

REPORT TO TRUST BOARD

Report from: Anna Dugdale

Subject: Refinancing

Purpose: To update the Board on the progress with regard to refinancing.

Date: 24 September 2003

Executive Summary

- ◆ The report follows on from previous reports regarding refinancing and updates the Board on the latest position in the negotiation .

Summary of Key Recommendations

- ◆ The Board is asked to note the progress in the negotiation of the refinancing and to approve the changes to the Project Agreement set out and delegate authority to the Chief Executive and Director of Resources to make changes to the Agreements as necessary.

NORFOLK & NORWICH UNIVERSITY HOSPITAL NHS TRUST

REPORT TO THE TRUST BOARD

WEDNESDAY 24 SEPTEMBER 2003

Refinancing

1. Introduction

The report updates the Board on the progress in the last month in the negotiation of the refinancing deal. In relation to this item Board members are reminded that the Trust is subject to confidentiality obligations with regard to disclosure, members are asked to bear this in mind and are asked to keep this item strictly confidential.

2. Progress to Date

Since the last Board meeting the Heads of Terms have been sent to Peter Coates of the Private Finance Unit who raised a question concerning the corporation tax status of Octagon. We have been able to confirm that the issue he raised has been correctly addressed.

There have been a number of further negotiation meetings with Octagon, its lawyers, the funders and their lawyers. As predicted the funders' lawyers have raised a number of concerns and issues in relation to the provisions of the Project Agreement and certain minor amendments have been agreed.

There are a small number of significant issues which remain to be resolved. These are set out below:

- **Exclusive remedies and consequential loss.** Under the Project Agreement the Trust has the right to claim for consequential loss (eg loss of profit from private patients) in excess of the deductions made under the Project Agreement for non performance.

In addition to this the deductions made under the Project Agreement are not the only remedy the Trust has. If part of the hospital were to be unavailable, we could make unavailability deductions under the contract, but would also be entitled to claim for costs in addition to the amounts deducted for, for example, the costs of transferring patients and treating them elsewhere if this were a consequence of the unavailability.

We are not aware of any other PFI deals in the Health sector which enjoy the benefit of similar provisions. The provisions carry significant risk from a funder perspective since they represent a potentially unlimited liability. Conversely these are strong provisions from the Trust's perspective.

The negotiation around these two clauses has been very intense and the Trust has maintained a firm line.

- **ProjectCo termination compensation.** The provisions in the Project Agreement with regard to termination compensation reflect the way in which compensation would be paid to the Octagon in the event of termination for Project Co default. The construction of the provisions reflects the nature of the debt used to finance the deal and the funders have proposed that the provisions be amended to better reflect their needs on termination. The Trust has some sympathy with this request since the current financing arrangements are very different to those proposed (eg in relation to repayment profile).
- **Beneficiaries Direct Agreement.** The funders have proposed substituting the existing beneficiaries direct agreement with the NHS standard form agreement. The Trust position on this is that the rest of the agreement is not based on standard form and since the beneficiaries direct agreement has linkages in to the rest of the agreement and the standard form is less favourable to the Trust this is not a desirable change
- **Set off.** The Trust currently enjoys the right of set off of amounts owed to it by Octagon in the event of termination through force majeure or Trust default. Since the circumstances under which this right of set off applies are restricted, and by their nature are unlikely to occur, the Trust view on the proposal by the funders that this right be removed is that it should not be a major point of contention but a negotiating point.
- **Wrap up.** As previously reported Octagon and the funders have requested a wide ranging wrap up agreement. There has been a significant degree of negotiation around this issue. The current position is that we believe that the wrap up as now proposed should be acceptable, however the drafting is awaited.
- **Variations.** There has been much negotiation on the subject of variations since these clearly have the potential to affect the risk profile of the overall project from the funders perspective. Degrees of authorisation have been proposed and are currently being discussed internally by both sides.

The current position is that a “package deal” has been proposed which preserves the current provisions on exclusivity and on consequential loss and the current Beneficiaries Direct Agreement and concedes the variation to termination compensation and the right of set off. This is subject to the funders receiving an acceptable report from the Technical Advisor and the proposal receiving the

approval of their Credit Committee and the Rating Agencies. The recommendation is that if this “package” is preserved it should be accepted by the Trust.

The current timetable anticipates financial close in the first week of November although the timing will be dependent on the successful conclusion of a number of critical activities.

4. Recommendation

The Board is asked to note the progress this month in the negotiation of the refinancing and to approve the changes to the Project Agreement as summarised above and as considered appropriate by the Director of Resources and Chief Executive.

Anna Dugdale
Director of Resources
September 2003.