



AUTHORITY DIRECT AGREEMENT (Construction Agreement)

as Contractor  
and

as Company  
and

THE LANARKSHIRE PRIMARY CARE NATIONAL HEALTH  
SERVICE TRUST

as Authority

24 June 2003

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DIRECT AGREEMENT (Construction Agreement)

between

incorporated under the Companies Acts (registered number )  
and having their registered office at (the "Contractor");

and

incorporated under the Companies Acts (registered number ),  
and having their registered office at (the "Company");

and

**LANARKSHIRE PRIMARY CARE NATIONAL HEALTH SERVICE TRUST** established in Scotland by virtue of The Lanarkshire Primary Care National Health Service Trust (Establishment) Order 1998 (SI 1998/2732 (S.157)) and having their principal place of business at Trust Headquarters, Strathclyde Hospital, Airbles Road, Motherwell, ML1 3BW (the "Authority");

**1. CONTRACTOR UNDERTAKINGS AND WARRANTIES**

1.1 The Contractor undertakes and warrants to the Authority that:

1.1.1 it has complied with and performed and will continue to comply with all the terms of and perform all obligations to be observed or performed by the Contractor under or arising out of the Construction Agreement and shall complete the Contract Works in accordance with the Construction Agreement;

1.1.2 without prejudice to Clause 1.1.1:

(i) it will not seek to modify or vary any of the obligations for which it is responsible under the Construction Agreement without prior written consent of the Authority;

(ii) it has not and will not specify for use and has exercised and will continue to exercise the reasonable skill and care referred to in Clause 1.2 not to use in relation to the Contract Works any products or materials not in conformity with relevant British or European Standards or Codes of Practice or which are at the time of use generally known within the United Kingdom to designers within the appropriate profession or builders (in each case experienced in the design and/or construction of works such as the Contract Works) to be deleterious to health and safety or to the

durability of buildings an/or other structures and/or finishes and/or plant and machinery in the particular circumstances in which they are used;

- (iii) it shall maintain professional indemnity insurance throughout the construction of the Development in an amount of not less than TEN MILLION POUNDS (£10,000,000) STERLING in respect of any one occurrence or series of occurrences arising out of any one event and in the aggregate in respect of any one period of insurance (being a period of not more than 12 months) and thereafter for a period of 12 years from the last date of practical completion (or its equivalent) under the Construction Agreement, provided always that such insurance is generally available on the market at commercially reasonable rates;
- (iv) it shall immediately inform the Authority if the insurance required pursuant to Clause 1.1.2.3, ceases to be available at commercially reasonable rates in order that the Contractor and the Authority can discuss the means of best protecting the respective positions of the Authority and the Contractor in respect of the Development in the absence of such insurance (and in these circumstances the Authority shall be entitled to require the Contractor to maintain such lesser amount of professional indemnity insurance as is available to the Contractor at commercially reasonable rates);
- (v) as and when it is reasonably requested to do so by the Authority, it shall produce for inspection documentary evidence that its professional indemnity insurance is being maintained;
- (vi) this Deed has been disclosed to the Contractor's professional indemnity insurers and underwriters who have not raised any objection to this Deed;

1.2 it has exercised and will continue to exercise all the reasonable skill and care to be expected from an architect or, as the case may be, other appropriate professional designer experienced in carrying out works similar in nature, size and complexity to the Contract Works in:-

1.2.1 the design of the Contract Works;

1.2.2 the selection of goods and materials for the Contract Works.

Provided that the Contractor shall owe no greater duty to the Authority than it would have owed if the Authority had been named as employer under the Construction Agreement.

## **2. TERMINATION AND DEFAULT**

- 2.1 The Contractor agrees that it will not, without first giving the Authority not less than 35 Business Days notice in writing, exercise any right or purported right it may have to:-
- 2.1.1 terminate the Construction Agreement;
  - 2.1.2 treat the Construction Agreement as having been repudiated by the Company; or
  - 2.1.3 discontinue or suspend the performance of any duties or obligations under the Construction Agreement.
- 2.2 The Contractor shall within 14 Business Days of giving the notice referred to in Clause 2.1, notify the Authority of any of the obligations of the Company under the Construction Agreement which the Company has failed to discharge together with the Contractor's reasonable estimate of the Contractor's financial entitlement arising therefrom.
- 2.3 If the Contractor discovers further obligations which the Company has failed to discharge and which have not been notified under Clause 2.2, then the Contractor shall notify the Authority promptly upon becoming aware of the same.
- 2.4 In the event that the Contractor shall delay in giving the notice and information required in Clause 2.2 within the said 14 Business Days, or gives further information under Clause 2.3 the period of 35 Business Days in Clause 2.1 shall be extended by the period of any such delay or if later to the date 35 Business Days after receipt by the Authority of the information under Clause 2.3.
- 2.5 The Contractor's right to terminate the Construction Agreement or to treat the same as having been repudiated or to discontinue performance shall be subject to Clause 3.2.

## **3. STEP IN RIGHTS**

- 3.1 The Contractor agrees that it will, if so required by notice in writing given by the Authority and subject to Clauses 3.4 to 3.8, accept the instructions of the Authority or its appointee, as the case may be (which for the avoidance of doubt and without limitation may include a third party appointed by the Authority to act as "the Employer" under the Construction Agreement) to the exclusion of the Company in respect of the Development upon the terms and conditions of the Construction Agreement.
- 3.2 The Contractor's right to terminate the Construction Agreement or treat the same as repudiated or discontinue performance of the same will cease if, within the 35 Business Day period provided for by Clause 2.1 (as extended under Clause 2.4) and subject to Clause 4 the Authority shall give notice in writing to the Contractor requiring the Contractor to accept the

instructions of the Authority or its nominee to the exclusion of the Company in respect of the Development upon the terms and conditions of the Construction Agreement.

- 3.3 The Company acknowledges that:
- 3.3.1 the Contractor shall be entitled to rely on a notice given to the Contractor by the Authority under this Clause 3; and
- 3.3.2 such acceptance of the instructions of the Authority or its appointee, as the case may be, to the exclusion of the Company shall not constitute any breach of the Contractor's obligations to the Company under the Construction Agreement.
- 3.4 Upon the issue of any notice by the Authority under Clauses 3.1 or 3.2, the Construction Agreement shall remain in full force and effect as if no right of determination of the Contractor's employment under the Construction Agreement, or any right of the Contractor to treat the Construction Agreement as having been repudiated by the Company had arisen and the Contractor shall be liable to the Authority and/or its appointee, as the case may be, under the Construction Agreement in lieu of its liability to the Company.
- 3.5 It shall be a condition of any notice given by the Authority under Clause 3.2 that the Authority or its appointee, as the case may be, accepts liability for payment of the sums notified as due to the Contractor under the Construction Agreement in terms of Clause 2.2 and for performance of the Company's other obligations under the Construction Contract
- 3.6 If any notice given by the Authority under this Clause 3 requires the Contractor to accept the instructions of the Authority's appointee, the Authority shall be liable to the Contractor as guarantor for the payment of all sums from time to time due to the Contractor from the Authority's appointee.
- 3.7 Nothing in this Deed shall prevent the Authority issuing a notice requiring the Contractor to accept the instructions of its appointee following the issue by the Authority of a notice requiring the Contractor to accept instructions direct from the Authority.
- 3.8 The Authority may exercise any of its rights pursuant to this Clause 3 on more than one occasion.
- 3.9 The Authority has no authority to issue any direction or instruction to the Contractor in relation to the Construction Agreement unless and until (i) the Project Agreement has been terminated and (ii) the Authority has given notice under this Clause 3.
- 3.10 The Authority or its appointee has no liability to the Contractor in relation to amounts due under the Construction Agreement unless and until the Authority has given notice under Clause 3.1 or Clause 3.2.

**4. PRIORITY OF CLAIMS**

- 4.1 If two or more valid notices claiming rights similar to those set out in this Deed are received by the Contractor the deemed order of priority of such notice shall be that issued by Senior Funders before any issued by the Authority.
- 4.2 Any notice issued by Senior Funders shall, unless such notice was previously withdrawn or the rights thereunder are not exercised, take immediate effect and any notice by the Authority shall be postponed until such notice by Senior Funders is withdrawn or is deemed to be withdrawn or the right to claim rights similar to those set out herein is at an end.

**5. LICENCE**

- 5.1 The Contractor grants to the Authority a non-exclusive irrevocable royalty-free licence in perpetuity to use and reproduce the Documents for all purposes relating to the Development including (without limitation) the construction, completion, reconstruction, modification repair, use, letting and advertisement of the Development. Such licence shall carry the right to grant sub licenses and shall subsist notwithstanding that the Construction Agreement is terminated or the obligations and duties thereunder have been completed.
- 5.2 The Contractor shall not assign or agree to assign copyright in any of the Documents without the previous written consent of the Authority and shall not be liable for any use by the Authority of any of the Documents for any purpose other than that for which the same were prepared and provided by the Contractor or for any improper or negligent use by the Authority.

**6. MISCELLANEOUS**

- 6.1 No failure, approval, act or forbearance on the part of the Authority in respect of any right of the Authority pursuant to this Deed shall constitute any waiver of any right of the Authority under or arising out of this Deed nor relieve the Contractor of any of its duties or obligations under or arising out of this Deed.
- 6.2 No action or proceedings for any breach of this Deed shall be commenced against the Contractor after the expiry of 12 years from the last date of practical completion (or its equivalent) under the Construction Agreement.

## 7. NOTICES

- 7.1 All notices or other communications under or in connection with this Deed must be delivered or sent by first class, recorded delivery post or by fax to the addresses appearing in the Details or to such other addresses or fax numbers as may have been notified in writing for the purposes of giving notices by not less than five Business Days' notice.
- 7.2 Any such notice or demand shall be deemed to have been served:-
- 7.2.1 if delivered at the time of delivery; or
  - 7.2.2 if posted at noon (Greenwich mean time) one Business Day after posting; or
  - 7.2.3 if sent by fax at the time shown in the relevant transmission report for the complete fax.
- 7.3 A notice or other communication received on a non-Business Day or after 4.30 pm in the place of receipt shall be deemed to be received at 9 a.m. on the next Business Day in such place.
- 7.4 All notices, communications and demands shall be given in the English language.

## 8. ASSIGNATION

- 8.1 This Deed may be assigned in whole or in part by the Authority to any successor to the Authority's interest in the Project Agreement without the consent of the Company or the Contractor being required and such assignation shall be effective upon written notice thereof being given to the Company and to the Contractor. No other or further assignation of the benefit of this Deed shall be permitted.
- 8.2 No assignation of this Deed by any party other than the Authority shall be permitted.

## 9. INTERPRETATION

- 9.1 In this Deed:-
- the following expressions have the following meanings:-
- Business Day** means a day (other than a Saturday or Sunday) on which banks are open for business in the City of Glasgow;
- Construction Agreement** means the construction agreement entered into between the Company and the Contractor on or about the date hereof;
- Contract Works** means the works in terms of the Construction Agreement;

**Development** means the building and other facilities to be known as Stonehouse Hospital together with all support infrastructure and amenities located on the land made available to the Company for the Development as required to enable the company to comply with its obligations under the Project Agreement;

**Documents** means all designs, drawings, models, plans, specifications, design details, photographs, brochures, reports, notes of meetings and any other materials prepared by or on behalf of the Contractor in connection with the Contract Works and all amendments and additions thereto (whether in existence or to be made) any works, designs or insertions of the Contractor incorporated or referred to therein; and

**Project Agreement** means the Project Agreement entered into between Lanarkshire Primary Care National Health Service Trust and Stonehouse Hospitals Limited on or about the date hereof.

**Senior Funders** has the meaning ascribed to it in the Project Agreement;

9.2 references to (or to any specified provision of) this Deed or any other document shall be construed as references to this Deed, that provision or that document as in force for the time being and as amended in accordance with the terms thereof, or, as the case may be, with the agreement in writing of the relevant parties and (where such consent is, by the terms of this Deed or the relevant document, required to be obtained as a condition to such amendment being permitted) the prior written consent of Authority;

9.3 references to a person shall be construed as including references to an individual, firm, company, partnership corporation, governmental bodies and departments, authorities, agencies, unincorporated body of persons or associations and any other organisation having legal capacity and to any successor which has taken over the functions or responsibilities of that person or permitted assignee or transferee of such person.

## 10. GOVERNING LAW

10.1 The governing law of this Deed shall be Scots Law.

The parties irrevocably submits to the jurisdiction of the Courts of Scotland: **IN WITNESS WHEREOF**