintenance Work"), Project Co shall not carry out any Unprogrammed Maintenance Work unless and until the Trust's Representative has approved the proposed commencement date, the proposed hours of work and estimated duration of the requisite Unprogrammed Maintenance Works in accordance with the provisions of paragraph 3(h) of Part 10 of the Schedule (*Review Procedure*). Nothing in this Clause (including any approval of the Trust pursuant to Part 10 of the Schedule (*Review Procedure*)) shall prevent the Trust from making any deductions from the Service Payments pursuant to the Deduction Mechanisms.
- 28.9 If, as a result of an emergency, the need arises for Unprogrammed Maintenance Works, Project Co may carry out such Unprogrammed Maintenance Works provided that Project Co shall notify the Trust's Representative as soon as possible (and in any event within five (5) Business Days of the occurrence of the emergency) of the extent of the necessary Unprogrammed Maintenance Works and the reasons for them. Project Co shall take all reasonable steps to minimise the duration of such Unprogrammed Maintenance Works. Nothing in this Clause shall prevent the Trust from making any deductions from the Service Payments pursuant to the Deduction Mechanisms.
- 28.10 Where Programmed Maintenance scheduled to be carried out in accordance with the Schedule of Programmed Maintenance has been deferred by the Trust's Representative under Clause 28.7, Project Co shall not be treated as having failed to perform the Services on account of the condition of the Facilities or any part of them from the time the Programmed Maintenance was scheduled to have been completed until the time the deferred Programmed Maintenance was scheduled to have been completed, but not afterwards, provided always, to avoid doubt, that Project Co shall not be relieved from the consequences of any failure to maintain the Facilities in respect of any period prior to the period for performing the particular work according to the Schedule of Programmed Maintenance.

5 Year Maintenance Plan

- 28.11 Project Co shall deliver to the Trust's Representative not less than twenty (20) Business Days prior to the commencement of each Contract Year the latest version of the 5 Year Maintenance Plan for the Services.

29. Monitoring of Performance

Monitoring

- 29.1 In carrying out the Project Operations, Project Co shall, and shall procure that all Project Co Parties and any other persons for whom it is responsible shall, comply with the provisions of Part 16 of the Schedule (*Performance Monitoring System*) and the provisions of Part 18 of the Schedule (*Payment Mechanism*).
- 29.2 Project Co shall be responsible for monitoring its performance of this Agreement during the Operational Term, in the manner and at the frequencies set out in Part 16 of the Schedule (*Performance Monitoring System*). Project Co shall provide the Trust's Representative with relevant particulars of any aspects of its performance which fail to meet the requirements of this Agreement (unless otherwise notified in writing by the Trust). The Trust may at all reasonable times observe, inspect and satisfy itself as to the adequacy of the monitoring procedures (including without limitation carrying out sample checks).

Service Failure Points

- 29.3 The Trust may, by notice to Project Co, award Service Failure Points in respect of a Service in accordance with Part 8 of the Schedule (*Payment Mechanism*), depending on the performance of that Service in any month as measured in accordance with Part 8 of the Schedule (*Payment Mechanism*). Service Failure Points which are agreed, or determined, to have been awarded in circumstances where such award was not justified shall be deemed to have been cancelled.

Warning Notices

- 29.4 Without prejudice to the Trust's rights under Clause 44 (*Project Co Events of Default*) and any other express rights under this Agreement, if at any time Project Co has:
- (a) committed any material breach of its obligations under this Agreement; or
 - (b) accrued more than one hundred (100) Service Failure Points in any one (1) month period in respect of any Service,

then the Trust may give written notice (a "Warning Notice") to Project Co setting out the matter or matters giving rise to such notice and containing a reminder to Project Co of the implications of such notice. Any such notice shall state on its face that it is a "Warning Notice".

29.5 Without prejudice to the Trust's rights under Clause 44 (*Project Co Events of Default*) and to any other express rights under this Agreement, if Project Co receives three (3) or more Warning Notices in any three (3) month period in respect of any Service, the Trust may by notice to Project Co increase the level of its monitoring of Project Co, or (at the Trust's option) of Project Co's monitoring of its own performance of its obligations under this Agreement, in respect of the relevant Service until such time as Project Co shall have demonstrated to the reasonable satisfaction of the Trust that it will perform (and is capable of performing) its obligations under this Agreement, in which case, the following provisions shall apply:

- (a) any such notice to Project Co shall specify in reasonable detail the additional measures to be taken by the Trust or by Project Co (as the case may be) in monitoring the performance of Project Co;
- (b) if Project Co (acting reasonably) objects to any of the specified measures on the grounds that they are excessive it shall notify the Trust in writing within five (5) Business Days of the receipt of the notice of the measures objected to (and of any changes necessary in order to prevent prejudice to Project Co's performance of its obligations under this Agreement);
- (c) the measures to be taken by the Trust and Project Co (as the case may be) shall be agreed between the parties or, in the absence of agreement within seven (7) Business Days of the Trust's receipt of Project Co's objection, determined pursuant to Part 26 of the Schedule (*Dispute Resolution Procedure*); and
- (d) Project Co shall bear its own costs and indemnify and keep indemnified the Trust at all times from and against all reasonable costs and expenses (if any) incurred by or on behalf of the Trust in relation to such increased level of monitoring (including an appropriate sum in respect of general staff costs and overheads).

Trust's remedial rights

29.6 The provisions of Clauses 29.7 to 29.12 (inclusive) shall apply if:

- (a) the Trust, acting reasonably, considers that a breach by Project Co of any obligation under this Agreement:

- (i) may create an immediate and serious threat to the health or safety of any user of the Facilities; or
- (ii) may result in a material interruption in the provision of one or more of the Services; or
- (iii) is prejudicial to the ability of the Trust to provide Clinical Services; or
- (b) Project Co has accrued more than seven hundred and fifty (750) Service Failure Points in a three (3) month period in respect of any Service; or
- (c) Project Co is not in breach of its obligations as described in Clause 29.6(a) and (b) but the Trust considers the circumstances constitute an emergency.

29.7 In any of the circumstances set out in Clause 29.6, the Trust, acting reasonably, may (without prejudice to its rights under Clause 44 (*Project Co Events of Default*) or any other express rights under this Agreement) either:

- (a) if it considers that there is sufficient time and that it is likely that Project Co will be willing and able to provide assistance, require Project Co by written notice to take such steps as the Trust considers necessary or expedient to mitigate or rectify such state of affairs and Project Co shall use its best endeavours to comply with the Trust's requirements as soon as reasonably practicable; or
- (b) if it considers there is not sufficient time, or that Project Co is not likely to be willing and able to take the necessary steps, take such steps as it considers to be appropriate (either itself or by engaging others to take any such steps) to ensure performance of the relevant Services to the standards required by this Agreement (or as close as possible to those standards as the circumstances permit and, in any event, in accordance with Good Industry Practice).

29.8 If:

- (a) Project Co does not confirm, within ten (10) Business Days of a notice served pursuant to Clause 29.7(a) (or such shorter period as is appropriate in the case of an emergency), that it is willing to take such steps as are referred to in Clause 29.7(a); or
- (b) Project Co fails to take the steps notified to it by the Trust pursuant to Clause 29.7(a) within such time as the Trust, acting reasonably, shall think fit,

then (without prejudice to Clause 29.7(b)) the Trust, acting reasonably, may itself take or engage others to take such steps as it considers appropriate.

- 29.9 Where the Trust considers it to be necessary or expedient to do so, the steps which the Trust may take pursuant to this Clause shall include the partial or total suspension of the right and obligation of Project Co to provide one or more of the Services but only for so long as the circumstances referred to in Clause 29.6 (a) or (c) subsist or, in the circumstances set out in clause 29.6(b), until such time as Project Co shall have demonstrated to the reasonable satisfaction of the Trust that it will perform (and is capable of performing) its obligations in respect of the relevant Services to the required standard.
- 29.10 If the Trust either takes steps itself or requires Project Co to take steps in accordance with this Clause as a result of the circumstance referred to in Clause 29.6(c):
- (a) the Trust shall indemnify and keep indemnified Project Co at all times from and against all additional direct reasonable costs, losses, expenses or damages suffered or incurred in relation to undertaking such steps over and above those that would otherwise have been incurred in the proper performance of Project Co's obligations under this Agreement; and
 - (b) any costs incurred by the Trust in taking such steps or requiring Project Co to take such steps shall be borne by the Trust.
- 29.11 To the extent that the parties shall agree, or it shall be determined in accordance with Part 26 of the Schedule (*Dispute Resolution Procedure*), that the Trust was not reasonable in requiring Project Co to take such steps (or in taking such steps itself) as are referred to in this Clause 29, then the Trust shall indemnify and keep indemnified Project Co at all times from and against any costs, losses, expenses or damages (over and above those that would otherwise have been incurred by Project Co in the proper performance of its obligations under this Agreement) that are directly and reasonably incurred by Project Co in complying with those requirements of the Trust as are agreed or determined not to be reasonable. To avoid doubt, it is acknowledged that Project Co has no right to require determination before taking any such action that the Trust may specify; only subsequently may it refer any dispute for resolution to determine if the Trust was reasonable in requiring Project Co to take such steps.
- 29.12 Subject to Clauses 29.10 and 29.11:
- (a) any costs or expenses incurred by Project Co in taking such steps as are required by the Trust pursuant to Clause 29.7(a) shall be borne by Project Co;
 - (b) Project Co shall reimburse the Trust for all reasonable costs, losses, expenses or damages incurred by it in relation to taking the steps, or engaging others to take the steps, referred to in Clauses 29.7 and 29.8; and

- (c) the Trust shall be entitled to deduct any such amount from any amount payable to Project Co under the provisions of this Agreement.

Employment Issues

30. References and Enquiries

- 30.1 Project Co shall procure that no Prospective Employee is employed or engaged in the provision of the Services unless Project Co shall first have obtained two satisfactory references (at least one of which shall be from that Prospective Employee's current or most recent employer).
- 30.2 Project Co shall procure that any Prospective Employee who may during the course of his/her employment or engagement (if he/she were to be so employed or engaged by Project Co or any Sub-Contractor) have access to persons receiving Clinical Services:-
- 30.2.1 is thoroughly questioned concerning their Convictions;
- 30.2.2 provides a signed statement providing details of any Convictions held by them, or if the Prospective Employee has no Convictions, providing details of that fact; and
- 30.2.3 have given their written consent to such information as shall be contained in the signed statement referred to in sub-clause 30.2.2. above being given to and processed by the Trust.
- 30.3 Project Co shall procure that where any Prospective Employee may have access to children or other vulnerable individuals during the course of their employment or engagement:-
- 30.3.1 it obtains a basic disclosure certificate (or equivalent in terms of the Police Act 1997, as may be amended from time to time) in respect of such Prospective Employee;
- 30.3.2 it has obtained the written consent of such Prospective Employee to such information as shall be contained in the criminal record certificate being given to and processed by the Trust; and
- 30.3.3 such Prospective Employee is aware that any spent convictions will be disclosed on a criminal record certificate.
- 30.4 Project Co shall procure that no Prospective Employee who discloses any Convictions under Clause 30.2. above, or who is found to have any Convictions following the completion of a police check under Clause 30.3 above, is employed without the Trust's prior written consent.
- 30.5 Project Co shall carry out any and all such further background checks as the Trust (acting reasonably) shall request in respect of any Prospective Employee and being checks that

would be carried out by a reasonably prudent employer acting in accordance with Good Industry Practice.

- 30.6 If, notwithstanding Clause 30.5 above, the Trust believes that any Project Co Employee has any Convictions, or if any Project Co Employee is found to have any Convictions following the completion of a police check under Clause 30.3 and such Project Co Employee has been assigned to the provision of the Services without the Trust's prior written consent, or about whom any other background checks have revealed circumstances which the Trust believes to be unsatisfactory; the Trust may consider such person to be an unsuitable person (an "Unsuitable Person") and the Trust may require the removal of the person in accordance with the procedure set out in Clauses 30.13 to 30.15 of this Agreement.
- 30.7 Project Co shall procure that the Trust is immediately advised if, following the commencement of his/her employment with the Project Co or any Sub-Contractor, any Project Co Employee receives a Conviction or their previous Convictions become known to Project Co (or to any Sub-Contractor involved in the provision of Services).
- 30.8 Where the Trust (acting reasonably) refuses to give its prior written consent to the employment or engagement of any Prospective Employee in accordance with Clause 30.4 above, Project Co shall indemnify and hold it harmless against any and all Losses incurred by the Trust (including any Losses arising out of any claims made by or arising out of the treatment of any Prospective Employee) as a consequence of action taken by the Project Co in accordance with the Trust's instructions.
- 30.9 Project Co shall not (and shall procure that any Sub-Contractor shall not) engage any Prospective Employee unless in the opinion of Project Co the Prospective Employee has successfully completed a Pre-Employment Health Check Questionnaire and such Pre-Employment Health Check Questionnaire does not reveal any responses that Project Co (acting reasonably) believes might endanger the health of patients being treated at the Facilities (whether through the risk of infection or otherwise).
- 30.10 Before requiring a Prospective Employee to complete a Pre-Employment Health Check Questionnaire, the Project Co shall procure that:-
- 30.10.1 the Prospective Employee gives his/her written consent to completion of the Pre-Employment Health Check Questionnaire; and
 - 30.10.2 the Prospective Employee gives his/her written consent to such information as may be disclosed in the Pre-Employment Health Check being given to and processed by the Trust.

- 30.11 If, notwithstanding the provisions of Clause 30.9 above, the Trust believes that any employee engaged or employed either by the Project Co or and Sub-Contractor in the provision of the Services has not successfully completed a Pre-Employment Health Check Questionnaire, the Trust may consider such person to be an Unsuitable Person and the Trust may require the removal of the person in accordance with the procedure set out in Clauses 30.13 to 30.15 of this Agreement.
- 30.12 Where the Trust is of the opinion that the Prospective Employee has not successfully completed the Pre-Employment Health Check Questionnaire or (where completed) such Questionnaire reveals such response that might endanger the health of patients being treated at the Facilities, Project Co shall indemnify and hold it harmless against any and all Losses incurred by the Trust (including any Losses arising out of any claims made by or arising out of the treatment of any Prospective Employee) as a consequence of action taken by the Project Co in accordance with the Trust's instructions under Clause 30.9 of this Agreement.

The removal procedure

- 30.13 Subject and without prejudice to the provisions of Clause 30.19, the Trust may at any time during the subsistence of this Agreement by issuing an instruction to the Project Co require the Project Co immediately:-
- 30.13.1 to remove or procure the removal of an Unsuitable Person from the Facilities; or
- 30.13.2 to procure that no Unsuitable Person is employed or engaged directly or indirectly in the provision of any part of the Services either by Project Co or any Sub-Contractor. Where any instruction issued pursuant to this Clause 30.13 is issued orally, the Trust shall confirm the same in writing within three (3) Business Days of the date of issue of the oral instruction. In the event that the Trust fails to confirm any such instruction in writing within such period, Project Co shall be entitled to confirm receipt of the oral instruction to the Trust in writing. Where the Trust fail to respond to any such written confirmation in writing, denying or otherwise disputing that an oral instruction has been issued within the period of three (3) Business Days of the Trust's receipt of the same, such written confirmation will be deemed to be conclusive evidence of the issue of the oral instruction requiring removal of an unsuitable person by the Trust to Project Co.
- 30.14 Subject and without prejudice to the provisions of Clause 30.19 the Project Co shall indemnify the Trust against all Losses incurred by the Trust as a consequence of action taken by the Project Co in accordance with the provisions of Clause 30.13 above.

30.15 Subject and without prejudice to the provisions of Clause 30.19 if Project Co fails to act immediately upon an oral instruction given in accordance with Clause 30.13 above, the Trust will be entitled to remove or procure the removal of such Unsuitable Person from the Facilities and the Project Co shall indemnify the Trust against all Losses incurred as a consequence of the Trust's actions.

Disciplinary Action

30.16 Subject and without prejudice to the provisions of Clause 30.19, if the Trust believes that:-

30.16.1 any Project Co Employee has committed any act of misconduct;

30.16.2 any Project Co Employee is incapable, incompetent or negligent in his duties; or

30.16.3 that it is otherwise inappropriate or undesirable for any Project Co Employee to be engaged or employed in the provision of the Services;

the Trust may, (i) require the removal of such Project Co Employee in accordance with Clause 30.13 above, and deem the Project Co Employee to be an "Unsuitable Person" in terms of that Clause and/or (ii) request Project Co to procure that appropriate disciplinary action shall be taken against the Project Co Employee (and Project Co shall procure that such action is taken where, acting reasonably, it is satisfied that there are grounds for taking such action pursuant to the relevant Project Co Employee's employment contract)".

30.17 Subject and without prejudice to the provisions of Clause 30.19 the Project Co shall indemnify the Trust and hold it harmless against any and all Losses arising from or related to any disciplinary action taken against, any removal of, or any dismissal of any Project Co Employee in accordance with Clause 30.16 above.

30.18 Project Co shall procure that there are set up and maintained, by it and by any Sub-Contractor, personnel policies and procedures covering all such matters as the Trust may from time to time direct (which shall include but not be limited to discipline, grievance, equal opportunities and health and safety). Project Co shall procure that the terms and the implementation of such policies and procedures comply with Law and Good Industry Practice and that they are published in written form and that copies of them (and any revisions and amendments to them) are forthwith issued to the Trust upon application. For the avoidance of doubt, any such policies and procedures comprise part of the Intellectual Property rights and the provisions of Clause 51 shall apply thereto.

30.19

30.19.1 Where the Trust:

- (i) requires Project Co to remove or procure the removal of an Unsuitable Person from the Facilities pursuant to Clause 30.13.1 and/or to procure that no Unsuitable Person is engaged directly or indirectly in the provision of the Services pursuant to Clause 30.13.2; and/or
- (ii) removes or procures the removal of an Unsuitable Person from the Facilities pursuant to Clause 30.15; and/or
- (iii) requires Project Co to remove an Project Co Employee or to procure that disciplinary action is taken against an Project Co Employee pursuant to Clause 30.16; and/or
- (iv) refuses to admit or orders the removal from the Facilities of an Project Co Employee or other individual pursuant to Clause 32.1

and it is subsequently agreed or determined pursuant to the Dispute Resolution Procedure that the Trust has acted unreasonably in doing so, the provisions of Clauses 30.19.2 and 30.19.3 shall apply.

30.19.2 The Trust shall not be permitted to deduct or withhold any payment pursuant to Part 18 of the Schedule (*Payment Mechanism*) in respect of any Quality Failure and/or Failure Event to the extent that the same arises as a consequence of the employee or other operative being prevented from performing the Services and/or restricted in such performance due to the Trust's action under Clause 30.13.1, 30.13.2, 30.15, 30.16 or 32.1 (as appropriate). In the event that any such payment is deducted or withheld prior to the parties agreeing or it being determined that the Trust has acted unreasonably as aforesaid, the Trust shall repay the same to Project Co within 7 Business Days of the amount of the relevant deduction or withholding being agreed or determined.

30.19.3 Project Co: -

- (i) (in the case of it being agreed or determined that the Trust has acted unreasonably pursuant to Clause 30.13.1 or 30.13.2) shall not be obliged to indemnify the Trust pursuant to Clause 30.14; and/or
- (ii) (in the case of it being agreed or determined that the Trust has acted unreasonably pursuant to Clause 30.15) shall not be obliged to indemnify the Trust pursuant to such Clause; and/or

- (iii) (in the case of it being agreed or determined that the Trust has acted unreasonably pursuant to Clause 30.16) shall not be obliged to indemnify the Trust pursuant to such sub-clause.

31. Transfer Assistance Period

31.1 Save to the extent that Project Co is prohibited from delivering Personnel Records and other information or documentation mentioned below due to the operation of any Law and/or such delivery would result in any infringement of Law, Project Co undertakes:-

31.1.1 that during the Transfer Assistance Period it shall, within 7 Business Days of receiving a request from the Trust, supply in writing to the Trust such information or documentation relating to the Assigned Employees (including the Personnel Records) in its possession or control (or which it can reasonably obtain) as may be requested by the Trust.

31.1.2 that as soon as it becomes aware of the same during the Transfer Assistance Period it shall provide to the Trust any further information or documentation in its possession or under its control (or which it can reasonably obtain) which updates any information or documentation provided in accordance with Clause 31.1.1 above.

31.1.3 that immediately upon the date of the Cessation of Services, it shall deliver the Personnel Records and any other information or documentation relating to the Assigned Employees as the Trust shall request to the Trust (or to such other person as the Trust may direct).

31.2 Project Co warrants that the information provided to the Trust in accordance with Clauses 31.1.1 and 31.1.2 above will be full, complete and accurate and the Project Co shall indemnify the Trust and hold it harmless from and against any and all Losses suffered by the Trust as a result of any breach of the foregoing warranty.

31.3 Throughout the Transfer Assistance Period Project Co shall, as soon as it becomes aware of the same and save to the extent that Project Co is prohibited from so notifying the Trust due to the operation of any Law and/or such notification would result in infringement of Law:-

31.3.1 notify the Trust of any disputes, disciplinary proceedings or other proceedings concerning any Assigned Employee or the dismissal of any Assigned Employee;

- 31.3.2 notify the Trust in the event that any Assigned Employee resigns or gives notice of termination his/her employment; and
- 31.3.3 notify the Trust of, and supply the Trust with, any additional information or documentation updating the information supplied to it under Clauses 31.1.1 and 31.1.2 above.
- 31.4 Project Co shall procure that throughout the Transfer Assistance Period neither it nor any Sub-Contractor shall:-
- 31.4.1 vary the terms and conditions of the Assigned Employees;
- 31.4.2 increase the number of Assigned Employees; or
- 31.4.3 replace any Assigned Employee;
- without the prior written consent of the Trust.
- 31.5 Project Co undertakes that there shall not be in existence on the date of the Cessation of Services any written or unwritten contract of employment with any Assigned Employee which cannot be terminated by three months notice or less.
- 31.6 Project Co undertakes that during the Transfer Assistance Period it shall procure that:-
- 31.6.1 the Assigned Employees are made available to the Trust for the purpose of training or for any other purpose specified by the Trust; and
- 31.6.2 all such steps are taken and all such things are done as may be required by the Trust to enable the Trust to have full access to the Assigned Employees,
- at no charge and within five (5) Business Days of such any request by the Trust.
- 31.7 Project Co undertakes that, during the Transfer Assistance Period it shall, within five (5) Business Days of a request from the Trust, provide the Trust with such evidence as it may require to demonstrate that:-
- 31.7.1 each Assigned Employee is properly trained and adequately supervised;
- 31.7.2 has all appropriate and necessary qualifications and registrations for the performance of the Services for which they are engaged;
- 31.7.3 has all the skills reasonably required for the performance of the Services for which they are engaged; and
- 31.7.4 has received all appropriate training (including relevant statutory update training) as the Trust considers to be required for the performance of the Services for which they are engaged.
- 31.8 Not used.

31.9 Not used.

Cessation of Services

31.10 The Trust and Project Co acknowledge and agree that if on the Cessation of Services the contracts of employment of the Assigned Employees transfer by virtue of the TUPE Regulations to the Trust (or to any provider of services to the Trust) then the Trust shall give effect to the same (or shall procure that any such provider of services to the Trust shall give effect to the same) as if they had been originally entered into between the Trust or any such provider of services to the Trust (as appropriate) and the individual concerned on the Re-Transfer Date and the provision of Clause, 31.11 to 31.15 shall apply.

31.11 Prior to the transfer of the employment of any Assigned Employee to the Trust (or to any provider of services to the Trust referred to in Clause 31.10): -

31.11.1 Project Co undertakes fully to comply with its obligations under Regulation 10(2) of the TUPE Regulations and/or to procure that the Service Provider or any relevant Sub-Contractor complies with such obligations; and

31.11.2 the Trust undertakes fully to comply with its obligations under Regulation 10(3) of the TUPE Regulations and/or to procure that any such provider of services to the Trust referred to in Clause 31.10 complies with such obligations.

31.12.1 All obligations in respect of the Assigned Employees including without prejudice to the foregoing generality, unpaid wages, benefits, pensions contributions and other emoluments, tax and national insurance payments (including PAYE) contributions to retirement benefits schemes and bonus and commission arrangements ("**Transfer Financial Obligations**") relative to the period following commencement of the Transfer Assistance Period and up to but not including the date when the transfer of the contract of employment of each Assigned Employee to the Trust (or to any such provider of services to the Trust referred to in Clause 31.10) becomes effective under the TUPE Regulations ("**the Re-Transfer Date**") shall be borne by Project Co.

31.12.2 All Transfer Financial Obligations relative to the period from and including the Re-Transfer Date shall be borne by the Trust or any provider of services to the Trust referred to in Clause 31.10 (as appropriate).

31.13 In relation to entitlement to holiday pay for the Assigned Employees the following shall apply:

- 31.13.1 where the Assigned Employee has taken more than his proportionate holiday for the then current holiday year prior to the Re- Transfer Date, the Trust (or any provider of services to the Trust referred to in Clause 31.1) shall not be obliged to make any reimbursement in respect thereof to Project Co; and
- 31.13.2 where the Assigned Employee has taken less than his proportionate holiday in the then current holiday year prior to the Re-Transfer Date, the Trust shall or shall procure that any provider of services to the Trust referred to in Clause 31.10 shall bear the cost of such entitlement arising thereafter in full without recourse to any reimbursement from Project Co.
- 31.14 Project Co shall indemnify the Trust and hold it harmless from and against all Direct Losses arising out of or in connection with: -
- 31.14.1 any claim or demand by any Assigned Employee arising under statute, contract, custom and practice or at common law including without prejudice to the foregoing generality, any claim for unfair dismissal, redundancy, unlawful deductions, sex, race or disability discrimination equal pay, wrongful dismissal, breach of contract and any claim in delict or otherwise arising or resulting from any act, fault or omission of Project Co or any Project Co Party in relation to each such Assigned Employee prior to the Re-Transfer Date provided that, for the avoidance of doubt, the indemnity in this Clause 31.14.1 shall not relate to the Trust's obligation to employ the Assigned Employees or to procure the employment of the Assigned Employees on the terms and conditions to which they were entitled immediately prior to the Re-Transfer Date nor does it relate to the Trust's obligations to recognise or to procure the recognition of their periods of continuous employment as at the Re-Transfer Date; and/or
- 31.14.2 any claim under statute or at common law by any trade union or staff association or any other workers' representative within the meaning of the TUPE Regulations arising from or connected with any failure by Project Co or any Project Co Party to comply with any legal obligations to that trade union, staff association or other worker representative whether under Regulation 10 of the TUPE Regulations or otherwise and whether any such claim arises or has its origin before, on or after the Re-Transfer Date,

save in each case to the extent that such claim or demand arises out of any breach hereunder by the Trust or any Trust Party of any of their respective obligations (or any act, fault or omission by the Trust or any Trust Party).

31.15 The Trust shall indemnify Project Co or any Project Co Party in respect of all Direct Losses arising out of or in connection with: -

31.15.1 any claim or demand by an Assigned Employee arising under statute, contract, custom and practice or at common law including, without prejudice to the foregoing generality, any claim for unfair dismissal, redundancy, unlawful deductions, sex, race or disability discrimination, equal pay, wrongful dismissal, breach of contract and any claim in delict or otherwise arising or resulting from any act, fault or omission of the Trust or any Trust Party in relation to that Assigned Employee on or after the Re-Transfer Date; and/or

31.15.2 any claim, either under statute or at common law or by any trade union or staff association or other worker representative within the meaning of the TUPE Regulations arising from or connected with any failure by the Trust or any Trust Party to comply with its obligations to such trade union, staff association or other worker representative, whether under Regulation 10 of the TUPE Regulations or otherwise and whether such claim arises or has its origin before, on or after the Re-Transfer Date,

save in each case to the extent that such claim or demand arises out of any breach hereunder by Project Co or any Project Co Party of any of their respective obligations (or any act, fault or omission by Project Co or any Project Co Party).

32. Site Security and Personnel Issues

Access

32.1 Subject and without prejudice to the provisions of Clause 30.19 the Trust shall have the right to refuse admittance to, or order the removal from the Facilities of, any Assigned Employee or any other individual engaged by or acting on behalf of the Project Co or any Sub-Contractor whose presence is, in the opinion of the Trust, likely to have an adverse effect on the performance by the Trust of the Clinical Services or is not a fit and proper person to be in the Facilities.

32.2 Action taken under Clause 32.1 shall forthwith be confirmed in writing by the Trust to Project Co and, to avoid doubt, shall not relieve Project Co of any of its obligations under this Agreement.

- 32.3 If and when so directed in writing by the Trust, Project Co shall within twenty (20) Business Days provide a list of the names and addresses of all persons it expects may require admission in connection with this Agreement, to any premises occupied by the Trust, specifying the capacities in which those persons are concerned with this Agreement and giving such other particulars as the Trust may, at its absolute discretion, require.
- 32.4 Subject and without prejudice to the provisions of Clause 30.19 the decision of the Trust as to whether any person is to be refused admission shall be final and conclusive.

Trust Policies

- 32.5 Project Co shall, and shall procure that any Sub-Contractor shall, comply at all times with the Trust Policies save where the same are inconsistent with or ambiguous having regard to Project Co's obligations under this Agreement and in particular (but without limitation) the Method Statements and/or Project Co's Proposals and/or the Service Requirements set out in Part 14 of the Schedule and/or the Trust's construction Proposals (the "Key Scope Documents") or (without prejudice to the provisions of Clause 40) where the requirement to comply with the Trust Policies would require Project Co to provide a facility and/or services which differ from the facility or the services (as appropriate) described in the Key Scope Documents to a material extent.
- 32.6 The Trust shall notify Project Co of any proposed change to the Trust Policies as soon as practicable (and, in any event, prior to such change taking effect) and, subject to Clause 32.7, such change shall take effect as a Variation in accordance with Part 22 of the Schedule (*Variation Procedure*).
- 32.7 The Trust may, at its sole option, notify Project Co that Project Co shall not be obliged to comply with any change to any Trust Policy and that Project Co should continue to comply with the relevant Trust Policy prior to any change, in which case such change shall not take effect as a Variation in accordance with Part 22 of the Schedule (*Variation Procedure*).

Resources and training

- 32.8 Project Co shall procure that:
- 32.8.1 there shall at all times be a sufficient number of Project Co Employees (including all relevant grades of supervisory staff) engaged in the provision of the Services with the requisite level of skill and experience. To avoid doubt, this obligation shall include ensuring that there are at all times sufficient Project Co Employees and/or

such other individuals to cover periods of holiday, sickness, other absence, and anticipated and actual peaks in demand for each of the Services;

32.8.2 all Project Co Employees receive such training and supervision as may be necessary to ensure the proper performance of this Agreement and for compliance with all health and safety rules, procedures and requirements; and

32.8.3 all Project Co Employees have and maintain all appropriate qualifications and registrations as may necessary for the performance of the Services for which they are engaged.

Management

32.9 Project Co shall consult with the Trust in relation to the selection procedure for Project Co's Hospital Manager and such person shall not be appointed (or replaced) without the prior written consent of the Trust (such approval not to be unreasonably withheld or delayed).

32.10 Project Co shall provide (and shall procure that any Sub-Contractor shall provide) to the Trust upon request, all such details of their respective management and organisation structure as the Trust (acting reasonably) may require.

Lists and Records

32.11 Project Co undertakes that throughout the subsistence of this Agreement it shall maintain (and shall procure that any Sub-Contractor shall maintain) complete Personnel Records in relation to each Project Co Employee.

32.12 Project Co shall give the Trust access to the Personnel Records and all other details concerning any Project Co Employees as the Trust may request upon demand save where Project Co is prohibited from giving the Trust such access due to the operation of any Law and/or where giving such access will result in the contravention of any Law. Such other details may include, but shall not be limited to the numbers and categories of Project Co Employees.

32.13 Project Co warrants that the information provided to the Trust in accordance with Clauses 32.11 and 32.12 above shall be full, complete, and accurate to the best of the Project Co's knowledge and belief and the Project Co shall indemnify the Trust and hold it harmless from and against any and all Losses suffered by the Trust as a result of any breach of the foregoing warranty.

33. Stocks, Consumables, Materials and Equipment

Standards

- 33.1 All goods, equipment, consumables and materials which are to be used in the provision of the Services shall be of satisfactory quality.
- 33.2 Project Co shall ensure that the goods, equipment, consumables and materials used by it or any Sub-Contractor in connection with the provision of any of the Services (each as a distinct and separate obligation) are:
- (a) maintained in a safe, serviceable and clean condition in accordance with Good Industry Practice;
 - (b) of the type specified in the Output Requirements and/or the Method Statements (where appropriate); and
 - (c) in compliance with any relevant rules, regulations, codes of practice and/or British or European Standards,
- and shall, as soon as practicable after receiving a request from the Trust's Representative, supply to the Trust's Representative evidence to demonstrate its compliance with this Clause.
- 33.3 Project Co shall procure that sufficient stocks of goods, consumables, equipment and materials are held in order to comply with its obligations under this Agreement.

Hazardous substances and materials

- 33.4 Project Co shall not install, keep or use in or on the Facilities any materials, equipment or apparatus the installation, keeping or use of which is likely to cause (or in fact causes):
- (a) material damage to the Facilities;
 - (b) dust, noise or vibration constituting a nuisance to the owners and/or occupiers of any property adjoining or near to the Facilities; or
 - (c) the generation, accumulation or migration of any hazardous substance in an unlawful manner whether within or outside the Facilities,
- and shall use all reasonable endeavours to ensure (by directions to staff and otherwise) that all materials, equipment or apparatus in or on the Facilities is operated so as to minimise noise and vibration likely to cause annoyance or disturbance and the unlawful generation or migration of any hazardous substance.
- 33.5 Save for articles or things commonly used or generated in hospitals, Project Co shall not bring in or on to (or keep or maintain in or on) the Facilities any hazardous materials or equipment

without the prior written consent of the Trust and unless Project Co has complied with all relevant Law.

33.6 Without prejudice to the generality of its obligations, Project Co shall:

- (a) procure that all hazardous materials and equipment used or stored on the Site shall be kept in accordance with Good Industry Practice, properly and securely labelled and stored, under appropriate supervision and used only by appropriately trained and competent staff; and
- (b) use all practicable and reasonable means to:
 - (i) prevent or counteract the unlawful emission of any hazardous substance to the satisfaction of the Trust's Representative;
 - (ii) avoid the unlawful discharge into any conducting media serving the Facilities of any hazardous substance;
 - (iii) prevent the unlawful generation, accumulation or migration of any hazardous substance at or from the Facilities; and
 - (iv) prevent any environmental claims arising or any circumstances arising likely to result in any environmental claims,

in so far as such hazardous substance is, or should be, under the control of Project Co pursuant to this Agreement.

34. Not Used

PART H: PAYMENT AND FINANCIAL MATTERS

35. Payment

Service Payments

35.1 Project Co shall not be entitled to receive any Service Payments until the Payment Commencement Date. Subject to the provisions of this Agreement, the Trust shall pay Project Co the Service Payments in respect of each Payment Month in accordance with the provisions of Part 18 of the Schedule (*Payment Mechanism*).

Invoicing and payment arrangements

35.2 Invoicing

35.2.1 Within ten (10) Business Days prior to the end of each Payment Month Project Co shall prepare and deliver to the Trust a report (a "**Payment Report**") in the Agreed Form setting out:

- (a) the Monthly Payment (if any) due in respect of the Payment Month;
- (b) the calculation set out in paragraph 1.1 of Part 18 of the Schedule (*Payment Mechanism*);
- (c) the back up information validating the calculation set out in 35.2.1(b) above;
- (d) any other amount due and payable from one party to the other under this Agreement;
- (e) any VAT payable in respect of any payments;
- (f) any adjustments to reflect previous over payments and/or under payments;
and
- (g) the net amount owing by the Trust to Project Co or by Project Co to the Trust.

35.2.2 The Payment Report delivered pursuant to Clause 35.2.1 shall be accompanied by a VAT invoice reflecting the amounts set out as due and payable in the Payment Report.

35.2.3 If the Payment Report shows a net amount owing by Project Co to the Trust, the Trust shall issue an invoice to Project Co in respect of such amount and Project Co shall pay to the Trust the amount shown by such invoice not later than the twenty (20) Business Days after Project Co received the invoice from the Trust.

35.2.4 Within thirty (30) Business Days of the Expiry Date, Project Co shall render an invoice for any payments due in respect of the final Payment Month of the Operational Term.

35.3 **Payments**

All payments under this Agreement:-

35.3.1 shall be due and payable by the later of:-

(a) in the case of payment of the Monthly Payment (unless otherwise agreed between the Parties) within thirty (30) Business Days after the later of:

- (1) the issue of the Payment Report in terms of Clause 35.2.1; and
- (2) the issue of the VAT invoice in terms of Clause 35.2.2; and

(b) in the case of payments other than those specified in Clause 35.2.1 by the later of:-

- (1) the date specified for payment in this Agreement, or where no such date is specified, thirty (30) days after the date on which the amount of the payment is agreed or determined; and
- (2) thirty (30) days after the date of issue of an invoice and/or Payment Report for the payment (or VAT invoice where VAT is payable).

Manner of payment

35.4 All payments under this Agreement shall be made in pounds sterling by electronic transfer of funds for value on the day in question to the bank account of the recipient (located in the United Kingdom) specified in the relevant invoice, quoting the invoice number against which payment is made.

Disputes

35.5 If either party (acting in good faith) disputes all or any part of the Service Payments calculated in accordance with Clause 35.2 (*Invoicing*), the undisputed amount of the Service Payment shall be paid by the Trust in accordance with Clause 35.2 (*Invoicing*) and the provisions of this Clause shall apply. The parties shall use all reasonable endeavours to resolve the dispute in question within twenty (20) Business Days of the dispute arising. If they fail so to resolve it, either party may refer the matter to the Fast Track Dispute Resolution Procedure. Following resolution of the dispute, any amount agreed or determined to have been payable shall be

paid forthwith by the Trust to Project Co, together with interest on such amount calculated in accordance with Clause 35.6 (*Late Payment*).

Late Payments

- 35.6 Each party shall be entitled, without prejudice to any other right or remedy, to receive interest on any payment not duly made pursuant to the terms of this Agreement on the due date calculated from day to day at a rate per annum equal to the Default Interest Rate from the day after the date on which payment was due up to and including the date of payment.

Set-Off

- 35.7 Whenever any sum of money shall be agreed, or determined (pursuant to the Dispute Resolution Procedure or in terms of any court or other proceedings), as due and payable by Project Co to the Trust under this Agreement, such sum may at the Trust's discretion be deducted from or applied to reduce the amount of any sum then due, or which at any time afterwards may become due, to Project Co from the Trust under this Agreement provided that the Trust has given Project Co under this Agreement not less than twenty (20) Business Days' prior notice of its intention to deduct or apply such sum.
- 35.8 Whenever any sum of money shall be agreed, or determined, as due and payable by the Trust to Project Co, such sum may at Project Co's discretion be deducted from or applied to reduce the amount of any sum then due, or which at any time afterwards may become due, from Project Co to the Trust under this Agreement provided that Project Co has given the Trust not less than twenty (20) Business Days' prior notice of its intention to deduct or apply such sum.

VAT

- 35.9 The provisions of Clause 53 (*Taxation*) shall apply.

Utilities

- 35.10.1 Project Co shall maintain records of the energy and utilities consumption and the relevant tariff rates within the Facilities. Subject to Clauses 35.10.2 and 35.10.5, costs payable in respect of gas and electricity shall be invoiced to and paid timeously by Project Co.

35.10.2 Within ten (10) Business Days of receipt by Project Co of an invoice for gas or electricity for the Facilities, where the actual tariff differs from the Base Tariff for the utilities shown in the table below (whether due to an inability on the part of Project Co to secure supplies from Scottish Healthcare Supplies (but not being an inability arising from any breach of contract or other default on the part of Project Co) or due to an increase in the cost of such supplies from Scottish Healthcare Supplies or otherwise), Project Co shall submit to the Trust a calculation showing the Utility Adjustment calculated in accordance with this Clause 35.10.3 in respect of such gas or electricity invoice.

35.10.3 The Utility Adjustment shall be calculated as follows:-

Utility Adjustment = BC x (T - BT) where

BC = the Base Consumption for the utility shown in the table below.

BT = the Base Tariff shown in the table below index linked.

T = the tariff applying in respect of the relevant invoice

Utility	Base Consumption	Base Tariff Index Linked (from 1 June 2003) exclusive of Tax
Gas	728752 kWh	1.149 p/kWh
Electricity	142515 kWh	3.95 p/kWh

35.10.4 Where the Utility Adjustment is a positive amount, the Trust shall pay the Utility Adjustment to Project Co within ten (10) Business Days of delivery by Project Co of such calculation. Where the Utility Adjustment is a negative amount, (without prejudice to the generality of its rights pursuant to Clause 35.7) the Trust shall be entitled to deduct the Utility Adjustment from the instalment of the Service Payment next falling due after the Utility Adjustment is agreed or (failing agreement) after determination of the same pursuant to the Dispute Resolution Procedure.

35.10.5 **Equipment Adjustment**

(i) At the end of each Contract Year where there has been an Equipment Adjustment Event, Project Co shall submit to the Trust a calculation in

accordance with paragraph 35.10.5(ii) showing the Equipment Adjustment together with background information supporting such calculation. The Trust shall provide Project Co with a copy of their asset register and PAT test register within ten (10) Business Days of written request from Project Co.

- (ii) The Equipment Adjustment is calculated in accordance with the following formula:

Where $(BC - AV)$ is a (i) positive number and (ii) greater than 5% of Base Consumption

$$\mathbf{A - Equipment Adjustment = ([AV - BC] - [BC \times 0.05]) \times T}$$

- (a) "AV" is the actual volume of electricity (demonstrably incurred) for that Contract Year following an Equipment Adjustment Event;
- (b) "BC" is the Base Consumption; and
- (c) "T" the tariff applying in respect of electricity for that Contract Year.

Where $(BC - AV)$ is (i) a negative number and (ii) greater than 5% of Base Consumption

$$\mathbf{B - Equipment Adjustment = ([AV - BC] - [BC \times 0.05]) \times (T \times 0.5)}$$

- (d) "AV" is the actual volume of electricity (demonstrably incurred) for that Contract Year following an Equipment Adjustment Event;
- (e) "BC" is the Base Consumption; and
- (f) "T" the tariff applying in respect of electricity for that Contract Year.

- (iii) The Trust shall within twenty (20) Business Days after receipt of the Information referred to in Clause 35.10.5(i) notify Project Co of any matters with which it does not agree. If within twenty (20) Business Days the Trust have not provided Project Co with any matters which it does not agree to in the report, the Trust shall be deemed to accept Project Co's proposals. Where the parties fail to agree such matters within twenty five (25) Business Days of Project Co's delivering information under Clause

35.10.5(i) to the Trust the same shall be referred to the Dispute Resolution Procedure for determination. Where the Equipment Adjustment is a positive amount the Trust shall pay the Equipment Adjustment within ten (10) Business Days of agreement or determination in accordance with this sub-clause. Where the Equipment Adjustment is a negative amount the Trust shall be entitled to deduct the Equipment Adjustment from the instalment of the Service Payment next falling due after the Equipment Amount is agreed or determined in accordance with this sub-clause.

35.10.6 The provisions of Clause 35.5 (Disputes) and Clause 35.6 (Late Payments) shall apply mutatis mutandis to the payment of the Utility Adjustment. Subject to Clause 35.10.2 costs payable in respect of gas, electricity, water and sewerage shall be invoiced to and paid by Project Co timeously.

35.10.7 The Trust and Project Co will meet annually or at such longer interval as shall be agreed to review utility tariffs. The parties will as soon as practicable thereafter agree a tariff structure for the next twelve month period, or such longer period as is agreed which will be the lower of the tariff payable by the Trust available to it by virtue of its position as a utility user or the tariff negotiated by Project Co.

36. Insurance

Project Co Insurances

36.1 Project Co shall, at its own cost, procure that the insurances, details of which are set out in Section 1 of Part 21 of the Schedule (*Insurance Requirements*), are taken out prior to the commencement of the Works and are maintained for the periods specified in Section 1 of Part 21 of the Schedule (*Insurance Requirements*).

36.2 Project Co shall, at its own cost, procure that the insurances, details of which are set out in Section 2 of Part 21 of the Schedule (*Insurance Requirements*), are taken out prior to the Actual Completion Date and are maintained for the periods specified in Section 2 of Part 21 of the Schedule (*Insurance Requirements*).

36.3 Without prejudice to the other provisions of this Clause, Project Co shall, at all relevant times, at its own cost, effect and maintain in full force those insurances which it is required to effect by any applicable Law.

36.4 All Insurances shall:

- (a) be maintained in the names of the parties specified in Part 21 of the Schedule (*Insurance Requirements*) unless stated otherwise in any case in Part 21 of the Schedule (*Insurance Requirements*);
- (b) be placed with insurers who are acceptable to the Trust (such acceptance not to be unreasonably withheld or delayed);
- (c) provide that they shall continue in effect and unaltered for the benefit of the insured parties for at least thirty (30) Business Days after written notice by registered mail or fax of any cancellation, change, modification or lapse by reason of non-payment of premiums or instalment or otherwise has been received by the insured parties;
- (d) where the Trust is not named as an insured party, contain a provision for twenty (20) Business Days' written notice to be given to the Trust before any cancellation, change, lapse, non-renewal or material modification of any such policy is to take effect;
- (e) contain a provision that:
 - (i) no claim of any of the insured under the policy shall be defeated, prejudiced or otherwise affected by any act or omission on the part of any other insured and shall insure the interests of each insured regardless of any act or omission on the part of any other insured party; and
 - (ii) each policy of insurance which insures the rights and interests of more than one party operates, save for limits of liability and/or amount, in the same manner as if there were a separate policy with and covering each insured and be without right of contribution from any other insurance which is carried by an insured;
- (f) in so far as they relate to damage to assets (including the Facilities), cover the same for the full reinstatement value; and
- (g) comply with the relevant provisions of Part 21 of the Schedule (*Insurance Requirements*).

36.5 Project Co shall ensure that its brokers give the Trust a letter of undertaking in the Agreed Form;

Subrogation and Vitiating

36.6 Project Co shall:

- (a) procure that all policies of insurance to be effected by it pursuant to this Clause shall contain a provision to the effect that the insurers have agreed to waive all rights of subrogation against the Trust (and all Trust Parties); and
- (b) where Project Co is obliged to effect insurance under this Clause, not bring any claim or action against the Trust (or any Trust Party) in respect of any loss or damage in circumstances where Project Co could recover such loss or damage under such insurance (whether or not such insurance has in fact been effected or, if effected, has been vitiated as a result of any act or omission of Project Co (or any Project Co Party), including but not limited to non-disclosure or under-insurance),

provided that, to avoid doubt, this Clause shall not by itself prevent Project Co from claiming against the Trust (or any Trust Party) for any loss or damage not covered because of the level of deductibles under such insurance permitted by this Agreement or to the extent such loss or damage exceeds the maximum of such insurance required by this Agreement.

36.7 Neither party shall take any action or fail to take any reasonable action or (in so far as it is reasonably within its power) permit or allow others to take or fail to take any action (including failure to disclose any fact) as a result of which any of the Insurances maintained pursuant to this Clause may be rendered void, voidable, unenforceable or suspended or impaired in whole or in part or which may otherwise render any sum paid out under any relevant policy repayable in whole or in part.

Evidence of Project Co Insurance

36.8 Not less than twenty (20) Business Days prior to the expiry or amendment of any relevant insurance policy, Project Co shall submit to the Trust a request for approval from the Trust of the insurer and the principal terms and conditions of such insurance policy (and any revision to such terms and conditions or change in identity of such insurer), such approval not to be unreasonably withheld or delayed.

36.9 Project Co shall supply the Trust with copies of every policy of Insurance (or such other evidence of insurances as may be reasonably required) as soon as it is available, together with evidence of payment of the premiums. If Project Co defaults in insuring or continuing to maintain the Insurances, the Trust may insure against any risk in respect of which such default has occurred and recover any premiums from Project Co as a debt.

Acceptance and compliance

36.10 The supply to the Trust of any draft insurance policy or certificate of insurance or other evidence of compliance with this Clause shall not imply acceptance by the Trust (or the Trust's Representative) that:

- (a) the extent of insurance cover is sufficient and its terms are satisfactory; or
- (b) in respect of any risks not insured against, an acceptance by the Trust that the same were Uninsurable Risks.

36.11 Neither failure to comply nor full compliance with the insurance provisions of this Agreement shall relieve Project Co of its liabilities and obligations under this Agreement.

Uninsurable Risks

36.12 Project Co shall notify the Trust of any risk becoming an Uninsurable Risk within 5 Business Days of becoming aware of the same and, in any event, at least 5 Business Days before the expiry of any existing insurance in respect of such risk.

36.13 Where there is an Uninsurable Risk:

- (a) the Agreement shall continue;
- (b) upon the existing cover lapsing Project Co shall be relieved of its obligation to maintain insurance in respect of the Uninsurable Risk;
- (c) the Service Payments shall be reduced in each year for which the relevant insurance is not maintained, by an amount equal to the premium paid by Project Co in respect of the relevant risk in the year prior to it becoming an Uninsurable Risk (index-linked). Where the risk is an Uninsurable Risk for part of a year only, the reduction in the Service Payments shall be pro rated to the number of months for which the risk was an Uninsurable Risk; and
- (d) On the occurrence of the relevant Uninsurable Risk the Trust may (at its option) (i) pay to Project Co an amount equal to the insurance proceeds that would have been payable had the relevant insurance continued to be available (payment to be made to the Insurance Proceeds Account in accordance with Clause 36.18 (*Application of Proceeds*)) within six (6) calendar months of the date on which the risk occurs, in which case the Agreement shall continue or (ii) this Agreement shall terminate and the provisions of Clause 46.1 (*Non-Default Termination - Force Majeure*) shall apply.

36.14 Where there is an Uninsurable Risk, Project Co shall approach the insurance market on a regular basis and in any event at intervals of not less than six (6) months to establish whether the relevant risk remains an Uninsurable Risk.

36.15 Where a risk which was previously an Uninsurable Risk ceases to be so, and Project Co has become aware that this is the case, Project Co shall forthwith take out and maintain insurance in accordance with the requirements of this Agreement in respect of the risk and the provisions of Clause 36.13 and 36.14 (*Uninsurable Risks*) shall no longer apply to the risk.

Risk Management

36.16 With effect from the date of this Agreement, each party shall designate or appoint an insurance and risk manager and notify details of the same to the other party. Such person shall:

- (a) be responsible for dealing with all risk management matters on behalf of its appointing or designating party including (without limitation) ensuring compliance by that party with this Clause;
- (b) advise and report to that party on such matters; and
- (c) ensure that any report or survey conducted by any insurer of any relevant procedures in relation to the Project is disclosed to the parties.

36.17 Without prejudice to the provisions of Clause 36.16, the parties shall notify one another, and in Project Co's case the relevant insurer, of any circumstances which may give rise to a claim of a value equal to or in excess of Twenty Thousand pounds sterling (£20,000) (index-linked) under the Insurances within five (5) Business Days of becoming aware of the same (or earlier, if so requested by the terms of the relevant insurance policy). If any insurer disputes any such claim, Project Co shall provide the Trust with full details of any disputed claim and the parties shall liaise with one another to ensure that the relevant claim is preserved or pursued.

Application of Proceeds

36.18 All insurance proceeds received by Project Co under the insurances referred to in Sections 1 and 2 of Part 21 of the Schedule (*Insurance Requirements*) shall be paid into the Insurance Proceeds Account and shall be held on trust for the purposes of, and to be applied in accordance with, this Agreement.

36.19 Subject to the provisions of the Lenders Direct Agreement and Clause 36.21 (*Trust Election not to reinstate*), Project Co shall apply any proceeds of any policies of Insurance:

- (a) in the case of third party legal liability or employers' liability insurance, in satisfaction of the claim, demand, proceeding or liability in respect of which such proceeds are payable; and
- (b) in the case of any other insurance, so as to ensure the performance by Project Co of its obligations under this Agreement, including where necessary the reinstatement, restoration or replacement of the Facilities or any other assets, materials or goods.

36.20 If the proceeds of any insurance claim are insufficient to cover the settlement of such claims, Project Co will make good any deficiency forthwith.

Trust election not to reinstate

36.21 In the event of damage to, or destruction of, all or a material part of the Facilities, the Trust may, at its option, serve a Viability Statement on Project Co within ten (10) Business Days of:

- (a) completion of the Economic Reinstatement Test; or
- (b) if the Lenders' Direct Agreement has ceased to apply, agreement or determination of the extent of the damage.

If the Trust exercises this right, this Agreement shall automatically terminate and the Trust shall pay compensation to Project Co in accordance with Clause 48.3 (*Compensation on Termination*). Any insurance proceeds shall first be applied towards such compensation payment and any balance shall be paid to the Trust.

36.22 Project Co shall take all reasonable steps to mitigate the effects of any risks or claims covered by this Clause (including without limitation minimising the amount of any costs and expenses which might result).

Insurance Premium Increase Risk Sharing Mechanism

36.22A.1 In the event that the aggregate actual costs of maintaining insurances pursuant to Clause 36.2 incurred by Project Co in any Contract Year ("the Actual Annual Cost of Insurance") differs from the Modelled Insurance Cost then such difference ("the Premium Change") shall be allocated between Project Co and the Trust in accordance with the following table so that where the Actual Annual Cost of Insurance (expressed as a percentage of the Modelled Insurance Cost in the relevant Contract Year) falls within a band in column 1 of such table, the entire Premium Change shall be borne, enjoyed or shared between the parties in the percentages set

out in columns 2 and 3.

Column 1	Column 2	Column 3
Actual Annual Cost of Insurance as a percentage of the Modelled Insurance Cost	Percentage of Annual Premium Change allocated to Project Co	Percentage of Annual Premium Change allocated to the Trust
300% or above	See Clause 36.22A.5	
200% to less than 300%	10%	90%
150% to less than 200%	25%	75%
125% to less than 150%	50%	50%
100% to less than 125%	100%	0%
75% to less than 100%	50%	50%
51% to less than 75%	25%	75%
50% or less	10%	90%

36.22A.2 For the avoidance of doubt all amounts payable by Project Co by way of insurance premium tax shall be included in the Actual Annual Cost of Insurance.

36.22A.3 Where (following application of the above table) the Actual Annual Cost of Insurance, expressed as a percentage of the Modelled Insurance Cost, is greater than or equal to 125%, the Trust shall pay a sum equating to the relevant percentage of the Annual Premium Change allocated to the Trust under column 3 of the same to Project Co not later than 5 Business Days after the Annual Premium Change is agreed or (failing agreement) not later than 5 Business Days after the determination of the same

pursuant to the Dispute Resolution Procedure.

36.22A.4 Where (following application of the above table) the Actual Annual Cost of Insurance, expressed as a percentage of the Modelled Insurance Cost, is less than or equal to 100%, the Trust shall (without prejudice to the generality of its rights pursuant to Clause 35.7) be entitled to deduct from the instalment of the Service Payment next occurring after the Annual Premium Change is agreed or (failing agreement) after the determination of the same pursuant to the Dispute Resolution Procedure, an amount equating to the relevant percentage of the Annual Premium Change allocated to the Trust under column 3 of the same.

36.22A.5 Where (following application of the above table) the Actual Annual Cost of Insurance, expressed as a percentage of the Modelled Insurance Cost, is 300% or more, Project Co's obligation to insure pursuant to Clause 36.2 shall be suspended pending the parties agreeing such reduction in the scope of the insurances to be maintained as may be fair and reasonable in all the circumstances.

Vandalism

36.23 Project Co shall, at its own cost, and as soon as practicable:-

- (a) repair the Facilities; and/or
- (b) replace the Facilities.

which have been damaged by acts of vandalism or malicious damage that may have occurred at any time.

36.24 In discharging its obligations under Clause 36.23 Project Co shall be obliged to comply with the Trust's Construction Requirements and/or Project Co's Proposals and (where not incompatible with its obligation to comply with the Trust's Construction Requirements and/or Project Co's Proposals) mitigate the costs of such repair and/or replacement works.

36.25 When effecting repairs to the Facilities in accordance with Clause 36.23, Project Co shall comply with any instructions issued by a relevant insurer to secure value for money who has or will pay out monies in respect of such repairs or replacement.

37. Custody of Financial Model

- 37.1 Immediately after execution of this Agreement, Project Co shall deliver two (2) copies of the Financial Model to the Custodian (both on disc and in hard copy) to be held in safe custody to be released to the Trust only for the purpose of a Variation in terms of Part 22 of the Schedule (*Variation Procedure*).
- 37.2 Unless otherwise agreed between the parties, any amendments to the Financial Model shall reflect, be consistent with and be made only in accordance with the provisions of this Agreement, and shall in all cases be subject to the prior written approval of the Trust (such approval not to be unreasonably withheld or delayed). In the event that the parties fail to agree any proposed amendments to the Financial Model, the matter shall be referred for resolution in accordance with Part 26 of the Schedule (*Dispute Resolution Procedure*).
- 37.3 Following the approval of any amendment of the Financial Model by the Trust, Project Co shall promptly deliver a copy of the revised Financial Model to the Trust, and two (2) copies to the Custodian, in the same form as the original form (or such other form as may be agreed by the parties from time to time).
- 37.4 The parties shall instruct the Custodian to keep a copy of all versions of the Financial Model on disc and in hard copy.

38. Information and Audit Access

- 38.1 Project Co shall provide to the Trust's Representative all information, documents, records and the like in the possession of, or available to, Project Co (and to this end Project Co shall use all reasonable endeavours to procure that all such items in the possession of the Contractor or any Service Providers shall be available to it and Project Co has included, or shall include, relevant terms in all contracts with the Contractor or any Service Providers to this effect) as may be reasonably requested by the Trust's Representative for any purpose in connection with this Agreement.
- 38.2 For the purpose of:
- (a) the examination and certification of the Trust's accounts; or
 - (b) any examination pursuant to Section 23 of the Public Finance and Accountability (Scotland) Act 2000 of the economy, efficiency and effectiveness with which the Trust has used its resources,
- the Comptroller and Auditor General may examine such documents as he may reasonably require which are owned, held or otherwise within the control of Project Co (and Project Co

shall procure that any person acting on its behalf who has such documents and/or other information shall also provide access) and may require Project Co to produce such oral or written explanations as he considers necessary.

- 38.3 Project Co shall provide and shall procure that any Sub-Contractor shall provide such information as the Trust may reasonably require from time to time to enable it to meet its obligations to provide reports and returns pursuant to regulations, directions or guidance applicable to the NHS or as required by external agencies including, without limitation, reports and returns regarding the physical condition of buildings occupied by the Trust, health and safety, under the firecode, relating to environmental health and to comply with the Patients Charter or any document replacing it.

PART I: CHANGES IN LAW AND VARIATIONS

39. Changes in Law

General

39.1 Project Co shall take all steps necessary to ensure that the Project Operations are performed in accordance with the terms of this Agreement (including, without limitation, Clause 5.2(e) (*Compliance with Applicable Law*)) following any Change in Law.

Relevant Changes in Law

39.2 Subject to Clause 39.4(c)(v) and (vi) (*Mitigation*), on the occurrence of any Relevant Change in Law, the parties shall be entitled to seek adjustments to the Service Payments to compensate for any increase or decrease (as the case may be) in the net cost to Project Co of performing the Project Operations. Such adjustments (if any) will be calculated in accordance with (and subject to) Clauses 39.4 to 39.7 (inclusive).

39.3 Relevant Change in Law means any of the following:

- (a) the occurrence of any Discriminatory Change in Law having an impact on the cost of performance of the Project Operations;
- (b) the occurrence of any NHS Specific Change in Law having an impact on the cost of performance of the Project Operations; or
- (c) the occurrence, after the relevant date, of any Change in Law which requires Project Co to carry out works affecting the Facilities (being any work of alteration, addition, demolition or extension or variation in the quality or function of the Facilities) which are not Maintenance Works or work which Project Co would otherwise be required to undertake to comply with its obligations under this Agreement. For the purposes of this paragraph, the relevant date shall be the later to occur of the Completion Date and the Actual Completion Date, save where the Actual Completion Date is delayed by a Compensation Event, a Delay Event referred to in Clause 41.3(a) (*Works Change*) or by a Delay Event referred to in Clause 41.3(g) (*Discriminatory and NHS Specific Changes in Law*), in which case the relevant date shall be the later to occur of the Completion Date and the date on which the Works would have been completed in accordance with this Agreement had the relevant Delay Event not occurred,

provided that:

- (i) in the case of a Change in Law referred to in paragraphs (a) and (b) above, the impact of such Relevant Change in Law (either singly or in aggregate with any other such Relevant Change in Law in any Contract Year) on the cost of performance of the Project Operations exceeds one thousand pounds (£1,000) (index linked). To avoid doubt, any such amount of one thousand pounds (£1,000) (index linked) shall always be borne by Project Co;
- (ii) such Change in Law was not reasonably foreseeable at the date of this Agreement by an experienced contractor performing operations similar to the relevant Project Operations, on the basis of draft bills published in Government green or white papers or other Government departmental consultation papers, bills, draft statutory instruments or draft instruments or proposals published in the Official Journal of the European Communities, in each case published:
 - (a) prior to the date of this Agreement; and
 - (b) in substantially the same form or having substantially the same effect as the Relevant Change in Law; and
- (iii) a Change in Law relating to the application for, coming into effect, terms, implementation, repeal, revocation or otherwise of any Planning Permission shall not constitute a Relevant Change in Law.

39.4 On the occurrence of a Relevant Change in Law:

- (a) either party may give notice to the other of the occurrence of the Relevant Change in Law;
- (b) the parties shall meet within twenty (20) Business Days of the notice referred to in paragraph (a) to consult and seek to agree the effect of the Relevant Change in Law. If the parties, within ten (10) Business Days of this meeting, have not agreed the occurrence or the effect of the Relevant Change in Law, either party may refer the question of whether a Relevant Change in Law has occurred or the effect of any Relevant Change in Law for resolution in accordance with Part 26 of the Schedule (*Dispute Resolution Procedure*); and
- (c) within ten (10) Business Days of the agreement or determination referred to in paragraph (b) above, the Trust's Representative shall issue a Variation Enquiry and the relevant provisions of Part 22 of the Schedule (*Variation Procedure*) shall apply except that:

- (i) Project Co may give notice to the Trust's Representative that it objects to such a Variation Enquiry only on the grounds that the implementation of the Variation would not give effect to or comply with the Relevant Change in Law;
- (ii) the Trust shall issue a Variation Confirmation in respect of the Variation in accordance with the relevant provisions of Part 22 of the Schedule (*Variation Procedure*);
- (iii) the provisions of Clause 16 (*Consents and Planning Approval*) shall apply and, to avoid doubt, the provisions of paragraph 5 of Section 1 of Part 22 of the Schedule (*Variation Procedure*) shall not apply;
- (iv) the Trust shall not be entitled to withdraw any Variation Enquiry or Variation Confirmation issued in accordance with this Clause;
- (v) Project Co shall, without prejudice to its general obligation to comply with the terms of this Agreement:
 - (aa) use all reasonable endeavours to mitigate the adverse effects of any Relevant Change in Law and take all reasonable steps to minimise any increase in costs arising from such Relevant Change in Law; and
 - (bb) use all reasonable endeavours to take advantage of any positive or beneficial effects of any Relevant Change of Law and take all reasonable steps to maximise any reduction in costs arising from such Relevant Change in Law; and
- (vi) any compensation payable, or reduction to the Service Payments, shall be calculated in accordance with Clause 39.5 or Clause 39.6 (as appropriate) provided that:
 - (aa) the amount of any compensation payable; or
 - (bb) the amount by which the Services Payment is to be reduced,shall not take into account any amounts incurred or to be incurred as a result of Project Co's failure to comply with paragraph (v) above.

Discriminatory and NHS Specific

39.5 In relation to a Relevant Change in Law referred to in Clause 39.3(a) (*Discriminatory*) or (b) (*NHS Specific*), any compensation payable, or reduction to the Service Payments, pursuant to this Clause shall be calculated on the basis that Project Co shall be placed in no better or

worse position than it would have been in had the Relevant Change in Law not occurred, and any assessment of whether Project Co is in a better or worse position shall take account (inter alia) of the provisions of Clause 39.4(c)(v) and (vi) (*Failure to mitigate*) and:

- (a) the extent to which Project Co has been (or will be) compensated as a result of any indexation of the Service Payments under this Agreement;
- (b) any decrease in its costs resulting from any Relevant Change in Law; and
- (c) any amount which Project Co will recover under any insurance policy (or would have recovered if it had complied with the requirements of this Agreement or of any policy of insurance required under this Agreement) which amount, to avoid doubt, shall not include the amount of any excess or deductibles or any amount above the maximum insured amount applicable to such insurance policy.

Project Co shall not be entitled to any other payment or compensation or, save as expressly provided otherwise in this Agreement, relief in respect of such Relevant Change in Law or associated Variation (or the consequences of either) and the provisions of Clause 41.10 (*Delay Events - Compensation*) shall be construed accordingly.

Works after Actual Completion Date

39.6 In relation to a Relevant Change in Law referred to in Clause 39.3(c) (*Works after Actual Completion Date*) (a "Relevant Works Change in Law"):

- (a) for which the Allowable Expenses amounts to less than 0.05% of the Capital Cost of the Facilities (a "De Minimis Amount"), Project Co shall not be entitled to receive any payment, compensation or, save as expressly provided otherwise in this Agreement, any other relief in respect of such Relevant Works Change in Law, save where in any one Contract Year there shall occur more than two (2) Relevant Works Change in Law which each give rise to a De Minimis Amount, in which case the third and each subsequent such De Minimis Amount resulting from a Relevant Works Change in Law in that Contract Year (each an "Additional De Minimis Amount") shall be taken into account for the purposes of:
 - (i) calculating the Cumulative Allowable Expenses; and
 - (ii) calculating the Trust's Cost Share of such Additional De Minimis Amounts;and

- (b) subject to paragraph (a), Project Co shall be entitled to receive compensation from the Trust of an amount equal to the Trust's Cost Share in respect of such Relevant Works Change in Law. Project Co shall not be entitled to receive any other payment, compensation or (save as expressly provided otherwise in this Agreement) any other relief in respect of any such Relevant Works Change in Law or associated Variations (or the consequences of either) and the provisions of Clause 41.10 (*Delay Events - Compensation*) shall be construed accordingly. Project Co has accepted the risk of bearing the financial consequences which are not covered by (or exceed) the Trust's Cost Share and has had the opportunity of assessing the risk when bidding and agreeing the Service Payments.

39.7 For the purpose of Clause 39.6:

- (a) Capital Cost of the Facilities means THREE MILLION ONE HUNDRED AND THIRTY THOUSAND POUNDS STERLING (£3,130,000);
- (b) Allowable Expenses means the costs and expenses to be incurred by Project Co as a direct consequence of the Relevant Works Change in Law, which shall be calculated on the basis that Project Co shall be placed in no better or worse position than it would have been in had the Relevant Works Change in Law not occurred, taking into account (inter alia) the provisions of Clause 39.4(c)(v) and (vi) (*Failure to mitigate*) and:
- (i) the extent to which Project Co has been (or will be) compensated as a result of any indexation of the Service Payments under this Agreement;
- (ii) any decrease in its costs resulting from such Relevant Works Change in Law; and
- (iii) any amount which Project Co will recover under any insurance policy (or would have recovered if it had complied with the requirements of this Agreement or of any policy of insurance under this Agreement) which amount, to avoid doubt, shall not include the amount of any excess or deductibles or any amount above the maximum insured amount applicable to any such insurance policy;
- (c) Cumulative Allowable Expenses means the cumulative amount of the Allowable Expenses from time to time (excluding any De Minimis Amount but including any Additional De Minimis Amount); and

- (d) Trust's Cost Share means an amount equal to the percentage share of the relevant Allowable Expenses that are to be borne by the Trust as indicated in Column 3 in the Table below and which is calculated by reference to the ratio that the Cumulative Allowable Expenses at that time bears to the Capital Cost of the Facilities:

Table B

Column 1	Column 2	Column 3	Column 4
Cumulative Allowable Expenses (as a % of the Capital Cost of the Facilities)	Project Co share of Allowable Expenses (as a % of the Allowable Expenses)	Trust's Cost Share (as a % of the Allowable Expenses)	Cumulative Project Co share of Allowable Expenses (as a % of the Capital Cost of the Facilities)
<0.05%	100%	0%	0.05%
0.05% - 0.5%	75%	25%	0.38%
>0.5% - 1%	50%	50%	0.63%
>1% - 5%	25%	75%	1.63%
>5% - 20%	10%	90%	3.13%
>20%	0%	100%	3.13%

General Change in Law

39.8 Either party may give notice to the other of the need for a Variation which is necessary in order to enable Project Co to comply with any Change in Law which is not a Relevant Change in Law, in which event:

- (a) the parties shall meet within twenty (20) Business Days to consult in respect of the effect of the Change in Law and any Variation required as a consequence; and
- (b) within twenty (20) Business Days of the meeting referred to in paragraph (a) above the Trust's Representative shall, if a Variation is required in order to comply with the Change in Law, issue a Variation Enquiry and the relevant provisions of Part 22 of the Schedule (*Variation Procedure*) shall apply except that:

- (i) Project Co may give notice to the Trust's Representative that it objects to such a Variation Enquiry only on the grounds that the implementation of the Variation would not implement the Change in Law;
- (ii) the Trust shall issue a Variation Confirmation in respect of the Variation in accordance with the relevant provisions of Part 22 of the Schedule (*Variation Procedure*);
- (iii) the provisions of Clause 16 (*Consents and Planning Approval*) shall apply and, to avoid doubt, the provisions of paragraph 5 of Section 1 of Part 22 of the Schedule (*Variation Procedure*) shall not apply;
- (iv) the Trust shall not be entitled to withdraw any Variation Enquiry or Variation Confirmation issued in accordance with this Clause; and
- (v) Project Co shall not be entitled to any payment or other compensation or relief from any performance of its obligations under this Agreement in respect of such Change in Law or associated Variation (or the consequences of either).

40. Variation Procedure

The provisions of Part 22 of the Schedule (*Variation Procedure*) shall have effect in respect of Variations except as otherwise expressly provided in this Agreement.

PART J: DELAY EVENTS, RELIEF EVENTS AND FORCE MAJEURE

41. Delay Events

- 41.1 If, at any time, Project Co becomes aware that the Works will not be (or are unlikely to be) completed by the Completion Date, Project Co shall forthwith give notice to the Trust's Representative to that effect specifying the relevant delay or impediment. In relation to any such delay or impediment if the Trust's Representative is satisfied, or it is determined in accordance with Part 26 of the Schedule (*Dispute Resolution Procedure*), that such delay or impediment has arisen as a result of the occurrence of a Delay Event, then, subject to Clause 41.2 (*Mitigation*) the Trust's Representative shall allow Project Co an extension of time equal to the delay or impediment caused by such Delay Event (taking into account reasonably foreseeable consequences of the Delay Event) and shall fix a new Completion Date which shall replace the existing Completion Date but to avoid doubt, there shall be no extension to the Project Term as a result of any such delay or impediment.
- 41.2 If Project Co is (or claims to be) affected by a Delay Event:
- (a) it shall (and shall procure that the Project Co Parties shall) take and continue to take all reasonable steps to eliminate or mitigate the consequences of such an event upon the performance of its obligations under this Agreement and, where relevant, resume performance of its obligations affected by the Delay Event as soon as practicable; and
 - (b) it shall neither be relieved from liability under this Agreement nor entitled to any extension of time for the purpose of Clause 41.1(a) (*Delay Event*) to the extent that it is delayed or impeded due to its failure (if any) to comply with its obligations under paragraph (a) above.
- 41.3 For the purposes of this Agreement, Delay Events means any of the following to the extent in each case that it has a material and adverse effect on Project Co's ability to complete the Facilities by the Completion Date:
- (a) a Trust Works Variation initiated by a Trust Works Variation Enquiry in accordance with paragraph 2 of Section 1 of Part 22 of the Schedule (*Variation Procedure*) in relation to which Project Co has issued a response pursuant to paragraph 3.2(b) of Section 1 of Part 22 of the Schedule (*Variation Procedure*) specifying and providing evidence that implementation of the Trust Works Variation would prevent the Actual Completion Date from occurring by the Completion Date, if this has been agreed

between the parties or determined to be the case in accordance with Part 26 of the Schedule (*Dispute Resolution Procedure*);

- (b) any breach by the Trust and/or any Trust Party of any of the Trust's express obligations under this Agreement to the extent in each case that any such breach is not caused, or contributed to, by Project Co or any Project Co Party;
- (c) the execution of works on the Site not forming part of this Agreement by the Trust or any contractors employed by the Trust;
- (d) opening up of the Works pursuant to Clauses 18.3 to 18.7 (inclusive) (*Right to open up*) where such Works are not subsequently found to be defective (unless it is agreed or determined in accordance with Part 26 of the Schedule (*Dispute Resolution Procedure*) that the opening up of the Works was reasonable in the light of other defects previously discovered by the Trust);
- (e) Force Majeure;
- (f) a Relief Event; or
- (g) a Relevant Change in Law referred to in Clause 39.3 (a) (*Discriminatory*) or (b) (*NHS Specific*).

41.4 Without prejudice to the generality of Clause 41.1, Project Co shall give notice in writing to the Trust's Representative as soon as it (or the Contractor) can reasonably foresee a Delay Event occurring which is likely to cause a delay to, or will prevent, the Actual Completion Date occurring by the Completion Date or, if the same is not reasonably foreseeable, as soon as it (or the Contractor) shall become aware of a Delay Event. Project Co shall within ten (10) Business Days after such notification, give further written details to the Trust's Representative which shall include:

- (a) a statement of which Delay Event the claim is based upon;
- (b) details of the circumstances from which the Delay Event arises;
- (c) details of the contemporary records which Project Co will maintain to substantiate its claim for extra time;
- (d) details of the consequences (whether direct or indirect, financial or non-financial) which such Delay Event may have upon completion of the Facilities; and
- (e) details of any measures which Project Co proposes to adopt to mitigate the consequences of such Delay Event.

41.5 As soon as possible but in any event within five (5) Business Days of Project Co (or the Contractor) receiving, or becoming aware of, any supplemental information which may further

substantiate or support Project Co's claim then Project Co shall submit further particulars based on such information to the Trust's Representative.

41.6 The Trust's Representative shall, after receipt of written details under Clause 41.4, or of further particulars under Clause 41.5, be entitled by notice in writing to require Project Co to provide such further supporting particulars as he may reasonably consider necessary. Project Co shall afford the Trust's Representative reasonable facilities for investigating the validity of Project Co's claim including, without limitation, on-site inspection.

41.7 Subject to the provisions of this Clause, the Trust's Representative shall fix a revised Completion Date in accordance with Clause 41.1 (*New Completion Date*) as soon as reasonably practicable and in any event within ten (10) Business Days of the later of:

- (a) the date of receipt by the Trust's Representative of Project Co's notice given in accordance with Clause 41.4 and the date of receipt of any further particulars (if such are required under Clause 41.6), whichever is the later; and
- (b) the date of receipt by the Trust's Representative of any supplemental information supplied by Project Co in accordance with Clause 41.5 and the date of receipt of any further particulars (if such are required under Clause 41.6), whichever is the later.

41.8 If Project Co has failed to comply with the requirements as to the giving of notice under Clause 41.4, or has failed to maintain records or afford facilities for inspection to the Trust's Representative, then the following provisions shall apply:

- (a) the Trust's Representative may require Project Co to submit details of the reasons for such failure. If the Trust's Representative has not stated that he is satisfied with the reasons given within ten (10) Business Days of their receipt, Project Co may refer the matter for resolution in accordance with Part 26 of the Schedule (*Dispute Resolution Procedure*);
- (b) if either the Trust's Representative is satisfied with the reasons given or the decision of the Dispute Resolution Procedure is that the failure is excusable, then the Trust's Representative shall proceed to the evaluation of the request for an extension of time in accordance with Clause 41.7; or
- (c) if the decision of the Trust's Representative (or in the event that the decision is disputed, if the determination in accordance with Part 26 of the Schedule (*Dispute Resolution Procedure*)) is that the failure is not excusable, then Project Co shall not be entitled to a revised Completion Date in respect of the relevant Delay Event to the

extent that the Trust's Representative has, as a result of such failures, been prevented from assessing the consequences of the Delay Event.

- 41.9 If:
- (a) the Trust's Representative declines to fix a revised Completion Date; or
 - (b) Project Co considers that a different Completion Date should be fixed; or
 - (c) there is a disagreement as to whether a Delay Event has occurred,
- then Project Co shall be entitled to refer the matter for determination in accordance with Part 26 of the Schedule (*Dispute Resolution Procedure*).

Compensation

41.10 If the Delay Event is a Delay Event referred to in Clause 41.11 (a "Compensation Event"), Project Co's sole right to compensation shall be as provided for in this Clause. To avoid doubt, no other Delay Event shall entitle Project Co to receive any compensation save as otherwise expressly provided in:

- (a) Part 22 of the Schedule (*Variation Procedure*) in the case of a Delay Event referred to in Clause 41.3(a) (*Works Change*) (subject always to the provisions of Clause 39 (*Changes in Law*)); or
- (b) Clause 39 (*Changes in Law*) in the case of a Delay Event referred to in Clause 41.3(g) (*Discriminatory and NHS Specific Changes in Law*).

41.11 For the purpose of Clause 41.10, a Compensation Event means any Delay Event referred to in Clause 41.3(b) (*Breach*), (c) (*Execution of non-project related works*) or (d) (*Opening up of works*) for which, in each case, it has been agreed or determined pursuant to this Clause that Project Co is entitled to an extension of time.

41.12 Subject to Clause 41.13, if it is agreed, or determined, that there has been a Compensation Event, and Project Co has incurred loss and/or expense as a direct result of such Compensation Event, Project Co shall be entitled to such compensation as would place Project Co in no better or no worse position than it would have been in had the relevant Compensation Event not occurred. Project Co shall promptly provide the Trust's Representative with any additional information he may require in order to determine the amount of such compensation.

41.13 Project Co shall take all reasonable steps so as to minimise the amount of compensation due in accordance with this Clause in relation to any Compensation Event and any compensation payable shall:

- (a) exclude any amounts incurred or to be incurred as a result of any failure of Project Co (or any Project Co Party) to comply with this Clause; and
- (b) be reduced by any amount which Project Co will recover under any insurance policy (or would have recovered if it had complied with the requirements of this Agreement or of any policy of insurance required under this Agreement) which amount, to avoid doubt, shall not include any excess or deductibles or any amount over the maximum amount insured applicable to any such insurance policy.

41.14 The amount of any compensation due to Project Co under this Clause shall be agreed between the parties or, failing agreement, determined pursuant to Part 26 of the Schedule (*Dispute Resolution Procedure*).

41.15 Where the amount of compensation due to Project Co is agreed or determined in accordance with Clause 41.14 as being less than or equal to ten thousand pounds (£10,000) index-linked the Trust shall make payment of the compensation by way of a single payment at a time to be agreed between the parties or, failing agreement, determined pursuant to Part 26 of the Schedule (*Dispute Resolution Procedure*).

41.16 Where the amount of compensation due to Project Co is agreed or determined in accordance with Clause 41.14 is more than ten thousand pounds (£10,000) index-linked, the Trust shall, within twenty (20) Business Days of such agreement or determination notify Project Co as to whether:

- (a) it shall make payment of the compensation by way of a single payment in immediately available funds at a time to be agreed between the parties or, failing agreement, to be determined pursuant to Part 26 of the Schedule (*Dispute Resolution Procedure*); or
- (b) it shall make payment of the compensation by way of equal annual instalments (together with interest thereon at) over the remainder of the Project Term.

42. Relief Events

42.1 For the purposes of this Agreement, subject to Clause 42.4 (*Mitigation*), Relief Events mean any of the following events:

- (a) fire, explosion, lightning, storm, tempest, flood, bursting or overflowing of water tanks, apparatus or pipes, ionising radiation (to the extent it does not constitute Force Majeure), earthquake, riot or civil commotion;

- (b) failure by any statutory undertaker, utility company, local authority or other like body to carry out works or provide services;
- (c) accidental loss or damage to the Works and/or Facilities or any roads servicing the same;
- (d) without prejudice to any obligation of Project Co to provide stand-by power facilities in accordance with the Trust's Construction Requirements or the Output Requirements, failure or shortage of power, fuel or transport;
- (e) blockade or embargo falling short of Force Majeure;
- (f) the discovery of fossils, antiquities and human remains requiring action in accordance with Clause 24 (*Fossils and Antiquities*); or
- (g) official or unofficial strike, lockout, go slow or other dispute in each case generally affecting the construction, building maintenance or facilities management industry (or a significant sector of that industry),

provided in each case that such event does not arise (directly or indirectly) as a result of any wilful act or default of the party claiming relief and/or (i) in the case of Project Co claiming relief, any Project Co Party and (ii) in the case of the Trust claiming relief, any Trust Party.

42.2 Subject to Clauses 42.3, 42.4 and 42.10, no right of termination shall arise under this Agreement by reason of any failure by a party to perform any of its obligations under this Agreement to the extent that such failure to perform occurs because of the occurrence of a Relief Event (and, to avoid doubt, and without prejudice to Clause 42.9 (*No Compensation*), unless expressly stated to the contrary in this Agreement, it is acknowledged that all other rights and obligations of the parties under this Agreement remain unaffected by the occurrence of a Relief Event).

42.3 Without prejudice to Project Co's rights under Clause 41 (*Delay Events*), Project Co shall only be relieved of its obligations under Clauses 17 (*The Design, Construction and Commissioning Process*), 18 (*Right of Access of Trust's Representative*), 19 (*Programme and Dates for Completion*) and 41 (*Delay Events*) by Delay Events in accordance with Clause 41 (*Delay Events*).

Mitigation

42.4 Where a party is (or claims to be) affected by a Relief Event:

- (a) it shall take all reasonable steps to mitigate the consequences of such an event upon the performance of its obligations under this Agreement, resume performance of its obligations affected by the Relief Event as soon as practicable and use all reasonable endeavours to remedy its failure to perform; and
 - (b) it shall not be entitled to rely upon the relief afforded to it pursuant to Clause 42.2 of this Agreement to the extent that it is not able to perform, or has not in fact performed, its obligations under this Agreement due to its failure (if any) to comply with its obligations under paragraph (a) above.
- 42.5 The party claiming relief shall serve written notice on the other party within ten (10) Business Days of it becoming aware of the relevant Relief Event. Such initial notice shall give sufficient details to identify the particular event claimed to be a Relief Event.
- 42.6 A subsequent written notice shall be served by the party claiming relief on the other party within a further ten (10) Business Days of the notice referred to in Clause 42.4 (*Mitigation*) which shall contain such relevant information relating to the failure to perform (or delay in performing) as is available, including (without limitation) the effect of the Relief Event on the ability of the party to perform, the action being taken in accordance with Clause 42.4(*Mitigation*), the date of the occurrence of the Relief Event and an estimate of the period of time required to overcome it (and/or its effects).
- 42.7 The party claiming relief shall notify the other as soon as the consequences of the Relief Event have ceased and of when performance of its affected obligations can be resumed.
- 42.8 If, following the issue of any notice referred to in Clause 42.6, the party claiming relief receives or becomes aware of any further information relating to the Relief Event (and/or any failure to perform), it shall submit such further information to the other party as soon as reasonably possible.
- 42.9 To avoid doubt, the occurrence of a Relief Event shall not entitle Project Co to any compensation.
- 42.10 In the event of a Relief Event rendering either Party unable to carry out all or substantially all of its obligations pursuant to this Agreement for a continuous period of one hundred and eighty (180) days the Trust may, whilst the same is continuing, terminate this Agreement forthwith on serving written notice on the other Party.

43. **Force Majeure**

43.1 For the purposes of this Agreement, Force Majeure means any of the following events or circumstances:

- (a) war, civil war, armed conflict or terrorism; or
- (b) nuclear contamination unless in any case Project Co and/or any Project Co Party is the source or cause of the contamination; or
- (c) chemical or biological contamination of the Works and/or the Facilities and/or the Site from any of the events referred to in paragraph (a) above; or
- (d) pressure waves caused by devices travelling at supersonic speeds,

which directly causes either party to be unable to comply with all or a material part of its obligations under this Agreement.

43.2 Subject to Clauses 43.3 and 43.4 the party claiming relief shall be relieved from liability under this Agreement to the extent that by reason of the Force Majeure it is not able to perform its obligations under this Agreement.

43.3 Where a party is (or claims to be) affected by an event of Force Majeure:

- (a) it shall take all reasonable steps to mitigate the consequences of such an event upon the performance of its obligations under this Agreement, resume performance of its obligations affected by the event of Force Majeure as soon as practicable and use all reasonable endeavours to remedy its failure to perform; and
- (b) it shall not be relieved from liability under this Agreement to the extent that it is not able to perform, or has not in fact performed, its obligations under this Agreement due to its failure (if any) to comply with its obligations under paragraph (a).

43.4 Without prejudice to Project Co's rights under Clause 41 (*Delay Events*), Project Co shall only be relieved from its obligations under Clauses 17 (*The Design, Construction and Commissioning Process*), 18 (*Right of Access of Trust's Representative*), 19 (*Programme and Dates for Completion*) and 41 (*Delay Events*) by Delay Events in accordance with Clause 41 (*Delay Events*).

43.5 The party claiming relief shall serve written notice on the other party within seven (7) Business Days of it becoming aware of the relevant event of Force Majeure. Such initial notice shall give sufficient details to identify the particular event claimed to be an event of Force Majeure.

43.6 A subsequent written notice shall be served by the party claiming relief on the other party within a further seven (7) Business Days which shall contain such relevant information

relating to the failure to perform (or delay in performing) as is available, including (without limitation) the effect of the event of Force Majeure on the ability of the party to perform, the action being taken in accordance with Clause 43.3 (*Mitigation*), the date of the occurrence of the event of Force Majeure and an estimate of the period of time required to overcome it (and/or its effects).

- 43.7 The party claiming relief shall notify the other as soon as the consequences of the event of Force Majeure have ceased and of when performance of its affected obligations can be resumed.
- 43.8 If, following the issue of any notice referred to in Clause 43.6, the party claiming relief receives or becomes aware of any further information relating to the event of Force Majeure (and/or any failure to perform), it shall submit such further information to the other party as soon as reasonably possible.

Compensation

- 43.9 If the event of Force Majeure occurs on or after the Actual Completion Date, the provisions of Part 18 of the Schedule (*Payment Mechanism*) shall apply to determine the payments to be made to Project Co during the period of any event of Force Majeure.
- 43.10 If an event of Force Majeure occurs prior to the Actual Completion Date, Project Co shall not be entitled to receive any compensation other than as expressly provided in Clause 48.1 (*Compensation on Termination*).
- 43.11 Subject to Clause 48.1 (*Compensation on Termination*), Project Co's sole right to payment or otherwise in relation to the occurrence of an event of Force Majeure shall be as provided in this Clause.

Modifications

- 43.12 The parties shall endeavour to agree any modifications to the Agreement which may be equitable having regard to the nature of an event or events of Force Majeure. Part 26 of the Schedule (*Dispute Resolution Procedure*) shall not apply to a failure of the Trust and Project Co to reach agreement pursuant to this Clause.

PART K: TERMINATION

44. Project Co Events of Default

Project Co Events of Default

44.1 For the purposes of this Agreement, Project Co Events of Default means any of the following events or circumstances:

Insolvency

- (a) the occurrence of any of the following events in respect of Project Co, namely:
- (i) any arrangement or composition with or for the benefit of creditors (including any voluntary arrangement as defined in the Insolvency Act 1986) being entered into by or in relation to Project Co;
 - (ii) a receiver, administrator, administrative receiver, judicial factor or other encumbrancer taking possession of or being appointed over, or any diligence (other than diligence on the dependence) or other process being levied or enforced (and not being discharged within ten (10) Business Days) upon, the whole or any material part of the assets of Project Co;
 - (iii) Project Co ceasing to carry on business; or
 - (iv) a petition being presented (and not being discharged within twenty (20) Business Days), or a resolution being passed or an order being made for the administration or the winding-up, bankruptcy or dissolution of Project Co;

Long stop

- (b) Project Co failing to achieve the Actual Completion Date within a period of one (1) year after the Completion Date;

Default

- (c) Project Co committing a material breach of its obligations under this Agreement which has a material and adverse effect on the delivery of Clinical Services or any other services at the Hospital for which Project Co is not responsible (other than as a consequence of a breach by the Trust of its obligations under this Agreement);
- (d) where Project Co Abandons the Works (other than as a consequence of a breach by the Trust of its obligations under this Agreement);

- (e) Project Co ceasing to provide all or a substantial part of the Services in accordance with this Agreement (other than as a consequence of a breach by the Trust of its obligations under this Agreement);

Health and safety

- (f) At any time after the Actual Completion Date Project Co committing a material breach of its obligations under this Agreement (other than as a consequence of a breach by the Trust of its obligations under this Agreement) which results in the criminal investigation, prosecution and conviction of Project Co or any Project Co Party under the Health and Safety Regime (an "H&S Conviction") provided that an H&S Conviction of a Project Co Party shall not constitute a Project Co Event of Default if, within ninety (90) Business Days from the date of the H&S Conviction (whether or not the H&S Conviction is subject to an appeal or any further judicial process), the involvement in the Project Operations of each relevant Project Co Party (which in the case of an individual director, officer or employee shall be deemed to include the Project Co Party of which that person is a director, officer or employee) is terminated and a replacement is appointed by Project Co in accordance with Clause 50.5 (*Sub-contracting*);

Change in Control

- (g) the occurrence of any Change in Control which is prohibited by Clause 50 (*Assignment, sub-contracting and Changes in Control*);

Assignment

- (h) Project Co failing to comply with the provisions of Clauses 50.2 or 50.5 (*Assignment, sub-contracting and Changes in Control*);

Service Failure Points

- (i) Project Co being awarded a total of one thousand seven hundred and fifty (1,750) or more Service Failure Points in any four (4) month period; or

Payment

- (j) Project Co failing to pay any sum or sums due to the Trust under this Agreement (which sums are not in dispute) which, either singly or in aggregate, exceed(s) one thousand pounds (£1,000) (index linked) and such failure continues for sixty (60) Business Days from receipt by Project Co of a notice of non payment from the Trust PROVIDED HOWEVER, that the Trust shall not have the right to terminate this Agreement pursuant to this Clause 44.1(j) where and to the extent that any such sum or sums due to the Trust by Project Co have been set-off against sums due by the Trust to Project Co under Clause 35.7 or otherwise.

Notification

- 44.2 Project Co shall notify the Trust of the occurrence, and details, of any Project Co Event of Default and of any event or circumstance which is likely, with the passage of time or otherwise, to constitute or give rise to a Project Co Event of Default, in either case promptly on Project Co becoming aware of its occurrence.

Trust's options

- 44.3 On the occurrence of a Project Co Event of Default, or within a reasonable time after the Trust becomes aware of the same, and while the same is subsisting, the Trust may:
- (a) in the case of the Project Co Events of Default referred to in Clauses 44.1(a), (b), (f), (g), (h), and (j), terminate this Agreement in its entirety by notice in writing having immediate effect;
 - (b) in the case of any Project Co Event of Default referred to in Clause 44.1(c) (d), and (e), serve notice of default on Project Co requiring Project Co at Project Co's option either:

- (i) to remedy the Project Co Event of Default referred to in such notice of default (if the same is continuing) within twenty (20) Business Days of such notice of default; or
 - (ii) to put forward within twenty (20) Business Days of such notice of default a reasonable programme (set out, if appropriate, in stages) for remedying the Project Co Event of Default. The programme shall specify in reasonable detail the manner in, and the latest date by, which such Project Co Event of Default is proposed to be remedied (Project Co shall only have the option of putting forward a programme in accordance with this paragraph if it first notifies the Trust within ten (10) Business Days of such notice of default that it proposes to do so); and
- (c) in the case of any Project Co Event of Default referred to in Clause 44.1 (i) (*Service Failure Points*), if Project Co is awarded two hundred and fifty (250) or more further Service Failure Points in the following two (2) month period, terminate this Agreement in its entirety by notice in writing having immediate effect.

Remedy provisions

44.4 Where Project Co puts forward a programme in accordance with Clause 44.3(b)(ii), the Trust shall have twenty (20) Business Days from receipt of the same within which to notify Project Co (acting reasonably) that it does not accept the programme, failing which the Trust shall be deemed to have accepted the programme. Where the Trust notifies Project Co that it does not accept the programme as being reasonable, the parties shall endeavour within the following five (5) Business Days to agree any necessary amendments to the programme put forward. In the absence of agreement within five (5) Business Days, the question of whether the programme (as the same may have been amended by agreement) will remedy the Project Co Event of Default in a reasonable manner and within a reasonable time period (and, if not, what would be a reasonable programme) may be referred by either party for resolution in accordance with Part 26 of the Schedule (*Dispute Resolution Procedure*).

44.5 If:

- (a) the Project Co Event of Default notified in a notice of default served under Clause 44.3(b) is not remedied before the expiry of the period referred to in Clause 44.3(b)(i); or
- (b) where Project Co puts forward a programme pursuant to Clause 44.3(b)(ii) which has been accepted by the Trust or has been determined to be reasonable and Project Co fails to achieve any element of the programme or the end date for the programme (as the case may be); or
- (c) any programme put forward by Project Co pursuant to Clause 44.3(b)(ii) is rejected by the Trust as not being reasonable, and the Dispute Resolution Procedure does not find against that rejection,

then the Trust may terminate this Agreement in its entirety by written notice to Project Co with immediate effect. Provided that for the purposes of Clause 44.5 (b) if Project Co's performance of the programme is adversely affected by the occurrence of Force Majeure, a Relief Event or an Excusing Cause then, subject to Project Co complying with the mitigation and other requirements in this Agreement concerning Force Majeure, a Relief Event or an Excusing Cause (as the case may be), the time for performance of the programme or any relevant element of it shall be deemed to be extended by a period equal to the delay caused by Force Majeure, the Relief Event or the Excusing Cause (as the case may be) which is agreed by the parties or determined in accordance with Part 26 of the Schedule (*Dispute Resolution Procedure*).

Trust's costs

44.6 Project Co shall reimburse the Trust for all reasonable costs incurred by the Trust in exercising any of its rights (including, without limitation, any relevant increased administrative expenses). The Trust shall take reasonable steps to mitigate such costs.

44.7 The Trust shall not exercise, or purport to exercise, any right to terminate this Agreement except as expressly set out in this Agreement. The rights of the Trust (to terminate or otherwise) under this Clause are in addition (and without prejudice) to any other right which the Trust may have to claim the amount of loss or damage suffered by the Trust on account of the acts or omissions of Project Co (or to take any action other than termination of this Agreement).

45. Trust Events of Default

45.1 For the purposes of this Agreement, Trust Events of Default means any of the following events or circumstances:

- (a) the Trust committing a material breach of its obligations under Clause 14 (*Land*) and/or the Head Lease (other than as a consequence of a breach by Project Co of its obligations under this Agreement) and such breach shall materially adversely affect the ability of Project Co to perform its material obligations under this Agreement for a continuous period of not less than thirty (30) Business Days;
- (b) the failure of the Trust to pay any sum or sums due to Project Co under this Agreement (which sums are not in dispute) which, either singly or in aggregate, exceed(s) £ (index linked) and such failure continues for thirty (30) Business Days from receipt by the Trust and NHS Lanarkshire (or such other party as may be notified in advance in writing by the Trust to Project Co in substitution for such regional office) of a notice of non-payment from Project Co; or
- (c) an Adverse Law or a Proposal for an Adverse Law being made.

Project Co's options

45.2 On the occurrence of a Trust Event of Default, or within a reasonable time after Project Co becomes aware of the same, and while the same is still subsisting, Project Co may, at its option:

- (a) in respect of execution of the Works prior to the Actual Completion Date, suspend performance by it of its obligations under this Agreement until such time as the Trust shall have demonstrated to the reasonable satisfaction of Project Co that it will perform and is capable of performing its obligations under this Agreement; or
- (b) serve notice on the Trust Chief Executive (or such other party as may be notified in advance in writing by the Trust Chief Executive to Project Co in substitution for such regional office) of the occurrence (and specifying details) of such Trust Event of Default. If the relevant matter or circumstance has not been rectified or remedied by the Trust (or otherwise) in respect of Clause 45.1(a) or (c) within sixty (60) Business Days of such notice, and in respect of Clause 45.1(b) within thirty (30) Business Days of such notice, Project Co may serve a further notice on the Trust Chief Executive (or

its substitute notified in accordance with this paragraph (b)) terminating this Agreement with immediate effect.

45.3 Project Co shall not exercise or purport to exercise any right to terminate this Agreement (or accept any repudiation of this Agreement) except as expressly set out in this Agreement.

46. Non-Default Termination

Force Majeure

46.1 If, in the circumstances referred to in Clause 43 (*Force Majeure*), the parties have failed to reach agreement on any modification to this Agreement pursuant to Clause 43 (*Force Majeure*) within six (6) calendar months of the date on which the party affected serves notice on the other party in accordance with Clause 43 (*Force Majeure*) either party may at any time afterwards terminate this Agreement by written notice to the other party having immediate effect provided always that the effects of the relevant event of Force Majeure continues to prevent either party from performing any material obligation under this Agreement.

Voluntary termination

46.2 The Trust shall be entitled to terminate this Agreement at any time on three (3) months' written notice to Project Co. In the event of notice being given by the Trust in accordance with this Clause, the Trust shall, at any time before the expiration of such notice, be entitled to direct Project Co, where the Works (or any part or parts of the Works) or any Service (or any elements of any Service) have not been commenced, to refrain from commencing any such Works or Services (or to procure the same).

Expiry

46.3 This Agreement shall terminate automatically on the expiry of the Project Term unless it shall have been terminated earlier in accordance with the provisions of this Agreement. To avoid doubt, Project Co shall not be entitled to any compensation for termination of this Agreement on expiry of the Project Term.

47. Effect of Termination

Termination

- 47.1 Notwithstanding any provision of this Agreement, on service of a notice of termination, this Agreement shall only terminate in accordance with the provisions of this Clause.

Continued effect - no waiver

- 47.2 Notwithstanding any breach of this Agreement by either party, and without prejudice to any other rights which the other party may have in relation to it, the other party may elect to continue to treat this Agreement as being in full force and effect and to enforce its rights under this Agreement. The failure of either party to exercise any right under this Agreement, including any right to terminate this Agreement and any right to claim damages, shall not be deemed a waiver of such right for any continuing or subsequent breach.

Continued performance

- 47.3 Subject to any exercise by the Trust of its rights to perform, or to procure a third party to perform, the obligations of Project Co, the parties shall continue to perform their obligations under this Agreement, notwithstanding the giving of any notice of default or notice of termination, until the termination of the Agreement becomes effective in accordance with the provisions of this Clause.

Transfer to Trust of Assets, Contracts etc.

- 47.4 On the service of a notice of termination in accordance with this Agreement for any reason:
- (a) if prior to the Actual Completion Date, in so far as any transfer shall be necessary fully and effectively to transfer property to the Trust, Project Co shall transfer to, and there shall vest in, the Trust such part of the Works and/or the Facilities as shall have been constructed and such items of the Plant and Group 1 Equipment as shall have been procured by Project Co and if the Trust so elects:

- (i) all plant and all materials on or near to the Site shall remain available to the Trust for the purposes of completing the Works; and
 - (ii) the construction plant shall remain available to the Trust for the purposes of completing the Works, subject to payment of the Contractor's reasonable charges;
- (b) Project Co shall hand over to, and there shall vest in, the Trust, free from all encumbrances, the Facilities (which in the case of the termination of this Agreement in accordance with Clause 46.3 (*Non-Default Termination- Expiry*) shall be in the state required in accordance with Part 24 of the Schedule (*Handback Procedure*)); and
- (c) if the Trust so elects, Project Co shall procure that any of the Construction Contract, the Service Contracts shall be novated or assigned to the Trust, provided that where termination occurs under Clause 45 (*Trust Events of Default*) the consent of the Contractor, the Service Provider (as the case may be) shall be required;
- (d) Project Co shall, or shall procure that any Contracting Associate shall (as the case may be), offer to sell to the Trust at a fair value (determined as between a willing vendor and willing purchaser, with any disputes as to such fair value being determined pursuant to Part 26 of the Schedule (*Dispute Resolution Procedure*)), free from any security interest with full title guarantee all or any part of the stocks of material and other assets, road vehicles, spare parts and other moveable property owned by Project Co or any of its Contracting Associates and reasonably required by the Trust in connection with the operation of the Facilities or the provision of the Services;
- (e) Project Co shall deliver to the Trust (as far as not already delivered to the Trust) one complete set of:
 - (i) "as built drawings" showing all alterations made to the Facilities since the commencement of operation of the Facilities; and
 - (ii) maintenance, operation and training manuals for the Facilities;
- (f) Project Co shall use all reasonable endeavours to procure that the benefit of all manufacturer's warranties in respect of mechanical and electrical plant and equipment used or made available by Project Co under this Agreement and included in the Facilities are assigned, or otherwise transferred, to the Trust with full title guarantee; and

(g) Project Co shall deliver to the Trust the information referred to in Clauses 30 (*Employment issues*) and 31 (*Transfer Assistance Period*) and the records referred to in Clause 55 (*Records and Reports*) except where such documents are required by Law to be retained by Project Co or its Contracting Associates (in which case complete copies shall be delivered to the Trust).

47.5 Project Co shall ensure that provision is made in all relevant contracts with Sub-Contractors to ensure that the Trust will be in a position to exercise its rights, and Project Co will be in a position to comply with its obligations, under Clause 47.4.

Termination

47.6 On completion of the transfer required by Clause 47.4 (except in so far as any of the requirements of that Clause may be waived by the Trust), this Agreement shall terminate and, save as provided in Clause 47.9 (*Continuing obligations*), all rights and obligations of the Trust and Project Co under this Agreement shall cease and be of no further force and effect.

Transitional arrangements

47.7 On the termination of this Agreement for any reason, for a reasonable period both before and after any such termination, Project Co shall have the following duties:

(a) Project Co shall co-operate fully with the Trust and any successor providing to the Trust services in the nature of any of the Services or any part of the Services in order to achieve a smooth transfer of the manner in which the Trust obtains services in the nature of the Services and to avoid or mitigate in so far as reasonably practicable any inconvenience or any risk to the health and safety of the employees of the Trust and members of the public;

(b) Project Co shall as soon as practicable remove from the Site all property not acquired by the Trust pursuant to Clause 47.4 (or not belonging to the Trust or any Trust Party) and if it has not done so within forty (40) Business Days after any notice from the Trust requiring it to do so the Trust may (without being responsible for any loss, damage, costs or expenses) remove and sell any such property and shall hold any proceeds less all costs incurred to the credit of Project Co;

(c) Project Co shall forthwith deliver to the Trust's Representative:

- (i) any keys to the Facilities; and
 - (ii) without prejudice to Clause 51 (*Intellectual Property*), any copyright licences for any computer programmes (or licences to use the same) necessary for the operation of the Facilities (but excluding computer programmes, which have been developed or acquired by a Service Provider for its own use and not solely for the purposes of provision of any of the Services at the Facilities or the assignation or transfer of which is otherwise restricted); and
- (d) Project Co shall as soon as practicable vacate the Site and (without prejudice to Part 24 of the Schedule (*Handback*)) shall leave the Site and the Facilities in a safe, clean and orderly condition.

47.8 If the Trust wishes to conduct a competition prior to the Expiry Date with a view to entering into an agreement for the provision of services (which may or may not be the same as, or similar to, the Services or any of them) following the expiry of this Agreement, Project Co shall co-operate with the Trust fully in such competition process including (without limitation) by:

- (a) providing any information which the Trust may reasonably require to conduct such competition but, to avoid doubt, information which is commercially sensitive to Project Co shall not be provided (and, for the purpose of this Clause commercially sensitive shall mean information which would if disclosed to a competitor of Project Co give that competitor a competitive advantage over Project Co and thereby prejudice the business of Project Co but shall, to avoid doubt, exclude any information referred to in Clause 30 (*Employment Issues*); and
- (b) assisting the Trust by providing all (or any) participants in such competition process with reasonable access to the Site and the Facilities.

Continuing Obligations

47.9 Save as otherwise expressly provided in this Agreement:

- (a) termination of this Agreement shall be without prejudice to any accrued rights and obligations under this Agreement as at the date of termination; and
- (b) termination of this Agreement shall not affect the continuing rights and obligations of Project Co and the Trust under Clauses 7 (*Warranties*), 8 (*Indemnities and Liability*), 9 (*Limits on Liability*), 14 (*Nature of Land Interests*), 30 (*Employment Issues*), 35 (*Payment*), 36 (*Insurance*), 43 (*Force Majeure*), 46 (*Non-Default Termination*), 47.7

and 47.8 (*Transitional Arrangements*) 48 (*Compensation on Termination*), 51 (*Intellectual Property*), 52 (*Confidentiality*), 53 (*Taxation*), 54 (*Corrupt Gifts and Payments*), 55 (*Records and Reports*), 56 (*Dispute Resolution Procedure*), 57 (*Notices*), 67 (*Mitigation*) and Clause 68 (*Governing Law and Jurisdiction*) or under any other provision of this Agreement which is expressed to survive termination or which is required to give effect to such termination or the consequences of such termination.

48. Compensation on Termination

- 48.1 If this Agreement is terminated pursuant to Clause 46.1 (*Force Majeure*), then the Trust shall pay compensation to Project Co in accordance with Section 3 of Part 23 of the Schedule (*Compensation on Termination*).
- 48.2 If this Agreement is terminated pursuant to Clause 44 (*Project Co Events of Default*), then the Trust shall pay compensation to Project Co in accordance with Section 2 of Part 23 of the Schedule (*Compensation on Termination*).
- 48.3 If this Agreement is terminated pursuant to Clause 45 (*Trust Events of Default*), then the Trust shall pay compensation to Project Co in accordance with Section 1 of Part 23 of the Schedule (*Compensation on Termination*).
- 48.4 If this Agreement is terminated pursuant to Clause 46.2 (*Voluntary Termination*), then the Trust shall pay compensation to Project Co in accordance with Section 1 of Part 23 of the Schedule (*Compensation on Termination*).
- 48.5 If this Agreement is terminated pursuant to Clause 54.3 (*Corrupt Gifts and Payments*), then the Trust shall pay compensation to Project Co in accordance with Section 4 of Part 23 of the Schedule (*Compensation on Termination*).

Tax equalisation

- 48.6 Where a payment is to be made to Project Co pursuant to Clauses 48.1 (*Force Majeure*), 48.3 (*Trust Events of Default*), 48.4 (*Voluntary Termination*) or 48.5 (*Corrupt Gifts*) (a "Compensation Payment") and Project Co has a Relevant Tax Liability in respect of such payment, then the amount of the Compensation Payment to be made by the Trust to Project Co shall be increased so as to ensure that Project Co is in the same position (after account is

taken of the Relevant Tax Liability) as it would have been in had it not been for such Relevant Tax Liability.

48.7 For the purposes of this Clause 48:

- (a) "Relief" shall mean any relief, allowance or deduction in computing profits or tax or a credit against, or right to repayment of, tax granted by or pursuant to any legislation for tax purposes;
- (b) a "Relief derived from the Project" is a Relief which arises in connection with the Project and includes any Relief arising as a consequence of the distribution of any amount obtained in respect of the Project (other than a Compensation Payment) by Project Co (whether by way of interest, dividend or other distribution, repayment, reduction or redemption of capital or indebtedness or return of assets or otherwise); and
- (c) Project Co shall be regarded as having a "Relevant Tax Liability" in respect of a Compensation Payment to the extent that:
 - (i) it has a liability for tax in consequence of or in respect of a Compensation Payment ("Actual Liability"); or
 - (ii) it would have had a liability for tax within paragraph (i) above but for the utilisation of a Relief other than a Relief derived from the Project ("Deemed Liability").

48.8 In determining whether Project Co has a Relevant Tax Liability by reason of a Compensation Payment, it should be assumed that any Reliefs derived from the Project which are available to Project Co (or would have been so available but for a surrender by Project Co of such Reliefs by way of group or consortium relief) for offset against the Compensation Payment, or against tax in relation to the same, have been so offset to the maximum extent possible.

48.9 Project Co shall keep the Trust fully informed of all negotiations with the Inland Revenue in relation to any Relevant Tax Liability in respect of a Compensation Payment. Project Co shall not agree, accept or compromise any claim, issue or dispute relating to such Relevant Tax Liability without the prior written consent of the Trust, which shall not be unreasonably withheld or delayed. The Trust may, if it considers in good faith that such action is justified having regard to the likely costs and benefits, direct Project Co to resist, appeal, defend or otherwise dispute the Relevant Tax Liability in respect of the Compensation Payment, provided that the cost of any such dispute (including any interest or penalties incurred) shall be at the Trust's expense. However, if Project Co obtains professional advice from an

independent person with relevant expertise that any resistance, appeal, defence or other mode of dispute is not likely to result in any more beneficial position in relation to the Relevant Tax Liability, Project Co shall be entitled not to continue with such resistance, appeal, defence or other mode of dispute. Where any resistance, appeal, defence or other mode of dispute results in a more beneficial position in relation to the Relevant Tax Liability, an adjustment will be made to the amount payable under Clause 48.6 (*Tax equalisation*) to reflect such outcome.

48.10 Any increase in the amount of a Compensation Payment which is payable under Clause 48.6 (*Tax equalisation*) shall be paid on the later of five (5) Business Days after a demand therefor (together with evidence in sufficient detail for the Trust to satisfy itself of the Relevant Tax Liability and its calculation) is made by Project Co and:

- (a) in the case of an Actual Liability, five (5) Business Days before the date on which the relevant tax must be paid to the tax authority in order to avoid incurring interest and penalties; and
- (b) in the case of a Deemed Liability, five (5) Business Days before the date on which tax which would not have been payable but for the utilisation of the relevant Relief must be paid in order to avoid incurring interest or penalties (whether by Project Co or otherwise) and, for the purposes of determining when the Relief would otherwise have been utilised, Reliefs shall be regarded as utilised in the order in which they arise.

48.11 The Trust shall have the right to pay the amount payable under Clause 48.6 (*Tax equalisation*) direct to the Inland Revenue in satisfaction of the relevant tax due by Project Co.

Rights of Set-Off

48.12 To avoid doubt, the Trust's obligations to make any payment of compensation to Project Co pursuant to this Clause are subject to the Trust's rights under Clause 35.7 (*Set-Off*), save that the Trust agrees not to set-off any amount agreed or determined as due and payable by Project Co to the Trust against any payment of termination compensation under Clauses 48.1 (*Force Majeure*), 48.3 (*Trust Events of Default*) and 48.4 (*Voluntary Termination*), except to the extent that such termination payment exceeds the Senior Debt Amount.

Full and Final Settlement

48.13 Subject to the provisions of paragraph 2.1 of Section 5 of Part 23 of the Schedule (*Compensation on Termination*):

- (a) any compensation paid pursuant to this Clause shall be in full and final settlement of any claim, demand and/or proceedings of Project Co in relation to any termination of this Agreement, the Leases and/or any Project Document (and the circumstances leading to such termination) and Project Co shall be excluded from all other rights and remedies in respect of any such termination; and
- (b) the compensation payable (if any) pursuant to any of Clauses 48.1 to 48.5 above shall be the sole remedy of Project Co and Project Co shall not have any other right or remedy in respect of such termination.

49. **Handback Procedure**

The provisions of Part 24 of the Schedule (*Handback Procedures*) shall apply to the handback of the Facilities to the Trust on expiry of this Agreement.

PART L: MISCELLANEOUS

50. Assignment, sub-contracting and Changes in Control

Assignment

- 50.1 This Agreement, the Leases and any other agreement in connection with the Project to which both the Trust and Project Co are a party shall be binding on, and shall enure to the benefit of, Project Co and the Trust and their respective successors and permitted transferees and assignees. In the case of the Trust, its successors shall include any person to whom the Scottish Ministers, in exercising their statutory powers to transfer property, rights and liabilities of the Trust upon the Trust ceasing to exist, transfer the property, rights and obligations of the Trust under this Agreement, the Leases and such other agreements in connection with the Project to which the Trust and Project Co are both a party.
- 50.2 Subject to Clause 50.3, Project Co shall not, without the prior written consent of the Trust, assign, transfer, sub-contract or otherwise dispose of any interest in this Agreement, the Leases, the Construction Contract and the Service Contracts entered into by Project Co for the purposes of performing its obligations under this Agreement.
- 50.3 The provisions of Clause 50.2 do not apply to the grant of any security, in a form approved by the Trust prior to its grant (such approval not to be unreasonably withheld or delayed), for any loan made to Project Co under the Initial Funding Agreements provided that any assignee shall enter into the Lenders' Direct Agreement in relation to the exercise of its rights, if the Trust so requires.
- 50.4 The Trust shall not assign or otherwise dispose of the benefit of the whole or part of this Agreement or any agreement in connection with this Agreement to which Project Co and the Trust are a party to any person, save:
- (a) to the Scottish Ministers, another National Health Service Trust, a Health Board, the Common Services Agency for the Scottish Health Service, a Special Health Board or any other person or body replacing any of the foregoing (or to whom the Scottish Ministers exercising their statutory rights would be entitled to transfer such benefits) covered by the National Health Service (Residual Liabilities) Act 1996; or
 - (b) with the prior written consent of Project Co (such approval not to be unreasonably withheld or delayed),

provided that nothing in this Clause shall restrict the rights of the Scottish Ministers to effect a statutory transfer.

Sub-contractors

50.5 Project Co shall:

- (a) not terminate or agree to the termination of the engagement and/or employment of (or the replacement of) the Contractor or any Service Provider under the Ancillary Documents; and
- (b) without prejudice to Clause 50.1 (*Assignment*), procure that none of the persons listed below shall sub-contract all (or substantially all) of their obligations under or in the agreement set out next to its name:

Person	Contract
Dawn Construction Limited	Construction Contract
FES FM Limited and FES Limited	Service Contract

without, in each case, the prior written consent of the Trust (such consent not to be unreasonably withheld or delayed). To avoid doubt, (i) any failure to comply with Clause 50.7 shall be a reasonable ground for withholding consent and (ii) consent shall, without prejudice to the other provisions of Clause 50.5, not be required in respect of the appointment of any party currently approved by the Trust as a suitable replacement.

50.6 If the contract set out next to the name of any person referred to in Clause 50.5 shall at any time lapse, terminate or otherwise cease to be in full force and effect (whether by reason of expiry or otherwise), with the effect that such person shall cease to act in relation to the Project, Project Co shall forthwith appoint a replacement (subject to compliance with Clause 50.5).

50.7 Project Co shall procure that any replacement for any person referred to in Clause 50.5 shall enter into a contract upon the same or substantially similar terms as the person so replaced and shall also enter into a collateral agreement on the same or substantially the same terms as the Collateral Agreement entered into by the person so replaced.

Changes in Control

- 50.8 Subject to Clause 50.9, prior to the expiry of a period of twelve (12) months commencing on the Actual Completion Date, no Change in Control in any or all of the shares in Project Co (or any company of which Project Co is a subsidiary) shall be permitted without the prior written approval of the Trust.
- 50.9 Subject to Clause 50.10, the conditions and restrictions in Clause 50.8 shall not apply to a Change in Control in any shares in Project Co held by any Third Party Shareholder.
- 50.10 No Change in Control (at any time) in any or all of the shares in Project Co (or any company of which Project Co is a subsidiary) shall be permitted without the prior written approval of the Trust where the person acquiring control is a Restricted Person.

51. Intellectual property

Project Data

- 51.1 Project Co shall make available to the Trust free of charge (and hereby licences the Trust to use in perpetuity) all Project Data that might reasonably be required by the Trust and Project Co shall ensure that it obtains all necessary licences, permissions and consents to ensure that it can make the Project Data available to the Trust on these terms, for the purposes of:
- (a) the Trust carrying out the Clinical Services (and its operations relating to the performance of the Clinical Services), its duties under this Agreement and/or any statutory duties which the Trust may have; and
 - (b) following termination of this Agreement, the design or construction of the Facilities, the operation, maintenance or improvement of the Facilities and/or the carrying out of operations the same as, or similar to, the Project Operations,
- (together, the "Approved Purposes"), and in this Clause "use" shall include the acts of copying, modifying, adapting and translating the material in question and/or incorporating them with other materials and the term "the right to use" shall be construed accordingly.

Intellectual Property Rights

51.2 Project Co:

- (a) hereby grants to the Trust, free of charge and in perpetuity a non-exclusive and transferable (but only to any assignee or transferee of any rights or benefits under this Agreement or upon or at any time following termination of this Agreement) licence (carrying the right to grant sub-licences) to use the Intellectual Property Rights which are or become vested in Project Co; and
 - (b) shall, where any Intellectual Property Rights are or become vested in a third party, use all reasonable endeavours to procure the grant of a like licence to that referred to in paragraph (a) above to the Trust,
- in both cases, solely for the Approved Purposes.

51.3 Project Co shall use all reasonable endeavours to ensure that any Intellectual Property Rights created, brought into existence or acquired during the term of this Agreement vest, and remain vested throughout the term of this Agreement, in Project Co and Project Co shall enter into appropriate agreements with any Project Co Party (or other third parties) that may create or bring into existence, or from which it may acquire, any Intellectual Property Rights.

Maintenance of data

51.4 To the extent that any of the data, materials and documents referred to in this Clause are generated by or maintained on a computer or similar system, Project Co shall use all reasonable endeavours to procure for the benefit of the Trust, at no charge or at the lowest reasonable fee, the grant of a licence or sub-licence for any relevant software to enable the Trust or its nominee to access and otherwise use (subject to the payment by the Trust of the relevant fee, if any) such data for the Approved Purposes. As an alternative, Project Co may provide such data, materials or documents in a format which may be read by software generally available in the market at the relevant time or in hard copy format.

51.5 Project Co shall ensure the back-up and storage in safe custody of the data, materials and documents referred to in Clause 51.4 in accordance with Good Industry Practice. Without prejudice to this obligation, Project Co shall submit to the Trust's Representative for approval its proposals for the back-up and storage in safe custody of such data, materials and

documents and the Trust shall be entitled to object if the same is not in accordance with Good Industry Practice. Project Co shall comply, and shall cause all Project Co Parties to comply, with all procedures to which the Trust's Representative has given its approval. Project Co may vary its procedures for such back-up and storage subject to submitting its proposals for change to the Trust's Representative, who shall be entitled to object on the basis set out above.

Claims

- 51.6 Where a claim or proceeding is made or brought against the Trust which arises out of the infringement of any rights in or to any Intellectual Property (other than any Disclosed Data) or because the use of any materials, Plant, machinery or equipment in connection with the Works or the Project Operations infringes any rights in or to any Intellectual Property of a third party then, unless such infringement has arisen out of the use of any Intellectual Property by or on behalf of the Trust otherwise than in accordance with the terms of this Agreement, Project Co shall indemnify the Trust at all times from and against all such claims and proceedings and the provisions of Clause 8.3 (*Conduct of Claims*) shall apply.

Data Protection

- 51.7 For the purpose of the following Clauses, the term "personal data" shall have the meaning given to it in the Data Protection Act 1998.
- 51.8 Project Co undertakes to the Trust that it shall comply with the obligations of a "data controller" under the provisions of the Seventh Data Protection Principle as set out in Schedule 1 of the Data Protection Act 1998. In addition, Project Co:
- (a) warrants that it has, or will have at all material times, (and it shall use its best endeavours to procure that all Sub-Contractors (and their agents and sub-contractors of any tier have or will have at all material times) the appropriate technical and organisational measures in place against unauthorised or unlawful processing of personal data and against accidental or unauthorised loss or destruction of, or damage to, personal data held or processed by it and that it has taken, or will take at all material times, all reasonable steps to ensure the reliability of any of its staff which will have access to personal data processed as part of the Project Operations;

- (b) undertakes that it will act only on the instructions of the Trust in relation to the processing of any personal data made available by or on behalf of the Trust as part of the Project Operations;
- (c) undertakes that it will only obtain, hold, process, use, store and disclose personal data as is necessary to perform its obligations under this Agreement and (without prejudice to Clause 5.2 (*General standards*)) that such data will be held, processed, used, stored and disclosed only in accordance with the Data Protection Act 1998 and any other applicable Law; and
- (d) undertakes to, at the request of the Trust, supply any relevant information to the Trust and to allow the Trust access to any relevant premises on reasonable notice to inspect its procedures described at (a) above.

52. Confidentiality

Confidential Information

- 52.1 In this Agreement, "Confidential Information" means all information relating to the other party which is supplied by or on behalf of the other party (whether before or after the date of this Agreement), either in writing, orally or in any other form, directly or indirectly from or pursuant to discussions with the other party or which is obtained through observations made by the receiving party. "Confidential Information" also includes all analyses, compilations, studies and other documents whether prepared by or on behalf of a party which contain or otherwise reflect or are derived from such information.

Use and disclosure of Confidential Information

- 52.2 Each party shall (and shall procure that persons for whom it is responsible shall) hold in confidence any Confidential Information, provided that the provisions of this Clause shall not restrict either party from passing such information to its professional advisers, to the extent necessary, to enable it to obtain professional advice with regard to the terms of this Agreement and the negotiation of the same (subject to such advisers being made aware of the provisions contained in this Clause 52 and to each party procuring that their respective advisers hold any Confidential Information provided in confidence), perform (or to cause to be

performed) or to enforce its rights or obligations under this Agreement, and provided further that Project Co may, subject to obtaining appropriate confidentiality restrictions:

- (a) pass to the Funders such documents and other information as are reasonably required by the Funders in connection with the raising of finance for the Project Operations or which Project Co is obliged to supply by the terms of the Funding Agreements; and
- (b) pass to the Contractor and the Service Providers documents and other information which are necessary for Project Co's performance of this Agreement.

Exceptions

52.3 The obligation to maintain the confidentiality of the Confidential Information does not apply to Confidential Information:

- (a) which the other party confirms in writing is not required to be treated as Confidential Information;
- (b) which is or comes into the public domain otherwise than through any disclosure prohibited by this Agreement;
- (c) to the extent any person is required to disclose such Confidential Information by Law or any regulatory or government authority (but only to that extent);
- (d) as the Trust may require for the purpose of the Project Operations or for the operation, maintenance or improvement of the Facilities in the event of, or following, termination of this Agreement;
- (e) disclosed pursuant to Clause 52.5 (*Disclosure*); or
- (f) to the extent required to be disclosed pursuant to Clause 38.2 (*Information and Audit Access*).

Announcements

52.4 Unless otherwise required by any Law or any regulatory or governmental authority (but only to that extent), neither party shall make or permit or procure to be made any public announcement or disclosure (whether for publication in the press, the radio, television screen or any other medium) of any Confidential Information or in the case of Project Co of its (or any Project Co Party's) interest in the Project or, in any such case, any matters relating thereto,

without the prior written consent of the other party (which shall not be unreasonably withheld or delayed).

Disclosure

- 52.5 Subject to Clause 52.6, the Trust shall be free to disclose the terms of this Agreement, the Lenders' Direct Agreement and the Collateral Agreements to the Scottish Executive and/or NHS Lanarkshire and the parties agree that the Trust shall be free to use and disclose such information on such terms and in such manner as the Scottish Executive and/or NHS Lanarkshire see fit.
- 52.6 The Trust shall notify Project Co in writing not less than 10 Business Days prior to any intended disclosure of the terms of any of the documents referred to in Clause 52.5 to the Scottish Executive and/or NHS Lanarkshire. Project Co shall notify the Trust in writing of any terms of such documents (the "Sensitive Information") that Project Co objects to being disclosed within 5 Business Days of any such notification by the Trust (failing which Project Co shall be deemed to have notified the Trust that it has no objection to any such disclosure). Without prejudice to the Trust's right to disclose the Sensitive Information pursuant to Clause 52.5, the Trust shall consult with Project Co following receipt of a notification from Project Co that it objects to disclosure of such Sensitive Information with a view to agreeing whether or not part or all of the Sensitive Information can be removed from the information to be disclosed.

53. Taxation

VAT

- 53.1 All amounts stated to be payable by either party under this Agreement shall be exclusive of any VAT properly chargeable on any amount.
- 53.2 Each party shall pay to the other party any VAT properly chargeable on any supply made to it under this Agreement provided that it shall first have received from the other party a valid tax invoice in respect of that supply which complies with the requirements of Part III VAT Regulations 1995.
- 53.3 If either party (referred to in this Clause as the "First Party") shall consider that any VAT which the other party (referred to in this Clause as the "Second Party") claims to be properly

chargeable to the First Party in connection with this Agreement is not in fact properly so chargeable, the First Party shall be entitled to require the Second Party to obtain a ruling from the Commissioners for Customs and Excise (or, if relevant, such other body as is charged at the time with the collection and management of VAT) (referred to in this Clause as the "Commissioners") as to the VAT (if any) properly so chargeable. The Second Party shall forthwith request the Commissioners for such a ruling.

53.4 The following further provisions shall apply in respect of the application for a ruling in accordance with Clause 53.3:

- (a) prior to submitting its request for such a ruling and any further communication to the Commissioners in connection with the obtaining of the ruling, the Second Party shall first obtain the agreement of the First Party to the contents of such request and any such further communication, such agreement not to be unreasonably withheld or delayed;
- (b) the Second Party shall provide to the First Party copies of all communications received from the Commissioners in connection with the application for a ruling as soon as practicable after receipt; and
- (c) the Second Party shall use all reasonable endeavours (including without limitation the provision of such additional information as the Commissioners may require) to obtain such a ruling as soon as reasonably practicable following the initial request.

53.5 If a ruling is required by the First Party under Clause 53.3, the First Party shall not be obliged to pay the VAT so claimed by the Second Party unless and until a ruling is received from the Commissioners which states that a sum of VAT (the "VAT Sum") is properly so chargeable or the Commissioners state that they are not prepared to give any ruling on the matter. In this case, then subject to Clauses 53.6 and 53.7 and provided that the First Party shall first have received a valid tax invoice which complies with the requirements of Part III VAT Regulations 1995 and which states the VAT Sum to be the amount of VAT chargeable to the First Party, the First Party shall pay the VAT Sum (and any interest or penalties attributable to the VAT Sum) to the Second Party.

53.6 If the First Party disagrees with any ruling obtained pursuant to Clause 53.3 by the Second Party from the Commissioners, then the Second Party (provided that it is indemnified to its reasonable satisfaction against all costs and expenses including interest and penalties which it may incur in relation thereto) shall take such action and give such information and

assistance to the First Party as the First Party may require to challenge such ruling or otherwise to resist or avoid the imposition of VAT on the relevant supply.

53.7 The following further provisions shall apply if the First Party shall exercise its rights under Clause 53.6:

- (a) the action which the First Party shall be entitled to require the Second Party to take shall include (without limitation) contesting any assessment to VAT or other relevant determination of the Commissioners before any VAT tribunal or court of competent jurisdiction and appealing any judgement or decision of any such tribunal or court;
- (b) if the Second Party shall be required to pay to or deposit with the Commissioners a sum equal to the VAT assessed as a condition precedent to its pursuing any appeal, the First Party shall, at its election, either pay such sum to the Commissioners on behalf of the Second Party or on receipt of proof in a form reasonably satisfactory to the First Party that the Second Party has paid such sum to or deposited such sum with the Commissioners the First Party shall pay such sum to the Second Party;
- (c) save as specifically provided in Clause 53.5, the First Party shall not be obliged to pay to the Second Party any sum in respect of the VAT in dispute to the Second Party or in respect of VAT on any further supplies made by the Second Party to the First Party which are of the same type and raise the same issues as the supplies which are the subject of the relevant dispute unless and until the final outcome of the relevant dispute is that it is either determined or agreed that VAT is properly chargeable on the relevant supply or supplies; and
- (d) the Second Party shall account to the First Party for any costs awarded to the Second Party on any appeal, for any sum paid to or deposited with the Commissioners in accordance with Clause 53.7(b) which is repayable to the Second Party and for any interest to which the Second Party is entitled in respect of such sums.

Changes in recoverability of VAT

53.8 Subject to Clause 53.9, if, following a Change in Law, Project Co becomes unable to recover VAT attributable to supplies to be made to the Trust by Project Co pursuant to this Agreement the Trust and Project Co shall co-operate, as far as is practicable and reasonable, to ensure that Project Co is left in no better and no worse position than it would have been had such Change in Law not occurred (including but not limited to making such amendments

to the Agreement as Project Co and the Trust shall agree acting reasonably) provided that Project Co shall use all reasonable endeavours to mitigate the adverse effects of any such Change in Law.

- 53.9 The provisions of Clause 53.8 shall apply only if (and to the extent that) the Change in Law was not reasonably foreseeable at the date of this Agreement by an experienced contractor performing operations similar to the relevant Project Operations on the basis of draft bills published in Government green or white papers or other Government departmental consultation papers, bills, draft statutory instruments or draft instruments or proposals published in the Official Journal of the European Communities, in each case published:
- (a) prior to the date of this Agreement; and
 - (b) in substantially the same form as the Change in Law.

Construction Industry Tax Deduction Scheme

- 53.10 This Clause relates to the Construction Industry Tax Deduction Scheme:
- (a) in this Clause (but not otherwise):
 - (i) "the Act" means the Income and Corporation Taxes Act 1988;
 - (ii) "the Regulations" means the Income Tax (Sub-Contractors in the Construction Industry) Regulations 1993 (SI 1993/743);
 - (iii) "contractor" means a person who is a contractor for the purposes of the Act and the Regulations;
 - (iv) "evidence" means such evidence as is required by the Regulations to be produced to a contractor for the verification of a sub-contractor's tax certificate;
 - (v) "statutory deduction" means the deduction referred to in Section 559(4) of the Act or such other deduction as may require to be made at the relevant time;
 - (vi) "sub-contractor" means a person who is a sub-contractor for the purposes of the Act and the Regulations; and
 - (vii) "tax certificate" is a certificate issued under Section 561 of the Act;
 - (b) not later than fifteen (15) Business Days before the first payment under this Agreement is due to be made to Project Co or after this Clause applies for the first time and on each occasion when this Clause applies following a period when it has not so applied, Project Co shall either:

- (i) provide the Trust with the evidence that Project Co is entitled to be paid without the statutory deduction; or
 - (ii) inform the Trust in writing that it is not entitled to be paid without the statutory deduction (in which event, subject to the provisions of Clause 53.10 (d), the provisions of paragraph (h) shall apply);
- (c) if the Trust is not satisfied with the validity of the evidence submitted in accordance with Clause 53.10(b)(i) or Clause 53.10 (d) (as appropriate), it shall within ten (10) Business Days of Project Co submitting such evidence notify Project Co in writing that it intends to make the statutory deduction from payments due under this Agreement to Project Co and give its reasons for that decision, and thereupon paragraph (h) below shall apply. If the Trust is satisfied with the validity of the evidence submitted in accordance with Clause 53.10 (b) (i) or Clause 53.10 (d) (as appropriate) it shall (subject to clause 53.10 (e)) make all payments due under this Agreement without making the statutory declaration from the same;
- (d) where Clause 53.10(b)(ii) or Clause 53.10 (e) (ii) or Clause 53.10 (f) applies, Project Co shall immediately inform the Trust if it obtains a tax certificate and thereupon paragraph (c) above will apply;
- (e) if the period for which the tax certificate has been issued to Project Co expires before the final payment is made to Project Co under this Agreement and provided that this Clause applies at that time, Project Co shall not later than twenty (20) Business Days before the date of expiry either:
 - (i) provide the Trust with evidence that Project Co from, the said date of expiry, is entitled to be paid for a further period without the statutory deduction, in which case the provisions of paragraph (h) shall apply if the Trust is not satisfied with the evidence and the Trust will (subject to the provisions of this Clause 53.10 (c)) continue to make payment without making the statutory deduction where the Trust is satisfied with such evidence; or
 - (ii) inform the Trust in writing that it will not be entitled to be paid without the statutory deduction after the said date of expiry (in which event, subject to the provisions of Clause 53.10 (d), the provisions of paragraph (h) shall apply);
- (f) Project Co shall immediately inform the Trust in writing if its current tax certificate is cancelled and give the date of such cancellation, and thereupon (subject to the provisions of Clause 53.10 (d)) paragraph (h) below will apply;

- (g) the Trust shall, as a "contractor" in accordance with the Regulations, send promptly to the Inland Revenue any voucher which, in compliance with the obligations of Project Co as a "sub-contractor" under the Regulations, Project Co gives to the Trust;
- (h) the Trust shall be entitled to make a deduction at the rate specified in Section 559(4) of the Act or at such other rate as may be in force from time to time from the whole of any payment to Project Co (and not just that part of such payment which does not represent the direct cost to Project Co or any other person of materials used or to be used in carrying out the construction operations to which the relevant payment relates) unless prior to making such payment the Trust shall have received written confirmation from the Inland Revenue (obtained by and at the expense of Project Co) in a form which is reasonably satisfactory to the Trust directing the Trust to make the deduction against only a specified amount or proportion of any such payment to Project Co;
- (i) where any error or omission has occurred in calculating or making the statutory deduction then:
 - (i) in the case of an over deduction, the Trust shall correct that error by repayment of the sum over deducted to Project Co; and
 - (ii) in the case of an under deduction, Project Co shall correct that error or omission by repayment of the sum under deducted to the Trust;
- (j) Project Co shall at the request of the Trust produce to the Trust the original of any current tax certificate which it holds and shall permit the Trust to make a copy of such tax certificate and/or to record such details in respect of such tax certificate as the Trust may consider appropriate; and
- (k) if compliance with this Clause involves the Trust or Project Co in not complying with any other of the terms of this Agreement, then the provisions of this Clause shall prevail.

54. Corrupt Gifts and Payments

Prohibition on corruption

54.1 The term "Prohibited Act" means:

- (a) offering, giving or agreeing to give to the Trust or any other public body or to any person employed by or on behalf of the Trust or any other public body any gift or consideration of any kind as an inducement or reward:
 - (i) for doing or not doing (or for having done or not having done) any act in relation to the obtaining or performance of this Agreement or any other agreement with the Trust or any other public body; or
 - (ii) for showing or not showing favour or disfavour to any person in relation to this Agreement or any other agreement with the Trust or any other public body;
- (b) entering into this Agreement or any other agreement with the Trust or any other public body in connection with which commission has been paid or has been agreed to be paid by Project Co or on its behalf, or to its knowledge, unless before the relevant agreement is entered into particulars of any such commission and of the terms and conditions of any such agreement for the payment of such commission have been disclosed in writing to the Trust;
- (c) committing any offence:
 - (i) under the Prevention of Corruption Acts 1889-1916;
 - (ii) under any Law creating offences in respect of fraudulent acts; or
 - (iii) at common law, in respect of fraudulent acts in relation to this Agreement or any other agreement with the Trust or any other public body; or
- (d) defrauding or attempting to defraud or conspiring to defraud the Trust or any other public body.

Warranty

54.2 Project Co warrants that in entering into this Agreement it has not committed any Prohibited Act.

Remedies

- 54.3 If Project Co or any Project Co Party (or anyone employed by or acting on behalf of them) commits any Prohibited Act, then the Trust shall be entitled to act in accordance with paragraphs (a) to (f) below:
- (a) if a Prohibited Act is committed by Project Co or by an employee not acting independently of Project Co, then the Trust may terminate the Agreement with immediate effect by giving written notice to Project Co;
 - (b) if the Prohibited Act is committed by an employee of Project Co acting independently of Project Co, then the Trust may give written notice to Project Co of termination and the Agreement will terminate, unless within twenty (20) Business Days of receipt of such notice Project Co terminates the employee's employment and (if necessary) procures the performance of the relevant part of the Services by another person;
 - (c) if the Prohibited Act is committed by a Contracting Associate or by an employee of that Contracting Associate not acting independently of that Contracting Associate then the Trust may give written notice to Project Co of termination and the Agreement will terminate, unless within twenty (20) Business Days of receipt of such notice Project Co terminates the relevant Sub-Contract and procures the performance of the relevant part of the Services by another person, where relevant, in accordance with Clause 50 (*Assignment, sub-contracting and Change in Control*);
 - (d) if the Prohibited Act is committed by an employee of a Contracting Associate acting independently of that Contracting Associate, then the Trust may give notice to Project Co of termination and the Agreement will terminate, unless within twenty (20) Business Days of receipt of such notice Project Co procures the termination of the employee's employment and (if necessary) procures the performance of the relevant part of the Services by another person;
 - (e) if the Prohibited Act is committed by any other person not specified in paragraphs (a) to (d) above, then the Trust may give notice to Project Co of termination and the Agreement will terminate unless within twenty (20) Business Days Project Co procures the termination of such person's employment and of the appointment of their employer (where such person is not employed by Project Co or the Contracting Associate) and (if necessary) procures the performance of the relevant part of the Services by another person; and

- (f) any notice of termination under this Clause shall specify:
 - (i) the nature of the Prohibited Act;
 - (ii) the identity of the party who the Trust believes has committed the Prohibited Act; and
 - (iii) the date on which the Agreement will terminate in accordance with the applicable provisions of this Clause.

54.4 Without prejudice to its other rights or remedies under this Clause, the Trust shall be entitled to recover from Project Co:

- (a) the amount or value of any such gift, consideration or commission; and
- (b) any other loss sustained in consequence of any breach of this Clause.

Permitted payments

54.5 Nothing contained in this Clause shall prevent Project Co from paying any proper commission or bonus to its employees within the agreed terms of their employment.

Notification

54.6 Project Co shall notify the Trust of the occurrence (and details) of any Prohibited Act promptly on Project Co becoming aware of its occurrence.

Interim management

54.7 Where Project Co is required to replace any Sub-Contractor pursuant to this Clause, the provisions of Clause 44.7 (*Project Co Events of Default*) shall apply and be construed accordingly.

55. Records and Reports

The provisions of Part 25 of the Schedule (*Record Provisions*) shall apply to the keeping of records and the making of reports.

56. Dispute Resolution Procedure

Except where expressly provided otherwise in this Agreement, any dispute arising out of or in connection with this Agreement shall be resolved in accordance with the procedure set out in Part 26 of the Schedule (*Dispute Resolution Procedure*).

57. Notices

57.1 All notices under this Agreement shall be in writing and all certificates, notices or written instructions to be given under the terms of this Agreement shall be served by sending the same by first class post, facsimile or by hand, leaving the same at:

If to Project Co Stonehouse Hospitals Limited, Eldo House, Monkton Road, Prestwick, Ayrshire KA9 2PB

Fax No: 01292 671199

If to the Trust Lanarkshire Primary Care NHS Trust, Trust Headquarters, Strathclyde Hospital, Airbles Road, Motherwell ML1 3BW

57.2 Fax No: 01698 245 009

Where any information or documentation is to be provided or submitted to the Trust's Representative or the Project Co Representative it shall be provided or submitted by sending the same by first class post, facsimile or by hand, leaving the same at:

If to Project Co's Representative Iain Kent
Mackenzie Partnership
20 North Claremont Street
Glasgow
G3 7LE

Fax No: 0141 331 7719

If to the Trust's Representative Hunter Health Centre, Andran Street, East Kilbride
G74 1AD

Fax No: 01355 906699 (copied in each case to the Trust).

57.3 Either party to this Agreement (and either Representative) may change its nominated address or facsimile number by prior notice to the other party.

57.4 Notices given by post shall be effective upon the earlier of (i) actual receipt, and (ii) five (5) Business Days after mailing. Notices delivered by hand shall be effective upon delivery.

Notices given by facsimile shall be deemed to have been received where there is confirmation of uninterrupted transmission by a transmission report and where there has been no telephonic communication by the recipient to the senders (to be confirmed in writing) that the facsimile has not been received in legible form:

- (a) within two (2) hours after sending, if sent on a Business Day between the hours of 9am and 4pm; or
- (b) by 11am on the next following Business Day, if sent after 4pm, on a Business Day but before 9am on that next following Business Day.

58. Amendments

This Agreement may not be varied except by an agreement in writing signed by duly authorised representatives of the parties.

59. Waiver

Any relaxation, forbearance, indulgence or delay (together "indulgence") of any party in exercising any right shall not be construed as a waiver of the right and shall not affect the ability of that party subsequently to exercise that right or to pursue any remedy, nor shall any indulgence constitute a waiver of any other right (whether against that party or any other person).

60. No Agency

60.1 Nothing in this Agreement shall be construed as creating a partnership or as a contract of employment between the Trust and Project Co.

60.2 Save as expressly provided otherwise in this Agreement, Project Co shall not be, or be deemed to be, an agent of the Trust and Project Co shall not hold itself out as having authority or power to bind the Trust in any way.

60.3 Without limitation to its actual knowledge, Project Co shall for all purposes of this Agreement, be deemed to have such knowledge in respect of the Project as is held (or ought reasonably to be held) by any Project Co Party.

61. Entire Agreement

61.1 Except where expressly provided otherwise in this Agreement, this Agreement together with all documents referred to herein (to the extent applicable), constitutes the entire agreement

between the parties in connection with its subject matter and supersedes all prior representations, communications, negotiations and understandings concerning the subject matter of this Agreement.

61.2 Each of the parties acknowledge that:

- (a) it does not enter into this Agreement on the basis of and does not rely, and has not relied, upon any statement or representation (whether negligent or innocent) or warranty or other provision (in any case whether oral, written, express or implied) made or agreed to by any person (whether a party to this Agreement or not) except those expressly repeated or referred to in this Agreement and the only remedy or remedies available in respect of any misrepresentation or untrue statement made to it shall be any remedy available under this Agreement; and
- (b) this Clause shall not apply to any statement, representation or warranty made fraudulently, or to any provision of this Agreement which was induced by fraud, for which the remedies available shall be all those available under the law governing this Agreement.

62. Conflicts of agreements

Subject to Clause 25.8 (*Quality Plans and Systems*), in the event of any conflict between this Agreement and the Project Documents and/or the Leases, the provisions of this Agreement will prevail.

63. Severability

If any provision of this Agreement shall be declared invalid, unenforceable or illegal by the courts of any jurisdiction to which it is subject, such provision may be severed and such invalidity, unenforceability or illegality shall not prejudice or affect the validity, enforceability and legality of the remaining provisions of this Agreement.

64. Costs and Expenses

Each party shall be responsible for paying its own costs and expenses incurred in connection with the negotiation, preparation and execution of this Agreement.

65. Third Party Rights

Save to the extent expressly provided in this Agreement and, to avoid doubt, without prejudice to the terms of the Lender's Direct Agreement or the rights of any permitted successor to the rights of Project Co or of any permitted assignee, it is expressly declared that no rights shall be conferred under and arising out of this Agreement upon any person other than the Trust and Project Co and without prejudice to the generality of the foregoing, there shall not be created by this Agreement *a jus quaesitum tertio* in favour of any person whatsoever.

66. Mitigation

Each of the Trust and Project Co shall at all times take all reasonable steps to minimise and mitigate any loss for which the relevant party is entitled to bring a claim against the other party pursuant to this Agreement.

67. Governing Law and Jurisdiction

- 67.1 This Agreement shall be considered as a contract made in Scotland and shall be subject to the laws of Scotland.
- 67.2 Subject to the provisions of the Dispute Resolution Procedure, both parties agree that the courts of Scotland shall have exclusive jurisdiction to hear and settle any action, suit, proceeding or dispute in connection with this Agreement and irrevocably submit to the jurisdiction of those courts. The submission to such jurisdiction shall not limit the right of the Trust to take proceedings against Project Co in any other court of competent jurisdiction for the purposes of enforcement.

68. Further Assurance

Each party shall do all things and execute all further documents reasonably necessary to give full effect to this Agreement.

IN WITNESS WHEREOF these presents typewritten on this and the preceding 129 pages together with the Schedule in twenty nine parts are executed by the Parties hereto as follows:

SUBSCRIBED for and on behalf of **LANARKSHIRE PRIMARY CARE NATIONAL HEALTH SERVICE TRUST** by MARTIN FENNELLY HILL, the Trust's Chief Executive in the presence of _____ as witness together at Glasgow on the _____ day of June Two thousand and three:

..... Chief Executive

..... Witness

..... Full Name

..... Address

.....

.....

SUBSCRIBED for and on behalf of **STONEHOUSE HOSPITALS LIMITED** at Glasgow on the _____ day of June two thousand and three by RAY ANTHONY EVE, one of their Directors in the presence of _____ as witness:

..... Director

..... Full Name

..... Witness

..... Full Name

..... Full Address

.....