

**DATED** 8TH JANUARY **1998**

(1) **NORFOLK & NORWICH HEALTH CARE NHS TRUST**

- and -

(2) **OCTAGON HEALTHCARE LIMITED**

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**PROJECT AGREEMENT**

**(as amended on 14<sup>th</sup> July 2000, 11<sup>th</sup> December 2003 and 6<sup>th</sup> May 2004)**

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**THIS PROJECT AGREEMENT** is made on 8th January, 1998

**BETWEEN:-**

- (1) **NORFOLK & NORWICH HEALTH CARE NHS TRUST** of Brunswick Road, Norwich NR1 3SR (the "**Trust**"); and
- (2) **OCTAGON HEALTHCARE LIMITED**, a company incorporated under the laws of England and Wales with registered number 3112891, whose registered office is at New Norfolk and Norwich Hospital, Colney Lane, Norwich NR4 7UZ (the "**Project Co**").

**WHEREAS:**

- (A) The Trust was established in England by virtue of Order (SI 1994 No. 176) made by the Secretary of State for Health on 28th January, 1994 pursuant to Section 5(1) National Health Service and Community Care Act 1990, as amended by virtue of Order (SI 1996 No. 1001) made by authority of the Secretary of State for Health on 28th March, 1996 pursuant to Section 126(3) National Health Service Act 1977 and to Section 5(1) as referred to above.
- (B) The Project Co was incorporated on 12th October, 1995 and is a private company limited by shares. Details of the Project Co's issued share capital and shareholders as at the Execution Date are set out in Schedule 12.
- (C) By a notice in the Official Journal of the European Communities dated 8th February, 1995, the Trust invited expressions of interest from appropriately qualified consortia for the design realisation, development and construction, part operation and finance of a 700-bed acute hospital to be constructed on the Trust's new 63 acre greenfield site situated at Colney Lane in UK-NORWICH in accordance with the Government's private finance initiative.
- (D) The size of the acute hospital referred to in the OJEC Notice has been increased to 809 beds and subsequently to 953 beds, in each case, as approved by the Department of Health.
- (E) The Consortium Members form the consortium chosen by the Trust as a result of the ensuing negotiated tender process.
- (F) The Parties have now agreed the terms on which the Project Co will design, develop and construct and (subject to the overriding responsibility of the Trust to manage the Hospital) part operate and maintain the Hospital and, accordingly, have agreed to enter into the Project Documents and the IT Agreement.
- (G) The Project Co has agreed to seek finance for the Project by way of the Funding Agreements.



NOW IT IS AGREED as follows:

**1. DEFINITIONS AND CONSTRUCTION**

**1.1 Definitions:**

In this Agreement (including the Recitals and Schedules), the following terms shall, unless the context otherwise requires, have the following meanings:

**"Achieved Performance Standard"** has the meaning given in the Facilities Management Agreement.

**"Additional Services"** has the meaning given in the Facilities Management Agreement;

**"Agreement for Appointment of Independent Certifier"** means the agreement so titled entered into between (1) the Project Co, (2) the Independent Certifier and (3) any guarantor of the Independent Certifier's obligations thereunder, in a form acceptable to the Trust (acting reasonably).

**"Ambulatory/Outpatient Attendance"** means the attendance at the Hospital by a patient (excluding any Private Patient) who is seen by a consultant or his deputy within an outpatient clinic or at some other time, whether by appointment or not, including patients having treatment in clinics and those attending for Ambulatory Procedures but excluding accident & emergency attenders, ward attenders and patients attending for diagnostic services, open access services, audiology or therapies, unless the patient remains at the Hospital overnight.

**"Ambulatory Procedures"** means endoscopy, minor surgery, see and treat procedures, oncology day patients procedures, colposcopy, procedures carried out at the ambulatory procedures unit or at the clinical investigation unit at the Hospital and other procedures classified as ambulatory in purchaser contracts to which the Trust is a party.

**"Amendment Execution Date"** means 14<sup>th</sup> July, 2000.

**"Ancillary Documents"** means the documents listed in Schedule 1.

**"Annual Debt Service Cover Ratio"** means such ratio as is calculated in the Financial Model and designated "Sr ADSCR fore" therein.

**"Annual Programme"** has the meaning given in the Facilities Management Agreement.

**"Anticipated Construction Cost"** means the Phase 1 Anticipated Construction Cost or the Phase 2 Anticipated Construction Cost, as the case may be.

**"Anticipated Works Cost"** means the Phase 1 Anticipated Works Cost or the Phase 2 Anticipated Works Cost, as the case may be.

**"Archaeological Delay Event"** means archaeological finds at the Site during the Design and Construct Phase, as referred to in Clause 23.1.

**"Associated Company"** means, in respect of a relevant company, a company which is a Subsidiary, a Holding Company or a company which is a Subsidiary of the Holding Company of that relevant company and, in the case of the Project Co, shall include each of the Consortium Members.

**"Associated Entity"** has the meaning given in the Facilities Management Agreement.

**"Bed Days"** means, in respect of any period, the sum of Day Case Attendances and Inpatient Occupied Bed Days.

**"Bed Days Usage Fee"** means an amount determined in accordance with paragraph 1.2 of Part 1 of Schedule 6 or paragraph 1.3 of Part 1 of Schedule 6 (as the case may be).

**"Beneficial Occupation Areas"** means those parts of the Phase 2 Areas, being parts of block 13, level 2, as shown on the plan annexed at Part 1 of Appendix I to Schedule 5 and blocks 25 and 26, level 2, as shown on the plan annexed at Part 2 of Appendix I to Schedule 5, together in each case with the associated adjacent areas, identified as such on the plans.

**"Beneficiaries' Direct Agreement"** means an agreement substantially in the form set out at Part 5 of Schedule 4 and any further agreement that may be entered into pursuant to Clauses 2.5 and 5.12 of the agreement substantially in the form set out at Part 5 of Schedule 4 or pursuant to Clause 5.2.3.

**"Beneficiaries' Representative"** has the meaning given in the Beneficiaries' Direct Agreement.

**"BOA Building Completion Certificate"** has the meaning given in Clause 17.10.2(A)(3).

**"BOA Building Completion Date"** has the meaning given in Clause 17.10.2(A)(3).

**"BOA Completion"** means, in respect of each Beneficial Occupation Area, when the BOA Building Completion Certificate has been issued and Service Completion Certificates for all of the Services have been issued in respect of it.

**"BOA Completion Certificate"** has the meaning given in Clause 17.10.2(A)(4).

**"BOA Completion Date"** has the meaning given in Clause 17.10.2(A)(4).

**"BOA Date for Completion"** means the date which is the earlier of the Phase 2 Date for Completion and nine months after the Phase 1 Completion Date, as may be extended from time to time by the Trust's Works Adviser pursuant to Clause 10.5.

**"Bond Documents"** has the meaning given in the Collateral Deed.

**"Bondholder"** has the meaning given in the Collateral Deed.

**"Bonds"** has the meaning given in the Collateral Deed.

**"Bond Trust Deed"** has the meaning given in the Collateral Deed.

**"Building Completion Certificate"** means the Phase 1 Building Completion Certificate, either BOA Building Completion Certificate or the Phase 2 Building Completion Certificate (as the case may be).

**"Building Completion Date"** means the Phase 1 Building Completion Date, either BOA Building Completion Date or the Phase 2 Building Completion Date, as the case may be.

**"Building Contract"** means the contract so titled entered into between (1) the Project Co and (2) the Building Contractor for the construction of the Works, in a form acceptable to the Trust (acting reasonably).

**"Building Contract Performance Guarantee"** means a performance guarantee in relation to the Building Contractor, substantially in the form set out in Part 1 of Schedule 4.

**"Building Contractor"** means **John Laing Construction Limited**, a company incorporated under the laws of England and Wales with registered number 172161, whose registered office is at Page Street, Mill Hill, London NW7 2ER or such substitute as may be appointed as such by the Project Co from time to time pursuant to a replacement of the Building Contract in accordance with Clause 6.1.4.

**"Building Contractor's Parent Company"** means John Laing PLC, a company incorporated under the laws of England and Wales with registered number 1345670, whose registered office is at Page Street, Mill Hill, London, NW7 2ER.

**"Building and Engineering Services"** means the mechanical, electrical, lifts, building management and building engineering services, as further described or to be described in the Design Documents.

**"Building and Engineering Services Commissioning"** means the completion, testing, balancing, setting to work and preliminary operation of the Building and Engineering Services.

**"Call Option Agreement"** has the meaning given in Clause 4.6.5.

**"CDM Regulations"** means the Construction (Design and Management) Regulations 1994.

**"Certificate of Approval of Design"** means a certificate of approval of design issued by the Trust pursuant to paragraph 3.1 of Part 3 of Schedule 5.

**"Claim"** means any claim, demand, proceedings or liability.

**"Collateral Deed"** means the collateral deed dated on or about 11<sup>th</sup> December, 2003 between (1) Octagon Healthcare Funding Plc, (2) Project Co, (3) Octagon Healthcare Holdings (Norwich) Limited, (4) HSBC Trustee (C.I.) Limited and (5) Financial Security Assurance (U.K.) Limited.

**"Commencement Date"** means 25th November, 1996.

**"Commercial Areas"** means the commercial areas to be constructed within the Hospital fully to implement any Planning Approval and, for the avoidance of doubt, shall consist of the retail/financial services units to be let by the Trust to commercial

third parties from time to time and shall be the internal, non-structural parts thereof. The exact extent of the commercial areas shall be determined by reference to the as-built drawings.

**"Commercial Income"** means any income of the Project Co in relation to the commercial activities of any person (other than the Trust) at the Site, excluding any Excluded Income.

**"Commission"** means unpacking, depalleting, assembling, testing, calibrating, checking, connecting to the Building and Engineering Services, recommissioning, initial servicing and operating and, if required, providing relevant instruction, familiarisation and training to any person authorised by the Trust or the Project Co and **"Commissioning"** shall be construed accordingly.

**"Compensation Month"** means a calendar month starting on the first day of such month and ending on the last, with the exception of the first Compensation Month which shall commence on the Termination Date and end on the last day of the calendar month in which the Termination Date arises and the last Compensation Month which shall commence on the first day of the month in which the Compensation Period expires and end on the last day of the Compensation Period.

**"Compensation Period"** means the period commencing on the Termination Date and expiring on the next date on which the Trust is entitled to terminate the Project Documents in their entirety in accordance with Clause 3.5.1, provided that if 8<sup>th</sup> January 2052 has passed, the period shall expire at the end of the Full Term calculated from the Phase 1 Date for Completion.

**"Completion"** means Phase 1 Completion, either BOA Completion or Phase 2 Completion, as the case may be.

**"Completion Certificate"** means the Phase 1 Completion Certificate, either BOA Completion Certificate or the Phase 2 Completion Certificate, as the case may be.

**"Completion Date"** means the Phase 1 Completion Date, either BOA Completion Date or the Phase 2 Completion Date, as the case may be.

**"Completion Statement"** has the meaning given in Clause 22.1.

**"Conditions Precedent"** means the conditions precedent listed in Schedule 2.

**"Confidential Information"** has the meaning given in Clause 52.1.

**"Consortium Members"** means **John Laing Investments Limited**, a company incorporated under the laws of England and Wales with registered number 780225, whose registered office is at Page Street, Mill Hill, London NW7 2ER and **Serco Investments Limited**, a company incorporated under the laws of England and Wales with registered number 03287461, whose registered office is at Serco House, Hayes Road, Southall, Middlesex UB2 5NJ.

**"Construction Collateral Warranty Agreement"** means the agreement so titled entered into between (1) the Building Contractor, (2) the Trust and (3) the Building Contractor's Parent Company substantially in the form set out in Part 3 of Schedule 4.

**"Construction Cost Breakdown"** means the breakdown of the likely cost of construction of the Works, in form and substance satisfactory to the Trust, prepared by the Project Co and delivered to the Trust's Works Adviser before the Amendment Execution Date. A copy of the Construction Cost Breakdown is attached as Appendix A to Schedule 5.

**"Construction Programme"** means a high level programme prepared by the Project Co and delivered to the Trust's Works Adviser before the Amendment Execution Date, for the design, construction and fitting out of the Works consistent with the Project Co's obligations under this Agreement, as updated in accordance with Clause 10.1. A copy of the Construction Programme as at the Amendment Execution Date and in form and substance satisfactory to the Trust is attached as Appendix B to Schedule 5.

**"Contractors"** means the Building Contractor and the Facilities Manager.

**"Contract Month"** means a calendar month starting on and including the first day of such month and ending on but including the last, with the exception of the first Contract Month which shall commence on and include the Phase 1 Completion Date and end on and include the last day of the calendar month in which the Phase 1 Completion Date arises (the **"First Contract Month"**) and the last Contract Month which shall commence on and include the first day of the month in which the Termination Date arises and end on and include the Termination Date.

**"Contract Period"** means the period commencing on the earlier of the Phase 1 Date for Completion and the Phase 1 Completion Date and, subject to any extension in accordance with Clause 10.5.2, expiring 60 years thereafter or on such other date as shall be the Termination Date.

**"Contract Year"** means a period of 12 Contract Months starting on 1st April, with the exception of the First Contract Year which shall commence on the Phase 1 Completion Date and end on 31st March first occurring thereafter (the **"First Contract Year"**) and the last Contract Year, which shall commence on 1st April and end on the Termination Date (the **"Last Contract Year"**).

**"Controlling Creditor"** has the meaning given in the Collateral Deed.

**"Core Usage Fee"** means in respect of a Contract Month, the amount of the Usage Fee less the amount of the Usage Fee (Maintenance).

**"Cost Recovery Item"** has the meaning given in the Facilities Management Agreement.

**"Court"** means any court of competent jurisdiction.

**"Cromer Hospital"** means the hospital operated by the Trust at Mill Road, Cromer NR27 0BQ.

**"Custodian"** means the custodian for the time being under the Custody Agreement.

**"Custody Agreement"** means an agreement for the custody of the Financial Model, substantially in the form set out in Part 6 of Schedule 4.

**"Date for Completion"** means the Phase 1 Date for Completion or the BOA Date for Completion or the Phase 2 Date for Completion, as the case may be.

**"Date for Occupation"** means the date specified in the Occupation Programme, by which each Beneficial Occupation Area is required to be available for occupation and use by the Trust.

**"Day Case Attendance"** means the attendance at the Hospital by a patient (excluding those attending for Ambulatory Procedures and any Private Patient) who is electively admitted to hospital with the intention of receiving care or treatment which can be completed before the end of the day, unless the patient remains at the Hospital overnight.

**"Decant"** means the progressive transfer from the existing hospitals to the Hospital of the Trust's Employees, the Other Employees and all other employees of the Trust and of patient activity, together with any Used Medical Equipment and Used Other Equipment in use in respect of patients constituting Inpatients at the time of their transfer.

**"Decant and Commissioning Programme"** has the meaning given in Clause 18.1.3.

**"Decommission"** means the taking out of use, disconnecting, dismantling and fully preparing for Transportation, including securing, packaging and provision of any necessary special instructions regarding Transportation and final delivery location in the Hospital and a statement with condition schedule as to any defects, damage or other faults and **"Decommissioning"** shall be construed accordingly.

**"Deed of Safeguard"** means the deed of safeguard in relation to the Trust executed or to be executed on behalf of the Secretary of State in respect of the Project.

**"Deemed Senior Funding Agreements"** the Original Senior Funding Agreements and any other senior Funding Agreements entered into by the Project Co, the Issuer, any Beneficiaries' Representative or any Proposed Substitute (as the case may be), in connection with:

- (A) a Variation, Service Variation, Additional Service or amendment to the Standing Instructions and Procedures; or
- (B) any other advance of principal which does not exceed 10% of the amount of principal which it was anticipated in the Financial Model as at the Amendment Effective Date would be owed to Funders in respect of the Bonds as at the Termination Date, adjusted to reflect any change in RPI arising on or after the Amendment Effective Date; or
- (C) any additional finance to which the Trust gives its prior written approval.

**"Default Amount"** has the meaning given in Condition 8.

**"Default Interest Rate"** means a rate per annum equal to the Interest Rate plus two per cent. per annum.

**"Delay Event"** means any of the events specified in Part 2 of Schedule 8.

**"Deleterious Materials"** means those materials listed in Part 4 of Schedule 5.

**"Design and Construct Phase"** means, in respect of the Phase 1 Areas only, the Phase 1 Design and Construct Phase and, in respect of the Phase 2 Areas only, the Phase 2 Design and Construct Phase.

**"Design and Construct Phase Variation Construction Cost"** has the meaning given in Clause 16.4.1(D).

**"Design and Construct Phase Variation Construction Saving"** has the meaning given in Clause 16.4.1(D).

**"Design and Construct Phase Variation Cost"** means, where greater than zero, the aggregate of the Design and Construct Phase Variation Construction Cost, the Variation Financing Cost or Variation Financing Saving (expressed as a negative) and the Variation Usage Fee Costs or the Variation Usage Fee Savings (expressed as a negative).

**"Design and Construct Phase Variation Saving"** means, where greater than zero, the aggregate of the Design and Construct Phase Variation Construction Saving, the Variation Financing Cost (expressed as a negative) or Variation Financing Saving and the Variation Usage Fee Costs (expressed as a negative) or Variation Usage Fee Savings.

**"Design Approval Programme"** has the meaning given in paragraph 2.1 of Part 3 of Schedule 5.

**"Design Data"** means all calculations (other than financial calculations), designs, design information, specifications, plans, drawings, graphs, sketches, models and other materials, including all eye readable or computer or other machine readable data, prepared or to be prepared by or on behalf of the Project Co relating to the design or construction of the Works or any Variation.

**"Design Development Procedure"** means the procedure for developing the design of the Works set out in Part 3 of Schedule 5.

**"Design Documents"** means all documents identified by or on behalf of the Parties pursuant to paragraph 4.1 of the Design Development Procedure.

**"Detailed Design Stage"** has the meaning given in paragraph 2.3 of Part 3 of Schedule 5.

**"Determination Date"** has the meaning given in Condition 5.

**"Dilapidation"** means any matter in respect of the Works at the Site which has not been carried out by the Project Co in breach of its obligations in respect of the Maintenance of Buildings and Engineering Services, other than any such matter which has been included in the Annual Programme to be undertaken during the succeeding twelve month period or which has been rectified during a Rectification Period in accordance with Part 4 of Schedule 6 but not, at that point, included in the Annual Programme.

**"Disclosed Data"** has the meaning given in Clause 7.2.1.

**"Discriminatory Legislation"** means any Law or NHS Requirement, including Law in respect of Taxation which:-

- (A) discriminates against the Hospital in relation to other hospitals; or
- (B) discriminates against hospitals procured on a similar basis to the Hospital in relation to other hospitals or discriminates against services procured on a similar basis to the Services in relation to other services; or
- (C) discriminates against the Project Co in relation to other companies; or
- (D) discriminates against companies undertaking design, construction, finance and operation under a contract with a public sector entity in relation to other companies.

**"Dispute"** means any difference or dispute of whatever nature between the Trust directly or through the Trust's Works Adviser and/or the Trust's Facilities Adviser of the one part and the Project Co directly or through the Project Co's Representative of the other part arising under, out of or in connection with any Project Document (including any question of interpretation thereof).

**"Disputes Resolution Procedure"** means the procedure referred to in Clause 55 and set out in Schedule 10.

**"Draft Equipment Schedule"** has the meaning given in Clause 18.1.6.

**"Early Redemption Price"** has the meaning given in Condition 5 (b).

**"Effective Date"** means the latest of the dates referred to in Clause 2.2.

**"Equipment"** has the meaning given in the IT Agreement.

**"Equipment Schedule"** has the meaning given in Clause 18.1.9.

**"Equity IRR"** means at any time during the Design and Construct Phase, the internal rate of return (expressed in real terms) in respect of equity in the Project Co, as calculated in the Financial Model and designated "Equity IRR real" therein.

**"Employees"** has the meaning given in the Facilities Management Agreement.

**"Event of Default"** means any of the events set out in Clause 43.1.

**"Excluded Income"** means the aggregate of the following:

- (A) income of the Project Co from the Trust pursuant to any Project Document; and
- (B) income of the Project Co from any other person pursuant to or in connection with the provision of any Service;
- (C) income of the Project Co from commercial telephony services at the Hospital, excluding income from the provision of payphones; and
- (D) £150,000, provided that such amount shall be adjusted on 1st October in every Contract Year to reflect any change in RPI arising on or after 1st April, 1995.

**"Exclusion Order"** has the meaning given in Clause 21.9.

**"Execution Date"** means 8<sup>th</sup> January, 1998.



**"Existing Design Documents"** means the documents comprising the Trust's Requirements and the Project Co's Proposals.

**"Existing Hospitals Closure"** means the securing, insuring and making good after the Decommissioning of Used Medical Equipment and the Decommissioning of Used Other Equipment of the existing hospitals at Brunswick Road, Norwich and at the West Norwich site, as well as making safe during and after Decant.

**"Existing Service"** has the meaning given in the Facilities Management Agreement.

**"Existing Trust Service"** has the meaning given in the Facilities Management Agreement.

**"Facilities Management Agreement"** means the agreement so titled of even date herewith between (1) the Project Co and (2) the Trust for the management and provision of Services at the Hospital.

**"Facilities Manager"** means Serco Systems Limited, a company incorporated under the laws of England and Wales with registered number 1861237, whose registered office is at Serco House, Hayes Road, Southall, Middlesex UB2 5NJ or such substitute(s) as may be appointed as such by the Project Co from time to time pursuant to a replacement of the Facilities Provision Contract in accordance with Clause 6.1.4.

**"Facilities Provision Contract"** means the agreement so titled entered into between (1) the Project Co and (2) the Facilities Manager for the provision of Services at the Hospital, in a form acceptable to the Trust (acting reasonably).

**"Facilities Provision Contract Performance Guarantee"** means a performance guarantee in relation to the Facilities Manager, substantially in the form set out in Part 2 of Schedule 4.

**"Facilities Provision Handover Agreement"** means the agreement so titled entered into between (1) the Facilities Manager, (2) the Guarantor in respect of the Facilities Manager and (3) the Trust, substantially in the form set out in Part 4 of Schedule 4.

**"Final Determination"** means the earliest date by which any Proceedings are determined and any time for appealing or further appealing has expired, except that if the Proceedings are withdrawn, the relevant date shall be the date of such withdrawal.

**"Financial Model"** means the financial model prepared on behalf of the Project Co and delivered to the Trust at the Amendment Execution Date, as the same may subsequently be amended in accordance with Clause 5.3, such model setting out the basis on which the financing of the Project and/or the costs of and revenue from the Project have been calculated by the Project Co (including, the assumptions used, the cell logic network for the financial model software and any accompanying documentation necessary to operate the financial model). A printed copy of the Financial Model as at the Amendment Execution Date and in form and substance satisfactory to the Trust is at Part 1 of Schedule 15.

**"Fire Certificate"** means a fire certificate required pursuant to the provisions of the Fire Precautions Act 1971.

**"Fire Precautions Policy and Programme"** means a clearly defined fire precautions policy and a programme in respect of the Hospital, in each case devised by the Trust's Nominated Fire Officer and agreed with the local fire authority, for installing and maintaining an adequate level of physical fire precautions designed to prevent the occurrence of fire, ensure its early detection and warning and to control and stop the spread of fire, such programme to include plans for raising the alarm in case of fire, first aid, fire fighting, the movement and evacuation of patients and staff and other occupants in an emergency and appropriate, periodic and formally recorded staff training in such matters.

**"First Contract Month"** has the meaning given in the definition of Contract Month.

**"First Contract Year"** has the meaning given in the definition of Contract Year.

**"Fix-Only Items"** means the lights to 23 operating theatres, four Nr Arjo baths, one Nr Burns bath and all beverage bay/rest room water boilers.

**"FM IPR"** means Intellectual Property vested in the Facilities Manager which is:

- (A) related to the method and style of delivery by the Facilities Manager of the Services or any of them; and
- (B) created otherwise than exclusively for the Hospital; and
- (C) of a nature, the withdrawal of which would not materially adversely affect the continuity of the provision of the relevant Service or Services.

**"Force Majeure"** means, during the Design and Construct Phase, any of those events specified in paragraph 1 of Part 1 of Schedule 8 and, during the Operational Phase, any of those events specified in paragraph 3 of Part 1 of Schedule 8 (as amended from time to time pursuant to paragraph 4 of the same).

**"Former Project Agreement"** means the project agreement dated 25th November, 1996 between (1) the Trust and (2) the Project Co.

**"Full Term"** means a period of 60 years.

**"Funders"** means all or any of the persons who provide financing or funding or financial facilities generally under the Funding Agreements (including the Bondholders) and any trustees or agents of all or any of such persons who are party to the Funding Agreements.

**"Funding Agreements"** means:

- (A) the Senior Funding Agreements and all or any of the agreements or instruments to be entered into by the Project Co to provide finance or financial facilities (other than equity financing) to enable the Project Co to undertake the Project and its obligations under the IT Agreement, including any agreements or instruments to be entered into by the Project Co to raise additional or substitute finance or financial facilities of any form (other than equity financing) or relating to the rescheduling of its indebtedness or the re-financing of the Project and/or its obligations under the IT Agreement, as well as any related hedging arrangements; and

- (B) all or any of the agreements or instruments entered into by any Beneficiaries' Representative or any Proposed Substitute to provide finance or financial facilities (other than equity financing) to enable it to perform its obligations pursuant to and in accordance with the Beneficiaries' Direct Agreement or the agreements novated to it pursuant to and in accordance with the same, including any agreements or instruments entered into by the Beneficiaries' Representative or Proposed Substitute (as the case may be) to raise additional or substitute finance or financial facilities of any form (other than equity financing) or relating to the rescheduling of its indebtedness or the refinancing of its obligations pursuant to and in accordance with the Beneficiaries' Direct Agreement or the agreements novated to it pursuant to and in accordance with the same, as well as any related hedging arrangements.

**"Funding Amount"** has the meaning given in paragraph 4 of Part 5 of Schedule 14.

**"Further Operational Policies"** means the further operational policies relating to the Hospital (excluding the Operational Policies) devised or at any time operated by the Trust, comprising departmental policies and/or whole Hospital policies.

**"Good Industry Practice"** means the exercise of that degree of skill, diligence, prudence and foresight which would reasonably and ordinarily be expected from a skilled and experienced operator (being in those cases where the expression relates to the Works or Post Completion Variation Works (but not otherwise), a contractor) seeking in good faith to comply with its contractual obligations, complying with all applicable Laws and engaged in the same type of undertaking and under the same or similar circumstances and conditions.

**"Government"** means the government of the United Kingdom.

**"Guarantor"** means in respect of the Building Contractor, the guarantor of its obligations pursuant to the Building Contract Performance Guarantee and, in respect of the Facilities Manager, the guarantor of its obligations under the Facilities Provision Contract Performance Guarantee.

**"Health Building Notes"** means those notes identified in Part 6 of Schedule 5, together with any other such notes issued by the Department of Health from time to time after the Commencement Date.

**"Health Technical Memoranda"** means the technical memoranda listed at Part 5 of Schedule 5, together with any other such technical memoranda issued by the Department of Health from time to time after the Commencement Date.

**"Hedging Agreement"** has the meaning given in the Collateral Deed.

**"High Level Decant and Commissioning Programme"** means the programme and descriptive information contained in Appendix D to Schedule 5.

**"Highway Works"** means the works necessary to implement any permanent highway improvements required by any relevant Planning Agreement and/or Planning Approval to be effected outside the Site and/or to be adopted, including any service diversions or extinguishments required as a direct result of such works, the Access-way Works, as defined in the John Innes Agreement and the design and

construction of accommodation works which the Trust has covenanted to carry out and perform pursuant to the UEA Agreement.

**"Highway Works Agreement"** means a Planning Agreement dated 20th December, 1996 and made between (1) Norfolk County Council and (2) the Trust whose frontsheet describes it as "Deed relating to the improvement of Colney Lane and Watton Road".

**"Holding Company"** has the meaning given to it in Section 736 Companies Act 1985, as amended by Section 144 Companies Act 1989. Notwithstanding the provisions of Clause 1.2.5, this definition shall not be changed in the event of an amendment to the definition of "holding company" contained in the Companies Act 1985 as amended by the Companies Act 1989, whether by any subordinate legislation or otherwise.

**"Hospital"** means the new general hospital as described in any Planning Approval (as may be varied from time to time in accordance with Clause 16) to be designed, developed, constructed and part operated by the Project Co at the Site.

**"Hospital Specific Law"** means:

- (A) any NHS Requirement (other than any NHS Requirement that solely requires the Law to be implemented); and/or
- (B) any Law which expressly refers to the provision or running of the Hospital or hospitals generally

and, for the avoidance of doubt, includes any NHS Requirement within (A) which determines the manner of implementation or application of any Law which is not within (B).

**"Implementation"** means, in respect of any Planning Approval, the carrying out of a material operation falling within Section 56(4) Town and Country Planning Act 1990.

**"Incremental Cost"** has the meaning given in paragraph 3.3.4(A) of Part 4 of Schedule 7.

**"Independent Certifier"** means the person appointed by the Project Co pursuant to the Agreement for the Appointment of Independent Certifier or such substitute as may be appointed as such by the Project Co from time to time pursuant to a replacement of the Agreement for the Appointment of Independent Certifier in accordance with Clause 6.1.4.

**"Information Systems Acceptance"** has the meaning given in the IT Agreement.

**"Information Systems Services"** has the meaning given in the IT Agreement.

**"Inpatient"** means any patient (other than a Private Patient) who is admitted to hospital and occupies a bed at the Hospital other than pursuant to any Ambulatory/Outpatient Attendance, a Day Case Attendance or a Regular Day Patient Attendance and includes:

- (A) any patient who remains overnight, whatever the original intention;

- (B) any patient who at admission is expected to remain overnight but is discharged earlier and, for these purposes, discharge includes a transfer out of the Hospital and death;
- (C) any delivery in the Hospital (counting mothers only);
- (D) any patient who is admitted as an emergency regardless of length of stay; and
- (E) any patient who is admitted as an emergency and dies, whether or not a bed was occupied, provided that a patient who dies in the accident and emergency department at the Hospital shall not be classified as an admission,

but excludes well babies.

**"Inpatient Occupied Bed Day"** means the number of beds at the Hospital occupied by Inpatients at the time of the daily count.

**"Installation"** means providing attendant labour and materials during Commissioning as required to fix in final position in accordance with the Design Documents and **"Install"** shall be construed accordingly.

**"Insurance Proceeds"** has the meaning given in Part 4 of Schedule 7.

**"Insurance Proceeds Account"** has the meaning given in Clause 24.14.2.

**"Insurance Proceeds Reinstatement Account"** has the meaning given in Clause 24.14.1.

**"Intellectual Property"** means all current and future legal and/or equitable interests in registered or unregistered trade marks, service marks, patents, registered designs, utility marks, applications for any of the foregoing, copyrights, unregistered designs, inventions, confidential information, know-how or other intellectual property rights (including sui generis rights in relation to any database).

**"Interest Rate"** means a rate of interest per annum equivalent to the average of the base lending rate(s) announced by Barclays Bank PLC and National Westminster Bank PLC which are current on the date upon which the amount bearing interest first became due (such interest to accrue daily on the basis of a 365 day year and to be compounded at six monthly intervals). If such lending rates are varied whilst such amount remains outstanding, the interest payable shall be correspondingly varied from the date of each such variation.

**"Issuer"** has the meaning given in the Collateral Deed.

**"IT Access Agreement"** has the meaning given in the IT Agreement.

**"IT Agreement"** means the agreement of even date herewith between (1) the Trust, (2) the Project Co and (3) McKesson for the provision of information technology and related services at the Hospital.

**"IT Annual Programme"** has the meaning given in the IT Agreement.

**"IT Leases"** has the meaning given in the IT Agreement.

**"IT Services"** has the meaning given in the IT Agreement.

**"IT Service Fees"** has the meaning given in the IT Agreement.

**"IT Start Up Criteria"** has the meaning given in the IT Agreement.

**"John Innes"** means the Official Custodian for Charities and the Trustees from time to time of the John Innes Foundation, a charity registered under the Charities Act 1960 with registration number 313462.

**"John Innes Agreement"** means a sale and purchase agreement dated 1st May, 1997 made between (1) The Official Custodian for Charities (2) The Trustees of the John Innes Foundation and (3) the Trust.

**"John Innes Property"** means the freehold property at Colney Lane, Norfolk owned by the Official Custodian for Charities and administered by the Trustees of the John Innes Foundation which is more particularly described in the John Innes Agreement and referred to therein as the Retained Property.

**"Last Contract Year"** has the meaning given to it in the definition of Contract Year.

**"Law"** means any applicable law, statute, proclamation, by-law, directive, decision, regulation, rule, order, notice, rule of court or delegated or subordinate legislation and in the case of the Project Co, any applicable official request or requirement, whether or not having the force of law but, if not, being one which is generally complied with by other private companies limited by shares carrying on business of the nature carried on by it but excludes any NHS Requirement.

**"Leading Counsel"** means the first named of the Counsel listed in Schedule 13 but if he is unavailable at the relevant time, such other of them as shall be agreed upon by the Parties (acting reasonably).

**"Leases"** means the leases to be granted by the Trust pursuant to Clause 21 in respect of the Premises to the Facilities Manager substantially in the form set out in Schedule 3 or to the Project Co substantially in the form set out in Schedule 3, mutatis mutandis.

**"Liaison Procedure"** means the liaison procedure set out in Schedule 11.

**"Loss"** means any loss, damage, cost or expense.

**"LTA"** means Landlord and Tenant Act 1954.

**"Maintain"** means regular, routine and exceptional repair, servicing, refurbishment and replacement, provision of information, education and training to any person authorised by the Trust or the Project Co and testing and strip down/reassembly for insurance inspection.

**"Maintenance of Buildings and Engineering Services"** has the meaning given in the Facilities Management Agreement.

**"Maintenance of Ratios"** means such adjustment as is necessary to ensure that:

- (A) the Senior Loan Life Cover Ratio as at 30th June or 31st December whichever shall first occur after Phase 2 Completion as calculated in the Financial Model as a result of the relevant adjustment is maintained at the level of such ratio

forecast in the Financial Model in effect immediately before the relevant re-running of the Financial Model; and

- (B) the Total Debt Concession Life Cover Ratio as at 30th June or 31st December whichever shall first occur after Phase 2 Completion as calculated in the Financial Model as a result of the relevant adjustment is maintained at the level of such ratio forecast in the Financial Model in effect immediately before the relevant re-running of the Financial Model; and
- (C) the minimum Annual Debt Service Cover Ratio in the Financial Model as a result of the relevant adjustment is maintained at the level of such ratio forecast in the Financial Model in effect immediately before the relevant re-running of the Financial Model; and
- (D) the minimum Total Annual Debt Service Cover Ratio in the Financial Model as a result of the relevant adjustment is maintained at the level of such ratio forecast in the Financial Model in effect immediately before the relevant re-running of the Financial Model; and
- (E) the average Annual Debt Service Cover Ratio in the Financial Model as a result of the relevant adjustment is maintained at the level of such ratio forecast in the Financial Model in effect immediately before the relevant re-running of the Financial Model; and
- (F) the average Total Annual Debt Service Cover Ratio in the Financial Model as a result of the relevant adjustment is maintained at the level of such ratio forecast in the Financial Model in effect immediately before the relevant re-running of the Financial Model; and
- (G) the Annual Debt Service Cover Ratio and the Total Annual Debt Service Cover Ratio in respect of each period for which they are calculated in the Financial Model as a result of the relevant adjustment are within 5% of the respective Annual Debt Service Cover Ratio and Total Annual Debt Service Cover Ratio for each such period forecast in the Financial Model in effect immediately before the relevant re-running of the Financial Model, unless the Parties agree otherwise without recourse to the Disputes Resolution Procedure; and
- (H) the Equity IRR is maintained as a result of the relevant adjustment at a level which is no better and no worse than that forecast in the Financial Model in effect immediately before the relevant re-running of the Financial Model, provided that the Equity IRR may be better as a result of adjustments pursuant to (A) to (G) of this definition,

provided, further that there may only be one adjustment to the Usage Fee in accordance with this definition on each occasion on which this definition is applied.

**"Major Incident"** means a major incident as declared by the East Anglian Ambulance NHS Trust.

**"Managed Network Services"** has the meaning given in the IT Agreement.

**"Market Testing"** has the meaning given in the Facilities Management Agreement.

"**McKesson**" has the meaning given in the IT Agreement.

"**Medical Equipment**" means any piece of apparatus or furnishing, fixed or free-standing, loose or mobile:

- (A) which is used for diagnostic or treatment purposes, including any equipment related to the process, production, cleaning and/or sterilising of the apparatus and items related to diagnosis or treatment; or
- (B) which a patient may use or which is used to support a patient or used by an employee of the Trust (in the course of such employee's employment),

provided that Medical Equipment excludes Other Equipment, Service Equipment and Used Fixed Equipment.

"**Medical Planning Programme**" means the programme (including the explanatory notes) referred to in Appendix C to Schedule 5.

"**Minimum Design Life**" means, in respect of architectural and engineering systems included in the Works, the minimum design life to first replacement as specified in Part 7 of Schedule 5.

"**Monthly Facilities Charge**" has the meaning given in Clause 39.

"**Monthly Payment**" means a Monthly Facilities Charge, a Monthly Services Charge or a payment of Reimbursable Expenses in accordance with Clause 17.1 of the Facilities Management Agreement, as the case may be.

"**Monthly Services Charge**" has the meaning given in the Facilities Management Agreement.

"**Network Assets**" has the meaning given in the IT Agreement.

"**New Medical Contamination**" means the presence in an area of a disease-carrying agent of any type which cleaning and prevention of infection or contamination techniques in use in accordance with Good Industry Practice cannot substantially prevent or cannot substantially remove with the result that:

- (A) it is unsafe to admit patients or any Staff to the relevant area or to use the area for the purpose for which it is intended; and
- (B) the area cannot be made safe for the admission of patients or Staff,

irrespective of how the presence of the disease-carrying agent in the area was caused.

"**New Medical Equipment**" means Medical Equipment for the Hospital which has not been used by the Trust before its delivery to the Site in accordance with Clause 18.2.

"**NHS Requirement**" means any applicable official request or requirement including any Health Building Note or Health Technical Memoranda, whether or not having the force of law but, if not, being one which is generally complied with by other NHS trusts or in respect of which compliance is generally expected by the Department of Health.



**"Notice of Renewed Availability"** has the meaning given in paragraph 2.5.1 of Part 4 of Schedule 6.

**"Novation Effective Date"** has the meaning given in the Beneficiaries' Direct Agreement.

**"Occupation Programme"** means the programme prepared by the Project Co for the occupation and use by the Trust of each of the Beneficial Occupation Areas, as updated in accordance with Clause 10.5.3. A copy of the Occupation Programme as at the Amendment Execution Date in form and substance satisfactory to the Trust is attached as Appendix K to Schedule 5.

**"Omissions Cost"** has the meaning given in paragraph 3.3.4(B) of Part 4 of Schedule 7.

**"Oncology Area"** means block 13, level 1, as shown on the plan annexed at Section A of Appendix J to Schedule 5.

**"Operational Manuals"** means all manuals, documents and brochures relating to the operation and maintenance of the Works.

**"Operational Phase"** means, in respect of the Phase 1 Areas only, the Phase 1 Operational Phase and, in respect of the Phase 2 Areas only, the Phase 2 Operational Phase.

**"Operational Phase Variation Cost"** has the meaning given in Clause 16.5.1(D).

**"Operational Phase Variation Saving"** has the meaning given in Clause 16.5.1(D).

**"Operational Policies"** means the operational policies referred to in paragraph 6 of Part 1 of Schedule 5.

**"Operations"** means the activities to be carried out by the Project Co under the Project Documents in connection with the preparation for or carrying out of any preparatory works, the design, development, construction, completion, commissioning and testing of the Works, the carrying out of any Post-Completion Variation Works, the management and provision of the Services and the performance of all other obligations of the Project Co under the Project Documents.

**"Original Senior Funding Agreements"** means the Senior Funding Agreements, in the form originally entered into on or about 11<sup>th</sup> December, 2003 or, in the case of the Existing Barclays Swap, in its form as amended on or about 11<sup>th</sup> December, 2003.

**"Other Employees"** has the meaning given in the Facilities Management Agreement;

**"Other Equipment"** means Used Other Equipment and Other General Equipment.

**"Other General Equipment"** means non-fixed equipment and apparatus for the Hospital provided or to be provided by the Project Co, other than Service Equipment, procured on the instructions of the Trust pursuant to Clause 18.1.

**"Other General Equipment Sum"** means £1,071,000.

**"Outpatient Units"** means, in respect of any period, the sum of Ambulatory/ Outpatient Attendances and Regular Day Patient Attendances.

**"Outpatients Usage Fee"** means an amount determined in accordance with paragraph 1.2 of Part 1 of Schedule 6 or paragraph 1.3 of Part 1 of Schedule 6 (as the case may be).

**"Output Specification"** has the meaning given in the Facilities Management Agreement.

**"Outstanding Debt"** means all outstanding amounts (whether or not due) owing by the Project Co, the Issuer, any Beneficiaries' Representative or any Proposed Substitute (as the case may be) to the Funders under the Funding Agreements on the Termination Date, together with all amounts, including costs of early termination of hedging arrangements and other breakage costs (including, where relevant, any SPENS Amount) payable by the Project Co, the Issuer, any Beneficiaries' Representative or any Proposed Substitute (as the case may be) to the Funders by reason of early termination or redemption of the Funding Agreements (in each case, after such termination or redemption in full but assuming that such termination or redemption took place on the Termination Date) subject to the Project Co, the Issuer, any Beneficiaries' Representative or any Proposed Substitute (as the case may be) and the Funders mitigating all such costs to the extent reasonably possible (except in the case of any SPENS Amount or where the amount of such costs are fixed in advance under any hedging arrangements and those arrangements have been approved by the Trust (acting reasonably) before they were made) less (without double counting):

- (A) any amounts payable by the Funders to the Project Co, the Issuer, any Beneficiaries' Representative or any Proposed Substitute (as the case may be) under the terms of any hedging arrangements comprised in the Funding Agreements by reason of their termination;
- (B) any net proceeds of enforcement of security realised by the Funders in respect of the Funding Agreements free of third party claims, including in respect of enforcement of security over any amount of cash deposited or placed by or on behalf of the Project Co, the Issuer, any Beneficiaries' Representative or any Proposed Substitute (as the case may be) which secure obligations owed to the Funders under the Funding Agreements;
- (C) the amount by which interest accruing on amounts due but unpaid under the Funding Agreements has been increased by the application of a default interest rate rather than a non-default interest rate (subject as provided in Clauses 1.2.20 and 1.2.21) and the amount of any fee payable under the Funding Agreements in the nature of a default fee (excluding fees payable to advisers in respect of default) except, in each such case, for such sums arising as a direct or indirect result of the Trust's default;
- (D) any sums received by the Project Co, the Issuer, any Beneficiaries' Representative or any Proposed Substitute (as the case may be) from the Funders in respect of the Project and applied for purposes other than those specified in the Funding Agreements; and

- (E) any costs, expenses, liabilities and obligations owing to the Funders arising as a result of or in connection with any refinancing of or amendment, modification or variation to the terms of the Funding Agreements since the Effective Date, except where the same is effected in accordance with Clause 6.3.2,

provided that:

- (F) if the Bonds are redeemed in accordance with Condition 5 (b), the calculation of Outstanding Debt shall exclude the amount by which (1) the Early Redemption Price in respect of the Bonds exceeds (2) the Outstanding Principal Amount of the Bonds together with any payment of interest due but unpaid on or prior to the Determination Date (other than the Early Redemption Price itself);
- (G) amounts calculated in this definition by reference to the Funding Agreements shall be limited to the amounts that would have been so calculated had the Funding Agreements at the Termination Date been in the form of the Deemed Senior Funding Agreements and any Funding Agreements in respect of subordinated debt;
- (H) there will be no double counting of amounts owed by the Issuer and corresponding amounts owed to the Issuer; and
- (I) amounts payable under the Funding Agreements in respect of subordinated debt shall be limited to the outstanding principal amount of such subordinated debt and any interest due but unpaid and exclude any additional amount payable by reason of early termination or redemption of the relevant Funding Agreements in respect of subordinated debt.

**"Outstanding Dilapidation"** has the meaning given in paragraph 1.4.1 of Part 4 of Schedule 6.

**"Outstanding Dilapidation Amount"** has the meaning given in paragraph 1.4.2 of Part 4 of Schedule 6.

**"Outstanding Dilapidation Notice"** has the meaning given in paragraph 1.4 of Part 4 of Schedule 6.

**"Outstanding Principal Amount"** has the meaning given in Condition 3.

**"Panel"** means all or any of the Technical Panel, the Facilities Panel, the Financial Panel or the Clinical Services Panel, details of which are set out in Appendix B to Schedule 10.

**"Panel Rules"** means the rules set out in Appendix A to Schedule 10.

**"Partial Unavailability Period"** means a period in respect of any Unavailability Event, in the case of the first such period, commencing at the time on the date when the Rectification Period in respect of any Unavailability Unit commences and ending when the relevant Unavailability Unit ceases to be Unavailable as stated in any relevant Notice of Renewed Availability and, in the case of subsequent such periods, commencing at the time on the date the immediately preceding Partial Unavailability

Period ended (provided any relevant Unavailability Unit remains Unavailable) and ending when any further Unavailability Unit cease to be Unavailable, as stated in any relevant Notice of Renewed Availability;

**"Payment Schedule"** has the meaning given in the IT Agreement.

**"Permitted Recipient"** has the meaning given in Clause 52.2.

**"Phase 1 Anticipated Construction Cost"** means £143,497,351, adjusted as necessary to reflect any change in anticipated capital expenditure by the Project Co in respect of the Phase 1 Works (other than the Highway Works and the Services Connections), in consequence of any Variation or any Delay Event or any matter which is the subject of a Trust's Change of Law Adjustment Confirmation or a Project Co's Change of Law Adjustment Confirmation, in each case, during the Phase 1 Design and Construct Phase.

**"Phase 1 Anticipated Works Cost"** means the aggregate of the Phase 1 Anticipated Construction Cost, together with the costs in the Financial Model as at the Amendment Execution Date, attributed to Highway Works and Services Connections, IT Services start up, Services start up and insurance, adjusted in the case of Services start-up and insurance to reflect any change in anticipated capital expenditure by the Project Co in respect of the same, in consequence of any Variation or Service Variation or amendment to the Standing Instructions and Procedures or any Additional Services or any Delay Event or any matter which is the subject of a Trust's Change of Law Adjustment Confirmation or a Project Co's Change of Law Adjustment Confirmation, in each case, during the Phase 1 Design and Construct Phase.

**"Phase 1 Areas"** means the Hospital excluding the Phase 2 Areas.

**"Phase 1 Building Completion Certificate"** has the meaning given in Clause 17.10.2(A)(1).

**"Phase 1 Building Completion Date"** has the meaning given in Clause 17.10.2(A)(1).

**"Phase 1 Completion"** means when the Phase 1 Building Completion Certificate has been issued and Service Completion Certificates for all of the Services have been issued in respect of all of the Phase 1 Areas.

**"Phase 1 Completion Certificate"** has the meaning given in Clause 17.10.2(A)(2).

**"Phase 1 Completion Date"** has the meaning given in Clause 17.10.2(A)(2).

**"Phase 1 Date for Completion"** means the date which is 48 calendar months after the Effective Date, as may be extended from time to time by the Trust's Works Adviser pursuant to Clause 10.5.

**"Phase 1 Design and Construct Phase"** means the period following the Execution Date and ending on the Phase 1 Completion Date.

**"Phase 1 Non-Completion Certificate"** has the meaning given in Clause 9.3.1.

**"Phase 1 Operational Phase"** means the period commencing on the Phase 1 Completion Date and ending on the last day of the Contract Period.

**"Phase 1 Works"** means the design, development, construction, completion, commissioning (but not the works subject to the Decant and Commissioning Programme) and testing of the Phase 1 Areas at the Site and access thereto from the highway, including the Highway Works and the Services Connections and works required as the result of any Variation to the Phase 1 Areas during the Phase 1 Design and Construct Phase (including the physical assets resulting from the same).

**"Phase 2 Anticipated Construction Cost"** means £16,539,896, adjusted as necessary to reflect any change in anticipated capital expenditure by the Project Co in respect of the Phase 2 Works, in consequence of any Variation or any Delay Event or any matter which is the subject of a Trust's Change of Law Adjustment Confirmation or a Project Co's Change of Law Adjustment Confirmation, in each case, during the Phase 2 Design and Construct Phase.

**"Phase 2 Anticipated Works Cost"** means the aggregate of the Phase 2 Anticipated Construction Cost, together with the costs in the Financial Model as at the Amendment Execution Date, attributed to IT Services start up, Services start up and insurance in respect of the Phase 2 Areas, adjusted in the case of Services start-up and insurance to reflect any change in anticipated capital expenditure by the Project Co in respect of the same, in consequence of any Variation or Service Variation or amendment to the Standing Instructions and Procedures or any Additional Services or any Delay Event or any matter which is the subject of a Trust's Change of Law Adjustment Confirmation or a Project Co's Change of Law Adjustment Confirmation, in each case, during the Phase 2 Design and Construct Phase.

**"Phase 2 Areas"** means part of the Hospital, being the Beneficial Occupation Areas, the areas including the Oncology Area as shown on the plan annexed at Section A of Appendix J to Schedule 5 and the whole of block 40, block 41 and block 42 as shown on the plan annexed at Section B of Appendix J to Schedule 5, together in each case with the associated adjacent areas as shown on such plans.

**"Phase 2 Building Completion Certificate"** has the meaning given in Clause 17.10.2(A)(5).

**"Phase 2 Building Completion Date"** has the meaning given in Clause 17.10.2(A)(5).

**"Phase 2 Completion"** means when the Phase 2 Building Completion Certificate has been issued and Service Completion Certificates for all of the Services have been issued in respect of all of the Phase 2 Areas.

**"Phase 2 Completion Certificate"** has the meaning given in Clause 17.10.2(A)(6).

**"Phase 2 Completion Date"** has the meaning given in Clause 17.10.2(A)(6).

**"Phase 2 Date for Completion"** means the date which is 58 calendar months after the Effective Date, as may be extended from time to time by the Trust's Works Adviser pursuant to Clause 10.5.

**"Phase 2 Design and Construct Phase"** means the period following the Execution Date and ending on the Phase 2 Completion Date.

**"Phase 2 Operational Phase"** means the period commencing on the Phase 2 Completion Date and ending on the last day of the Contract Period.

**"Phase 2 Works"** means the design, development, construction, completion, commissioning (but not the works subject to the Decant and Commissioning Programme) and testing of the Phase 2 Areas at the Site and works required as the result of any Variation to the Phase 2 Areas during the Phase 2 Design and Construct Phase (including the physical assets resulting from the same).

**"Planning Agreements"** means any agreements in relation to planning or highway matters required by the local planning authority or the highway authority as a pre-condition to any Planning Approval, including any agreement made pursuant to Section 106 Town and Country Planning Act 1990 and Sections 38 and 278 Highways Act 1980, the terms of which have been approved by the Parties (each acting reasonably).

**"Planning Application"** means the application dated 3rd April, 1996 to the local planning authority for the Works which was submitted in a form approved by the Trust prior to its submission, as supplemented by the application dated 2<sup>nd</sup> July, 1999 submitted to the local planning authority for the Works made by the Trust and any further application or modification thereof submitted to the local planning authority for the Works made by the Project Co or on behalf of the Project Co but in the joint names of the Trust and the Project Co, in a form approved by the Trust prior to its submission (such approval not to be unreasonably withheld or delayed).

**"Planning Approval"** means a planning approval granted by the relevant local planning authority pursuant to any Planning Application, which is subject only to conditions acceptable to both Parties (acting reasonably).

**"Plant"** means plant, materials and equipment used or to be used in the construction of the Hospital but excluding machinery, apparatus and the like intended to form or forming part of the Works having a permanent function (regardless of the length of the Minimum Design Life of such Works).

**"Post-Completion Variation Works"** means all works carried out by the Project Co in respect of any Variation in the Operational Phase (including the physical assets resulting from the same).

**"Premises"** means the areas required by the Facilities Manager with exclusive possession for the proper performance by it and/or the Service Providers of their respective obligations pursuant to their appointment in accordance with the Facilities Management Agreement (as shown in the Design Documents) and which are to be demised to the Facilities Manager in the Leases.

**"Primary Reinstatement Cost"** has the meaning given in paragraph 3.3.4(A) of Part 4 of Schedule 7.

**"Private Patient"** means a patient who gives an undertaking (or for whom an undertaking is given) to pay the Trust in respect of clinical services made available at the Hospital.

**"Private Patient Unit"** means the 20 bed dedicated unit for Private Patients at the Hospital.

**"Proceedings"** means:

- (A) a calling in by the Secretary of State for the Environment of the Planning Application; or
- (B) an application to the Court for judicial review or for leave to apply for judicial review; or
- (C) an application to the Court pursuant to Section 288 Town & Country Planning Act, 1990.

**"Procure"** means specification, identification, tendering, selection, purchasing and project management.

**"Project"** means the design, development, construction and financing of the Works, the management and provision of Services at the Hospital and the conduct of any other Operations during the Design and Construct Phase or the Operational Phase.

**"Project Co's Change of Law Adjustment Confirmation"** means a notice issued pursuant to Clause 14.9 of the Facilities Management Agreement or Clause 29.9 (as the case may be).

**"Project Co's Change of Law Adjustment Notice"** means a notice issued pursuant to Clause 14.2 of the Facilities Management Agreement or Clause 29.2 (as the case may be).

**"Project Co's Contract Manager"** has the meaning given in the Facilities Management Agreement.

**"Project Co's Proposals"** means the Project Co's proposals in respect of the design of the Works as at the Amendment Execution Date, as set out in Part 2 of Schedule 5.

**"Project Co's Representative"** means the person identified as such in Clause 48.1 or such substitute as may be appointed by the Project Co for the time being pursuant to Clause 32.3.

**"Project Co's Variation Response"** has the meaning given in Clause 16.3.

**"Project Co Termination Event"** means any of the events set out in Clause 44.1.

**"Project Documents"** means this Agreement and the Facilities Management Agreement.

**"Proposed Step-in Date"** has the meaning given in the Beneficiaries' Direct Agreement

**"Proposed Substitute"** has the meaning given in the Beneficiaries' Direct Agreement.

**"Prospective Tenderer"** has the meaning given in the Facilities Management Agreement.

**"Quality Manual"** means any quality manual in force from time to time in accordance with Clause 33.1.

**"Quarter"** means a period of three calendar months beginning on 1st January, 1st April, 1st July or 1st October and **"Quarterly"** shall be construed accordingly.

**"Record"** means any record maintained or updated in accordance with Clause 35.1.

**"Rectification Period"** means the period in respect of any Unavailability Category specified in the Unavailability Calculation Table, provided that:

- (1) where the relevant period commences during the Usual Hours of Business and will end outside the same, the period shall be extended until the Usual Hours of Business next commence, being in aggregate not less than the period referred to in the Unavailability Calculation Table; and
- (2) where the relevant period commences outside the Usual Hours of Business, the period shall be the period until the Usual Hours of Business next commence, unless such period would be less than the relevant period specified in the Unavailability Calculation Table, in which case, the latter will apply.

**"Regular Day Patient Attendance"** means the attendance at the Hospital by a patient (other than any Private Patient), including a renal dialysis patient for a course of treatment on a regular calendar day basis, unless the patient remains at the Hospital overnight.

**"Reimbursable Expenses"** has the meaning given in the Facilities Management Agreement.

**"Reinstatement Period"** has the meaning given in paragraph 3.2.1 of Part 4 of Schedule 7.

**"Relevant Transfer"** has the meaning given in the Facilities Management Agreement.

**"Relief Event"** means any of those events specified in Part 3 of Schedule 8.

**"Registration"** means the obtaining of all necessary approvals, certificates and registrations in connection with the whole or any part or parts of the Hospital and its or their operation as an NHS facility, including any such related to Medical Equipment, medical gases and related plant and equipment.

**"Remedial Period"** has the meaning given in Clause 36.1.

**"Report"** means any report given in accordance with Clause 34.1.

**"Reporting Periods"** means any six month period from 1st April to 30th September or 1st October to 31st March following the Phase 1 Completion Date except that the first Reporting Period shall be the period from the Phase 1 Completion Date to the earlier of 31st March or 30th September and the last Reporting Period shall be the period from the expiry of the penultimate Reporting Period to the Termination Date (all dates inclusive).



**"Required Performance Standard"** has the meaning given in the Facilities Management Agreement.

**"Rescheduling Delay Event"** means a Delay Event of the type described in paragraph 3 or 4 of Part 1 of Schedule 14.

**"Rescheduling Period"** means, as calculated following the occurrence of a Rescheduling Delay Event, the aggregate of all extensions of time allowed to the Project Co pursuant to Clause 10.5.1(A) in respect of all Rescheduling Delay Events which have then occurred (including the Rescheduling Delay Event leading to such calculation), such period not to exceed six months.

**"Rights in respect of land"** means any right over or in respect of or otherwise relating in any way to land, whether temporary, revocable, legal, equitable or otherwise of whatever nature.

**"Room Data Sheets"** means the room data sheets in respect of the Hospital listed at paragraph 4 of Part 1 of Schedule 5 as developed in accordance with paragraph 2.3.1(C) of Part 3 of Schedule 5.

**"RPI"** means the United Kingdom General Index of Retail Prices (for all items) as published by the Office of National Statistics (January 1987 = 100) from time to time or, failing such publication, such other index as may replace or supersede the same or, in the absence of a replacement or superseding index, such other appropriate index as the Parties may agree provided that, until such time as the RPI Hedging Agreement has terminated, in the event of the RPI being revised to a new base, its publication being delayed, its being replaced or superseded or ceasing to be published or fundamentally changed (as contemplated by Clause 25.4.1 (B) of the Beneficiaries' Direct Agreement), RPI shall be determined in accordance with Clause 25 of the Beneficiaries' Direct Agreement.

**"RPI Hedging Agreement"** means the Hedging Agreement entered into on or about 11<sup>th</sup> December, 2003 between (1) Project Co and (2) Dexia Bank Belgium S.A.

**"RPIX"** means the Retail Prices Index as published by the Office for National Statistics from time to time, in respect of all items excluding mortgage interest payments or, failing such publication, such other index as may replace or supersede the same or, in the absence of a replacement or superseding index, such other appropriate index as the Parties may agree.

**"RTPA"** means the Restrictive Trade Practices Act 1976.

**"Schedule of Accommodation"** means the schedule of accommodation included in the Trust's Requirements.

**"Security Trust and Intercreditor Deed"** has the meaning given in the Collateral Deed.

**"Security Trustee"** has the meaning given in the Collateral Deed.

**"Senior Creditors"** means the Senior Creditors as defined in the Security Trust and Intercreditor Deed or, on or after the Senior Discharge Date, any secured creditors of

the Project Co, from time to time, ranking ahead (either by way of security or intercreditor arrangements) of all other Funders, including other secured creditors.

**"Senior Discharge Date"** has the meaning given in the Beneficiaries' Direct Agreement.

**"Senior Funding Agreements"** means the following documents which are Funding Agreements:

- (A) the Collateral Deed;
- (B) the Bond Documents;
- (C) the Security Trust and Intercreditor Deed;
- (D) the Swap Financial Guarantee;
- (E) the Swap Guarantee and Indemnity Agreement;
- (F) the Financial Guarantee;
- (G) the Indemnification Agreement;
- (H) the Guarantee and Indemnity Agreement;
- (I) the Security Documents;
- (J) the Fees Letters;
- (K) each Hedging Agreement (including the Existing Barclays Swap);
- (L) the Accounts Agreement;
- (M) the Issuer On-Loan Agreement;
- (N) each Direct Agreement; and
- (O) the Investment Management Agreement,

(in each case (save as otherwise defined in this Agreement), as defined in the Collateral Deed).

**"Senior Loan Life Cover Ratio"** means such ratio as calculated in the Financial Model and designated "Sr LLCR" therein.

**"Serious Fire Occurrence"** means any outbreak of fire at the Hospital involving death or serious injury, closure of a ward or significant part of the Hospital or the destruction of a significant part of any room at the Hospital.

**"Service Completion Certificate"** has the meaning given in Clause 17.10.9.

**"Service Equipment"** means equipment and apparatus to be provided in order to undertake the Services in accordance with the Facilities Management Agreement (other than that which is to be provided as part of the Works).

**"Service Fees"** has the meaning given in the Facilities Management Agreement.

**"Service Provider"** means a person appointed by the Facilities Manager to provide all or part of any Service.

**"Services"** has the meaning given in the Facilities Management Agreement.

**"Services Connections"** means the matters referred to in Clauses 14.6.1 to 14.6.4 (inclusive).

**"Service Variation"** has the meaning given in the Facilities Management Agreement.

**"Site"** means the freehold land comprising 65 acres or thereabouts at Colney Lane in the parish of Colney, Norwich, Norfolk comprising enclosure numbers 0078,0003, 0024 and part 7000 on the Ordnance Survey Map (Current Edition as at April 1989) for the Parish of Colney, as the same is more particularly delineated on the plan annexed to the conveyance dated 28th April, 1989 between M.P. Kemp Limited and the Secretary of State for Health.

**"Snagging Matters"** has the meaning given in Clause 17.10.2(B)(1).

**"Snagging Matters Amount"** has the meaning given in Clause 17.10.2(B)(2).

**"Snagging Notice"** has the meaning given in Clause 17.10.2(B).

**"SofS Intentions and Policy Objectives"** means the following intentions and policy objectives of the Secretary of State:

- (A) that the NHS Executive, acting on behalf of the Secretary of State, seeks to ensure that National Health Service trusts are always able to fulfil their responsibilities;
- (B) that the intention of the NHS "purchaser/provider" system is not to affect adversely the position of third party creditors and that all valid third party claims have been and will continue in the future to be paid;
- (C) that, although the Secretary of State has wide duties of consultation in respect of trust mergers and dissolutions and cannot fetter his discretion as to how he exercises his powers, if any National Health Service trust were unable to meet its obligations (including its liabilities to its PFI contractors or their financiers), the Secretary of State would intervene in a timely manner to ensure that either the National Health Service trust itself, or any body to which its liabilities are transferred in accordance with the relevant legislation, is in a position to meet its liabilities on time and in full;
- (D) that the Secretary of State would not stand by and do nothing in circumstances where a National Health Service trust was unable to meet its obligations given the statutory responsibilities of the Secretary of State.

**"Spens Acceleration Event"** has the meaning given in Condition 8.

**"SPENS Amount"** means the amount by which (A) the Default Amount in respect of the Bonds exceeds (B) the Outstanding Principal Amount of the Bonds where the Bonds are redeemed in accordance with Condition 5 (c) or Condition 8, in either case, following a Spens Acceleration Event.

"**Staff**" has the meaning given in the Facilities Management Agreement.

"**Standing Instructions and Procedures**" has the meaning given in the Facilities Management Agreement.

"**Start Up Matters**" has the meaning given in the Facilities Management Agreement.

"**Start Up Criteria**" has the meaning given in Clause 17.10.1(C)(3).

"**Step-in Date**" has the meaning given in the Beneficiaries' Direct Agreement.

"**Step-in Notice**" has the meaning given in the Beneficiaries' Direct Agreement.

"**Subsidiary**" has the meaning given to it in Section 736 Companies Act 1985 as amended by Section 144 Companies Act 1989. Notwithstanding the provisions of Clause 1.2.5, this definition shall not be changed in the event of an amendment to the definition of "subsidiary" contained in the Companies Act 1985 as amended by the Companies Act 1989, whether by any subordinate legislation or otherwise.

"**Supplemental Project Documents**" means the supplemental agreements in respect of the Project Agreement and the Facilities Management Agreement, in each case made on the Amendment Execution Date between (1) the Trust and (2) the Project Co.

"**Systems Selection Process**" has the meaning given in the IT Agreement.

"**Target Date**" has the meaning given in paragraph 3.2.3(B) of Part 4 of Schedule 7.

"**Taxes**" includes all present and future income and other taxes, levies, imposts, deductions, charges, compulsory loans and withholdings in the nature of taxes whatsoever, together with interest thereon and penalties with respect thereto (if any) and any payments made on or in respect thereof and "**Tax**" and "**Taxation**" shall be construed accordingly.

"**Technical Adviser**" has the meaning given in the Collateral Deed.

"**Telecommunications Network**" means any network for the Trust's internal requirements at the Hospital for voice, data, image and/or video communications and/or for the distribution of any other communication media which may from time to time be capable of being distributed utilising such network.

"**Termination Date**" means the date upon which this Agreement terminates in accordance with its terms.

"**Termination Notice**" has the meaning given in the Beneficiaries' Direct Agreement.

"**Termination Payment**" has the meaning given in Clause 46.2.

"**Terrorism**" means any act of any person acting on behalf of or in connection with any organisation with activities directed towards the overthrowing or influencing of any government de jure or de facto by force or violence.

"**Third Party Investor**" means any person which holds shares of whatever class in the share capital of the Project Co or the Project Co's immediate parent company, from time to time, other than any Consortium Member.

**"Third Party Supplier"** means a supplier of goods or services to the Trust and/or any tenant or licensee of the Commercial Areas, other than the Project Co or any subcontractor of the Project Co carrying out Operations or performing obligations pursuant to the IT Agreement.

**"Total Annual Debt Service Cover Ratio"** means such ratio as is calculated in the Financial Model and designated "Tot ADSCR fore" therein.

**"Total Debt Concession Life Cover Ratio"** means such ratio as is calculated in the Financial Model and designated "Tot CLCR" therein.

**"Total Number of Unavailability Units"** means the total number of Unavailability Units in respect of any Unavailability Category specified in the Unavailability Calculation Table.

**"Transfer Date"** has the meaning given in the Facilities Management Agreement.

**"Transfer Regulations"** has the meaning given in the Facilities Management Agreement.

**"Transferred Equipment"** has the meaning given in the IT Agreement.

**"Transport"** means collecting from its existing location, handling and transporting it to its final location within the Hospital or to a storage place agreed between the Parties, including insurance in transit and **"Transportation"** shall be construed accordingly.

**"Trust's Adviser"** means the Trust's Works Adviser where referred to in the context of the design, development, construction, completion, commissioning or testing of the Works or any activities under the Project Documents related thereto and, in all other circumstances, the Trust's Facilities Adviser.

**"Trust's Change of Law Adjustment Confirmation"** means a notice issued pursuant to Clause 14.8 of the Facilities Management Agreement or Clause 29.8 (as the case may be).

**"Trust's Change of Law Adjustment Notice"** means a notice issued pursuant to Clause 14.4 of the Facilities Management Agreement or Clause 29.4 (as the case may be).

**"Trust's Employees"** has the meaning given in the Facilities Management Agreement.

**"Trust's Facilities Adviser"** means the person identified as such in Clause 48.1 or such substitute as may be appointed by the Trust for the time being pursuant to Clause 32.3.

**"Trust's Fire Safety Adviser"** means any person notified to the Project Co from time to time as being a specialist fire safety adviser appointed by the Trust for advising on any fire safety matters and/or for monitoring fire precautions at the Hospital.

**"Trust's Nominated Fire Officer"** means a person notified to the Project Co from time to time as being an employee of the Trust with responsibility for fire safety and fire precautions at the Hospital.

**"Trust's Notice of Variation"** has the meaning given in Clause 16.2.

**"Trust's Requirements"** means the Trust's requirements in respect of the design of the Works as at the Amendment Execution Date, as set out in Part 1 of Schedule 5.

**"Trust's Security Strategy and Policy"** has the meaning given in the IT Agreement.

**"Trust's Variation Confirmation"** has the meaning given in Clause 16.6.3.

**"Trust's Works Adviser"** means the person identified as such in Clause 48.1 or such substitute as may be appointed by the Trust for the time being pursuant to Clause 32.3.

**"UEA Agreement"** means a deed dated 2nd July, 1997 made between (1) Norfolk County Council, (2) the Trust and (3) the University of East Anglia.

**"UEA Deed of Grant"** means the deed of grant in relation to foul and surface water drainage dated 27th September, 1990 and made between (1) the University of East Anglia and (2) the Secretary of State for Health.

**"Unavailable"** means in relation to any Unavailability Unit that the same is not available for use by the Trust during the Usual Hours of Business for the relevant Unavailability Unit for the purpose contemplated by the Project Documents and is not being used by the Trust for that purpose, other than:

- (A) by reason of any breach by the Project Co in the performance of its obligations under the Facilities Management Agreement, excluding its obligations in respect of the Maintenance of Buildings and Engineering Services; or
- (B) pursuant to any planned maintenance, repair or renewal carried out by the Project Co in accordance with the Annual Programme or by HBO(UK) in accordance with the IT Annual Programme (but not any reinstatement works to the extent that the Project Co receives insurance proceeds in respect thereof derived from the advance loss of profits or business interruption insurances effected pursuant to Clause 24); or
- (C) by reason of the acts or omissions of any statutory undertaker, local authority, utilities company or other similar body, provided that the Project Co shall not be in breach of any obligation hereunder to provide outage or standby facilities in respect of the relevant act or omission; or
- (D) by reason of inspection or testing carried out by or on behalf of any government or quasi-governmental organisation pursuant to any Law or NHS Requirement but so that the Project Co will use reasonable endeavours to minimise the effect of such inspection or tests and, for the avoidance of doubt, this exclusion (without limitation to (B) above) shall not extend to any unavailability flowing from the results of any such inspection or testing; or

- (E) as a result of the acts or omissions of the Trust (including any breach by the Trust of its obligations under Clause 17.4) or any of its agents or employees acting in the course of employment; or
- (F) pursuant to the execution of any Post-Completion Variation Works; or
- (G) by reason of any action required to be undertaken in consequence of a Major Incident; or
- (H) by reason of the execution of works to undertake or remedy Snagging Matters, provided that the same are undertaken in accordance with a planned programme; or
- (I) by reason of the provision of services or execution of works or services provided or works executed by Third Party Suppliers or the execution of works or works executed by the Trust; or
- (J) by reason of the occurrence of Force Majeure; or
- (K) by reason of a failure by the Project Co or McKesson to comply with its obligations under the IT Agreement in respect of the IT Services; or
- (L) by reason of execution of or failure to execute any matters referred to in the Decant and Commissioning Programme which the Decant and Commissioning Programme shows are to be undertaken during a specified period after any Date for Completion, provided that if the corresponding Completion Date occurs either before or after the Date for Completion, the Project Co shall be entitled to rely upon this exception to the extent that any such matters are undertaken as if the corresponding Completion Date were the Date for Completion, mutatis mutandis; or
- (M) by reason of New Medical Contamination

and **"Unavailability"** shall be construed accordingly.

**"Unavailability Calculation Table"** means the table at paragraph 2.13 of Part 4 of Schedule 6.

**"Unavailability Category"** means a category of Works at the Site, as identified in the Unavailability Calculation Table.

**"Unavailability Deduction Notice"** has the meaning given in paragraph 2.6 of Part 4 of Schedule 6.

**"Unavailability Deduction (%)"** has the meaning given in paragraph 2.6.3 of Part 4 of Schedule 6.

**"Unavailability Event"** has the meaning given in paragraph 2.1 of Part 4 of Schedule 6.

**"Unavailability Event (%)"** has the meaning given in paragraph 2.6.2 of Part 4 of Schedule 6.

**"Unavailability Notice"** has the meaning given in paragraph 2.1 of Part 4 of Schedule 6.

**"Unavailability Response"** has the meaning given in paragraph 2.8 of Part 4 of Schedule 6.

**"Unavailability Unit"** means a unit in respect of any Unavailability Category identified in the Unavailability Calculation Table.

**"Up-front Cost Item"** has the meaning given in the Facilities Management Agreement.

**"Usage Fee"** means an amount in respect of a Contract Month determined in accordance with Part 1 of Schedule 6, as adjusted from time to time in accordance with the Project Documents.

**"Usage Fee Deduction"** has the meaning given in paragraph 2.6.5 of Part 4 of Schedule 6.

**"Usage Fee Deduction (%)"** has the meaning given in paragraph 2.6.4 of Part 4 of Schedule 6.

**"Usage Fee (Maintenance)"** means an amount in respect of a Contract Month determined in accordance with paragraph 2 of Part 1 of Schedule 6.

**"Usage Fee Weighting"** means the percentage in respect of any Unavailability Category identified in the Unavailability Calculation Table.

**"Used Fixed Equipment"** means fixed equipment for the Hospital which has been used by the Trust before being made available to the Project Co at the Site (excluding the Fix-Only Items and all Medical Equipment). "Fixed" in this context means any item to be permanently fixed to the fabric of the Works or attached to a fixing permanently attached to the fabric of the Works.

**"Used Medical Equipment"** means Medical Equipment for the Hospital which has been used by the Trust before its delivery to the Site in accordance with Clause 18.2.1(B).

**"Used Other Equipment"** means non-fixed equipment and apparatus for the Hospital which has been used by the Trust before its delivery to the Site in accordance with Clause 18.2.1(C).

**"Usual Hours of Business"** means the usual hours of the day and/or night during which any Unavailability Unit is used or would be used by the Trust if it were not Unavailable for the purposes contemplated by the Project Documents, as evidenced by the applicable policies and practices of the Trust.

**"Variation"** means, during the Design and Construct Phase, any change to the Trust's Requirements and/or the Works specified in the Design Documents and/or any other works at the Site and, during the Operational Phase, any change to the Hospital or other works at the Site.

**"Variation Saving"** means a Design and Construct Phase Variation Saving or an Operational Phase Variation Saving (as the case may be).



"**Variation Financing Cost**" has the meaning given in Clause 16.4.1(E).

"**Variation Financing Saving**" has the meaning given in Clause 16.4.1(F).

"**Variation Usage Fee Costs**" has the meaning given in Clause 16.4.1(G).

"**Variation Usage Fee Savings**" has the meaning given in Clause 16.4.1(G).

"**VAT**" means value added tax as referred to in Section 1 Value Added Tax Act 1994 or any similar tax replacing the same.

"**Working Day**" means a day (other than a Saturday or Sunday) on which banks are open for business in the City of London.

"**Works**" means the Phase 1 Works and the Phase 2 Works.

"**Wrap-Up Agreements**" has the meaning given in the Collateral Deed.

## 1.2 Construction

Save to the extent that the context or the express provisions of this Agreement otherwise require:

- 1.2.1 headings and sub-headings are for ease of reference only and shall not be taken into consideration in the interpretation or construction of this Agreement;
- 1.2.2 all references to Clauses and Schedules are references to clauses of and schedules to this Agreement and all references to Parts, Sections, paragraphs, Annexes or Appendices are references to parts, sections and paragraphs contained in and annexes and appendices to the Schedules;
- 1.2.3 the Schedules to this Agreement are an integral part of this Agreement and reference to this Agreement includes reference thereto;
- 1.2.4 all references to agreements, documents or other instruments include (subject to all relevant approvals) a reference to that agreement, document or instrument as amended, supplemented, substituted, novated or assigned from time to time;
- 1.2.5 all references to any statute or statutory provision shall include references to any statute or statutory provision which amends, extends, consolidates or replaces the same and shall include any orders, regulations, codes of practice, instruments or other subordinate legislation made under the relevant statute or statutory provision;
- 1.2.6 any reference to time of day shall be a reference to London time;
- 1.2.7 the words "**herein**", "**hereto**" and "**hereunder**" refer to this Agreement as a whole and not to the particular Clause, Schedule, Part, Section, paragraph or Annex in which such word may be used;
- 1.2.8 words importing the singular include the plural and vice versa;

- 1.2.9 words importing a particular gender include all genders;
- 1.2.10 "**person**" includes any individual, partnership, firm, trust, body corporate, government, governmental body, authority, agency or unincorporated body of persons or association;
- 1.2.11 any reference to a public organisation (other than the Trust) shall be deemed to include a reference to any successor to such public organisation or any organisation or entity which has taken over the functions or responsibilities of such public organisation;
- 1.2.12 references to "**Party**" means a party to this Agreement;
- 1.2.13 all monetary amounts are expressed in pounds sterling;
- 1.2.14 references to the word "**includes**" or "**including**" are to be construed without limitation;
- 1.2.15 references to a document being "**in the Agreed Form**" means in the form of a draft of such document initialled for the purpose of identification by or on behalf of the Parties;
- 1.2.16 references to "**sub-contractors**" are to subcontractors of any tier;
- 1.2.17 the obligations of either Party under this Agreement are to be performed at that Party's own cost and expense;
- 1.2.18 terms defined for the purposes of the National Health Service (Residual Liabilities) Act 1996 shall have the same meanings in this Agreement; and
- 1.2.19 during the Operational Phase, references to leaving a Party "**in no better and no worse position**" shall, in respect of the Project Co, be construed by reference to its rights, duties and liabilities and ability to perform its obligations under the Project Documents, the Ancillary Documents and the IT Agreement and ensuring that its financial condition is no better and no worse than if the relevant event had not occurred and that its ability to meet the financial cover ratios projected immediately before the relevant event pursuant to the Funding Agreements and to achieve the real rate of equity return projected immediately before the relevant event, would not be adversely affected.
- 1.2.20 the interest rate applicable under the Guarantee and Indemnity Agreement and the Swap Guarantee and Indemnity Agreement shall be treated as a non-default interest rate unless (and then to the extent that) interest accrues thereunder on amounts due but unpaid as a result of the exercise by the Controlling Creditor of a voluntary right to redeem any or all of the Bonds and/or the early termination by the Controlling Creditor of any Hedging Agreement, in which case, the interest rate applicable under the Guarantee and Indemnity Agreement and the Swap Guarantee and Indemnity Agreement shall (to that extent) be treated as a default interest rate and the relevant non-default interest rate for the purposes of the definitions of "Outstanding Debt" and "Default Interest" shall be the non-default interest rate applicable to the Bonds;

- 1.2.21 the interest rate applicable under any Hedging Agreement upon its termination shall be treated as a non-default interest rate, except to the extent that the relevant interest rate as calculated in accordance with the Hedging Agreement exceeds the default rate payable under any Hedging Agreement entered into on or about 11<sup>th</sup> December, 2003 or, in the case of the Existing Barclays Swap, in its form as amended on or about such date;
- 1.2.22 references to Conditions are to Conditions of the Bonds as set out in the Bond Trust Deed; and
- 1.2.23 references to the Collateral Deed, the Bond Documents, the Guarantee and Indemnity Agreement and the Swap Guarantee and Indemnity Agreements are to those documents in the form originally entered into on or about 11th December, 2003.

## **2. CONDITIONS PRECEDENT AND DEVELOPMENT COSTS**

### **2.1 Agreement Conditional**

Except for Clause 1 (Definitions and Construction), this Clause 2, Clause 3 (Duration), Clause 4 (Planning Approval, Land Acquisition and Highway Costs), Clause 5 (Funding Agreements, Other Agreements and Financial Model), Clause 10.8 (Drop Dead Dates), Clause 11.3 (Continuing Development), Clause 14 (The Site), Clause 16.1.2 (Variations), Clause 18.1 (Planning) save where otherwise indicated, Clause 19.1.3 (CDM Regulations), Clause 48 (Notices), Clause 52 (Confidentiality), Clause 56 (Whole Agreement) and Clause 66 (Governing Law and Jurisdiction), the obligations of the Parties hereunder shall be conditional upon the occurrence of the Effective Date.

### **2.2 Satisfaction of Conditions Precedent**

- 2.2.1 On the date the Conditions Precedent listed in paragraph 1 of Schedule 2 have been satisfied, the Trust shall notify the Project Co of the same.
- 2.2.2 On the date the Conditions Precedent listed in paragraph 2 of Schedule 2 have been satisfied, the Project Co shall notify the Trust of the same.
- 2.2.3 On the date the Conditions Precedent listed in paragraph 3 of Schedule 2 have been satisfied, each Party shall confirm the same to the other Party.

### **2.3 Waiver of Condition Precedent**

The Project Co shall have the right by service of notice on the Trust at any time on or after the Commencement Date to waive the whole or any part of the Condition Precedent set out in paragraph 3.3 of Schedule 2.

### **2.4 Long-Stop Date**

If the Effective Date has not arisen, the Project Documents in their entirety shall terminate automatically on 9th January, 1998 (or on such later date as may be agreed between the Parties unless, at such date, the outcome of any Proceedings is awaited, in which case the date shall be the date which is one month after the Final Determination of any Proceedings, save that, if the Effective Date has not occurred by

9th January, 1998, each Party shall have the right to determine the Project Documents in their entirety by the service of notice in writing on the other Party.)

## 2.5 Development Costs

2.5.1 In consideration of the Trust entering into the Project Documents, the Project Co shall pay the Trust a fee of one million pounds (£1,000,000) within 10 Working Days of the later of the Effective Date and the date of receipt of a relevant valid VAT invoice. Such amount shall reflect costs and expenses incurred by the Trust before the Execution Date, in connection with the Project.

2.5.2 In consideration of the Trust entering into the Supplemental Project Documents, the Project Co shall pay the Trust a fee of £704,877.44 within 10 Working Days of the later of the Amendment Execution Date and the date of receipt of a relevant valid VAT invoice. Such amount shall reflect costs and expenses incurred by the Trust before the Amendment Execution Date, in connection with the Project.

## 2.6 Capital Contribution

In consideration of the Project Co entering into the Supplemental Project Documents, the Trust shall pay the Project Co:

2.6.1 £700,000 within 10 Working Days of the later of the Amendment Execution Date and the date of receipt of a relevant valid VAT invoice; and

2.6.2 £306,000 within 10 Working Days of the later of the date which is six months after the Amendment Execution Date and the date of receipt of a relevant valid VAT invoice.

## 2.7 Agreement

For the avoidance of doubt, during the period from the Commencement Date to the Effective Date, the Disputes Resolution Procedure shall not apply and all matters which are to be agreed between the Parties shall either be agreed or not agreed (as appropriate).

## 3. DURATION

### 3.1 Expiry of Term

This Agreement shall commence on the Commencement Date and terminate automatically upon the expiry of the Contract Period.

### 3.2 Deemed Performance

During the period from the Commencement Date to the Execution Date, performance by a Party of its rights and obligations under the Former Project Agreement shall be deemed to constitute performance of that Party's rights and obligations under this Agreement.

**3.3 Cancellation**

The Former Project Agreement shall be cancelled on the Execution Date, with effect from the Commencement Date.

**3.4 Breaches**

Without prejudice to Clause 3.2, no breach of the Former Project Agreement shall be a breach of this Agreement and each Party waives any such breach on the part of the other Party and neither Party shall have any liability to the other in respect of the Former Project Agreement.

**3.5 Break Options**

3.5.1 The Trust shall have options to terminate the Project Documents in their entirety:

- (A) on 8<sup>th</sup> January, 2037.
- (B) on 8<sup>th</sup> January, 2042.
- (C) on 8<sup>th</sup> January, 2052.

3.5.2 The options referred to in Clause 3.5.1 shall each be exercisable by the Trust serving notice on the Project Co not less than 12 months before the relevant termination date.

**4. PLANNING APPROVAL, LAND ACQUISITION AND HIGHWAY COSTS**

**4.1 Planning Approval**

4.1.1 The Project Co shall use all reasonable endeavours to obtain any Planning Approval.

4.1.2 For the purposes of Clause 4.1.1, "**all reasonable endeavours**" means that the Project Co shall incur such expenditure and, where Proceedings arise and Leading Counsel has advised that, in all the circumstances, there is a reasonable prospect of success and it is reasonable in all the circumstances to do so, take such steps in the context of those Proceedings to secure or preserve the grant of any Planning Approval, in each case, as may be reasonably necessary.

4.1.3 The Project Co shall not:

- (A) submit any appeal to the Secretary of State in respect of any Planning Application without obtaining the prior consent of the Trust (not to be unreasonably withheld or delayed); or
- (B) vary any Planning Application without the approval of the Trust (such approval not to be unreasonably withheld or delayed).

4.1.4 The Trust shall:

- (A) use all reasonable endeavours to assist the Project Co in obtaining any Planning Approval, provided that, without prejudice to the Project Co's

obligations under Clause 2.5, this obligation shall not extend to the expenditure of monies on the part of the Trust other than the reasonable costs of management; and

- (B) at all times, at the reasonable request of the Project Co, support any application for any Planning Approval and support the Project Co in any reasonable lobbying or publicity in relation thereto carried out by or on behalf of the Project Co.

4.1.5 Where the Trust has approved plans or specifications for the purposes of any Planning Application and the Project Co produces Design Documents which accord with those approved plans or specifications, the Trust shall be bound by the prior approval and shall not be entitled to require the Project Co to produce something different, other than by way of Variation.

4.1.6 With effect from the Effective Date, the Project Co shall comply with all conditions to any Planning Approval. The Project Co shall not be obliged to comply with the obligations contained in the Planning Agreement made on 20th December, 1996, under Section 106 of the Town and Country Planning Act 1990 relating to public transport. The obligation to provide the bus service shall remain with the Trust, including the obligation to ensure that the bus service is provided in accordance with such Planning Agreement on or before the Phase 1 Completion Date. The Trust shall provide the Project Co with regular updates on the progress of the arrangements relating to the provision of the bus service through the Liaison Procedure.

4.1.7 Each Party shall use all reasonable endeavours to procure that the liability of the Trust as a covenantor in any Planning Agreement is limited to seisin and is conditional upon Implementation.

4.1.8 The Trust shall, where necessary, enter into any Planning Agreements provided that:

- (A) with effect from the Effective Date, the Project Co shall indemnify and keep indemnified the Trust in respect of any costs incurred by the Trust in performing any obligations thereunder as a result of breach by the Project Co of its obligations under Clause 4.1.7.
- (B) the terms of any Planning Agreement to which the Trust is to be a party shall be subject to the approval of the Trust (not to be unreasonably withheld or delayed).
- (C) their effect (other than as to the payment of legal and other related costs) is conditional upon Implementation of any Planning Approval.

4.1.9 If either Party considers that the planning approval granted by the relevant local planning authority pursuant to any Planning Application is subject to any condition or any Planning Agreement which is not acceptable to it (acting reasonably), it shall serve notice thereof on the other Party prior to the expiration of 10 Working Days following the grant thereof and, if neither Party serves such a notice within such period of 10 Working Days, the planning approval shall irrevocably be deemed to be a Planning Approval as defined in Clause 1.1.

4.1.10 At the request of the Project Co, the Trust shall enforce the obligations of the Norfolk County Council contained in the two Planning Agreements each dated 20th December, 1996 which relate to highway matters and public transport respectively.

## 4.2 Land Acquisition

4.2.1 The Trust shall, subject to the prior grant of any Planning Approval (with no notice being served pursuant to Clause 4.1.9) use all reasonable endeavours to acquire the land and any rights needed for the construction and dedication of the Highway Works (but not any agreement with statutory undertakers, bonds, construction contracts, statutory consents, orders, licences, insurance or any other such matters) which are the subject of any Planning Agreement or any Planning Approval, save to the extent that the same are already owned by the Trust or the highway authority.

4.2.2 At any time after the Commencement Date and during the subsistence of the Project Documents or any of them, the Trust shall not, without the consent of the Project Co (which consent shall not be unreasonably withheld or delayed) grant any interest or right in the Site or otherwise encumber the Site insofar as such rights, interests or encumbrances would materially adversely affect the ability of the Project Co to perform its obligations under the Project Documents or materially increase the net cost of performing such obligations, provided always that this Clause shall not apply to the grant of any lease or licence of the Commercial Areas or any part thereof by the Trust or to the grant of any Lease or IT Lease.

4.2.3 The Trust shall, forthwith on receipt of the same, supply the Project Co with copies of all notices, orders, resolutions, restrictions, agreements, directions and proposals made in respect of the Site, save to the extent that these have been originated by the Project Co, the Contractors or any of their sub-contractors.

## 4.3 Highway Works and Services Connections

4.3.1 As soon as practicable after the Effective Date, the Project Co shall procure that:

(A) detailed designs for the Highway Works are prepared and submitted to the Trust for approval, it being acknowledged by the Parties that the relevant Planning Agreement will require the Trust to obtain the approval of the Norfolk County Council to the designs. The Design Development Procedure shall, *mutatis mutandis*, apply to the preparation and approval of such designs. The Trust accepts that the requirements of the Norfolk County Council shall be paramount;

(B) detailed plans for the Services Connections are prepared and submitted to the Trust for approval in accordance with and subject to the Design Development Procedure, by reference to the plan shown at Appendix E to Schedule 5.

4.3.2 The Project Co shall instruct the Building Contractor to supervise the construction of the Highway Works and the execution of the Services

Connections and, in each case, shall procure that sub-contractors are selected pursuant to an open market tender process conducted in accordance with Clause 4.3.3.

- 4.3.3 Following finalisation of the designs pursuant to Clause 4.3.1(A), the Parties (both acting reasonably) shall meet to discuss and agree the number and identity of prospective tenderers for constructing the Highway Works and the form and requirements of the proposed tender documents, including the proposed form of contract between the Project Co and the Building Contractor, which contract shall include obligations reflecting those set out in Clause 4.6.
- 4.3.4 Following finalisation of the plans pursuant to Clause 4.3.1(B), the Parties (both acting reasonably) shall meet to discuss and agree the number and identity of prospective tenderers for executing the Service Connections and the form and requirement of the proposed tender documents, including the proposed form of contract between the Project Co and the Building Contractor, which contract shall include obligations reflecting those set out in Clause 4.6.
- 4.3.5 The Project Co shall procure that the Building Contractor conducts the tendering processes and selects sub-contractors pursuant to Clauses 4.3.3 and 4.3.4 with the approval of the Trust (not to be unreasonably withheld or delayed).
- 4.3.6 Following such selection, the Project Co shall procure that the Building Contractor employs the relevant sub-contractors:
  - (A) to construct the Highway Works pursuant to a contract with the Project Co in the form agreed or determined pursuant to Clause 4.3.3; and
  - (B) to execute the Services Connections pursuant to a contract with the Project Co in the form agreed or determined pursuant to Clause 4.3.4.
- 4.3.7 The Trust shall comply with the terms of Clauses 4, 5 and 10 of the Highways Works Agreement and paragraph 18(i)(a) of Schedule 2 to the Highways Works Agreement, in each case in accordance with their terms.
- 4.3.8 The Project Co shall comply with the Highway Works Agreement to the extent that obligations contained in the Highway Agreement are not the responsibility of Norfolk County Council pursuant to that Agreement or the responsibility of the Trust pursuant to this Agreement. Without prejudice to any of its other obligations hereunder, the Project Co shall use reasonable endeavours to procure that those works comprised within the Highway Works and required to be carried out by the Trust pursuant to the UEA Agreement shall be carried out and completed in accordance with the terms and conditions of the UEA Agreement.

#### 4.4 **Payment**

- 4.4.1 From time to time, the Project Co shall provide the Trust with such evidence as the Trust may reasonably require of amounts which are due to the Building Contractor in respect of the Highway Works or the Services Connections or



reasonably and properly incurred by the Project Co in complying with its obligations in Clause 4.3.8.

- 4.4.2 In relation to such amounts, the Project Co shall pay to the Building Contractor in respect of each Quarter specified in Part 2 of Schedule 15, an amount of up to the amount specified for that Quarter in the same. Where the amount due to the Building Contractor in respect of such Quarter exceeds the amount specified in Part 2 of Schedule 15 (as adjusted pursuant to Clause 4.4.3), the Trust shall, within 10 Working Days of demand by the Project Co, pay the amount of such excess to the Project Co.
- 4.4.3 Where the amount due to the Building Contractor in respect of any Quarter is less than the amount specified in Part 2 of Schedule 15 (as may previously have been adjusted pursuant to this Clause 4.4.3), the amount of the difference shall be added to the amount specified for the next following Quarter in Part 2 of Schedule 15.
- 4.4.4 Where any amount is incurred by the Project Co in respect of public liability insurance in complying with its obligations in Clause 4.3.8, the Trust shall, within 10 Working Days of demand by the Project Co accompanied by satisfactory evidence of the amount so incurred, pay such amount to the Project Co.
- 4.4.5 Following completion of the Highway Works in accordance with the Design Documents and completion of the Services Connections in accordance with Clause 14.6, the Project Co will compare the payments made by it to the Building Contractor, less any repayment due pursuant to paragraph 5 of Part 3 of Schedule 2 to the Building Contract, against the dates and amounts of the total payments in respect of Highway Works and Services Connections assumed in Part 2 of Schedule 15.
- 4.4.6 After any comparison pursuant to Clause 4.4.5, the Project Co will notify the Trust as to whether there will be any reduction in cost to the Project Co arising by reason of the relevant payment(s) being made on a date or dates and in an amount or amounts different to those assumed in Part 2 of Schedule 15 and by reason of any repayment due pursuant to paragraph 5 of Part 3 of Schedule 2 to the Building Contract. Following the issue of any notice by the Project Co the Parties shall liaise in accordance with Liaison Procedure to seek to agree the amount of the relevant reduction in costs. Where any such matter is not agreed within 10 Working Days, the Dispute shall be referred to the Disputes Resolution Procedure.
- 4.4.7 Once any reduction in costs to the Project Co has been agreed or determined, the Project Co shall account for the same to the Trust through an adjustment to the Usage Fee made in accordance with Clause 4.5. Such adjustment will be made by the Project Co and notified to the Trust within five Working Days of the end of the relevant Quarter.

#### 4.5 Usage Fee

- 4.5.1 Where an adjustment to the Usage Fee is to be made pursuant to Clause 4.4, the Project Co shall re-run the Financial Model and ascertain the impact of the

actual payment made by the Project Co on the Usage Fee by inputting the change in real (and, where relevant, nominal) costs for all affected periods.

- 4.5.2 Following the re-running of the Financial Model pursuant to Clause 4.5.1, the Project Co shall notify the Trust of the adjustments to the Usage Fee necessary to ensure the Maintenance of Ratios as a result of the relevant changes.

#### 4.6 **John Innes Obligations**

- 4.6.1 Without prejudice to any other obligations of the Project Co under this Project Agreement, the Project Co shall use reasonable endeavours to procure that insofar as the Works affect the John Innes Property:

- (A) the design of the Works is carried out by appropriately skilled professionals and that the Works will be carried out under a contract which requires the Building Contractor to carry out the Works in accordance with any necessary consents, in a good and workmanlike manner and in a manner which causes as little nuisance or danger to John Innes and their tenants, licensees and occupiers of the John Innes Property as possible;
- (B) the Works do not encourage or facilitate unauthorised access to the John Innes Property and that the boundaries between the land acquired from John Innes for the Highway Works pursuant to the John Innes Agreement and the John Innes Property are at all times secure by (inter alia) erecting where appropriate a new retaining fence on such land near the boundary with the John Innes Property before moving or removing the existing fence on the relevant part of such boundary;
- (C) all reasonable and proper precautions will be taken to avoid damage to the John Innes Property during the execution of the Works;
- (D) all reasonable precautions to prevent workmen employed by the Building Contractor or any sub-contractor in respect of the Works trespassing on the John Innes Property will be taken and, if it is

reasonable and necessary to enter upon the John Innes Property, approvals and arrangements for access are first arranged;

- (E) all plant, machinery, surplus materials, rubbish and temporary works of every kind shall be cleared away and removed from the John Innes Property on the completion of the Highway Works;
- (F) at all times during the carrying out of the Works there is adequate and uninterrupted pedestrian and vehicular access to the John Innes Property for John Innes, their tenants, licensees and occupiers; and
- (G) the regulations set out in the Third Schedule to the John Innes Agreement are observed by the Building Contractor.

4.6.2 If there is any material default by the Building Contractor in respect of the matters referred to in Clause 4.6.1(A), the Project Co shall take appropriate recourse (having regard to the nature of the default and the effect on the John Innes Property) against the Building Contractor in accordance with the provisions of the relevant contract;

4.6.3 The Project Co shall make good all damage caused to the John Innes Property in the execution of the Works.

4.6.4 The Project Co shall indemnify the Trust against any expense, liability, loss, claim or proceedings suffered by the Trust as a result of the Works pursuant to or arising under an indemnity given by the Trust to John Innes under the terms of Clause 14 of the John Innes Agreement.

4.6.5 At the request of the Project Co, prior to 25th February, 2002, for the purpose of enabling the Project Co to undertake the Highway Works, the Trust shall serve a notice pursuant to Clause 3 of an agreement dated 15th May, 1997 made between (1) The Official Custodian for Charities (2) The Trustees of the John Innes Foundation and (3) the Trust (the "**Call Option Agreement**") to exercise the right of the Trust to acquire those parcels of land which are the subject of the option granted by the Call Option Agreement. The purchase price for the property acquired by the Trust pursuant to the terms of the Call Option Agreement shall be borne by the Trust. The Trust shall not vary or release the rights contained in the Call Option Agreement to acquire the land without the consent of the Project Co.

## **5. FUNDING AGREEMENTS, OTHER AGREEMENTS AND FINANCIAL MODEL**

### **5.1 Funding Agreements**

5.1.1 With effect from the Execution Date, the Project Co shall use all reasonable endeavours to enter into and procure that the Funders enter into the Funding Agreements, provided that such obligation shall not oblige the Project Co to enter into Funding Agreements which are not to the satisfaction of the Project Co in its absolute discretion.

5.1.2 Although the Funding Agreements to be entered into by it may involve the issue by the Project Co of share capital to be subscribed for by the Funders,

the Trust shall have no right to approve the identity of any person which becomes a Third Party Investor on or before the Effective Date, subject to the Project Co giving notice to the Trust of the name and address of each Third Party Investor within 10 Working Days of any subscription and, in any event, on or before the Effective Date.

- 5.1.3 The Trust shall use all reasonable endeavours to assist the Project Co in relation to its obligations under Clause 5.1.1, provided that, this obligation shall not extend to the expenditure of monies on the part of the Trust other than the reasonable costs of management.

## 5.2 Other Agreements

- 5.2.1 With effect from the Execution Date, the Project Co shall use all reasonable endeavours to procure that:

- (A) the Agent enters into the Beneficiaries' Direct Agreement;
- (B) the Building Contractor and the Building Contractor's Parent Company enter into the Construction Collateral Warranty Agreement; and
- (C) the Facilities Manager enters into the Facilities Provision Handover Agreement.

- 5.2.2 Upon execution of the Beneficiaries' Direct Agreement, the Construction Collateral Warranty Agreement and the Facilities Provision Handover Agreement in accordance with Clause 5.2.1, the Trust shall, at the request of the Project Co, forthwith enter into the same.

- 5.2.3 Without prejudice to Clause 6.1, the Parties shall from time to time enter into other agreements, mutatis mutandis, in the form of the Beneficiaries' Direct Agreement, in so far as the same may reasonably be required by Funders for the purposes of the refinancing or the further financing of the Project.

## 5.3 Financial Model

- 5.3.1 During the period after the Effective Date and before the Phase 2 Completion Date, the Project Co shall, from time to time, update the Financial Model:

- (A) immediately before the Financial Model is used for the purposes of making any adjustment to the Usage Fee or calculating any lump sum under the Project Documents and, otherwise, not less than every six months following the Effective Date. Any updating carried out pursuant to this Clause 5.3.1 (A) shall include any changes to the assumptions in the Financial Model in respect of:
  - (1) RPI or other relevant indices;
  - (2) LIBOR and/or the fixed cost of funds;
  - (3) the gilt rate;
  - (4) the finance or financial facilities provided under the Funding Agreements;

- (5) the construction cost profile; and
  - (6) the development cost profile.
- (B) in order to reflect the circumstances giving rise to the adjustment to the Usage Fee and/or the lump sum calculation and in order to adjust the Usage Fee and/or reflect any lump sum payments pursuant to the Project Documents.
- 5.3.2 Before updating the Financial Model pursuant to Clauses 5.3.1, the Project Co shall liaise with the Trust by way of the Liaison Procedure and the Project Co agrees it will act reasonably when updating the Financial Model. This Clause 5.3.2 shall be without prejudice to the Parties' respective rights and obligations pursuant to any provision relating to the adjustment of the Usage Fee or the calculation of any lump sum payment under the Project Documents.
- 5.3.3 Without prejudice to Clause 5.3.2, the Project Co shall be entitled to update the Financial Model whenever it is required to do so under the Funding Agreements and, subject to the Project Co confirming that such amendments have been effected in accordance with the terms of the Funding Agreements in effect at the Effective Date (or as those terms may subsequently have been amended with the consent of the Trust) such amended Financial Model shall be treated as the Financial Model then applying for all the purposes of the Project Documents.
- 5.3.4 Following any updating of the Financial Model pursuant to Clause 5.3.3, the Project Co shall liaise with the Trust in accordance with the Liaison Procedure in respect of the same at the earliest opportunity. Such liaison shall not lead to any Dispute under the Disputes Resolution Procedure where the amendments have been effected in accordance with the Funding Agreements.
- 5.3.5 Following any updating of the Financial Model pursuant to Clauses 5.3.1 or 5.3.3, the Project Co shall promptly deliver the revised Financial Model to the Trust and to the Custodian in the same form as is established at the Effective Date.
- 5.3.6 The Parties will instruct the Custodian to keep a copy of all versions of the Financial Model resulting from the application of this Clause 5.3.

#### 5.4 **Trust's Refinancing Share**

The following provisions of this Clause 5.4 shall apply in respect of any Eligible Refinancing:

- 5.4.1 within 90 days after the Refinancing Date in respect of any Eligible Refinancing, Project Co shall deliver to the Trust an Eligible Refinancing Notice;
- 5.4.2 within 14 days after receipt of an Eligible Refinancing Notice (or, if later, within 14 days after receipt by the Trust of such further particulars relating to the relevant Eligible Refinancing as the Trust may reasonably request by notice to Project Co given within 14 days after receipt of the Eligible Refinancing Notice), the Trust shall notify Project Co whether or not it agrees

the amount of the Trust's Refinancing Share (specifying, in the case of notification that it does not agree such amount, the grounds on which it does not so agree);

- 5.4.3 if the Trust notifies Project Co in accordance with Clause 5.4.2 that the Trust does not agree the amount of the Trust's Refinancing Share (specifying the grounds referred to in Clause 5.4.2), the Parties shall seek to agree upon the matters comprised in those grounds and, failing such agreement within 30 days after the date of the Trust's notification, either Party may refer such matters as have not been so agreed to the Disputes Resolution Procedure;
- 5.4.4 on the date (the "**Crystallisation Date**") which is 30 days after the latest to occur of the following:
- (A) the date on which the Trust notifies Project Co in accordance with Clause 5.4.2 that it agrees the amount of the Trust's Refinancing Share;
  - (B) the date on which the amount of the Trust's Refinancing Share is agreed or finally determined in accordance with Clause 5.4.3; and
  - (C) the date on which the aggregate amount of Distributions received by the holders of equity share capital and subordinated debt of Project Co is such as to provide a return (as at that date, but after taking account of the payment or future payment of an amount equal to the Trust's Refinancing Share) on the aggregate amount of equity share capital and subordinated debt subscribed by the holders of equity share capital and subordinated debt in Project Co of at least 25% (pretax nominal) per annum,

the Usage Fee shall be reduced for the remainder of the Contract Period following the Crystallisation Date. Such Usage Fee reduction shall be determined so that the Net Present Value of the Usage Fee reduction is equal to the amount of the Trust's Refinancing Share;

- 5.4.5 in this Clause 5.4, the following expressions shall have the following meanings :

**"Additional Subordinated Debt"** means the additional subordinated debt by way of principal and interest (other than default interest) which is outstanding pursuant to the terms of the Subordinated Loan Note Instrument as a result of the amendment to the Equity Subscription Agreement dated on or around the Amendment Execution Date or any debt by way of principal and interest (other than default interest) which is outstanding pursuant to any previous refinancing of such additional subordinated debt;

**"Credit Agreement"** means the credit agreement dated 9<sup>th</sup> January, 1998 as amended by an amendment agreement dated July, 2000 and made between (1) the Project Co, (2) Holdco, (3) the Banks listed therein as arrangers, (4) HSBC Investment Bank plc as agent, (5) HSBC Bank plc as security trustee, (6) HSBC Bank plc as account bank, (7) The Governor And Company of The Bank of Scotland as technical bank, (8) ABN AMRO Bank N.V. as standby arranger and (9) the Banks listed therein;

“**Crystallisation Date**” has the meaning given in Clause 5.4.4;

“**Distributions**” has the meaning given in the Credit Agreement;

“**Eligible Refinancing**” means a Refinancing:

- (A) the primary purpose of which is to increase the return achieved or to be achieved by the holders of equity share capital and subordinated debt in Project Co on their holdings; and
- (B) the result of which is that the holders of equity share capital and subordinated debt of Project Co will achieve a return on the aggregate amount of share capital and subordinated debt subscribed by such holders of at least 25% (pretax nominal) per annum over the Contract Period calculated by reference to:
  - (1) the aggregate amount of all Distributions received by such holders in respect of the period from (and including) the date of this Agreement until (but excluding) the Refinancing Date; and
  - (2) the aggregate amount of all Distributions projected to be received by such holders in respect of the period from (and including) the Refinancing Date to the expiry of the Contract Period as determined from the Financial Model used in connection with the Refinancing; and
- (C) which is not a Rescue Refinancing;

“**Eligible Refinancing Notice**” means a notice from Project Co to the Trust advising the Trust of the occurrence of an Eligible Refinancing and which:

- (A) proposes the amount of the Trust’s Refinancing Share in respect of that Eligible Refinancing;
- (B) provides particulars of the computation of the Total Refinancing Gain;
- (C) is accompanied by the Financial Model used in connection with that Eligible Refinancing; and
- (D) provides reasonable particulars of the terms of that Eligible Refinancing;

“**Equity Subscription Agreement**” means the equity subscription agreement dated 9<sup>th</sup> January, 1998 made between (1) 3i Group PLC, (2) Innisfree Partners Limited, (3) Barclays Industrial Investments Limited, (4) John Laing Investments Limited, (5) Serco Investments Limited, (6) Holdco, (7) Project Co, (8) Midland Bank PLC as Facility Agent and (9) Midland Bank PLC as Security Trustee;

“**Holdco**” means Octagon Healthcare Holdings (Norwich) Limited, a company incorporated under the laws of England and Wales with registered number 3367686, whose registered office is at New Norfolk and Norwich Hospital, Colney Lane, Norwich NR4 7UZ.

“**Net Present Value**” means the aggregate net present value as at the Refinancing Date of the relevant cash flows, with reference to the forecast due date for each relevant cash flow, using a discount rate of 18.2%;

“**Original Projected Distributions Amount**” means an amount equal to the Net Present Value of the Distributions projected to be received by the holders of equity share capital and subordinated debt of Project Co in respect of the period from (and including) the Refinancing Date to the expiry of the Contract Period as determined from the Financial Model as at the date of this Agreement;

“**Refinancing**” means a refinancing of Project Co effected by means of:

- (A) prepayment of the Standby Facility Debt or the Additional Subordinated Debt financed by:
  - (1) borrowings made under a Funding Agreement or Funding Agreements replacing the Credit Agreement or any other Funding Agreement and being entered into for the purposes of financing such prepayment; or
  - (2) moneys raised (including obligations evidenced by notes, bonds or similar instruments) for the purposes of financing such prepayment; and/or
- (B) a variation of the Credit Agreement or any other Funding Agreement such that the margin in respect of the Standby Facility Debt is reduced and/or any repayment date in respect of the Standby Facility Debt is deferred; and/or
- (C) a variation of the Subordinated Loan Note Instrument or any other Funding Agreement such that the margin in respect of any Additional Subordinated Debt is reduced and/or any repayment date in respect of the Additional Subordinated Debt is deferred; and/or
- (D) a voluntary termination or a variation of any interest rate hedging agreement entered into by Project Co pursuant to the Credit Agreement or any other Funding Agreement in respect of the Standby Facility Debt or the Additional Subordinated Debt;

“**Refinancing Date**” means the date on which an Eligible Refinancing is or is to be effected;

“**Rescue Refinancing**” means a Refinancing occurring as a result or in anticipation of:

- (A) any default by any Party under any of the Project Documents; or
- (B) the occurrence of an event of default (however described) under any of the Funding Agreements; or
- (C) the occurrence of any event or circumstance which, if it continued after the giving of any notice and/or the expiry of any grace period and/or



the making of any determination, would become a default or event of default referred to in (A) or (B) above;

**“Revised Projected Distributions Amount”** means an amount equal to the Net Present Value of the aggregate Distributions projected to be received by the holders of equity share capital and subordinated debt of Project Co in respect of the period from (and including) the Refinancing Date to the expiry of the Contract Period as determined from the Financial Model used in connection with the Eligible Refinancing;

**“Standby Facility”** has the meaning given in the Credit Agreement;

**“Standby Facility Debt”** means the debt by way of principal and interest (other than default interest) which is outstanding under the Standby Facility or any debt by way of principal and interest (other than default interest) which is outstanding pursuant to any previous refinancing of such debt;

**“Subordinated Loan Note Instrument”** means the subordinated loan note instrument constituting £50,000,000 unsecured subordinated loan notes due 2027 dated 9<sup>th</sup> January, 1998 and executed by Project Co;

**“Total Refinancing Gain”** means an amount (if positive) equal to:

- (A) the Revised Projected Distributions Amount;  
less an amount equal to aggregate of:
- (B) the Original Projected Distributions Amount; and
- (C) all fees, costs and expenses (including (1) legal and other advisory fees and (2) costs of, or liabilities incurred as a result of, the variation or early termination of any interest rate hedging arrangements or the early redemption of financing arrangements) of Project Co in connection with the relevant Refinancing (but without double-counting any such fees, costs or expenses to the extent taken into account in the calculation of the Revised Project Distributions Amount); and

**“Trust’s Refinancing Share”** means an amount equal to 10% of the Total Refinancing Gain which is attributable to the refinancing of the Additional Subordinated Debt and/or the refinancing of the Standby Facility Debt.

## 6. ANCILLARY DOCUMENTS AND SUB-CONTRACTING

### 6.1 Performance

The Project Co shall perform its obligations under and observe all the terms of the Ancillary Documents to which it is a party and, except in respect of the Funding Agreements (to which Clause 6.3 shall apply) shall not without the prior consent of the Trust (not to be unreasonably withheld or delayed):

- 6.1.1 terminate or agree to the termination of all or part of any Ancillary Document to which it is a party;

- 6.1.2 make or agree to any material amendment to or variation of any Ancillary Document to which it is a party;
- 6.1.3 in any material respect depart from or waive or allow to lapse any rights it may have under any Ancillary Document to which it is a party;
- 6.1.4 enter into any agreement replacing all or part of the Building Contract, the Facilities Provision Contract or the Agreement for Appointment of Independent Certifier, including by way of novation; or
- 6.1.5 consent to the assignment or transfer of all or part of the Building Contract, the Facilities Provision Contract, the Building Contract Performance Guarantee or the Facilities Provision Contract Performance Guarantee.

**6.2 Agreement for Appointment of Independent Certifier**

The Project Co undertakes:

- 6.2.1 not to exercise any rights pursuant to Clause 2.2(a) or Clause 3 of the Agreement for Appointment of Independent Certifier, without the prior written consent of the Trust; and
- 6.2.2 to make a demand under Clause 17.1 of the Agreement for Appointment of Independent Certifier upon request by the Trust.

**6.3 Funding Agreements**

- 6.3.1 The Project Co shall not enter into any Funding Agreement if to do so would materially and adversely affect the ability of the Project Co to perform its obligations under the Project Documents or the IT Agreement. Subject to Clause 6.3.2, there shall be no other restriction upon the Project Co entering into Funding Agreements.
- 6.3.2 Following the Effective Date, the Project Co shall, before entering into any Funding Agreement, liaise with the Trust in accordance with the Liaison Procedure in relation to the same. With a view to demonstrating that Clause 6.3.1 will not be breached by its entering into the relevant Funding Agreement, the Project Co shall provide the Trust with a copy of the same in draft form. The Project Co shall use all reasonable endeavours to provide any such copy not less than 10 Working Days before it enters into the Funding Agreement.
- 6.3.3 Where any such action would materially and adversely affect the ability of the Project Co to perform its obligations under the Project Documents or the IT Agreement, the Project Co shall not:
  - (A) terminate or agree to terminate any Funding Agreement; or
  - (B) make or agree to make any amendment to or variation of any Funding Agreement; or
  - (C) in any respect depart from or waive any rights it may have under any Funding Agreement,

in each case, without the prior consent of the Trust (not to be unreasonably withheld or delayed).

6.3.4 For the avoidance of doubt:-

- (A) the occurrence of any event of default under a Funding Agreement shall not of itself constitute a breach of Clause 6.3.3; and
- (B) Clause 6.3.3 shall not apply to any pre-payment or repayment whether pursuant to any Funding Agreement or agreed outside the terms of any Funding Agreement which the Project Co shall be free to make without any requirement to obtain the approval of the Trust, unless such pre-payment or repayment is likely materially to prejudice the ability of the Project Co to perform its obligations under the Project Documents or the IT Agreement.

6.3.5 The Project Co shall not make or agree to make any amendment to or variation of the following provisions of the Collateral Deed:

- (A) Clause 4.32 (*Insurance Proceeds*) insofar as that Clause refers to the Trust Insurance Proceeds and the Insurance Proceeds Reinstatement Amount (as defined in the Collateral Deed);
- (B) Clause 5.5.2 or Clause 5.5.3 (*Acquisitions and Additional Services*), Clause 5.10 (*Documents*) or Clause 5.19 (*Claims or Litigation*), where the effect of the relevant amendment or variation would be to require the consent or instructions of any person other than the Controlling Creditor;
- (C) Clause 5.13 (*Variations and Service Variations*), Clause 6 (*Controls Matrix*), Schedule 4 (*Variations and Service Variations*) or Schedule 5 (*Controls Matrix*) (to the extent the same refers to any provision of the Project Documents) where the effect of the relevant amendment or variation would be to impose more onerous restrictions on the Project Co;
- (D) Clause 8.2.2 (Semi-Annual Reports); and
- (E) Clause 1.1 (*Definitions*) in respect of any definitions used in the provisions referred to above,

or any amendment to or variation of any other provision of the Collateral Deed which has the same effect as any of the above, in each case, without the prior consent of the Trust (not to be unreasonably withheld or delayed).

6.4 **Subcontracting**

The Facilities Provision Contract shall require the prior written approval by the Trust of the appointment of any Service Provider in accordance with Clause 6.2 of the Facilities Management Agreement. The provisions of the Facilities Provision Contract reflecting such requirement shall not be amended, varied or departed from in any respect without the prior consent of the Trust (not to be unreasonably withheld or delayed).

**6.5 Delivery**

If, at any time, an amendment is made to any Ancillary Document in accordance with Clause 6.1 or Clause 6.4 or the Project Co is granted a waiver or release of any of its obligations under any Ancillary Document, the Project Co shall deliver to the Trust a conformed copy of each such amendment, release or waiver or (so far as it is not in writing) a true and complete record thereof in writing within 10 Working Days of the date of its execution or creation, certified a true copy by an officer of the Project Co or by a solicitor.

**6.6 Project Co Liable**

The Project Co shall remain responsible and liable to the Trust at all times for the construction of the Works, notwithstanding the appointment of the Building Contractor.

**7. WARRANTIES AND DISCLAIMERS**

**7.1 Warranties**

Without prejudice to any warranties or conditions implied by Law, the Project Co warrants and undertakes as at the Execution Date that:

- 7.1.1 it is duly incorporated under the laws of England and Wales and has the corporate power to own its assets and to carry on its business as it is now being conducted;
- 7.1.2 it has the power to enter into and to exercise its rights and perform its obligations under the Project Documents;
- 7.1.3 all necessary action to authorise the execution of and the performance of its obligations under the Project Documents has been taken or, in the case of any Project Document executed after the Execution Date, will be taken before such execution;
- 7.1.4 the obligations expressed to be assumed by the Project Co under the Project Documents are or, in the case of any Project Document executed after the Execution Date will be, legal, valid, binding and enforceable to the extent permitted by applicable law and each Project Document is or will be in the proper form for enforcement in England;
- 7.1.5 the execution, delivery and performance of the Project Documents do not and will not contravene any provision of:-
  - (A) any existing law, treaty or regulation either in force or enacted but not yet in force binding on the Project Co; or
  - (B) the Memorandum or Articles of Association of the Project Co; or
  - (C) any order or decree of any Court or arbitrator existing as at the Execution Date and binding on the Project Co; or
  - (D) any obligation which is binding upon the Project Co or upon any of its assets or revenues;

- 7.1.6 the claims of the Trust against the Project Co under the Project Documents will rank at least pari passu with the claims of all other unsecured creditors of the Project Co save for those claims preferred solely by any bankruptcy, insolvency, liquidation or other similar laws of general application;
- 7.1.7 no claim is presently being assessed and no litigation, arbitration or administrative proceeding is presently in progress or, to the best of the knowledge of the Project Co, pending or threatened against it or any of its assets which will or might have a material adverse effect on the ability of the Project Co to perform its obligations under any Project Document;
- 7.1.8 it is not subject to any other obligation, compliance with which will or is likely to, have a material adverse effect on the ability of the Project Co to perform its obligations under any Project Document;
- 7.1.9 no proceedings or other steps have been taken and not discharged (nor, to the best of the knowledge of the Project Co threatened) for its winding-up or dissolution or for the appointment of a receiver, administrative receiver, administrator, liquidator, trustee or similar officer in relation to any of its assets or revenues;
- 7.1.10 no Event of Default has occurred which is continuing nor has any event or circumstance occurred or arisen which, with the giving of notice, lapse of time, determination of materiality or satisfaction of any other condition may become an Event of Default;
- 7.1.11 no transfer, stamp or registration or similar Taxes or charges are payable by the Project Co pursuant to the laws of the United Kingdom or any part thereof in connection with the execution, delivery, performance or enforcement of any of the Project Documents or any transaction contemplated thereby;
- 7.1.12 each of the Ancillary Documents executed on or before the Execution Date is in full force and effect and constitutes the valid, binding and, to the extent permitted by applicable Laws, enforceable obligations of the parties thereto, the copies of such Ancillary Documents which the Project Co has delivered to the Trust are true and complete copies of such documents and there are not in existence any other agreements or documents replacing or relating to any such Ancillary Documents which would materially affect its interpretation or application;
- 7.1.13 as at the Execution Date, the share capital of the Project Co is legally and beneficially owned as shown in Schedule 12.

## 7.2 **Disclaimer**

- 7.2.1 The Trust has made available to the Project Co, the Consortium Members and to Funders prior to the date hereof certain materials, documents and data (the "**Disclosed Data**") relating, inter alia, to its business, assets, contractual arrangements, employees, the Site, the design or construction of the Works, the management and provision of Services, records and forecasts and other matters which are or may be relevant to the Project and the obligations undertaken by the Project Co under the Project Documents. The Disclosed Data includes all such materials, documents and data which were provided to

Consortium Members in connection with pre-qualification and/or the invitation to negotiate in respect of the Project.

- 7.2.2 Neither the Trust nor any of its agents or servants shall be liable to the Project Co (whether in contract, tort or otherwise howsoever and whether or not arising out of any negligence on the part of the Trust or any of its agents or servants) in respect of any inaccuracy, error, omission, unfitness for purpose, defect or inadequacy of any kind whatsoever in the Disclosed Data.
- 7.2.3 The Trust gives no warranty or undertaking that the Disclosed Data represents all of the information in its possession or power (either during the tender for the Project or at the execution of any Project Document) relevant or material to the Project or the Operations. Neither the Trust nor any of its agents or servants shall be liable to the Project Co in respect of any failure to disclose or make available (whether before or after the execution of any Project Document) to the Project Co any information, documents or data or to keep the Disclosed Data up to date or to inform the Project Co (whether before or after execution of any Project Document) of any inaccuracy, error, omission, unfitness for purpose, defects or inadequacy in the Disclosed Data.
- 7.2.4 The Project Co acknowledges and confirms that it shall not be entitled to make any Claim against the Trust or any of its agents or servants, whether in damages or for extensions of time or additional payments under any Project Document, on the grounds of any misunderstanding or misapprehension in respect of the Disclosed Data or the accuracy, completeness and fitness for purpose of the Disclosed Data or on the grounds that incorrect or insufficient information relating thereto or to the Site was given to it by any person, whether or not in the employ of the Trust nor shall the Project Co be relieved from any risks or obligations imposed on or undertaken by it under any Project Document on any such ground.

## **8. OPERATIONS**

### **8.1 Standard of Performance**

The Project Co shall at all times perform and shall procure that the Operations (except for the Start Up Matters, although without prejudice to Clause 8.2 of the Facilities Management Agreement) are performed:

- 8.1.1 without limitation to Clause 12, in accordance with Good Industry Practice;
- 8.1.2 in a manner as is consistent with the Quality Manuals;
- 8.1.3 in a manner that is not likely to be injurious to health or to cause damage to property;
- 8.1.4 in such manner as is consistent with the Trust discharging its statutory duties and as not wilfully to detract from the image and reputation of the Trust;
- 8.1.5 in compliance with all applicable Laws and NHS Requirements (save to the extent that, pursuant to any express agreement between the Parties, the Project Co is entitled to depart from any Health Technical Memoranda or Health Building Notes); and

8.1.6 in a manner which shall not infringe or otherwise cause the Trust to be in breach of or liable to pay any sums in respect of any Rights in respect of land, whether affecting or in respect of the Site or any other land or rights which may have been acquired by the Trust pursuant to Clause 4.2.1,

provided always that the Project Co's obligations in this Clause 8.1 and in Clause 12 shall be subject to the qualification that if any Law or NHS Requirement shall be introduced or changed after the date specified in the Construction Programme in respect of the Phase 1 Works or the Phase 2 Works including the date specified therein in respect of the Phase 2 Works relating to each Beneficial Occupation Area (as the case may be), after which no Variation may be requested by the Trust, the Project Co shall not be obliged to give effect to the same during the Design and Construct Phase, unless such Law or NHS Requirement expressly so requires.

## 8.2 **Discrimination**

The Project Co shall not and will procure that the Contractors shall not, unlawfully discriminate on the grounds of colour, sex, religion, disability, political opinion or nationality and, in particular but without limitation, the Project Co shall not and will procure that the Contractors shall not discriminate on the grounds of nationality in the selection of sub-contractors.

## 9. **DESIGN AND CONSTRUCTION OF THE WORKS**

### 9.1 **Project Co Obligations**

The Project Co shall carry out and complete or procure the carrying out and completion of the Works in compliance with the Design Documents using the standards of design, construction materials and workmanship therein specified, provided that, to the extent that the approval of any design, construction materials or workmanship is a matter for the opinion of the Trust's Works Adviser, such quality and standards shall be to the satisfaction of the Trust Works Adviser (acting reasonably).

### 9.2 **Time for Completion**

9.2.1 The Project Co shall ensure that:

- (A) the Phase 1 Building Completion Certificate and Service Completion Certificates for all of the Services in respect of the Phase 1 Areas are issued by the Phase 1 Date for Completion.
- (B) a BOA Building Completion Certificate and Service Completion Certificates for all of the Services in respect of each of the Beneficial Occupation Areas are issued by the BOA Date for Completion.
- (C) the Phase 2 Building Completion Certificate and Service Completion Certificates for all of the Services in respect of the Phase 2 Areas are issued by the Phase 2 Date for Completion.

9.2.2 In addition to the overall obligation under Clause 9.2.1(B), the Project Co shall use all reasonable endeavours to seek to ensure that a BOA Building Completion Certificate and Service Completion Certificates for all of the

Services for each of the Beneficial Occupation Areas are issued by the Date for Occupation for that Beneficial Occupation Area.

### 9.3 Failure to Complete Phase 1 on Time

- 9.3.1 If the Project Co fails to ensure that the Phase 1 Building Completion Certificate and Service Completion Certificates for all of the Services in respect of the Phase 1 Areas are issued by the Phase 1 Date for Completion, subject to Clauses 10.5.1 and 10.5.2, the Trust shall procure that the Trust's Works Adviser issues a certificate (a "**Phase 1 Non Completion Certificate**") to that effect.
- 9.3.2 If the Phase 1 Date for Completion is varied by the Trust's Works Adviser pursuant to Clause 10.5 after the issue of a Phase 1 Non Completion Certificate, the Trust shall procure that the Trust's Works Adviser cancels the existing Phase 1 Non Completion Certificate and, if appropriate, issues a new Phase 1 Non Completion Certificate which reflects any failure by the Project Co to ensure that the Phase 1 Building Completion Certificate and Service Completion Certificates for all of the Services in respect of the Phase 1 Areas are issued by the revised Phase 1 Date for Completion.
- 9.3.3 Subject to the issue of a Phase 1 Non Completion Certificate pursuant to Clause 9.3.1 or Clause 9.3.2, the Project Co shall pay or allow to the Trust liquidated damages during the period commencing on the later of the Phase 1 Date for Completion and the expiry of any period of time allowed pursuant to Clause 10.5.1(B) and ending on the Phase 1 Completion Date (but not exceeding 18 months) at the rate per week or part thereof applicable in accordance with Part 8 of Schedule 5. Such liquidated damages shall be due and payable by the Project Co on the 10th Working Day following the week (or part week) to which they relate. Without prejudice to Clause 40.5 and any other rights of the Trust under the Project Documents and subject to Clause 9.4, any amount of liquidated damages which becomes due and payable in accordance with this Clause 9.3.3 shall bear interest calculated from day to day at a rate per annum equal to the Default Interest Rate from the date on which the payment was due to (and including) the date of payment.
- 9.3.4 If the Trust's Works Adviser shall later vary the Phase 1 Date for Completion under Clause 10.5.1(A) or allow the Project Co any period of time under Clause 10.5.1(B), the Trust shall reimburse or allow to the Project Co any amount recovered under Clause 9.3.3 for the period up to such later Phase 1 Date for Completion or during the period of time allowed under Clause 10.5.1(B), as the case may be, together with interest calculated from day to day at a rate per annum equal to the Interest Rate from the date upon which the liquidated damages were paid to the date of reimbursement or allowance.

### 9.4 Dispute

Where there is any Dispute as to whether the Trust is entitled to levy or deduct liquidated damages or any challenge to a decision of the Independent Certifier which may affect the ability of the Trust to levy or deduct liquidated damages, the Trust shall not do so until such Dispute or challenge has been agreed or determined, leaving extant the right of the Trust to levy or deduct liquidated damages. Any such



liquidated damages, in the amount so agreed or determined, shall be paid by the Project Co, together with interest on each part thereof calculated from day to day at a rate per annum equal to the Interest Rate, in each case, from the date such part should have been paid had the same not been disputed or the decision of the Independent Certifier not been challenged, to the date of actual payment.

## 9.5 No Liability

The Trust's sole remedy for breach of the Project Co's obligations in respect of timing under Clauses 9.2.1 and 9.2.2 shall be:

9.5.1 in the case of Clause 9.2.1(A), the Trust's rights pursuant to Clause 9.3.3 and pursuant to Clause 43.3;

9.5.2 in the case of Clauses 9.2.1(B) and 9.2.2, the Trust's rights pursuant to Clause 39.2.2 and Part 4 of Schedule 6 and pursuant to Clause 43.4; and

9.5.3 in the case of Clause 9.2.1(C), the Trust's rights pursuant to Clause 43.5.

The Project Co shall have no other liability to the Trust for liquidated or general damages or otherwise for breach of such obligations nor shall any such breach otherwise entitle the Trust to terminate this Agreement.

## 10. CONSTRUCTION PROGRAMME AND EXTENSIONS OF TIME

### 10.1 Update

10.1.1 Within 20 Working Days after the Effective Date, the Project Co shall prepare and deliver to the Trust's Works Adviser a revised version of the Construction Programme in form and substance satisfactory to the Trust's Works Adviser, updated by reference to the Effective Date.

10.1.2 The Project Co shall, following the Effective Date:

- (A) develop a detailed programme amplifying the Construction Programme and, within five Working Days of its production, deliver a copy of the same to the Trust's Works Adviser;
- (B) without prejudice to its obligations under Clause 10.1.1, from time to time during the Design and Construct Phase, update the Construction Programme, in particular to reflect any change in any anticipated Completion Date and/or (where relevant) amend the detailed programme developed pursuant to Clause 10.1.2(A);
- (C) on the first Working Day of every month during the Design and Construct Phase, where during the previous month the Construction Programme has been updated and/or the detailed programme amended in accordance with Clause 10.1.2(B), deliver a copy of the revised Construction Programme and/or the detailed programme (as amended) to the Trust's Works Adviser; and
- (D) ensure that, during the Design and Construct Phase, where the Project Co anticipates that any change to any anticipated Completion Date, as shown in the Construction Programme, may arise, such change will

forthwith be discussed between the Parties in liaison in accordance with the Liaison Procedure.

## 10.2 Notice

If, at any time, the Project Co becomes aware that:

- 10.2.1 the relevant Works will not be or are unlikely to be complete; and/or
- 10.2.2 that Service Completion Certificates for all the Services will not be or are unlikely to be issued in relation to the Phase 1 Areas, the Beneficial Occupation Areas or all of the Phase 2 Areas (as the case may be),

in each case, by the relevant Date for Completion, the Project Co shall, as soon as reasonably practicable, give notice to the Trust's Works Adviser to that effect specifying the relevant delay or impediment.

## 10.3 Delay details

Within five Working Days or, if later, as soon as reasonably practicable after such notification, the Project Co shall provide the Trust's Works Adviser with full written details of the delay or impediment including:-

- 10.3.1 a statement of the reasons for any delay or impediment and the circumstances giving rise to such reasons.
- 10.3.2 an explanation of the effect of the delay or impediment on the critical path of the Works.
- 10.3.3 an estimate of the likely effect of the delay or impediment on Completion.
- 10.3.4 an explanation of any measures that the Project Co proposes or intends to adopt to mitigate the consequences of delay or impediment.
- 10.3.5 a statement of which of the Delay Events (if any) has caused the delay or impediment.
- 10.3.6 a statement of which of the Relief Events (if any) has caused the delay or impediment.
- 10.3.7 a statement that an Archaeological Delay Event (if any) has caused the delay or impediment.

## 10.4 Further Information

If the Project Co receives or becomes aware of any further information relating to the delay or impediment, it shall submit such further information to the Trust's Works Adviser as soon as reasonably practicable. The Trust's Works Adviser may request from the Project Co any further information which the Trust's Works Adviser may reasonably require in order to fulfil its obligations under Clause 10.5 and the Project Co shall supply the same within a reasonable period after such request.

**10.5 Extension of time**

10.5.1 Subject to compliance by the Project Co with Clauses 10.3 and 10.4, the Trust shall procure that the Trust's Works Adviser shall:

- (A) having satisfied itself that a Delay Event has occurred or it being agreed or determined that a Delay Event has occurred, allow the Project Co such extension of time as shall be reasonable (taking into account not only the Delay Event itself but also the reasonably foreseeable consequences of the Delay Event during the period up to Completion) by fixing a new Phase 1 Date for Completion and/or BOA Date for Completion and/or Phase 2 Date for Completion (as the case may be) which shall replace the existing Phase 1 Date for Completion and/or BOA Date for Completion and/or the Phase 2 Date for Completion (as the case may be).
- (B) having satisfied itself that a delay or impediment as referred to in Clause 10.2 has arisen as a result of the occurrence of a Relief Event or Archaeological Delay Event or it being agreed or determined that a delay or impediment as referred to in Clause 10.2 has arisen as a result of the occurrence of a Relief Event or Archaeological Delay Event, allow the Project Co such period of time as shall be reasonable (taking into account not only the Relief Event or Archaeological Delay Event itself but also the reasonably foreseeable consequences of the Relief Event or Archaeological Delay Event during the period up to Phase 1 Completion and/or BOA Completion and/or Phase 2 Completion, as the case may be) during and in respect of which the Project Co shall not be liable for any breach of its obligations under Clause 9.2. Any such period of time shall not affect the Phase 1 Date for Completion, the BOA Date for Completion or the Phase 2 Date for Completion.

No extensions of time or relief in respect of Clause 9.2 shall be given otherwise than pursuant to this Clause 10.5.

10.5.2 Where:

- (A) the Trust's Works Adviser satisfies itself that a delay or impediment as referred to in Clause 10.2 has arisen as a result of the occurrence of an Archaeological Delay Event or it is agreed or determined that a delay or impediment as referred to in Clause 10.2 has arisen as a result of an Archaeological Delay Event; and
- (B) a Phase 1 Non-Completion Certificate is issued pursuant to Clause 9.3.1,

the Contract Period shall be extended by a period equal to the period of time allowed to the Project Co pursuant to Clause 10.5.1(B).

10.5.3 The Occupation Programme and the Dates for Occupation shall be amended from time to time to reflect any extensions of time allowed pursuant to Clause 10.5.1 and any delay for any other reason, in each case after liaison between the Parties in accordance with the Liaison Procedure and without prejudice to

Project Co's obligations under Clause 9.2. The Dates for Occupation shall always precede the BOA Date for Completion.

## 10.6 Mitigation

10.6.1 The Project Co shall take all steps necessary and consistent with Good Industry Practice to mitigate the consequences of any Delay Event, any Relief Event or any Archaeological Delay Event but neither this obligation nor any other provision of this Agreement shall require the Project Co to accelerate the execution of the Works and Start Up Matters if to do so would require the Project Co to incur additional costs.

10.6.2 Notwithstanding Clause 10.6.1, where any Delay Event, Archaeological Delay Event or Relief Event has arisen, the Trust may request the Project Co to accelerate the execution of the Works or Start Up Matters so that the effects of the Delay Event, Archaeological Delay Event or Relief Event are alleviated. The Project Co shall act reasonably in considering any such request and in pricing the cost of such acceleration. The Project Co shall have no obligation to effect any works in respect of such acceleration before the relevant cost has been agreed between the Parties. Any Dispute shall not be subject to the Disputes Resolution Procedure. Following agreement of any acceleration cost, the Trust shall be entitled to pay the same as if it were a Design and Construct Phase Variation Cost, mutatis mutandis, in accordance with Clause 16.9.

## 10.7 Compensation for Delay Events

The Trust shall compensate the Project Co in respect of any Delay Event arising during the Design and Construct Phase, in accordance with Part 1 of Schedule 14.

## 10.8 Drop Dead Dates

10.8.1 In respect of each element of the Phase 1 Works specified in Appendix F to Schedule 5, other than pursuant to any application of Insurance Proceeds in accordance with Part 4 of Schedule 7, no Variation may be requested by the Trust during the Phase 1 Design and Construct Phase after the date specified for that particular element in such Appendix.

10.8.2 In respect of each element of the Phase 2 Works in respect of the Beneficial Occupation Areas specified in Appendix G to Schedule 5, other than pursuant to any application of Insurance Proceeds in accordance with Part 4 of Schedule 7, no Variation may be requested by the Trust during the Phase 2 Design and Construct Phase after the date specified for that particular element in such Appendix.

10.8.3 In respect of each element of the Phase 2 Works specified in Appendix H to Schedule 5, other than pursuant to any application of Insurance Proceeds in accordance with Part 4 of Schedule 7, no Variation may be requested by the Trust during the Phase 2 Design and Construct Phase after the date specified for that particular element in such Appendix.

10.8.4 Other than pursuant to paragraph 3.3 of Part 4 of Schedule 7, Project Co shall not be required to effect any Variation requested by the Trust in respect of any

element of the Works the subject of reinstatement with Insurance Proceeds during the Design and Construct Phase, unless the same has been approved in accordance with the Senior Funding Agreements.

## **11. DESIGN DEVELOPMENT**

### **11.1 Medical Planning Programme**

As at the Execution Date:

11.1.1 the Trust confirms that the matters the subject of the Medical Planning Programme operated under the Former Project Agreement have identified the area requirements for each department, their basic layout (including room adjacencies), the relationship between each department and each of the others and the number, size and general content of typical rooms, in each case at the Hospital, within the context of the performance specifications listed in Part 1 of Schedule 5. Such matters shall be binding on the Trust for the purposes of this Agreement.

11.1.2 the Trust confirms that, subject to the qualifications listed in any Certificate of Approval of Design delivered to the Project Co on or before the Execution Date and within the level of the information available at the Execution Date, the scheme design has been approved by the Trust pursuant to the Design Development Procedure in accordance with the Former Project Agreement prior to the Execution Date.

### **11.2 Operational Policies**

11.2.1 The Operational Policies as developed and agreed between the Trust and the Project Co describe in high level terms the way the Hospital departments and whole Hospital are to function. They constitute one of the reference points for scheme design and detailed design as described in the Design Development Procedure. The Trust shall not be entitled to change or develop the Operational Policies (including by way of any Further Operational Policies) or impose any unreasonable interpretation of the same, in such a way as to require the Project Co to make changes to any element of the scheme design or detailed design following the issue of a Certificate of Approval of Design in respect of the same, other than by way of a Variation.

11.2.2 Following the Effective Date, the Trust shall, in liaison with the Project Co through the Liaison Procedure:

(A) develop or introduce any Further Operational Policies within six months; and

(B) develop the Operational Policies during the detailed design period under the Design Development Procedure.

11.2.3 Where, following the Execution Date, any conflict is identified between any of the Operational Policies as at such date and the Output Specification for any Service as at such date, the Trust shall upon request by the Project Co:

- (A) amend the relevant Operational Policies such that the same conform to the relevant Output Specification; or
- (B) request a Service Variation (which shall not be capable of cancellation) in respect of the relevant Service such that the Output Specification conforms to the relevant Operational Policies.

### 11.3 Continuing Development

From the Effective Date, the Project Co shall, in conjunction with the Trust's Works Adviser, continue to develop the design of the Works in accordance with the Design Development Procedure. During the period from the Commencement Date to the Effective Date, the Project Co shall be entitled to develop the design of the Works in accordance with the Design Development Procedure, in which case, the Trust shall fully participate in the Design Development Procedure in accordance with its obligations in that respect.

### 11.4 Certificates of Approval of Design

To the extent that, pursuant to the Design Development Procedure, the Trust is entitled to approve the design of the Works, it shall not unreasonably withhold or delay its approval. Once any element of the design has been so approved, the Trust shall procure that the Trust's Works Adviser issues a Certificate of Approval of Design in respect of such element and that the issue of the same to the Project Co shall not be unreasonably withheld or delayed.

### 11.5 Project Co Obligations

The approval of any design or document or the issue of any Certificate of Approval of Design by the Trust's Works Adviser shall in no way reduce or otherwise affect the obligations of the Project Co as to design, materials and workmanship but, without limitation thereto, a Certificate of Approval of Design shall entitle the Project Co to rely upon the same such that if the Trust wishes to change the same it shall constitute a Variation.

## 12. STANDARDS OF DESIGN AND WORKMANSHIP

### 12.1 The Project Co undertakes to the Trust that:-

12.1.1 it has exercised and will continue to exercise in the performance of its obligations hereunder all the reasonable skill and care to be expected of a professionally qualified and competent designer experienced in the design and construction of hospitals of a size and scope and complexity similar to the Hospital in accordance with Good Industry Practice.

12.1.2 it has not and will not specify for use in the Works or any Post-Completion Variation Works any of the Deleterious Materials, save to the extent that use of the same would be consistent with Good Industry Practice.

12.1.3 the Works or any part thereof and any Post-Completion Variation Works will be fit for their purpose as identified at the time of design and specification (being in the case of the Works, as identified in the Design Documents ) and without any implication that:-

- (A) the Works or any Post-Completion Variation Works will be state of the art either at the time of execution or at any time in the future; or
- (B) the Works will be fit for a purpose outside the explicit scope of the Design Documents; or
- (C) any Post-Completion Variation Works will be fit for a purpose outside the explicit scope of the design and specification produced for such Post-Completion Variation Works.

12.1.4 the elements of the Works listed in Part 7 of Schedule 5 will each be designed to last for the relevant Minimum Design Life.

12.1.5 the Works and any Post-Completion Variation Works will be carried out using goods, materials and equipment which are new (save where otherwise expressly agreed between the Parties, each acting reasonably) and of satisfactory quality.

## **13. BUILDING CONTRACT**

### **13.1 Certificates and Instructions**

The Project Co shall provide the Trust with copies of all certificates and instructions issued under the Building Contract, including all interim and final certificates, and instructions regarding changes to the Trust's Requirements. Without limitation to the foregoing, the Project Co shall, during the Design and Construct Phase, supply to the Trust a monthly progress Report in relation to the Works.

### **13.2 Meetings**

The Project Co shall procure that:

13.2.1 project meetings between the Project Co, the Building Contractor and the principal design consultants (being the architect, the structural engineer and the services engineer employed by the Building Contractor for the purposes of the Project) are held at monthly intervals or at intervals as near to monthly as is practicable during the Design and Construct Phase; and

13.2.2 the Trust's Works Adviser is entitled to attend (and receive adequate notice of) all such meetings. Any comments which the Trust's Works Adviser may have as a result of such attendance shall be made through the Project Co's Representative.

## **14. THE SITE**

### **14.1 Licence**

14.1.1 From the Commencement Date, the Trust shall permit the Project Co and all others authorised by the Project Co access to and the non-exclusive right to occupy, enter onto and remain on the Site for the purposes of carrying out the Operations and all purposes ancillary or related thereto, save that, from the Phase 1 Completion Date, entry onto the Commercial Areas shall be subject to giving reasonable notice having regard to the Project Co's obligations under the Project Documents, in each case subject to:

- (A) any rights of public passage or access existing over any part of the Site from time to time;
  - (B) the agreed or statutory right of any relevant authority or third party to have access to the Site; and
  - (C) the right of Third Party Suppliers to have access for the execution on or near the Site of any works not included in the Project, provided that any such right of access shall be without prejudice to any rights of the Project Co under any other provision of the Project Documents and shall be subject to due and proper compliance by such Third Party Suppliers with the terms and conditions relating to Third Party Suppliers set out in Clause 16.12.
- 14.1.2 The rights of access and the non-exclusive right to occupy granted pursuant to Clause 14.1.1 shall subsist for the purposes of carrying out the Operations and all purposes ancillary or related thereto but for no other purposes, shall be by way of licence for the particular activity only and shall not grant or be deemed to grant any legal estate or other interest in land but without prejudice to the interest to be granted pursuant to Clause 21.1.
- 14.1.3 From the Effective Date, the Trust shall permit the Project Co and all others authorised by the Project Co access to all land outside the Site acquired by the Trust pursuant to Clause 4.2.1 or in respect of which it has rights pursuant to the UEA Deed of Grant or in respect of which it acquires rights or easements pursuant to Clause 4.2.1, in any such case for the purpose of undertaking the Works or complying with any obligation or requirement contained in a Planning Approval or a Planning Agreement.
- 14.1.4 During the Phase 1 Design and Construct Phase, the Project Co shall have control of the Site and the land referred to in Clause 14.1.3 for the purposes of health and safety and liability to third parties.
- 14.1.5 Other than to Third Party Suppliers, (who shall be subject to Clause 16.12) and subject to Clause 4.2.2 and Clause 28.1 of the IT Agreement, the Trust shall not grant to any person any rights of access to the Site or the land referred to in Clause 14.1.3 before the Phase 1 Completion Date where to do so would breach the Trust's obligations under the Project Documents or otherwise impede the Project Co in the conduct of the Operations prior to the Phase 1 Completion Date.
- 14.1.6 During the Phase 2 Design and Construct Phase, the Project Co shall have control of the Phase 2 Areas (in the case of each Beneficial Occupation Area, until the applicable BOA Completion Date and, in the case of the remaining Phase 2 Areas, until the Phase 2 Completion Date) and the land referred to in Clause 14.1.3 for the purposes of health and safety and liability to third parties.
- 14.1.7 Other than to Third Party Suppliers, (who shall be subject to Clause 16.12) and subject to Clause 4.2.2 and Clause 28.1 of the IT Agreement, the Trust shall not grant to any person any rights of access to the Phase 2 Areas or the land referred to in Clause 14.1.3 before the Phase 2 Completion Date where to



do so would breach the Trust's obligations under the Project Documents or otherwise impede the Project Co in the conduct of the Operations prior to the Phase 2 Completion Date.

14.1.8 Without prejudice to Clause 14.1.1, the Trust shall during the period following the Phase 1 Completion Date and before the occurrence of the Phase 2 Completion Date, permit Project Co and all others authorised by the Project Co reasonable access:

- (A) to any Beneficial Occupation Area in respect of which a BOA Completion Certificate has been issued, for the purpose of completing Phase 2 Works in any other Phase 2 Area; and
- (B) through the Hospital where necessary to any of the Phase 2 Areas for the purpose of completing the Phase 2 Works.

## 14.2 Access

The Project Co is deemed:

14.2.1 to have satisfied itself in relation to:

- (A) the means of access to and through the Site and the times and methods of working necessary to prevent any nuisance whether public or private to any third parties; and
- (B) the Site boundaries.

14.2.2 in general, to have obtained for itself all necessary information as to risks, contingencies and all other circumstances which may influence or affect the Works and the Operations.

## 14.3 Condition

In respect of the Site, the Project Co accepts entire responsibility for ascertainment of the ground conditions, the ground to be excavated and built upon and its loadbearing and other relevant properties.

## 14.4 No Warranty

The Project Co shall take the Site in its state and condition in all respects as at the Effective Date. Nothing in any of the Project Documents or otherwise shall constitute or imply a warranty by or on the part of the Trust as to the fitness and suitability of the Site or any part thereof for the Works or any other purpose.

## 14.5 Rights in respect of Land

The Project Co shall observe and comply with the terms and conditions of any Rights in respect of land comprising the Site which at the date hereof affect the Site or which are granted in accordance with Clause 4.2.2.

**14.6 Services Connections**

Without prejudice to the Parties' obligations pursuant to Clauses 4.3 and 4.4, the Project Co shall:

14.6.1 procure the connection of the Hospital to all services, including gas, electricity, water, drainage and telecommunications and comply with all its obligations under any associated agreements with the suppliers of such services, in each case so that the services are available at the Hospital for use as required by the Facilities Management Agreement and the IT Agreement.

14.6.2 be responsible for determining the location of such services at the Site and for the preservation of such services:

(A) to the Site; and

(B) to any adjoining or neighbouring properties, to the extent that the same are affected by the Works.

14.6.3 make and rely upon all necessary investigations and surveys as to such services at the Site.

14.6.4 make provision for lawfully diverting, disconnecting or otherwise dealing as may be necessary with any such services within the Site as at the Execution Date.

**14.7 Easements**

At the request of the Project Co, the Trust shall, where required in connection with the Project:

14.7.1 as owner of the Site; or

14.7.2 as owner of any land outside the Site acquired pursuant to Clause 4.2.1; or

14.7.3 as the owner of any rights or easements acquired pursuant to Clause 4.2.1,

grant wayleaves, deeds of grant, legal agreements and the like to all statutory undertakers and other providers of services or service media, except to the extent that the grants, rights or agreements permit connection to or rights of drainage through any foul or storm water pipes which connect to those pipes the subject of the UEA Deed of Grant.

**14.8 Sewers**

Notwithstanding any other provision of the Project Documents, the Trust shall be responsible for the maintenance of any sewers required by the Hospital, to the extent that the same are not situated on the Site but the Project Co shall otherwise be responsible for complying with the UEA Deed of Grant.

**14.9 Removal from Site**

At the request of the Project Co, the Trust shall promptly and fully co-operate with the Project Co in the removal from the Site of any person whose presence has not been authorised by the Trust or the Project Co, including permitting the Project Co to use

the Trust's name in any legal proceedings in accordance with Clause 38.3, provided that such co-operation shall be without prejudice to the Project Co's obligations under the Project Documents.

## **15. CARE OF THE WORKS AND REINSTATEMENT**

### **15.1 Care of the Works**

Subject to the following provisions of this Clause 15 and save as provided elsewhere herein, the Project Co shall be responsible for the care of the Site, the Works and all materials, plant and equipment brought or procured to be brought on to the Site by the Project Co or either Contractor (other than pursuant to the IT Agreement but without prejudice to the terms of that agreement), in each case intended to be incorporated into the Works.

### **15.2 Reinstatement**

Subject always to the terms of Part 4 of Schedule 7, if all or part of the Works on the Site are damaged or destroyed, the Project Co shall, as soon as practicable, reinstate the same to the satisfaction of the Trust (acting reasonably) provided that the Project Co shall not be obliged to reinstate to the extent that:

15.2.1 any insurances effected by it pursuant to Clause 24.1 have been vitiated or invalidated or any payment under the same is reduced or withheld, in any such case, by reason of any act, omission or default on the part of the Trust; or

15.2.2 the same is required by reason of the occurrence of Force Majeure.

### **15.3 Relief Event**

15.3.1 The Project Co shall be entitled to request relief from performance of its obligations pursuant to Clause 15.2, to the extent that its ability to perform the same is adversely affected by any Relief Event. Any such request shall be made by service of a notice on the Trust's Works Adviser within five Working Days of the Project Co becoming aware of the relevant Relief Event or, if later, of its failure to perform. Such initial notice shall give sufficient details as are necessary to identify the particular event claimed to be a Relief Event and shall, within a further five Working Days, be followed by a further notice from the Project Co to the Trust's Works Adviser containing such relevant information relating to the Relief Event and/or any failure to perform as is available to the Project Co, including:

- (A) full details of the Relief Event, including its nature, the date of its occurrence and its duration;
- (B) the effect of the Relief Event on the Project Co's ability to perform its obligations pursuant to Clause 15.2, including details of the relevant Works, the precise effect on their reinstatement and the likely duration of that effect; and
- (C) an explanation of any measures that the Project Co proposes or intends to adopt to mitigate the consequences of the Relief Event, save to the extent that it is not practicable to take mitigating action.

- 15.3.2 If, following the issue of any notice pursuant to Clause 15.3.1, the Project Co 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 Trust's Works Adviser as soon as possible. The Trust's Work Adviser may request from the Project Co any further information which the Trust's Works Adviser may reasonably require to fulfil its obligations under Clause 15.3.3 and the Project Co shall supply the same within a reasonable period after such request.
- 15.3.3 Subject to compliance by the Project Co with its obligations under Clauses 15.3.1 and 15.3.2, the Trust shall procure that the Trust's Works Adviser shall, having satisfied itself of the occurrence of the Relief Event and its effect on the ability of the Project Co to perform its obligations pursuant to Clause 15.2, issue a notice to the Project Co specifying:
- (A) the relevant obligations in respect of the reinstatement of the Works for which relief is given; and
  - (B) the period during which the Project Co shall be relieved from the performance of those obligations.
- 15.3.4 The Trust shall procure that the Trust's Works Adviser acts reasonably in performing its obligations pursuant to Clause 15.3.3. Where any of the matters notified by the Trust's Works Adviser pursuant to that Clause is disputed by the Project Co, the Parties shall each use all reasonable endeavours to reach agreement in relation to the same. If any matter is not agreed on within 10 Working Days of the date of the relevant notice, the Dispute shall be referred to the Disputes Resolution Procedure.
- 15.3.5 Notwithstanding the issue of any notice pursuant to Clause 15.3.3, the Project Co shall take all steps necessary and consistent with Good Industry Practice to mitigate the consequences of any Relief Event, save to the extent that it is not practicable to take mitigating action. In addition, Project Co shall resume performance of its obligations affected by any Relief Event as soon as practicable and use all reasonable endeavours to remedy its failure to perform.

## **16. VARIATIONS**

### **16.1 Request**

- 16.1.1 Subject to the provisions of this Clause 16 and to the requirements of Part 4 of Schedule 7, the Trust shall be entitled at any time to request Variations to be effected by the Project Co.
- 16.1.2 During the period from the Commencement Date to the Effective Date, the Project Co shall use its reasonable endeavours to provide the Trust with details of the consequences of the Variations referred to in Clause 16.1.3.
- 16.1.3 Immediately following the Effective Date, the Trust shall request the following:

- (A) a Variation to reflect the application of HTM 2045 to the Works, save to the extent agreed between the Parties.
- (B) a Variation to reflect the application of HTM 81 to the Works.
- (C) a Variation in respect of a 4½" pneumatic tube system for the Hospital, which Variation will give rise to Service Variations and consequential savings and reductions in Service Fees.
- (D) a Variation to reflect the application of HTM 2005 to the Works.

In respect of the Variations pursuant to this Clause 16.1.3, the Project Co shall disregard the Design and Construct Phase Variation Construction Costs resulting from the same for all purposes pursuant to this Clause 16 to the extent of £750,000 in aggregate.

16.1.4 If a Variation in respect of the Phase 1 Works requested by the Trust during the Detailed Design Stage leads to a reduction in department and circulation space which, in turn, gives rise to a Variation Saving, notwithstanding Clause 16.10, the Project Co shall only be required to account to the Trust for 50% of such Variation Saving, provided that no more than 750m<sup>2</sup> reductions in department and circulation space (in aggregate) may be taken into account for the purposes of this Clause 16.1.4.

16.1.5 If any Variation in respect of the Phase 1 Works requested by the Trust during the Detailed Design Stage in respect of the Building and Engineering Services with specific regard to primary energy provision and water storage, including:

- (A) the use of single fuel boilers with an alternative primary fuel source;
- (B) a reduction in oil storage period;
- (C) the size of the combined heat and power plant; and
- (D) back up systems, namely a second electrical supply to the Site and generators,

gives rise to a Variation Saving, notwithstanding Clause 16.10, the Project Co shall only be required to account to the Trust for 50% of such Variation Saving, provided that the Project Co shall be entitled to refuse such a Variation if the Trust's Requirements in respect of energy targets would not continue to be met.

16.1.6 If the Trust is prevented by applicable Law from granting any Lease pursuant to Clause 21, it shall request a Variation to provide the Facilities Manager or the Project Co (as the case may be) with accommodation equivalent in all material respects to that which would have been demised to it pursuant to the relevant Lease.

16.1.7 Notwithstanding the other provisions of this Clause 16, any Variation to any reinstatement works which are the subject of a Variation in accordance with paragraph 3.3 of Part 4 of Schedule 7 shall itself be subject to the requirements of such paragraph and, in particular, to paragraph 3.3.4(C) thereof.

16.1.8 The Project Co shall be entitled to make the following Variations at any time:

- (A) where a Variation is required for the purpose of obtaining any requisite permissions, consents, licences and approvals or to comply with the requirements of any competent authority; or
- (B) where a Variation is required to ensure compliance with any Law or NHS Requirement, provided that the Project Co shall not make any Variation pursuant to this Clause 16.1.8(B) which the Trust is obliged to request pursuant to Clause 16.1.3(A), Clause 16.1.3(B) or Clause 16.1.3(D).

16.1.9 Not less than 20 Working Days before making any Variation pursuant to Clause 16.1.8, the Project Co shall notify the Trust of its intention to make the same. Such notice shall be accompanied by full details of the relevant Variation including:

- (A) details of the relevant permissions, consents, licences and approvals or requirements of any competent authority or, as the case may be, details of the relevant Law or NHS Requirement;
- (B) where the Variation arises during the Design and Construct Phase, the information referred to in Clauses 16.4.1(A), 16.4.1(C), 16.4.1(H), 16.4.1(I) and 16.4.1(K);
- (C) where the Variation arises during the Operational Phase, the information referred to in Clauses 16.5.1(A), 16.5.1(C), 16.5.1(E), 16.5.1(F) and 16.5.1(H);
- (D) the precise nature of the Variation including:
  - (1) during the Design and Construct Phase, the relevant part of the Works specified in the Design Documents and/or any other works at the Site and, during the Operational Phase, the Hospital or other works at the Site which is or are to be subject to the Variation;
  - (2) the proposed manner of execution of the Variation, including all design and construction proposals;
  - (3) the proposed timing of the execution of the Variations; and
  - (4) the identity of the person(s) whom it is proposed will execute the Variation;

Following the issue of such notice, the Trust and the Project Co shall liaise together in accordance with the Liaison Procedure in respect of the relevant Variation and all matters relating to it and, during the Design and Construct Phase, the Project Co shall be entitled to proceed with the Variation. During the Operational Phase, the Parties shall seek to agree the matters referred to in Clause 16.1.9(D), failing which such matters shall be referred to the Disputes Resolution Procedure.

## 16.2 Trust's Notice of Variation

Should the Trust wish to request any Variation, it shall procure that the Trust's Works Adviser issues a notice to the Project Co to that effect (a "**Trust's Notice of Variation**") identifying the proposed Variation. Before the Trust procures that the Trust's Works Adviser issues a Trust's Notice of Variation, it shall ensure that the proposal is the subject of liaison through the Liaison Procedure and, where possible, provide an indication of the Trust's preferred funding route under Clause 16.9 in respect of any Design and Construct Phase Variation Cost or Operational Phase Variation Cost (as the case may be).

## 16.3 Project Co's Variation Response

The Project Co shall issue a written response to the Trust's Works Adviser (the "**Project Co's Variation Response**") as soon as reasonably practicable following receipt of any Trust's Notice of Variation. Before issuing a Project Co's Variation Response, the Project Co shall give notice in writing to the Trust of any reason entitling the Project Co to refuse to effect the Variation in accordance with Clause 16.4.2 or Clause 16.5.2 (as appropriate). If such reason is agreed or it is determined to be a valid reason pursuant to Clause 16.4.2 or Clause 16.5.2 (as appropriate) the Project Co shall not be obliged to issue a Project Co Variation Response and the Variation shall proceed no further.

## 16.4 Project Co's Variation Response During the Design and Construct Phase

16.4.1 Any Project Co Variation Response issued during the Design and Construct Phase shall state:

- (A) whether the Variation can be effected without adverse impact on the Construction Programme and on Completion and, if it cannot be so effected, what the Project Co anticipates will be the effect of the Variation, including the length of time and programme for obtaining any necessary consents as referred to in Clause 16.4.1(I), on the Construction Programme and on Completion.
- (B) whether, in the opinion of the Project Co, the Variation should be effected and, if the Project Co is of the opinion that it should not be effected, the reasons for that opinion.
- (C) any anticipated adverse effect of the Variation on the Operations.
- (D) either the cost of complying with the Variation calculated by reference to the details contained in the Construction Cost Breakdown, to the extent that the same is relevant to the Variation the subject of the Project Co's Variation Response (the "**Design and Construct Phase Variation Construction Cost**") or the saving which will arise as a result of complying with the Variation, calculated by reference to the details contained in the Construction Cost Breakdown, to the extent that the same is relevant to the Variation the subject of the Project Co's Variation Response (the "**Design and Construct Phase Variation Construction Saving**") in either case, taking into account construction cost inflation on the Anticipated Construction Cost both as to that part of the Works which has not been completed and as to the Variation, as

a result of any extension of the Date for Completion in consequence of the Variation. For the purposes of this Clause 16.4.1(D), construction cost inflation shall be taken into consideration by applying the construction cost indexation rates specified in the Financial Model as at the Commencement Date for each relevant period, provided that where a construction cost indexation rate is required for any period after the last period specified in the Financial Model, the relevant rate shall be six per cent. Where the Construction Cost Breakdown is not relevant as contemplated above, the cost shall be calculated by reference to a fair valuation for the cost of complying with the Variation.

- (E) the additional financing costs (if any) which will be incurred in consequence of the Variation by reason of funding the Variation and the additional financing costs which will be payable by reason of the deferral of the Date for Completion (if such be the case) under each of the payment options available to the Trust under Clauses 16.9.1(A), 16.9.1(B) and 16.9.1(C) (the "**Variation Financing Cost**").
- (F) the savings in financing costs (if any) which will be incurred in consequence of the Variation (the "**Variation Financing Saving**").
- (G) the effect which, in the opinion of the Project Co, compliance with the Variation will have on:
  - (1) the cost and timing of asset renewals;
  - (2) the cost and availability of insurance;
  - (3) the amount of the fee (if any) to be paid to the Facilities Manager; and
  - (4) the Project Co's overhead costs,
 (any net costs being, collectively, the "**Variation Usage Fee Costs**" and any net savings being, collectively, the "**Variation Usage Fee Savings**").
- (H) the effect of the Variation on the Services (if any) with a request that the Trust liaise with the Project Co in relation to the same pursuant to Clause 11.6 of the Facilities Management Agreement.
- (I) the necessary consents (including any planning approval if applicable) which, in the opinion of the Project Co, will need to be obtained to give effect to the Variation.
- (J) the Project Co's assessment of the adjustment to the Usage Fee and/or lump sum payments which must be made if the Trust elects to pay the Design and Construct Phase Variation Cost through Clause 16.9.1(A) or Clause 16.9.1(B) or Clause 16.9.1(C), respectively.
- (K) the Project Co's assessment of the effect (if any) of the Variation on any matter set out in the Unavailability Calculation Table.



16.4.2 Subject to Part 4 of Schedule 7, during the Design and Construct Phase, the Project Co shall only be entitled to refuse to effect any Variation requested by the Trust pursuant to any Trust's Notice of Variation where:

- (A) any necessary consents listed in the relevant Project Co's Variation Response pursuant to Clause 16.4.1(I) will not be obtainable; or
- (B) the Variation would, if implemented, materially adversely affect the health and safety of any person or give rise to a breach of any Law or any NHS Requirement; or
- (C) the Variation would, if implemented, have a material adverse effect on any Minimum Design Life; or
- (D) the Variation would, if implemented, have a material adverse effect on the design and/or specification of the works to be effected by the Building Contractor pursuant to the Building Contract; or
- (E) the extension of time which will result from the Delay Event consequent upon the Variation pursuant to Clause 10.5.1, with reference to the periods referred to in the Project Co's Variation Response in accordance with Clause 16.4.1(A), is reasonably likely to exceed three months or, when taken with previous extensions of time for Variations pursuant to Clause 10.5.1 is reasonably likely to exceed such period; or
- (F) the Design and Construct Phase Variation Construction Cost specified in the Project Co's Variation Response pursuant to Clause 16.4.1(D) is reasonably likely to exceed 10% of the relevant Anticipated Construction Cost as at the Amendment Execution Date or, when taken with Design and Construct Phase Variation Construction Costs in respect of previous Variations, is reasonably likely to exceed such amount; or
- (G) the Variation is in respect of an element of the Works in relation to which the date specified in Appendix F, G or H (as the case may be) to Schedule 5, after which no Variation may be requested by the Trust, has passed; or
- (H) the Variation would give rise to a Service Variation which the Project Co is entitled to refuse pursuant to Clause 11.4.3 of the Facilities Management Agreement; or
- (I) the Variation would, if implemented, make any insurance effected or to be effected by the Project Co in accordance with Clause 24.1 unavailable.

**16.5 Project Co's Variation Response During the Operational Phase**

16.5.1 Any Project Co's Variation Response issued during the Operational Phase shall state:

- (A) the length of time and programme for obtaining any necessary consents as referred to in Clause 16.5.1(F).
- (B) whether, in the opinion of the Project Co, the Variation should be effected and, if the Project Co is of the opinion that it should not be effected, the reasons for that opinion.
- (C) any anticipated adverse effect of the Variation on the Operations.
- (D) the cost (the "**Operational Phase Variation Cost**") of complying with the Variation calculated by reference to a fair price for the execution of the Variation taking into account:
  - (1) the costs of design and construction of the Variation, (including the cost of change of Law risk to the extent the same is assumed by the Project Co) provided that such costs shall be derived from an open market tender process conducted by the Project Co with the approval of the Trust (not to be unreasonably withheld or delayed) in respect of the form and requirements of the proposed tender documents, (including the proposed form of contract between the Project Co and the relevant contractor) the tendering process itself and the selection of contractors or sub-contractors to be invited to tender pursuant to such tendering process;
  - (2) the effect of Variation on the cost and timing of the asset renewals;
  - (3) the effect of Variation on the cost and availability of insurance;
  - (4) the amount of the fee to be paid to the Facilities Manager by the Project Co in consequence of or in relation to the Variation (but only to the extent that the amendment to the fee is reasonable);
  - (5) any impact on the Project Co's overhead costs in consequence of the Variation; and
  - (6) any additional financing costs that will be incurred in consequence of the Variation under each of the payment options available to the Trust under Clauses 16.9.8(A), 16.9.8(B) and 16.9.8(C) or any savings in financing costs that will be incurred in consequence of the Variation,  
  
or the saving which will arise as a result of complying with the Variation, (the "**Operational Phase Variation Saving**").
- (E) the effect of the Variation on the Services (if any), with a request that the Trust liaise with the Project Co in relation to the same pursuant to Clause 11.6 of the Facilities Management Agreement.

- (F) the necessary consents (including any planning approval if applicable) which, in the opinion of the Project Co, will need to be obtained to give effect to the Variation.
- (G) the Project Co's assessment of the adjustment to the Usage Fee and/or lump sum payments which must be made if the Trust elects to pay the Operational Phase Variation Cost through Clause 16.9.8(A) or Clause 16.9.8(B) or Clause 16.9.8(C), respectively and the contractual terms which the Project Co proposes will be used by the Project Co and its building contractor and the programme in accordance with which the Variation will be effected,
- (H) the Project Co's assessment of the effect (if any) of the Variation on any matter set out in the Unavailability Calculation Table.

16.5.2 Subject to Part 4 of Schedule 7, during the Operational Phase, the Project Co shall only be entitled to refuse to effect any Variation requested by the Trust pursuant to any Trust's Notice of Variation where:

- (A) any necessary consents listed in the relevant Project Co's Variation Response pursuant to Clause 16.5.1(F) will not be obtainable; or
- (B) the Variation would, if implemented, materially adversely affect the health and safety of any person or give rise to a breach of any Law or any NHS Requirement; or
- (C) the Variation would, if implemented, have a material adverse effect on the timing or cost of asset renewals; or
- (D) the Variation would give rise to a Service Variation which the Project Co is entitled to refuse pursuant to Clause 11.4.3 of the Facilities Management Agreement; or
- (E) the Variation would, if implemented, make any insurance effected or to be effected by the Project Co in accordance with Clause 24.1 unavailable.

## 16.6 Trust's Variation Confirmation

As soon as practicable after receipt of the Project Co's Variation Response, the Trust shall procure that the Trust's Works Adviser seeks to agree each of the following in respect of the relevant Variation:

16.6.1 during the Design and Construct Phase:

- (A) any extension of time resulting from the Delay Event consequent upon the Variation pursuant to Clause 10.5.1, with reference to the periods referred to in the Project Co's Variation Response in accordance with Clause 16.4.1(A);
- (B) the Design and Construct Phase Variation Construction Cost or the Design and Construct Phase Variation Construction Saving;
- (C) the Variation Financing Cost or the Variation Financing Saving;

- (D) the Variation Usage Fee Costs or the Variation Usage Fee Savings;
- (E) that the Variation will have the effect on the Services specified in the Project Co's Variation Response pursuant to Clause 16.4.1(H);
- (F) the nature of the necessary consents specified in the Project Co's Variation Response pursuant to Clause 16.4.1(I);
- (G) the terms upon which payment shall be made by the Trust to the Project Co; and
- (H) the effect (if any) of the Variation on any matter set out in the Unavailability Calculation Table.

16.6.2 during the Operational Phase:

- (A) the length of time and programme for obtaining any necessary consents as referred to in the Project Co's Variation Response pursuant to Clause 16.5.1(A);
- (B) the Operational Phase Variation Cost or the Operational Phase Variation Saving;
- (C) that the Variation will have the effect on the Services specified in the Project Co's Variation Response pursuant to Clause 16.5.1(E);
- (D) the nature of the necessary consents specified in the Project Co's Variation Response pursuant to Clause 16.5.1(F);
- (E) the terms upon which payment shall be made by the Trust to the Project Co, the contractual terms to be used by the Project Co and its building contractor and the programme in accordance with which the Variations will be effected; and
- (F) the effect (if any) of the Variation on any matter set out in the Unavailability Calculation Table.

16.6.3 if any of the matters referred to in Clauses 16.6.1 or 16.6.2 cannot be agreed within 10 Working Days of the date of the Project Co's Variation Response, the matter shall be referred to the Disputes Resolution Procedure. If the matter is referred to the Disputes Resolution Procedure, appropriate adjustments shall be made to each of the items in the Project Co's Variation Response to reflect the time taken by the Disputes Resolution Procedure. Proposals as to the extent of such adjustments shall be put forward by the Project Co as part of its submissions made in the Disputes Resolution Procedure. Once the terms of the Variation and the matters referred to in Clause 16.6.1 or Clause 16.6.2 (as the case may be) together with the extent of such adjustments have been agreed or determined, the Trust shall (subject as mentioned below) procure that the Trust's Work's Adviser issues a confirmation of the terms of the Variation as so agreed or determined forthwith following such agreement or determination (a "**Trust's Variation Confirmation**"). Until the issue of a Trust's Variation Confirmation in respect of any Variation (other than a Variation requested pursuant to Clauses 16.1.3, 16.1.4 or 16.1.5), the Trust

shall be entitled to cancel its request for the Variation at any time by procuring that the Trust's Works Adviser notifies the Project Co of the same. If no Trust's Variation Confirmation is issued within 10 Working Days of such agreement or determination, (except in relation to a Variation requested pursuant to Clauses 16.1.3, 16.1.4 or 16.1.5) the requested Variation shall be deemed to be cancelled.

## 16.7 Variation Implications

16.7.1 If the Trust's Works Adviser notifies the Project Co of the cancellation of any request for a Variation pursuant to Clause 16.6 or if the same is deemed to be cancelled, the Trust shall, upon demand pay to the Project Co the reasonable, out of pocket, design and other costs, properly incurred by the Project Co in considering or dealing with the requested Variation.

16.7.2 Upon receipt of a Trust's Variation Confirmation, the Project Co shall carry out the relevant works to effect the Variation on the terms of such Trust's Variation Confirmation or, in relation to a Variation requested pursuant to Clauses 16.1.3, 16.1.4 or 16.1.5, where no Trust's Variation Confirmation is issued, as agreed or determined. Such works shall include design, development, construction, completion, commissioning and testing, as well as the obtaining of any necessary consents, as agreed pursuant to Clause 16.6.1(F) or Clause 16.6.2(D).

16.7.3 The obligations of the Project Co to effect any Variation pursuant to Clause 16.7.2 shall be subject to:

(A) the Project Co obtaining:-

- (1) the consent of Funders (where requisite) to the Variation; and
- (2) all necessary consents (including planning approvals) to effect the Variation in a form which is satisfactory to both Parties (acting reasonably) and within the period agreed pursuant to Clause 16.6.1(A) or Clause 16.6.2(A),

which, in both cases, the Project Co will use all reasonable endeavours to obtain;

(B) the Trust obtaining approval of the Variation by the Department of Health and/or any other relevant NHS body (which the Trust will use all reasonable endeavours to obtain) and providing evidence of the same to the Project Co; and

(C) where it is agreed or determined that any Variation requires a Service Variation, the Trust requesting such a Service Variation and issuing a Trust's Service Variation Confirmation.

16.7.4 If, despite using such reasonable endeavours, any consent or approval of the type referred to in Clause 16.7.3 cannot be obtained either at all or in the period agreed or a Trust's Service Variation Confirmation is not issued in the period agreed, the requested Variation shall be deemed to be cancelled unless the Trust decides to pursue such consent in the name of the Project Co. The

Project Co will give the Trust all reasonable co-operation, access and assistance for the purposes of such pursuit. The Trust will indemnify and keep indemnified the Project Co in respect of any Claims or Losses which may arise out of such pursuit.

16.7.5 The Trust shall use all reasonable endeavours to assist the Project Co in obtaining or seeking to obtain any necessary consents, permission or licences required to effect a Variation.

16.7.6 The Project Co shall, upon request by the Trust, request the Technical Adviser to liaise with the Trust in respect of any proposed Variation.

## 16.8 Used Fixed Equipment

16.8.1 Following the Commencement Date, the Parties shall liaise together in accordance with the Liaison Procedure as often as may be necessary to discuss Used Fixed Equipment.

16.8.2 During the period of development of the design of the Works in accordance with the Design Development Procedure and following liaison in accordance with Clause 16.8.1, the Trust shall prepare and deliver to the Project Co a draft schedule specifying details of the items of Used Fixed Equipment, indicating those that are substitutive of the fixtures and fittings to be provided by the Project Co as part of the Works and those that are additional.

16.8.3 When the Project Co (acting reasonably) considers that the Phase 1 Works shall be completed in accordance with the Design Documents in two years' time, it shall notify the Trust of the same. Thereafter, the Parties shall liaise together in accordance with the Liaison Procedure to review the details of Used Fixed Equipment, the value of the fixtures and fittings to be provided by the Project Co as part of the Works that are substituted by Used Fixed Equipment and the additional cost or saving to the Project Co of Commissioning and Maintaining Used Fixed Equipment. The Parties shall use the results of such liaison to assist them in seeking to agree:

- (A) whether it is appropriate in all the circumstances for such items of fixed equipment to constitute Used Fixed Equipment;
- (B) the residual life of the Used Fixed Equipment;
- (C) the value of fixtures and fittings comprised in the Works that are substituted by each item of Used Fixed Equipment;
- (D) the additional cost or the saving of Commissioning and Maintaining the Used Fixed Equipment;
- (E) the replacement cost and quality of Used Fixed Equipment that is non-substitutive of fixtures and fittings intended to form part of the Works;
- (F) the depreciation policy and renewal frequency to be applied in respect of each item of Used Fixed Equipment.

16.8.4 All items of Used Fixed Equipment required by the Trust pursuant to Clause 16.8.2 and amended by Clause 16.8.3 shall be the subject of a Variation

requested by the Trust which shall not be capable of cancellation by the Trust (unless the change to Used Fixed Equipment is subsequently revoked by means of a subsequent Variation).

16.8.5 The Trust will Decommission and Transport all Used Fixed Equipment in accordance with a programme agreed between the Parties which is consistent with the Construction Programme.

## 16.9 Variation Cost Payment

16.9.1 Subject to Clause 16.9.3, each Design and Construct Phase Variation Cost shall be paid:

- (A) through an adjustment to the Usage Fee in respect of the whole amount; or
- (B) by way of a lump sum payment made in one or more instalments in respect of the Design and Construct Phase Variation Construction Cost and calculated to leave the Project Co in no better and no worse position than before the Design and Construct Phase Variation Construction Cost was incurred, on the basis of the tests in Part 2 of Schedule 6 (mutatis mutandis) and an adjustment to the Usage Fee made in accordance with Part 2 of Schedule 6 in respect of any Variation Financing Cost and any Variation Usage Fee Costs; or
- (C) by way of a lump sum payment made in one or more instalments in respect of the whole amount and calculated to leave the Project Co in no better and no worse position than before the Design and Construct Phase Variation Construction Cost was incurred, on the basis of the tests in Part 2 of Schedule 6 (mutatis mutandis).

Where any increased cost is to be paid by way of lump sum (whether by way of instalments or not) the Trust shall, at the request and direction of the Project Co, pay all or such part of the lump sum as the Project Co shall specify to such third party as the Project Co shall direct.

16.9.2 Subject to Clauses 16.9.3 and 30, the Trust shall be entitled to elect the method of payment pursuant to Clause 16.9.1. Any such election shall be made by the Trust within 10 Working Days of the date of the relevant Project Co's Variation Response.

16.9.3 Notwithstanding Clauses 16.9.1 and 16.9.2, that part of any Design and Construct Phase Variation Cost (if any) which comprises the Variation Usage Fee Costs shall be paid by the Trust by way of an adjustment to the Usage Fee pursuant to Clause 16.9.1(A) and not by any other method of payment.

16.9.4 If the Trust elects to pay the whole of any Design and Construct Phase Variation Cost pursuant to Clause 16.9.1(A), the Usage Fee shall be adjusted in accordance with Part 2 of Schedule 6 to reflect the same. Such adjustment will be made by the Project Co and notified to the Trust within five Working Days of the end of the relevant Quarter.

- 16.9.5 If the Trust elects to pay the Design and Construct Phase Variation Cost pursuant to Clause 16.9.1(B):
- (A) the Parties shall agree the amount and timing of the relevant instalments in respect of the Design and Construct Phase Variation Construction Cost which instalments, unless otherwise agreed, shall reflect the amount and timing of the relevant costs as they are incurred and the Trust shall pay the same in accordance with such agreement.
  - (B) the Usage Fee shall be adjusted in accordance with Part 2 of Schedule 6 to reflect such Variation Financing Cost and any Variation Usage Fee Costs. Such adjustment will be made by the Project Co and notified to the Trust within five Working Days of the end of the relevant Quarter.
- 16.9.6 If the Trust elects to pay the whole of any Design and Construct Phase Variation Cost pursuant to Clause 16.9.1(C), the Parties shall agree the amount and timing of the relevant instalments, which instalments, unless otherwise agreed, shall reflect the amount and timing of the relevant costs as they are incurred and the Trust shall pay the same in accordance with such agreement.
- 16.9.7 If the Trust elects to pay any amount through an adjustment to the Usage Fee but is precluded from doing so by Clause 30.1, the Trust shall pay such amount (in the case of any amount which relates to any Variation Financing Cost, as and when the same falls due) by way of a lump sum pursuant to Clause 16.9.1(B) or Clause 16.9.1(C), as the case may be.
- 16.9.8 Subject to Clause 16.9.10, each Operational Phase Variation Cost shall be paid:
- (A) through an adjustment to the Usage Fee in respect of the whole amount; or
  - (B) by way of a lump sum payment made in one or more instalments in respect of part of the Operational Phase Variation Cost and calculated to leave the Project Co in no better and no worse position than before the Operational Phase Variation Cost and an adjustment to the Usage Fee in respect of the remaining part; or
  - (C) by way of a lump sum payment made in one or more instalments in respect of the whole amount and calculated to leave the Project Co in no better and no worse position than before the Operational Phase Variation Cost.
- 16.9.9 Subject to Clauses 16.9.10 and 30, the Trust shall be entitled to elect the method of payment pursuant to Clause 16.9.8. Any such election shall be made within 10 Working Days of the relevant Project Co's Variation Response.
- 16.9.10 Notwithstanding Clauses 16.9.8 and 16.9.9, that part of the Operational Phase Variation Cost as is referred to in Clauses 16.5.1(D)(2) to 16.5.1(D)(5) (inclusive) (if any) shall be paid by the Trust by way of an adjustment to the



Usage Fee pursuant to Clause 16.9.8(A) and not by any other method of payment.

16.9.11 If the Trust elects to pay the whole of any Operational Phase Variation Cost pursuant to Clause 16.9.8(A), the Parties shall liaise together following provision of information by the Project Co in accordance with Clause 30.2. Following such liaison, the Trust shall notify the Project Co as to whether or not it still wishes to fund the relevant Operational Phase Variation Cost pursuant to Clause 16.9.8(A). If it does, the Usage Fee shall be adjusted by an amount calculated to leave the Project Co in no better and no worse position than before the Variation. Otherwise, the Trust shall pay for the Variation in accordance with Clause 16.9.8(B) or Clause 16.9.8(C) or shall cancel its request for the Variation in accordance with Clause 16.6.3.

16.9.12 If the Trust elects to pay the Operational Phase Variation Cost pursuant to Clause 16.9.8(B):

(A) the Parties shall agree the amount and timing of the relevant instalments in respect of the relevant part of the Operational Phase Variation Cost which instalments, unless otherwise agreed, shall reflect the amount and timing of the relevant costs as they are incurred and the Trust shall pay the same in accordance with such agreement.

(B) in relation to the payment of the remaining part of the Operational Phase Variation Cost, the Parties shall liaise together following provision of information by the Project Co in accordance with Clause 30.2. Following such liaison, the Trust shall notify the Project Co as to whether or not it still wishes to fund the relevant Operational Phase Variation Cost pursuant to Clause 16.9.8(B). If it does, the Usage Fee shall be adjusted by an amount calculated to leave the Project Co in no better and no worse position than before the Variation. Otherwise, the Trust shall pay for the Variation in accordance with Clause 16.9.8(C) or shall cancel its request for the Variation in accordance with Clause 16.6.3.

16.9.13 If the Trust elects to pay the whole of any Operational Phase Variation Cost pursuant to Clause 16.9.8(C), the Parties shall agree the amount and timing of the relevant instalments, which instalments, unless otherwise agreed, shall reflect the amount and timing of the relevant costs as they are incurred and the Trust shall pay the same in accordance with such agreement.

## 16.10 Variation Saving Adjustment

16.10.1 During the Design and Construct Phase:

(A) Variation Savings shall be accounted for by the Project Co through an adjustment to the Usage Fee made in accordance with Part 3 of Schedule 6.

(B) within five Working Days of the end of the relevant Quarter, the Project Co shall notify the Trust of any Variation Saving specified in any Trust's Variation Confirmation issued during such Quarter and the

Usage Fee shall be adjusted in accordance with Part 3 of Schedule 6 to reflect such Variation Saving.

16.10.2 During the Operational Phase, Variation Savings shall be accounted for by the Project Co through such adjustments to the Usage Fee calculated to leave the Parties in no better and no worse position.

#### 16.11 Post-Completion Variation Works

All Post-Completion Variation Works shall be performed so as to cause minimum inconvenience and disruption to the Trust and to any Third Party Supplier and to the operation of the Hospital.

#### 16.12 Third Party Suppliers

16.12.1 All Variations required by the Trust during the Design and Construct Phase shall be undertaken by the Project Co and the Trust shall not appoint a Third Party Supplier to undertake such Variations.

16.12.2 Subject to all procurement Laws, all Variations required by the Trust during the Operational Phase which relate to the Hospital shall be undertaken by the Project Co, unless the Project Co is unable to obtain the consent of Funders (where requisite) pursuant to Clause 16.7.3(A)(1). The Trust shall not appoint a Third Party Supplier to undertake such Variations, save where the Trust is obliged to do so by any procurement Laws or where the Project Co is unable to obtain such consent.

16.12.3 Subject to all procurement Laws, all Variations required by the Trust during the Operational Phase which relate to the Site other than the Hospital shall first be offered to the Project Co for the Project Co to undertake the relevant Variation and the Trust shall not appoint a Third Party Supplier to undertake such Variations, save where the Trust is obliged to do so by any procurement Laws or where the Project Co declines to undertake the relevant Variation.

16.12.4 Any Variation required by the Trust pursuant to the provision of any residential accommodation for any employee of the Trust or any student at the Site, shall be excluded from the scope of Clauses 16.12.1, 16.12.2 and 16.12.3. The Trust shall be entitled to enter into agreement with any Third Party Supplier in respect of the design, carrying out and completion of any works on the Site in respect of such provision.

16.12.5 Subject to Clauses 16.12.1, 16.12.2 and 16.12.3 and other than pursuant to Clause 16.12.4, the Trust shall be entitled to enter into agreement with any Third Party Supplier in respect of the design, carrying out and completion of any works on the Site.

16.12.6 In relation to any Third Party Supplier engaged or to be engaged in respect of any works on the Site, whether in respect of any Variation or otherwise:

- (A) the Trust shall, where such works will impact in any way on any Service (or, during the Phase 2 Design and Construct Phase, the Phase 2 Works) in good faith seek to agree with the Project Co before

engaging the Third Party Supplier, the date or dates on which the works will commence and be completed.

- (B) the Third Party Supplier shall be considered an agent or sub-contractor of the Trust and shall not be treated as a sub-contractor of the Project Co.
- (C) before appointing any Third Party Supplier, the Trust shall liaise with the Project Co as to the identity of the proposed Third Party Supplier and the works which are to be undertaken by it. The Project Co shall have the right to object to the selection of any person as a prospective Third Party Supplier to undertake works for the Trust if it reasonably believes (and is able to produce information verifying this belief) that such a person could not confidently be expected to undertake the works in a manner consistent with the provision of the Services by the Project Co (or, during the Phase 2 Design and Construct Phase, the completion of the Phase 2 Works).
- (D) before appointing any Third Party Supplier where the works to be undertaken by the Third Party Supplier will impact in any way upon any Service (or, during the Phase 2 Design and Construct Phase, the Phase 2 Works), the Trust shall supply to the Project Co a method statement as to the extent of that impact and will seek to agree with the Project Co the extent to which and the manner in which the interface between the Project Co and the Third Party Supplier needs to be coordinated. The Project Co shall identify the likely adverse impact on the provision of Services or, during the Phase 2 Design and Construct Phase, the completion of the Phase 2 Works and seek to agree with the Trust the actions to be taken by the Parties to avoid those consequences.
- (E) once a Third Party Supplier is appointed, the Parties shall liaise to discuss any adverse impact which the acts or omissions of the Third Party Supplier have on the provision of any Service (or, during the Phase 2 Design and Construct Phase, the Phase 2 Works). The Parties shall seek to agree matters to resolve any conflicts between the acts and omissions of any Third Party Supplier and the Project Co in the provision of the Services or, during the Phase 2 Design and Construct Phase, the completion of the Phase 2 Works.
- (F) the Parties shall ensure that the matters referred to in Clauses 16.12.6(D) and 16.12.6(E) are the subject of liaison in accordance with the Liaison Procedure. If the Parties are unable to agree any such matter within 10 Working Days of commencement of the relevant liaison, the same shall be referred to the Disputes Resolution Procedure.
- (G) the Project Co undertakes to cooperate fully with the Trust and with the relevant Third Party Supplier and shall provide or procure such access as may be necessary to any part of the Site and to any pipes, cabling, data materials and documents (including any Design Data) as such Third Party Supplier may reasonably require.

- (H) the Project Co shall cease to have any liability for defective design, materials or workmanship or fitness for purpose in respect of any Works or Post Completion Variation Works, to the extent that such Works or Post Completion Variation Works are the subject of works or services undertaken or provided by Third Party Suppliers or are adversely affected by the same, except where those works or services are undertaken as a result of breach by the Project Co of any of its obligations under the Project Documents.
- (I) the Trust shall ensure that all Third Party Suppliers who need to have access to the Site or any other land where any part of the Works are to be executed shall, whilst the Works are being executed, only be entitled to enter the Site or such land if:
  - (1) they first report to the Building Contractor;
  - (2) they comply with all health and safety requirements imposed by the Planning Supervisor or the Principal Contractor (in each case as defined in the CDM Regulations); and
  - (3) they comply with a programme in relation to their works which has been agreed between the Parties.

16.12.7 In relation to any Third Party Supplier engaged by the Trust in respect of any works on the Site or who is a tenant or licensee of the Trust carrying out works in respect of any Commercial Areas:

- (A) the Trust shall indemnify and keep indemnified the Project Co in respect of any Claims or Losses arising out of the acts, omissions, wilful default or negligence of the Third Party Supplier.
- (B) the Project Co shall notify the Trust as soon as reasonably practicable after becoming aware of any matter in relation to the Third Party Supplier which it believes may lead to any Claim or Loss referred to in Clause 16.12.7(A).
- (C) the Project Co shall take all reasonable steps to mitigate the consequences of any act, omission, wilful default or negligence of the Third Party Supplier giving rise to any Claim or Loss referred to in Clause 16.12.7(A).

16.12.8 Where the Trust carries out any works on the Site, whether in respect of any Variation or otherwise:

- (A) the Trust shall, where such works will impact in any way on any Service (or, during the Phase 2 Design and Construct Phase, the Phase 2 Works):
  - (1) in good faith seek to agree with the Project Co before carrying out the same, the date or dates on which the works will commence and be completed;

- (2) before carrying out the works, supply to the Project Co a method statement as to the extent of that impact and seek to agree with the Project Co the extent to which and the manner in which the interface between the Project Co and the Trust needs to be co-ordinated.
- (B) the Project Co shall identify the likely adverse impact on the provision of Services (or, during the Phase 2 Design and Construct Phase, the completion of the Phase 2 Works) and seek to agree with the Trust the actions to be taken by the Parties to avoid those consequences.
- (C) once the works have commenced, the Parties shall liaise to discuss any adverse impact which the acts or omissions of the Trust in respect of the works have on the provision of any Service (or, during the Phase 2 Design and Construct Phase, the completion of the Phase 2 Works). The Parties shall seek to agree matters to resolve any conflicts between the acts and omissions of the Trust in respect of the works and the Project Co in the provision of the Services (or, during the Phase 2 Design and Construct Phase, the completion of the Phase 2 Works).
- (D) the Parties shall ensure that the matters referred to in Clauses 16.12.8(A), 16.12.8(B) and 16.12.8(C) are the subject of liaison in accordance with the Liaison Procedure. If the Parties are unable to agree any such matter within 10 Working Days of commencement of the relevant liaison, the same shall be referred to the Disputes Resolution Procedure.
- (E) the Project Co undertakes to cooperate fully with the Trust and shall provide or procure such access as may be necessary to any part of the Site and to any pipes, cabling, data materials and documents as the Trust may reasonably require.
- (F) the Project Co shall cease to have any liability for defective design, materials or workmanship or fitness for purpose in respect of any Works or Post Completion Variation Works, to the extent that such Works or Post Completion Variation Works are the subject of works undertaken by the Trust or are adversely affected by the same, except where those works are undertaken as a result of breach by the Project Co of any of its obligations under the Project Documents.
- (G) if it needs to have access to the Site or any other land where any part of the Works are to be executed for the purposes of such works, it shall, whilst the Works are being executed, only be entitled to enter the Site or such land if:
- (1) it first reports to the Building Contractor;
  - (2) it complies with all health and safety requirements imposed by the Planning Supervisor or the Principal Contractor (in each case as defined in the CDM Regulations); and
  - (3) it complies with a programme in relation to its works which has been agreed between the Parties.

## **17. INSPECTION AND COMPLETION**

### **17.1 Right of Entry**

17.1.1 Subject to such inspection having previously been discussed with the Project Co by way of the Liaison Procedure and subject also to such inspection taking place at times calculated to cause least interference with the Works or any Post-Completion Variation Works, the Trust's Works Adviser and any other representative or adviser of the Trust will have, at all reasonable times, the right to enter the Site in order to inspect and view the state and progress of the Works and of any Post-Completion Variation Works and to ascertain that they are being executed in accordance with this Agreement.

17.1.2 Entry on to the Site during the execution of the Works or on to that part of the Site where any Post-Completion Variation Works are in progress shall be subject to the persons effecting such entry complying with all reasonable health and safety requirements of the Project Co and the Contractors and subject to such persons being accompanied at all times by representatives of the Project Co and/or the Contractors (as the Project Co shall determine).

### **17.2 Increased Monitoring**

If, following any inspection made pursuant to Clause 17.1, the Trust's Works Adviser serves a notice on the Project Co under Clause 36.1 in respect of any of the Project Co's obligations under this Agreement, the Trust may (without prejudice to any other right or remedy available to it) by further notice to the Project Co increase the level of its monitoring of the Project Co (by way of inspections pursuant to Clause 17.1) over and above the level applicable during the month preceding the date of such further notice, until such time as the Project Co shall have demonstrated to the reasonable satisfaction of the Trust that it will perform and is capable of performing all its obligations under this Agreement. Any notice to the Project Co issued under this Clause 17.2 shall specify the additional inspections pursuant to Clause 17.1 to be undertaken by the Trust's Works Adviser in monitoring the Project Co. The Project Co shall compensate the Trust for all reasonable, additional costs properly incurred by it as a result of such additional inspections (including the relevant administrative expenses of the Trust, with an appropriate sum in respect of general staff costs and overheads).

### **17.3 Inspection Access**

Subject to Clause 17.1.2, the Project Co will ensure that access to the Site is given to the Trust's Works Adviser and to any such other representative or adviser to allow any inspections pursuant to this Clause 17 and will liaise with and supply such information in respect of the Works and any Post-Completion Variation Works to the same, in each case as the Trust's Works Adviser, representative or adviser may reasonably require for such purposes.

### **17.4 No Interruption**

17.4.1 The Trust will procure that the Trust's Works Adviser and any other representative or adviser will each ensure that progress of the Works and of any Post-Completion Variation Works is not unduly interrupted or interfered with during the course of any inspections pursuant to this Clause 17.

17.4.2 Save for the Project Co's entitlement to claim an extension of time and compensation by reason of a Delay Event, the Trust shall have no other liability to the Project Co in the event that the Trust breaches Clause 17.4.1 during the Design and Construct Phase.

**17.5 No Effect**

No inspection by or on behalf of the Trust of the Works will, in any way, reduce or otherwise affect the obligations of the Project Co in respect of the Works and any Post-Completion Variation Works.

**17.6 Pre-Completion Inspection**

17.6.1 The Project Co shall give the Trust's Works Adviser not less than 10 Working Days notice of the date upon which the Project Co considers that the Phase 1 Works or the Phase 2 Works for any Beneficial Occupation Area or all of the Phase 2 Works (as the case may be) will be completed in accordance with the Design Documents and, in each case, a date or dates when the relevant Works can be inspected prior to the anticipated Building Completion Date.

17.6.2 The Trust's Works Adviser shall be entitled to inspect the Phase 1 Works or the relevant Phase 2 Works (as the case may be) on the date or dates stated in such notice and the Project Co shall accompany the Trust's Works Adviser upon such inspection.

**17.7 Pre-Completion Matters**

The Trust shall procure that the Trust's Works Adviser, within three Working Days of any inspection made pursuant to Clause 17.6, notifies the Project Co and the Independent Certifier of any outstanding matters which, in the Trust's Works Adviser's reasonable opinion, require to be attended to before the relevant Works can be considered to be completed in accordance with the Design Documents.

**17.8 Usage Fee**

17.8.1 Upon giving notice pursuant to Clause 17.6, the Project Co shall notify the Trust of:

- (A) any Design and Construct Phase Variation Cost specified in any Trust's Variation Confirmation issued since the latest notification to the Trust pursuant to Clause 16.9.4 or Clause 16.9.5 (as the case may be), where the Trust has made an election in respect of such Design and Construct Phase Variation Cost pursuant to Clause 16.9.1(A) or Clause 16.9.1(B); and
- (B) any Design and Construct Phase Variation Saving specified in any Trust's Variation Confirmation issued since the latest notification to the Trust pursuant to Clause 16.10.1(B).

17.8.2 Such notice shall request the Trust to adjust the Usage Fee in accordance with the relevant Trust's Variation Confirmation.

**17.9 Independent Certifier**

- 17.9.1 The Project Co shall notify the Trust's Works Adviser and the Independent Certifier when the Project Co (acting reasonably) considers that the Phase 1 Works will be complete in accordance with the Design Documents in 12 months time. Such notification shall trigger the activities of the Independent Certifier pursuant to Clause 17.10.1.
- 17.9.2 The Project Co shall notify the Trust's Works Adviser when the Project Co (acting reasonably) considers that the Phase 1 Works, the Phase 2 Works for any Beneficial Occupation Area or all of the Phase 2 Works (as the case may be) will be completed in accordance with the Design Documents in six months time. Such notification shall, in each case, trigger the activities of the Independent Certifier pursuant to Clause 17.10.2.
- 17.9.3 The role of the Independent Certifier shall be to carry out, acting with reasonable skill and care, the various tasks which the Project Co is to procure that it performs pursuant to Clause 17.10.
- 17.9.4 Subject to Clause 17.9.5, the cost of the employment of the Independent Certifier by the Project Co (including all reimbursable expenses payable in accordance with the Agreement for Appointment of Independent Certifier) shall be paid by the Trust to the Project Co within 10 Working Days of demand by the Project Co to the Trust, such demand to be accompanied by evidence that the invoice date relating to the relevant sum claimed by the Project Co has occurred provided that, nothing in this Clause 17.9.4 shall require the Trust to reimburse any cost to the Project Co which is payable by the Project Co pursuant to Clause 17.9.5.
- 17.9.5 In respect of the cost of employment of the Independent Certifier, the Project Co shall pay, without any right of reimbursement by the Trust under Clause 17.9.4:
- (A) any cost which arises as a result of any breach by the Project Co of any provisions of the Agreement for Appointment of Independent Certifier;
  - (B) any amount payable pursuant to paragraph 7.3 of the Second Schedule to the Agreement for Appointment of Independent Certifier;
  - (C) any amount payable pursuant to paragraph 8 of the Second Schedule to the Agreement for Appointment of Independent Certifier, where the relevant suspension pursuant to paragraph 7.1 of the same arises for any reason other than as a result of any Delay Event, Relief Event or Archaeological Delay Event; and
  - (D) any amount payable pursuant to paragraph 9 of the Second Schedule to the Agreement for Appointment of Independent Certifier in respect of any Dispute;
    - (1) where the Dispute is decided entirely in favour of the Trust; or



- (2) where the Dispute is decided only partly in favour of each Party, to the extent determined pursuant to the Disputes Resolution Procedure.

17.9.6 Where a delay arises during the briefing phase or either certification phase as described in the Second Schedule to the Agreement for the Appointment of Independent Certifier, whether as a result of any Delay Event, Relief Event or Archaeological Delay Event or for any other reason, the Parties shall liaise together in accordance with the Liaison Procedure to consider whether the activities of the Independent Certifier should be suspended and the duration of such suspension, in each case, pursuant to paragraph 7.1 of the Second Schedule to the Agreement for the Appointment of Independent Certifier. If the Parties (acting reasonably) are unable to agree upon any matter relating to the same within five Working Days, the Dispute shall be referred to the Disputes Resolution Procedure.

17.9.7 Without prejudice to their respective obligations pursuant to Clause 17.10, the Parties each undertake to co-operate with the Independent Certifier to ensure that the Independent Certifier is familiar with all necessary aspects of the Project for the purposes of its role as described in Clause 17.9.3.

17.9.8 The Parties agree that the Independent Certifier shall act as an expert and not as an arbitrator.

17.9.9 The Parties shall be bound by the decision of the Independent Certifier unless and until the same shall be overturned or modified by the Disputes Resolution Procedure.

17.9.10 If either Party wishes to challenge any decision of the Independent Certifier it shall refer the matter to the Disputes Resolution Procedure within 10 Working Days of the relevant decision, as to which time shall be of the essence, failing which the Parties shall be bound by the same.

## 17.10 Completion Certificates

17.10.1 During the period of six months following notification of the Trust's Works Adviser pursuant to Clause 17.9.1, the Project Co shall:

- (A) liaise with the Independent Certifier in relation to the tasks which are to be carried out by the Independent Certifier following notification by the Project Co in accordance with Clause 17.9.2;
- (B) provide the Independent Certifier with information regarding the detailed commissioning and testing programme developed by the Parties in respect of the Works and permit the Independent Certifier to make representations in respect of the same;
- (C) enforce the Independent Certifier's obligations pursuant to the terms of the Agreement for Appointment of Independent Certifier:
  - (1) to liaise with the Project Co in anticipation of carrying out its further tasks pursuant to its appointment;

- (2) to consider any information provided by the Project Co pursuant to Clause 17.10.1(B) and make representations to the Project Co in relation to the same, to the extent that it sees fit; and
- (3) to develop criteria (the "**Start Up Criteria**") which the Independent Certifier shall use to determine whether each of the Start Up Matters has been satisfied, provided that the Independent Certifier shall:
  - (a) consult with the Trust and the Project Co before issuing draft Start Up Criteria for consideration;
  - (b) take account of Clause 18.1.3 and 18.3.1 of the Project Agreement;
  - (c) not take account of any matter which is to take place after Completion; and
  - (d) in relation to the development of Start Up Criteria for the Phase 2 Areas, have regard to the extent to which each of the Start Up Matters has previously been satisfied in relation to other parts of the Hospital.

17.10.2 After notification of the Trust's Works Adviser pursuant to Clause 17.9.2, the Project Co shall enforce the Independent Certifier's obligations pursuant to the terms of the Agreement for Appointment of Independent Certifier:

- (A) when:
  - (1) the Phase 1 Works have been completed in accordance with the Design Documents, to issue a certificate (the "**Phase 1 Building Completion Certificate**") to that effect (which certificate shall not be unreasonably withheld or delayed) stating the date (the "**Phase 1 Building Completion Date**") upon which the Phase 1 Works were completed;
  - (2) the Phase 1 Building Completion Certificate and Service Completion Certificates for all of the Services in respect of the Phase 1 Areas have been issued, to issue a certificate (the "**Phase 1 Completion Certificate**") to that effect (which certificate shall not be unreasonably withheld or delayed) stating the date (the "**Phase 1 Completion Date**") upon which Phase 1 Completion was achieved;
  - (3) the Phase 2 Works for either Beneficial Occupation Area have been completed in accordance with the Design Documents, to issue a certificate (the "**BOA Building Completion Certificate**") to that effect, (which certificate shall not be unreasonably withheld or delayed) stating the date (the "**BOA Building Completion Date**") upon which the relevant Phase 2 Works were completed;

- (4) the BOA Building Completion Certificate and Service Completion Certificates for all of the Services in respect of either Beneficial Occupation Area have been issued, to issue a certificate (the "**BOA Completion Certificate**") to that effect (which certificate shall not be unreasonably withheld or delayed) stating the date (the "**BOA Completion Date**") upon which BOA Completion was achieved for that Beneficial Occupational Area;
  - (5) all of the Phase 2 Works have been completed in accordance with the Design Documents, to issue a certificate (the "**Phase 2 Building Completion Certificate**") to that effect (which certificate shall not be unreasonably withheld or delayed) stating the date (the "**Phase 2 Building Completion Date**") upon which all of the Phase 2 Works were completed;
  - (6) the Phase 2 Building Completion Certificate and Service Completion Certificates for all of the Services in respect of all of the Phase 2 Areas have been issued, to issue a certificate (the "**Phase 2 Completion Certificate**") to that effect (which certificate shall not be unreasonably withheld or delayed) stating the date (the "**Phase 2 Completion Date**") upon which Phase 2 Completion was achieved;
- (B) to issue each Building Completion Certificate , notwithstanding the fact that there are any matters which remain outstanding and which do not affect the occupation and use by the Trust of the Phase 1 Areas, any Beneficial Occupation Area or all of the Phase 2 Areas (as the case may be) and will not hinder or prevent the completion of the Start Up Matters in respect of the same and neither the absence of landscaping in accordance with Clause 17.12 nor the absence of any car parking pursuant to Clause 21.1 shall prevent the issue of any Building Completion Certificate or any Service Completion Certificate. In such circumstances, the Project Co shall procure that the Independent Certifier, within five Working Days of the date of issue of the relevant Building Completion Certificate, notifies the Parties with details of such outstanding matters. Such notice (a "**Snagging Notice**") shall specify:-
- (1) the matters which remain outstanding (the "**Snagging Matters**"); and
  - (2) the Independent Certifier's estimate of the cost of attending to the Snagging Matters, calculated by reference to the Construction Cost Breakdown to the extent that the same is relevant to the Snagging Matters in question and otherwise by reference to a fair valuation for the relevant cost (the "**Snagging Matters Amount**").

17.10.3 Following the issue of a Snagging Notice:

- (A) the Project Co shall:-
  - (1) within 10 Working Days of the later of receipt thereof and the Completion Date associated with the relevant Building Completion Certificate, provide to the Trust's Works Adviser and the Independent Certifier its proposals for attending to the Snagging Matters; and
  - (2) within three months of the later of receipt thereof and the relevant Completion Date or such longer period as may be certified by the Independent Certifier as reasonable in all the circumstances, attend to all Snagging Matters to the satisfaction of the Independent Certifier.
- (B) the Trust shall be entitled to deduct all or part of the Snagging Matters Amount from the amount of any Monthly Facilities Charges which become payable pursuant to Clause 39, provided that, where more than one such deduction is made in relation to any Snagging Matters Amount, the aggregate amount of such deductions in respect of such Snagging Matters Amount shall not exceed the same.

17.10.4 If any deduction is made under Clause 17.10.3(B), the Project Co shall procure that the Independent Certifier notifies them monthly of progress in respect of all the Snagging Matters referred to in the relevant Snagging Matters Notice. Following each such notification, the Trust shall pay to the Project Co an amount equal to the proportion of the relevant Snagging Matters Amount attributed to any Snagging Matters which have been completed by the Project Co, such amount being certified by the Independent Certifier in his notification. Once all such Snagging Matters have been attended to, to the satisfaction of the Independent Certifier, the Project Co shall procure that the Independent Certifier notifies them of the same. Thereafter, the Trust shall pay the aggregate amount of any deductions made under Clause 17.10.3(B) in relation to the relevant Snagging Matters Amount to the Project Co, where relevant, net of any such payments previously made under this Clause 17.10.4. All payments by the Trust pursuant to this Clause 17.10.4 shall be made by adding the relevant amount to the Monthly Facilities Charge next payable pursuant to Clause 39.

17.10.5 Neither the issue of any Building Completion Certificate nor the issue of any Completion Certificate shall in any way affect the obligations of the Project Co in respect of the Maintenance of Buildings and Engineering Services.

17.10.6 The Trust shall, upon request by the Project Co, after the date when the Project Co notifies the Trust's Works Adviser pursuant to Clause 17.6, consider any matter which remains outstanding in respect of the Phase 1 Works, the Phase 2 Works for any Beneficial Occupation Area or all of the Phase 2 Works (as the case may be) and confirm to the Independent Certifier whether the same affects the occupation and use by the Trust of the Hospital or not.

17.10.7 The Trust, the Trust's Works Adviser, the Trust's Facilities Adviser and the Project Co shall each be entitled to make representations to the Independent Certifier as to the Start Up Criteria during their development pursuant to the Agreement for Appointment of Independent Certifier and as to the progress of the Phase 1 Works, the Phase 2 Works for any Beneficial Occupation Area or all of the Phase 2 Works (as the case may be) and whether the same are complete in accordance with the Design Documents and as to the Services and whether any Start Up Matters have been undertaken and/or Start Up Criteria satisfied and the Project Co shall procure that the Independent Certifier shall have regard to such representations to the extent it considers it appropriate to do so but not otherwise.

17.10.8 The Project Co will be responsible for the Building and Engineering Services Commissioning.

17.10.9 In relation to each Service, the Project Co will undertake the Start Up Matters. The Project Co shall procure that the Independent Certifier shall, when the Start Up Matters in respect of any Service have been completed in respect of the Phase 1 Areas, either Beneficial Occupation Area or all of the Phase 2 Areas (as the case may be), issue a certificate (a "**Service Completion Certificate**") to that effect (which certificate shall not be unreasonably withheld or delayed) stating the date on which the Start Up Matters in respect of the relevant Service were so completed. Start Up Matters shall be considered by the Independent Certifier by reference to the applicable Start Up Criteria. Until Phase 1 Completion has arisen, the provision of any Service shall not give rise to any payment obligation on the Trust, unless the Parties otherwise agree.

17.10.10 Project Co's obligations in respect of Start Up Matters in relation to any Service in respect of any of the Phase 2 Areas shall exclude any obligation to undertake Start Up Matters in relation to any part of the Hospital other than the relevant Phase 2 Areas.

#### 17.11 IT Agreement

Failure by the Project Co or McKesson to achieve the IT Start Up Criteria in respect of any or all of the IT Services or Information Systems Acceptance by the Phase 1 Completion Date or by any other date shall not prevent or delay the issue of any Service Completion Certificate nor prevent or delay completion of the Works in accordance with this Agreement.

#### 17.12 Landscaping Works

17.12.1 When the Project Co (acting reasonably) considers that the Phase 1 Works will be completed in accordance with the Design Documents in 12 months' time, it shall notify the Trust of the same. Thereafter, the Parties shall liaise together in accordance with the Liaison Procedure to discuss the sequence and nature of the planting in respect of landscaping pursuant to the Phase 1 Works at the Site. Depending on seasonal factors, the Parties shall seek to agree:

- (A) which elements of landscaping (if any) shall be excluded from the Works for the purposes of Phase 1 Completion; and

- (B) where any elements of landscaping are so excluded, the date after the Phase 1 Completion Date on which such elements shall be completed.

If the Parties are unable to agree on any matter within one month of the commencement of their liaison pursuant to this Clause 17.12.1, either may refer the Dispute for resolution under the Disputes Resolution Procedure.

17.12.2 Having agreed or determined matters pursuant to Clause 17.12.1, the Parties shall liaise further from time to time to agree any adjustments to the same:

- (A) arising as a result of any change in the date on which the Project Co (acting reasonably) considers that the Phase 1 Works will be completed in accordance with the Design Documents; or
- (B) proposed as a result of unexpected seasonal factors.

17.12.3 If the Parties are unable to agree on any matter pursuant to Clause 17.12.2 within 10 Working Days of the commencement of their liaison pursuant to such Clause, either may refer the Dispute for resolution under the Disputes Resolution Procedure.

17.12.4 The provisions of Clauses 17.12.1 to 17.12.3 shall apply, mutatis mutandis, in relation to the Phase 2 Works for any Beneficial Occupation Area and BOA Completion and in relation to the other Phase 2 Works and Phase 2 Completion.

### **17.13 Trust Reimbursement**

Where the decision of the Independent Certifier to issue any Completion Certificate is challenged pursuant to Clause 17.9.10 and it is determined that the relevant Completion Certificate should not have been issued and/or the relevant Completion Date should not have arisen on the date specified in the Completion Certificate, the Project Co shall, within 10 Working Days of the relevant determination, repay to the Trust any amount paid by the Trust to the Project Co pursuant to Clause 39 or pursuant to Clause 17 of the Facilities Management Agreement (or, in the case of any BOA Completion Certificate or the Phase 2 Completion Certificate, any increased amount so paid as a result of the occurrence of Completion), in each case, in respect of the period from the Completion Date specified in the relevant Completion Certificate until the date determined as the date on which Completion was achieved.

### **17.14 Trust Acknowledgement**

The Trust has satisfied itself that, following the issue of a Completion Certificate in respect of the same, the Phase 1 Areas and each Beneficial Occupation Area can be used in the manner and for the purpose for which the Trust intends to use the same, notwithstanding that a Completion Certificate has not been issued in respect of any other part of the Hospital.

## **18. DECANT AND COMMISSIONING**

### **18.1 Planning**

18.1.1 Immediately following the Effective Date, the Parties will review and, if necessary, further develop the High Level Decant and Commissioning

Programme, to ensure that it provides for all the activities, obligations, responsibilities and liabilities contained in this Clause 18.

- 18.1.2 The Parties will review and, if necessary, further develop the High Level Decant and Commissioning Programme following the first anniversary of the Effective Date.
- 18.1.3 On or before the second anniversary of the Effective Date, the Parties will endeavour to agree the inter-relationship, inter-dependencies and timing of all items contained in this Clause 18 and update and amplify the High Level Decant and Commissioning Programme, having due regard to the obligations of the Project Co under Clause 9.2. The matters included in the Decant and Commissioning Programme shall not impact upon or affect the Start Up Matters. Should the Parties fail to agree, the Dispute shall be referred to the Disputes Resolution Procedure. Once agreed or determined, the document produced pursuant to this Clause 18.1.3 shall constitute the "**Decant and Commissioning Programme**".
- 18.1.4 The Decant and Commissioning Programme will form the basis for undertaking, managing and monitoring the obligations of the Parties under this Clause 18. Each of the Parties agrees to undertake its several obligations set out in this Clause 18 in accordance with the Decant and Commissioning Programme. Each Party shall have the right to vary the manner, sequence and timing of the performance of its respective obligations, provided that it shall previously have discussed and agreed the relevant variation with the other Party by liaison through the Liaison Procedure before commencing such variation and provided also the variation does not adversely impact upon the ability of the other Party to perform its obligations pursuant to the Project Documents. Any Dispute between the Parties as to such variations which the Parties are unable to resolve within 10 Working Days shall be referred to the Disputes Resolution Procedure.
- 18.1.5 Following the Commencement Date, the Parties shall liaise together in accordance with the Liaison Procedure, as often as may be necessary, to discuss the specification of Medical Equipment, as well as any specific and related Building and Engineering Services requirement and/or structural engineering requirement and to discuss Other Equipment.
- 18.1.6 Within six months of the Effective Date and following liaison in accordance with Clause 18.1.5, the Trust shall prepare and deliver to the Project Co a draft schedule (the "**Draft Equipment Schedule**") specifying:
- (A) details of the items of Medical Equipment and Other Equipment, including the value of the Other General Equipment; and
  - (B) dates on which all New Medical Equipment and Used Medical Equipment requiring incorporation into the Works (which equipment shall not be part of the Works) will be delivered by the Trust to the Hospital pursuant to Clause 18.2.1.

18.1.7 As far as practicable:-

- (A) the equipment items specified in the Draft Equipment Schedule shall reflect the Room Data Sheets; and
- (B) the value of the Other General Equipment specified in the Draft Equipment Schedule shall not exceed the Other General Equipment Sum.

18.1.8 Following the delivery of the Draft Equipment Schedule pursuant to Clause 18.1.6, the Parties shall liaise further in accordance with the Liaison Procedure to seek to agree upon the same. The Parties shall each act reasonably in seeking to reach agreement, provided that nothing in this Clause 18.1.8 shall restrict the Trust in its choice of Medical Equipment. If the Parties are unable to agree on any matter relating to the Draft Equipment Schedule within three months of the Project Co's receipt of the Draft Equipment Schedule, either may refer the Dispute for resolution under the Disputes Resolution Procedure.

18.1.9 Once agreed or determined, the Draft Equipment Schedule shall constitute the **"Equipment Schedule"**.

18.1.10 As soon as practicable after the Amendment Execution Date, the Parties shall liaise in accordance with the Liaison Procedure to revise the Equipment Schedule in respect of the Phase 2 Areas. In particular, the Equipment Schedule shall be amended to reflect any revised dates or new dates for the performance by the Parties of their respective obligations pursuant to Clauses 18.2, 18.5, 18.6 and 18.7 in respect of the Phase 2 Areas. Such amendments shall be agreed or determined having regard to each Date for Occupation and to the Phase 2 Date for Completion.

18.1.11 Without prejudice to the generality of this Clause 18, the Project Co shall permit access to the Oncology Area by the Trust, its agents, contractors or subcontractors and the employees of any of them, for the purposes of delivering and installing linear accelerators and associated Medical Equipment at such times as shall be specified in the Equipment Schedule and/or the Decant and Commissioning Programme. The Parties shall, from time to time, liaise in accordance with the Liaison Procedure to review the dates for such access shown in the Equipment Schedule and/or the Decant and Commissioning Programme. To the extent that the anticipated Phase 2 Completion Date precedes the Phase 2 Date for Completion, the dates for such access shall be correspondingly brought forward.

18.1.12 When the Project Co (acting reasonably) considers that the Phase 1 Works will be complete in accordance with the Design Documents in one year's time, it shall notify the Trust of the same. Thereafter, the Parties shall liaise together in accordance with the Liaison Procedure:

- (A) to review the details of the items of Other Equipment and the value of the Other General Equipment as specified in the Equipment Schedules. For the purpose of such review, the Parties shall jointly carry out an inspection of any non-fixed equipment and apparatus at the Trust's existing hospitals at the Brunswick Road and at the West Norwich site



which the Trust proposes will constitute Used Other Equipment. The Parties shall use the results of such inspection to assist them in seeking to agree:

- (1) whether it is appropriate in all the circumstances for such items of non-fixed equipment and apparatus to constitute Used Other Equipment;
  - (2) the residual life of the Used Other Equipment;
  - (3) the replacement cost and quality of the Used Other Equipment as at the Phase 1 Completion Date; and
  - (4) the depreciation policy and renewal frequency to be applied in respect of each item of Used Other Equipment;
- (B) an adjustment to the Usage Fee shall be calculated using the Financial Model to provide the Project Co with funds to pay for the ongoing replacement of Used Other Equipment pursuant to its obligations under Clause 18.8.3, taking account of:
- (1) the first renewal date for each item of Used Other Equipment as agreed pursuant to Clause 18.1.12(A) (2).
  - (2) the second and subsequent renewal dates for each item of Used Other Equipment as agreed pursuant to Clause 18.1.12(A) (4).
  - (3) the replacement cost as at the Phase 1 Completion Date for each item of Used Other Equipment for inclusion at each and every renewal date as agreed pursuant to Clause 18.1.12(A)(3).
- (C) where an adjustment to the Usage Fee is to be made pursuant to Clause 18.1.12(B), the Project Co shall re-run the Financial Model and ascertain the impact of the increase in costs on the Usage Fee by inputting the change in real (and, where relevant, nominal) costs for all affected periods. Following the re-running of the Financial Model pursuant to this Clause 18.1.12, the Project Co shall notify the Trust of the adjustment to the Usage Fee necessary to ensure the Maintenance of Ratios as a result of the relevant changes.
- (D) to consider the dates on which the Used Other Equipment will be delivered by the Trust to the Hospital pursuant to Clause 18.2.1(C).
- (E) to consider the dates on which the Other General Equipment will be delivered by the Project Co to the Hospital pursuant to Clause 18.2.2.

Following such liaison, the Parties shall seek to agree upon any changes to the Equipment Schedule. The Parties shall each act reasonably in seeking to reach agreement. If the Parties are unable to agree on any matter relating to the Equipment Schedule within three months of the commencement of their liaison pursuant to this Clause 18.1.12, either may refer the Dispute for resolution under the Disputes Resolution Procedure.

18.1.13 From time to time, the Parties will liaise in accordance with the Liaison Procedure to review the Equipment Schedule. Following such liaison before any Completion Date, the Equipment Schedule shall be amended to reflect:

- (A) any change to the Medical Equipment required by the Trust;
- (B) any change to the Used Other Equipment or Other General Equipment required by the Trust in view of the acquisition, obsolescence or disposal of any item since the date of agreement or determination of the Equipment Schedule pursuant to Clause 18.1.12, provided that the Trust shall not require any such change on or after the date on which the Project Co (acting reasonably) considers that the relevant Completion Date will arise in three months time and notifies the Trust of the same unless at any time thereafter, the anticipated relevant Completion Date as shown in the latest Construction Programme will not arise for more than three months, in which case, a change may be required prior to the commencement of those three months;
- (C) any agreed change to the Used Other Equipment or Other General Equipment required by the Project Co as a result of any item becoming obsolescent or the condition of any item having deteriorated since the date of agreement or determination of the Equipment Schedule pursuant to Clause 18.1.12; and
- (D) any agreed change to any delivery date specified in the Equipment Schedule.

Where the Equipment Schedule is amended in respect of the Used Other Equipment, a corresponding adjustment shall be made to the Usage Fee, mutatis mutandis, in accordance with Clauses 18.1.12(B) and 18.1.12(C).

18.1.14 Any change to the Medical Equipment referred to in Clause 18.1.6(B) required by the Trust pursuant to Clause 18.1.13(A), shall be the subject of a Variation and/or Service Variation requested by the Trust which shall not be capable of cancellation by the Trust (unless the change to the Medical Equipment is subsequently revoked by means of a subsequent Variation and/or Service Variation).

18.1.15 If the Parties are unable to agree on any change pursuant to Clause 18.1.13(C) or Clause 18.1.13(D) within 10 Working Days, either may refer the Dispute for resolution under the Disputes Resolution Procedure.

18.1.16 Where, in accordance with the Equipment Schedule, the Project Co is obliged to Procure Other General Equipment whose value is less than or more than the Other General Equipment Sum. The Usage Fee shall be adjusted in accordance with the following formula:

$$A = \frac{\boxed{\phantom{000000}} \times \boxed{\phantom{000000}}}{12} - \boxed{\phantom{000000}} \times \pounds 150,000 - \pounds 150,000$$

12

Where:

A = the amount of the adjustment to the Usage Fee.

V = the value of the Other General Equipment Procured by the Project Co.

18.1.17 As an alternative to an adjustment to the Usage Fee under Clause 18.1.16, the Trust may elect to pay any amount in excess of the Other General Equipment Sum by way of a lump sum payment made in one or more instalments in respect of the whole amount or part of the same and calculated to leave the Project Co in no better and no worse position than before the addition to the Other General Equipment Sum, on the basis of the tests in Part 2 of Schedule 6 (mutatis mutandis). If the Trust so elects, the Parties shall agree the amount and timing of the relevant instalments, which instalments, unless otherwise agreed, shall reflect the amount and timing of the relevant costs as they are incurred and the Trust shall pay the same in accordance with such agreement.

18.1.18 The Project Co shall have no obligation to the Trust to Procure Other General Equipment generally, save to the extent that the same is specified in the Equipment Schedule and then only in accordance with the Decant and Commissioning Programme. To the extent the Trust requires the Project Co to Procure Other General Equipment whose value is more than the Other General Equipment Sum, the Trust shall pay to the Project Co the reasonable costs incurred by the Project Co in relation to the same. Such costs shall be agreed between the Parties (acting reasonably) at the time and shall exclude any costs paid by the Trust pursuant to Clauses 18.1.16 and 18.1.17.

## 18.2 Delivery and Care

18.2.1 Subject to Clause 18.5.2, the Trust shall deliver or procure the delivery to the Hospital of:

- (A) all New Medical Equipment;
- (B) all Used Medical Equipment; and
- (C) all Used Other Equipment,

in each case on the dates specified in the Equipment Schedule.

18.2.2 The Project Co shall Transport all Other General Equipment to the Hospital on the dates specified in the Equipment Schedule.

18.2.3 In respect of any Loss or damage arising during the Design and Construct Phase in relation to any Medical Equipment and Used Other Equipment delivered by the Trust to the Phase 1 Areas or the Phase 2 Areas before the relevant Completion Date, the Trust shall not make any Claim against the Project Co, except and to the extent that Project Co has breached its obligations under Clause 24 in respect of insurance of Medical Equipment or Used Other Equipment (as appropriate).

**18.3 Decant**

18.3.1 Until the Phase 1 Completion Certificate has been issued in accordance with Clause 17.10.2, the Trust shall not transfer any patient activity to the Hospital.

18.3.2 The Trust will be responsible for Decant, subject to the availability of the Hospital for the purposes of any relevant transfer.

**18.4 Decommission**

The Trust will Decommission all Used Medical Equipment and Used Other Equipment.

**18.5 Procurement**

18.5.1 The Trust will Procure all New Medical Equipment as specified in the Equipment Schedule, except for the theatre pendants for 23 operating theatres and the body stores in the mortuary.

18.5.2 The Project Co will Procure the theatre pendants for 23 operating theatres and the body stores in the mortuary.

18.5.3 Without prejudice to its other obligations under the Project Documents in respect of Service Equipment, the Project Co will Procure all Service Equipment (other than that required to be provided to achieve any Start Up Matters).

18.5.4 The Project Co will Procure all Other General Equipment as specified in the Equipment Schedule.

**18.6 Install**

18.6.1 The Trust will Install all Medical Equipment, except for the theatre pendants for 23 operating theatres, the body stores in the mortuary, sterilizers, autoclaves, washers, driers and bed pan macerators.

18.6.2 The Project Co will Install the theatre pendants for 23 operating theatres and the body stores in the mortuary, sterilizers, autoclaves, washers, driers and bed pan macerators provided that, to the extent that the performance of such obligations in respect of sterilizers, autoclaves, washers, driers and bed pan macerators requires the Project Co to use labour which is not normally available to it on Site, the Trust shall pay to the Project Co the reasonable costs incurred by the Project Co in relation to such labour. Such costs shall be agreed between the Parties (acting reasonably) at the time.

18.6.3 Without prejudice to its other obligations under the Project Documents in respect of Service Equipment, the Project Co will Install all Service Equipment (other than that required to be provided to achieve any Start Up Matters), all Used Other Equipment, all Other General Equipment and the Fix-Only Items.

#### 18.7 **Commission**

18.7.1 The Trust will Commission all Medical Equipment, except for the theatre pendants for 23 operating theatres, the body stores in the mortuary, sterilizers, autoclaves, washers, driers and bed pan macerators.

18.7.2 The Project Co will Commission the theatre pendants for 23 operating theatres, the body stores in the mortuary, sterilizers, autoclaves, washers, driers and bed pan macerators provided that, to the extent that the performance of such obligations in respect of sterilizers, autoclaves, washers, driers and bed pan macerators requires the Project Co to use labour which is not normally available to it on Site, the Trust shall pay to the Project Co the reasonable costs incurred by the Project Co in relation to such labour. Such costs shall be agreed between the Parties (acting reasonably) at the time.

18.7.3 The Project Co will Commission all Service Equipment.

18.7.4 The Project Co will Commission all Used Other Equipment and all Other General Equipment.

#### 18.8 **Maintain**

18.8.1 The Trust will Maintain all Medical Equipment , except as otherwise provided in Schedule 9 to the Facilities Management Agreement.

18.8.2 Without prejudice to its other obligations under the Project Documents in respect of Service Equipment, the Project Co will Maintain all Service Equipment (other than that required to be provided to achieve any Start Up Matters) to the extent that it is obliged to do so and in accordance with the Facilities Management Agreement.

18.8.3 The Project Co will Maintain all Other General Equipment and all Used Other Equipment to the extent that it is obliged to do so and in accordance with the Facilities Management Agreement.

#### 18.9 **Registration**

Except to the extent the Project Co is specifically obliged elsewhere in these Project Documents, the Trust will obtain and maintain Registration to allow the Hospital to be fully operational.

#### 18.10 **Existing Hospitals Closure**

As between the Parties, the Trust will be responsible for all matters associated with the Existing Hospitals Closure.

**18.11 Employees**

- 18.11.1 The Parties shall, during the period from the Effective Date until the Phase 2 Completion Date, liaise as to the terms and conditions upon which the Trust shall procure Existing Services and Existing Trust Services within the existing hospitals at Brunswick Road, Norwich and at the West Norwich Site.
- 18.11.2 The Parties shall liaise as to the identity of those Employees who are candidates to transfer to the Project Co or any of its sub-contractors and as to the programme for their proposed transfer to the same, which transfer may arise either before or after each Completion Date.
- 18.11.3 Liaison between the Parties pursuant to Clause 18.11.2 shall commence when the Project Co, acting reasonably, considers that the Phase 1 Works will be completed in accordance with the Design Documents in one years' time.
- 18.11.4 Any Dispute between the Parties as to the programme for the transfer of any Employees who are proposed to transfer to the Project Co or any of its sub-contractors, which is not resolved within 10 Working Days shall be referred to the Disputes Resolution Procedure.
- 18.11.5 Once the Employees proposed to be transferred to the Project Co or any of its sub-contractors have been identified and the programme for their transfer determined, the following provisions shall apply:
- (A) if any such Employees do not wish to transfer to the Project Co or any of its sub-contractors, the Project Co or any of its sub-contractors shall be free to appoint its own employees in place of such proposed transferees;
  - (B) if the Trust shall not allow such Employees who are Trust Employees to transfer to the Project Co or any of its sub-contractors or if the Trust is unable to procure that such Employees who are Other Employees transfer to the Project Co or any of its sub-contractors, in each case in accordance with the programme determined for their transfer, the Project Co shall be deemed to have achieved any Start Up Matters the achievement of which relies upon the transfer of such Employees or their involvement in activities forming part of any of the Start Up Matters.
- 18.11.6 To the extent that the Project Co or any of its sub-contractors requires Trust Employees or Other Employees for the purposes of familiarisation and/or training in advance of their transfer the Trust will use its reasonable endeavours to release or obtain the release of such employees for such purpose for such periods and for such times as the Project Co or any of its sub-contractors reasonably requires.
- 18.11.7 For the avoidance of doubt, Project Co shall be under no obligation to accept any transfer or employ any Employee other than pursuant to a Relevant Transfer.

18.12 **Interface**

The failure to undertake any part of the works the subject of the Decant and Commissioning Programme either at all or in accordance with the Decant and Commissioning Programme shall not prevent the issue of any Completion Certificate.

**19. HEALTH AND SAFETY**

19.1 **CDM Regulations**

19.1.1 In this Clause 19, "**Client**", "**Executive**", "**Health and Safety File**" and "**Planning Supervisor**" have the same meanings as in the CDM Regulations.

19.1.2 The Project Co represents and warrants to the Trust that it is and shall continue to be competent to perform the duties imposed on a Client by the CDM Regulations.

19.1.3 The Trust hereby appoints the Project Co the only Client in respect of the Project, pursuant to Regulation 4(1) of the CDM Regulations. Forthwith following execution of this Agreement, the Project Co shall send the Executive a declaration in accordance with Regulation 4(4) of the CDM Regulations and a copy of such declaration to the Trust. Upon receipt, the Project Co shall forthwith send the Trust a copy of the notice from the Executive that it has received the declaration.

19.1.4 During the Design and Construct Phase and the Operational Phase, the Project Co shall not terminate, withdraw or derogate in any manner from its declaration or its acceptance of its responsibilities as Client.

19.1.5 The Project Co shall:

- (A) carry out and comply with all the obligations, requirements and duties of the Client arising under the CDM Regulations in connection with the Project; and
- (B) procure that, on the Termination Date, any Planning Supervisor appointed pursuant to the CDM Regulations delivers to the Trust the Health and Safety File.

19.2 **Fire Regulations**

19.2.1 Except as provided in Clause 19.2.2, the Project Co shall obtain and keep in force any Fire Certificate in relation to the whole or any part of the Hospital.

19.2.2 The Trust shall obtain and keep in force any Fire Certificate in relation to the whole or any part of the Hospital to the extent that the Project Co is unable to obtain and keep in force the same pursuant to Clause 19.2.1 by reason of the Trust's ownership or occupation of the Hospital or any relevant part of the Hospital or the designated use of the same pursuant to any activity of the Trust.

19.2.3 Each Party shall, in respect of the Hospital, comply with:

- (A) the requirements of any Fire Certificate; and

- (B) the requirements of any Fire Precautions Policy and Programme, in each case, applicable to it.

19.2.4 The Parties shall:

- (A) where appropriate and from time to time, consult with the local fire authorities to ascertain whether any Fire Certificate is required in relation to any part of the Hospital.
- (B) liaise together in accordance with the Liaison Procedure for the purpose of assisting each other to comply with their respective obligations under this Clause 19.2.

19.2.5 The Project Co shall:

- (A) comply with the requirements of the Trust's Nominated Fire Officer (or the deputy of any such officer) in relation to:
  - (1) the supervision of day to day maintenance of fire precautions at the Hospital;
  - (2) ensuring that all staff at the Hospital participate regularly in training and fire drills; and
  - (3) arranging for the co-ordination and direction of such staff in a fire emergency.
- (B) permit the Trust's Nominated Fire Officer and/or any Trust's Fire Safety Adviser to carry out their respective duties at the Hospital.
- (C) in the event of a Serious Fire Occurrence, notify the relevant line manager and, via the Trust's Fire Safety Adviser, the Trust's Nominated Fire Officer immediately and as soon as reasonably practicable thereafter (and in any event within 24 hours) deliver a Report to the same providing details of all injuries or damage, any information to hand as to the cause of the fire, measures taken to deal with the fire, problems encountered and any other particulars that appear relevant having regard to all the circumstances.
- (D) in the event of any other outbreak of fire or false alarm relating to any outbreak of fire, notify the Trust's Nominated Fire Officer and the Trust's Fire Safety Adviser as soon as reasonably practicable (and in any event within 24 hours) and deliver a Report to the same dealing with the matters referred to in Clause 19.2.5(C).

## **20. OPERATIONAL MANUALS**

### **20.1 Phase 1 Works**

On or before 11<sup>th</sup> June, 2004, the Project Co shall provide one copy of all Operational Manuals for the Phase 1 Works to the Trust.

### **20.2 Phase 2 Works**



On or before 11<sup>th</sup> June, 2004, the Project Co shall provide one copy of all Operational Manuals for the Phase 2 Works to the Trust, to the extent copies of such Operational Manuals have not already been supplied to the Trust pursuant to Clause 20.1.

## **21. CONTRACTORS' ACCOMMODATION AND LEASES**

### **21.1 Contractors' Accommodation**

21.1.1 During a period of up to three months immediately following the Phase 1 Completion Date, the Trust shall permit the Project Co the non-exclusive right to occupy that part of the Site shown outlined in red on the drawing attached at Section A of Part 9 of Schedule 5 for the purpose of providing contractors' accommodation, subject to the matters listed in Clauses 14.1.1(A) to 14.1.1(C) (inclusive). Such right to occupy shall subsist for such purpose only, shall be by way of licence for the particular activity only and shall not grant or be deemed to grant any legal estate or other interest in land.

21.1.2 During a period of up to three months immediately following the Phase 2 Completion Date, the Trust shall permit the Project Co the non-exclusive right to occupy that part of the Site shown outlined in red on the drawing attached at Section B of Part 9 of Schedule 5 for the purpose of providing contractors' accommodation, subject to the matters listed in Clauses 14.1.1(A) to 14.1.1(C) (inclusive). Such right to occupy shall subsist for such purpose only, shall be by way of licence for the particular activity only and shall not grant or be deemed to grant any legal estate or other interest in land.

21.1.3 None of the parts of the Site referred to in Clause 21.1.1 and in Clause 21.1.2 shall be deemed to be Unavailable whilst occupied in accordance with such Clauses.

### **21.2 Agreement for Lease**

Within 20 Working Days following the issue of the Phase 1 Completion Certificate, the Trust shall execute and deliver the Leases to the Facilities Manager and the Project Co shall procure that the Facilities Manager shall execute and deliver a counterpart thereof.

### **21.3 Obligations**

With effect from the Phase 1 Completion Date and pending grant of the Leases pursuant to Clause 21.2, the Trust shall and the Project Co shall procure that the Facilities Manager shall each perform and be liable for their several obligations contained in the Leases and the Trust and the Facilities Manager shall be entitled to their rights thereunder (including to the demise, in the case of the Facilities Manager) as if the relevant Leases had been granted.

### **21.4 Change of Facilities Manager**

21.4.1 On request by the Project Co, the Trust will terminate any Leases granted to the Facilities Manager pursuant to this Clause 21, where the Project Co has terminated the Facilities Provision Contract in accordance with Clause 6.1. Within 20 Working Days following the entry by the Project Co into an agreement replacing the Facilities Provision Contract in accordance with

Clause 6.1, the Trust shall execute and deliver replacement Leases to the Facilities Manager and the Project Co shall procure that the Facilities Manager shall execute and deliver a counterpart thereof. With effect from the date of entry by the Project Co into the replacement Facilities Provision Contract and pending grant of the Leases pursuant to this Clause 21.4.1, the Trust shall and the Project Co shall procure that the Facilities Manager shall each perform and be liable for their several obligations contained in the Leases and the Trust and the Facilities Manager shall be entitled to their rights thereunder (including to the demise, in the case of the Facilities Manager) as if the relevant Leases had been granted.

21.4.2 The Project Co shall indemnify the Trust for all reasonable costs and expenses incurred by it in complying with its obligations pursuant to Clause 21.4.1.

## 21.5 **Breach by Facilities Manager**

21.5.1 If any Lease to the Facilities Manager terminates as a result of the Trust exercising any right of re-entry pursuant to a breach of covenant by the Facilities Manager, on request by the Project Co, the Trust shall, within 20 Working Days of such termination execute and deliver a replacement Lease to the Project Co and the Project Co shall execute and deliver the counterpart thereof. With effect from the date of termination of the Lease to the Facilities Manager and pending grant of the Lease pursuant to this Clause 21.5.1, the Trust and the Project Co shall each perform and be liable for their several obligations contained in the Lease to the Project Co and the Trust and the Project Co shall be entitled to their rights thereunder (including to the demise, in the case of the Project Co) as if the relevant Lease had been granted.

21.5.2 The Project Co shall indemnify the Trust for all reasonable costs and expenses incurred by it in complying with its obligations pursuant to Clause 21.5.1.

## 21.6 **Term**

The term of the Leases granted pursuant to Clauses 21.2, 21.4 or 21.5 shall be computed from the Phase 1 Date for Completion.

## 21.7 **Requisitions**

The Trust's title to grant the Leases having been deduced, the Trust shall not be required to reply to any requisitions on such title and the Project Co shall not and shall procure that the Facilities Manager shall not raise any objection to such title, save in relation to any changes arising after the Commencement Date where not permitted by the Project Documents.

## 21.8 **Encumbrances**

The Premises will be let subject to:-

21.8.1 all local land charges, whether registered or not before or after the Commencement Date and all matters capable of registration as local land charges whether or not actually so registered;

21.8.2 all notices, orders, resolutions, restrictions, agreements, directions and proposals therefor made by any local or competent authority before or after the Commencement Date;

21.8.3 all matters referred to in Section 70 Land Registration Act 1925, notwithstanding that any title to the relevant Premises is unregistered; and

21.8.4 all rights, easements, covenants, stipulations and other matters affecting the Premises.

## 21.9 **Exclusion Order and Demise**

The Trust and the Facilities Manager (which obligation the Project Co shall procure compliance with) or the Project Co (as the case may be) shall apply to the Court for an order for each Lease under Section 38(4)(a) LTA to exclude the provisions of ss.24-48 inclusive of LTA (the "**Exclusion Order**") in the case of any Lease granted pursuant to Clause 21.2, as soon as construction has reached a sufficient stage to identify the precise extent of the areas to be demised by such Lease. Notwithstanding Clauses 21.2, 21.3, 21.4 and 21.5, no Lease shall be granted until an Exclusion Order has been made in respect of it.

## 22. **COMPLETION STATEMENTS**

### 22.1 **Completion Statements**

Within three months of the date of issue of each Completion Certificate, the Project Co shall submit to the Trust a statement (the "**Completion Statement**") detailing:

22.1.1 any Design and Construct Phase Variation Cost specified in any Trust's Variation Confirmation issued since the notification to the Trust pursuant to Clause 17.8.1, where the Trust has made an election in respect of such Design and Construct Phase Variation Cost pursuant to Clause 16.9.1(A) or Clause 16.9.1(B) and where no adjustment has previously been made to the Usage Fee in accordance with Part 2 of Schedule 6 to reflect such Design and Construct Phase Variation Cost.

22.1.2 any Design and Construct Phase Variation Saving specified in any Trust's Variation Confirmation issued since the notification to the Trust pursuant to Clause 17.8.1, where no adjustment has previously been made to the Usage Fee in accordance with Part 3 of Schedule 6 to reflect such Design and Construct Phase Variation Saving.

### 22.2 **Adjustment**

Each Completion Statement shall request the Trust to adjust the Usage Fee in accordance with each relevant Trust's Variation Confirmation.

### 22.3 **Interest**

Any Usage Fee adjustment in accordance with Clause 22.2 shall be calculated as at the relevant Completion Date and interest shall be paid or allowed (as appropriate) to the relevant Party on the amount of the relevant adjustment, at the Interest Rate, from that Completion Date until the date of the Completion Statement.

**23. FOSSILS AND ANTIQUITIES**

**23.1 Property**

As between the Parties, all fossils, antiquities and other objects having artistic, historic and monetary value which may be found on or at the Site by the Project Co or either Contractor or any sub-contractor are or shall become the property of the Trust.

**23.2 Discovery**

Upon the discovery of any such item, the Project Co shall, subject to Clause 23.3:-

23.2.1 inform the Trust's Adviser immediately of such discovery;

23.2.2 take all steps not to disturb the object and, if necessary, cease any Operations insofar as the carrying out of such Operations would endanger the object or prevent or impede its excavation; and

23.2.3 take all necessary steps to preserve the object in the same position and condition in which it was found.

**23.3 Action**

The Trust shall procure that the Trust's Adviser promptly issues an instruction to the Project Co specifying what lawful action the Trust's Adviser reasonably requires the Project Co to take in relation to the object and the Project Co shall, thereafter, promptly and diligently comply with the same, subject always to the terms of any Planning Approval and any other planning approval relating to any Post Completion Variation Works which may require otherwise, provided that, during the Design and Construct Phase, any such instruction shall impose no greater obligation on the Project Co in relation to any object than that imposed pursuant to any Planning Approval.

**24. INSURANCE**

**24.1 Insurance Cover**

24.1.1 The Project Co shall procure that:

- (A) with effect from the Effective Date, the insurances identified in Part 1 of Schedule 7 are taken out and maintained in respect of the Design and Construct Phase and for such additional period following the Completion Date as may be specified in Part 1 of Schedule 7; and
- (B) the insurances identified in Part 2 of Schedule 7 are taken out and maintained in respect of the Operational Phase.
- (C) the insurances referred to in Clauses 24.1.1(A) and 24.1.1(B):
  - (1) are effected against the risks and liabilities and maintained in the amounts specified in the relevant Part of Schedule 7 (as varied from time to time in accordance with this Clause 24);
  - (2) include only such provisions for self-insurance, whether by deductible or otherwise, as are specified in the relevant Part of

Schedule 7 (as varied from time to time in accordance with this Clause 24);

- (3) include only the exclusions specified in the relevant Part of Schedule 7 (as varied from time to time in accordance with this Clause 24) or such other exclusions in relation to the same subject matter, the effect of which is less exclusive and such other exclusions, of a type normal in the context of the relevant policy, as may be acceptable to the Trust (acting reasonably);
- (4) without prejudice to Clause 24.1.1(C)(1), are otherwise increased from time to time to such amounts as would be effected by a reasonable and prudent person carrying out the Operations and performing the Project Co's obligations under the IT Agreement which does not self-insure (except by means of minimum deductibles which are at a level which is consistent with insurance market practice generally) and having regard to all the circumstances; and
- (5) are maintained in the names of the parties specified in Schedule 7 and shall be composite policies of insurance (and not joint) unless stated otherwise in any case in Schedule 7."

24.1.2 Without prejudice to the other provisions of this Clause 24, the Project Co shall during both the Design and Construct Phase and the Operational Phase, from time to time effect and maintain in full force those insurances which:

- (A) the Project Co is required to effect by any applicable law;
- (B) would be effected by a reasonable and prudent person carrying out the Operations and performing the Project Co's obligations under the IT Agreement which does not self-insure (except by means of minimum deductibles which are at a level which is consistent with insurance market practice generally) and having regard to all the circumstances;

or shall procure the same.

24.1.3 Notwithstanding any other provisions of this Clause 24 or of Schedule 7:

- (A) the Project Co shall have no obligation to effect or maintain insurance in relation to any event which, at the relevant time, falls within the definition of Force Majeure.
- (B) in respect of the insurances referred to in Clause 24.1.1(B), the Project Co shall be relieved from its obligations hereunder to effect insurance in an amount or for any period specified in Part 2 of Schedule 7 insofar as such amount or period is not reasonably available in the English insurance market, provided that Project Co shall use its best endeavours to obtain insurance in such amount or for such period and provided further that the Project Co shall only be relieved hereunder in respect of the amount or period by which such amount or period exceeds what is reasonably available in the English insurance market.

**24.2 Insured Parties**

The Project Co shall procure that:

24.2.1 during the Design and Construct Phase, the construction all risks insurance and the public liability insurance effected pursuant to Clause 24.1.1(A); and

24.2.2 during the Operational Phase, the material damage all risks insurance, the additional cost of working insurance and the public liability insurance effected pursuant to Clause 24.1.1(B),

shall each, inter alia, include both the Project Co and the Trust as insured parties.

**24.3 Liaison**

24.3.1 Without prejudice to either Party's obligations under Part 3 of Schedule 7, the Project Co shall consult the Trust:-

(A) before effecting any insurance pursuant to its obligations under this Clause 24; and

(B) before effecting any amendment to any such insurance.

24.3.2 The Trust shall review any matter brought to its attention by the Project Co pursuant to Clause 24.3.1 and, within 10 Working Days of the date of consultation by the Project Co, inform the Project Co as to whether or not it considers that the proposed insurance or amendment to any insurance is in breach or would lead to a breach of any of the Project Co's obligations hereunder.

24.3.3 Where the Parties fail to agree any matter within 20 Working Days of the date of consultation by the Project Co, the Dispute shall be referred to the Disputes Resolution Procedure.

**24.4 Undertakings and Indemnities**

24.4.1 The Project Co shall not take or fail to take any reasonable action or (insofar 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) whereby any of the insurances maintained pursuant to this Clause 24 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.

24.4.2 The Trust shall not take or fail to take any reasonable action or (insofar 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) whereby any of the insurances maintained pursuant to this Clause 24 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.

24.4.3 The Project Co shall indemnify the Trust against any Loss incurred by the Trust to the extent that the same arises:

- (A) by reason of any insurance effected by the Project Co pursuant to this Clause 24 being vitiated or invalidated or payment under the same being reduced or withheld, in any such case, as a result of any act, omission, negligence or wilful default on the part of the Project Co its contractors or sub-contractors (excluding McKesson and its sub-contractors) or any of their respective agents or employees; or
- (B) by reason of any technology, practice or process used for the purposes of the Operations, where the same is uninsured and in respect of which there was hereunder an obligation to insure or would have been an obligation to insure but for the selection of the particular technology, practice or process by Project Co.

24.4.4 The Trust shall indemnify the Project Co against any Loss incurred by the Project Co to the extent that the same arises by reason of any insurance effected by the Project Co pursuant to this Clause 24 being vitiated or invalidated or payment under the same being reduced or withheld, in any such case, as a result of any act, omission, negligence or wilful default on the part of the Trust or any of its agents or employees (in the course of such employee's employment) or on the part of McKesson or any of its sub-contractors.

## 24.5 Disclosure

24.5.1 The Project Co shall ensure that the following matters are disclosed to the insurers providing any insurance required pursuant to this Clause 24:

- (A) all information which the Project Co, acting in accordance with Good Industry Practice and in good faith, reasonably considers to be material to the relevant insurance and/or acting in accordance with the advice of its insurance advisers believes that the relevant insurers require, including details of any material change in the methods or procedures used in the performance of the Operations and performing the Project Co's obligations under the IT Agreement; and/or
- (B) all information which such insurers specifically request be disclosed.

24.5.2 The Project Co shall put in place appropriate internal reporting procedures for the purposes of satisfying its obligations under Clause 24.5.1.

24.5.3 On request by the Trust, the Project Co shall supply the Trust with copies of any information supplied to insurers pursuant to this Clause 24.5.

24.5.4 Where the Trust is aware of any information which it would not reasonably expect to be known by the Project Co but, if the same were known to the Project Co, the Trust would expect the Project Co to disclose to the insurers pursuant to Clause 24.5.1, the Trust shall, promptly upon becoming aware of the relevant information, provide details of the same to the Project Co.

**24.6 Risk Management**

With effect from the Effective Date, the Project Co shall designate or appoint an insurance and risk manager and notify details of the same to the Trust. Such person shall:

24.6.1 be responsible for dealing with all insurance and risk management matters on behalf of the Project Co, including ensuring compliance by the Project Co with its obligations under this Clause 24; and

24.6.2 advise and report to the Project Co on such matters.

**24.7 Survey**

Where any survey is conducted by any insurer pursuant to the insurances effected under this Clause 24, the Project Co shall request the insurer to supply copies of the results of the same (including any relevant report) to the Trust.

**24.8 Premia and Policies**

The Project Co shall:

24.8.1 pay or procure the payment of all premia payable in respect of any insurance effected by it pursuant to this Clause 24, in accordance with the terms of the relevant policy.

24.8.2 furnish copies of all policies in respect of such insurances to the Trust's Adviser on request. During ordinary business hours, the Trust's Adviser shall be entitled to inspect the original copies of such policies which are or should (subject to the requirements of Funders) be in the custody of the Project Co, together with evidence that the premia payable thereunder have been paid and that the insurances are in full force and effect.

**24.9 Confidentiality**

Nothing in Clause 24.3 or Clause 24.8.2 shall oblige the Project Co to disclose the terms and conditions of any insurance or any revision to the same or to furnish copies of any insurance policy or permit inspection of any original insurance policy if such disclosure, copying or inspection would be a breach of such terms and conditions, provided that the Project Co shall use all reasonable endeavours to ensure that the terms and conditions of any insurance or any revision to the same may be disclosed to the Trust or the Trust's Adviser (as the case may be) pursuant to such Clauses, including seeking the consent of the relevant insurer if necessary.

**24.10 Rights of Subrogation, Good Faith and Notice of Cancellation**

24.10.1 Subject to the same being available in the English insurance market, the Project Co shall procure that all policies of insurance effected by it pursuant to this Clause 24 shall:

(A) subject to Clause 24.10.2, contain a clause to the effect that the insurers have agreed to waive all rights of subrogation against the Trust and its employees, servants and agents;



- (B) contain a provision that:
  - (1) 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
  - (2) 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.
- (C) contain provision for 30 days' written notice to be given to the Trust before any cancellation, non-renewal or material modification of any such policy.

24.10.2 If the Project Co demonstrates to the satisfaction of the Trust (acting reasonably) that compliance with Clause 24.10.1(A) in respect of any insurance would give rise to an additional cost to the Project Co by reason of an incremental charge made by the relevant insurers, the Trust shall either:

- (A) pay such cost to the Project Co once the relevant insurance has been effected; or
- (B) waive compliance with Clause 24.10.1(A) in respect of the relevant insurance.

24.10.3 If the Project Co demonstrates to the satisfaction of the Trust (acting reasonably) pursuant to the review procedure carried out in accordance with Clause 24.11.1 that the annual premium payable by the Project Co in respect of public liability insurance for the Trust pursuant to paragraph 4.1.2 of Part 2 of Schedule 7 would exceed £12,500, the Trust shall either:

- (A) pay the amount of such excess to the Project Co once the relevant insurance has been effected; or
- (B) waive compliance with paragraph 4.1.2 of Part 2 of Schedule 7 in respect of the relevant insurance.

The amount £12,500 referred to in this Clause 24.10.3 shall be adjusted on the first day of every Contract Year to reflect any change in RPI arising on or after 1st April, 1995.

## 24.11 **Renewal**

24.11.1 Before the expiry of any insurance effected by the Project Co pursuant to this Clause 24, the Parties shall, where such insurance is required to be maintained hereunder following such expiry, review the same in accordance with the procedure set out in Part 3 of Schedule 7.

24.11.2 Following renewal of any such insurance, the Project Co shall obtain a renewal certificate in relation to the same and a copy thereof (certified in a manner acceptable to the Trust's Adviser) shall be forwarded to the Trust's Adviser as soon as possible.

**24.12 Trust's Right to Insure**

24.12.1 If the Project Co fails to obtain or maintain any insurance required to be effected by it under the provisions of this Clause 24 the Trust shall, without prejudice to any of its other rights under the Project Documents, have the right to procure such insurances itself, provided that the Trust shall notify the Project Co upon exercising such right.

24.12.2 Any sum reasonably and properly incurred by the Trust pursuant to Clause 24.12.1 shall, upon demand, be paid to the Trust by the Project Co.

**24.13 Notification of Claims**

24.13.1 The Project Co shall notify the Trust's Adviser (as well as any relevant insurer) of any circumstances which may give rise to any claim in respect of any of the insurances referred to in this Clause 24, promptly upon becoming aware of the same.

24.13.2 If any insurer disputes any claim made under any of the insurances referred to in Clause 24.1.1(A) or Clause 24.1.1(B), the Project Co shall liaise with the Trust and take such steps as the Trust may require (acting reasonably) to preserve or pursue such claim.

**24.14 Application of Proceeds**

24.14.1 On or before the Effective Date, the Trust and the Project Co will open an account in their joint names designated "Norfolk and Norwich Hospital Insurance Proceeds Reinstatement Account" (the "**Insurance Proceeds Reinstatement Account**"). Such account shall be at such bank as the Project Co requires (acting reasonably) having regard to its obligations under the Funding Agreements.

24.14.2 On or before the Effective Date, the Project Co will open an account in its own name designated "Norfolk and Norwich Hospital Insurance Proceeds Account (the "**Insurance Proceeds Account**"). Such account shall be at such bank as the Project Co requires (acting reasonably) having regard to its obligations under Funding Agreements. As soon as practicable after opening the account, the Project Co shall notify the Trust of details of the same.

24.14.3 Except as provided in Clause 24.14.4 or Clause 24.14.9, each Party shall direct any insurers to pay any monies receivable by it in respect of the construction all risks insurance effected pursuant to Clause 24.1.1(A) and the material damage all risks insurance effected pursuant to Clause 24.1.1(B):

- (A) where the amount of the relevant Claim exceeds £50,000, forthwith into the Insurance Proceeds Reinstatement Account; and

- (B) where the amount of the relevant Claim is £50,000 or less, forthwith into the Insurance Proceeds Account.

24.14.4 Notwithstanding Clause 24.14.3, each Party shall direct any insurers to pay any monies receivable by it pursuant to the construction all risks insurance effected pursuant to Clause 24.1.1(A) in respect of:

- (A) Medical Equipment and Used Other Equipment used for or intended for incorporation within the Hospital (as referred to in paragraph 1.2.2 of Part 1 of Schedule 7); or
- (B) the sewers referred to in the UEA Deed of Grant (as referred to in paragraph 1.2.3 of Part 1 of Schedule 7),

forthwith to the Trust.

24.14.5 Without prejudice to Clause 24.14.3 or Clause 24.14.4, each Party undertakes to pay any monies received by it in respect of the insurances referred to in Clause 24.14.3:

- (A) where the monies are in respect of a Claim exceeding £50,000, forthwith into the Insurance Proceeds Reinstatement Account; and
- (B) where the monies are in respect of a Claim of £50,000 or less, forthwith into the Insurance Proceeds Account.

24.14.6 Without prejudice to Clause 24.14.4, the Project Co undertakes to pay any monies received by it in respect of the construction all risks insurance effected pursuant to Clause 24.1.1(A) in respect of the matters referred to in Clauses 24.14.4(A) and 24.14.4(B) forthwith to the Trust.

24.14.7 The amount £50,000 referred to in Clauses 24.14.3 and 24.14.5 shall be adjusted, during the Phase 1 Design and Construct Phase, on each anniversary of the Execution Date and, during the Phase 1 Operational Phase on the first day of every Contract Year to reflect any change in RPI arising on or after 1st April, 1995.

24.14.8 All monies in the Insurance Proceeds Reinstatement Account shall be applied in accordance with Part 4 of Schedule 7 to the extent permitted by Law.

24.14.9 Where any Equipment, Transferred Equipment or Network Assets installed at the Hospital are damaged or destroyed by risks against which the Project Co is obliged to insure pursuant to this Clause 24, the Project Co shall instruct the insurers to pay any amounts relating solely to such Equipment, Transferred Equipment or Network Assets due to be paid under the insurance policies effected by it to the Trust to enable the Trust to replace the relevant Equipment, Transferred Equipment or Network Assets.

## 24.15 Saving

Neither failure to comply nor full compliance with the insurance provisions of this Agreement shall limit or relieve the Project Co in respect of its liabilities and obligations under any Project Document or the IT Agreement.

**25. TELECOMMUNICATIONS NETWORK**

**25.1 Systems Selection Process**

Upon request by the Project Co, the Trust shall liaise with the Facilities Manager in relation to the Systems Selection Process. The purpose of such liaison shall be to inform the Facilities Manager in relation to the matters the subject of the Systems Selection Process. The Facilities Manager shall have no liability for the outcome of the Systems Selection Process, notwithstanding its involvement in such liaison.

**25.2 Access**

The Project Co and all others authorised by the Project Co shall be entitled to access and use:

25.2.1 the Telecommunications Network; and

25.2.2 the Information System Services, to the extent agreed between the Parties as required to deliver the Services, provided that such matter shall either be agreed or not agreed (as the case may be) and the Disputes Resolution Procedure shall not apply,

for any purpose connected with the performance of their obligations or the exercise of any rights and entitlements contained in any of the Project Documents but for no other purpose other than pursuant to the IT Agreement. Such access shall include:

- (A) the right to connect the Telecommunications Network with other telecommunications or computer systems or networks of the Project Co and/or any others authorised by the Project Co, for such purposes; and
- (B) access to any disaster recovery planning provided to the Trust in respect of the Telecommunications Network.

**25.3 Network Access Points**

Without prejudice to the generality of Clause 25.2, Project Co and all others authorised by the Project Co shall be entitled to access pursuant to such Clause:

25.3.1 by connecting telecommunications or computer systems to up to 85 network access points in aggregate in respect of the Telecommunications Network; and

25.3.2 through the Trust's own computer systems at the Hospital, provided that such access shall not disrupt the Trust in the performance of any of its functions.

**25.4 No Adverse Effect**

25.4.1 The exercise by any person of any right to access and use the Telecommunications Network and/or the Information Systems Services pursuant to Clause 25.2 shall be subject to such exercise not adversely affecting the performance of the Telecommunications Network and/or the delivery of any IT Service to the Trust.

25.4.2 The Project Co shall take and shall procure that all others authorised by the Project Co to have access to the Telecommunications Network and/or the Information Systems Services shall take all reasonable precautions to comply with the Trust's and McKesson's internal security and operational procedures (including the Trust's Security Strategy and Policy) during any access to the Telecommunications Network and/or the Information Systems Services (where and to the extent that these have been notified to the Project Co). Except where otherwise agreed between the Parties, the Trust shall not require (and shall procure that McKesson shall not require) the Project Co to comply with procedures in respect of the Telecommunications Network and/or the Information Systems Services more onerous than those imposed on any other authorised users.

25.4.3 After termination of the provision by McKesson of the Managed Network Services pursuant to the IT Agreement, the Trust shall ensure that its specification for the Telecommunications Network shall recognise the rights granted pursuant to Clause 25.2 and Clause 25.3 and the need to allow sufficient capacity for the same.

## 25.5 Indemnity

25.5.1 The Project Co shall indemnify and keep indemnified the Trust in respect of :

- (A) any Claim or Loss suffered or incurred by the Trust as a result of the Project Co and/or any others authorised by the Project Co accessing and using the Telecommunications Network and/or the Information Systems Services; and
- (B) any Claim or Loss suffered or incurred by the Trust as a result of the Project Co and/or any others authorised by the Project Co connecting the Telecommunications Network with other telecommunications or computer systems or networks of the Project Co and/or any others authorised by the Project Co.

25.5.2 The Project Co shall have no liability under Clause 25.5.1:

- (A) where the relevant access and use is a requirement of the IT Services and such access and use is carried out in accordance with the IT Agreement; or
- (B) where the relevant access and use is effected pursuant to Clause 25.2 or Clause 25.3.1, provided that the Project Co or the persons authorised by the Project Co shall have fully complied with the Trust's reasonable requirements in respect of such access; or
- (C) where any Claim or Loss suffered or incurred by the Trust arises out of the act, omission, default or negligence of McKesson.

25.5.3 The liability of the Project Co for any Losses (other than any Losses to the extent that the same may reasonably be insured in the English insurance market at reasonable cost or which are insured in any event) in respect of any Claim made by the Trust pursuant to this Clause 25.5 shall not exceed £2,000,000, provided that such amount shall be adjusted on the first day of

every Contract Year to reflect any change in RPI arising on or after 1st April, 1995.

**25.6 Consultation**

At least 12 months prior to the expiry of the IT Agreement and as soon as practicable following the giving of notice to terminate the same by any party to the IT Agreement, the Trust shall consult with the Project Co in connection with the on-going provision of services in relation to the Telecommunications Network and shall take account of its reasonable requirements in connection with the same and use reasonable endeavours to ensure that such on-going provision is not materially reduced from that provided under the IT Agreement.

**25.7 Upgrading the Network**

The Trust shall liaise with the Project Co in accordance with the Liaison Procedure in relation to any modification, upgrade or other alteration to the Telecommunications Network and shall have regard to Clause 25.2 in relation to the same and use reasonable endeavours to ensure that such modification, upgrade or other alteration does not materially worsen the position of the Project Co and those authorised by Project Co pursuant to Clause 25.2.

**25.8 No obligation**

Without prejudice to the Trust's obligations in Clauses 25.4.2, 25.6 and 25.7, nothing in this Clause 25 shall imply any obligation on the Trust to provide a Telecommunications Network or the Information Systems Services or to ensure that the same or any part of them exists at any time.

**26. IT AGREEMENT**

**26.1 Failure**

Neither:

26.1.1 any failure by the Project Co or McKesson to achieve the IT Start Up Criteria in respect of any or all of the IT Services or the Information Systems Acceptance by the Phase 1 Completion Date or by any other date nor;

26.1.2 any failure by the Project Co or McKesson to comply with its other obligations under the IT Agreement in respect of the IT Services,

shall entitle the Trust:

- (A) to terminate any of the Project Documents; nor
- (B) to terminate any Services; nor
- (C) to pursue any Claim against the Project Co in respect of any Service.

**26.2 IT Equipment**

26.2.1 By no later than four weeks before the anticipated Phase 1 Completion Date, the Trust shall make available to the Project Co for use by the Project Co or any of its sub-contractors at the Hospital:

- (A) 100 telephone handsets;
- (B) 70 pagers; and
- (C) 10 fax machines.

26.2.2 All the equipment made available by the Trust pursuant to Clause 26.2.1 will be in good working order.

**26.3 IT Access Agreement**

The Project Co shall not consent to the variation, amendment or termination of the IT Access Agreement without the prior consent in writing of the Trust.

**27. CHARITABLE ACTIVITIES**

**27.1 Exclusion**

Any charitable activity at the Site:

27.1.1 shall be excluded from the scope of Clause 28; and

27.1.2 shall be run or operated:

- (A) by a charity registered with the Charity Commissioners whose sole purpose in undertaking such activity shall be to generate monies, the net receipts of which shall be passed to the Trust or to a registered charity; or
- (B) by any other person with the consent of the Project Co (not to be unreasonably withheld or delayed).

**27.2 Restrictions**

In permitting any charitable activity to operate at the Site, the Trust shall procure that the relevant charity or other person causes the minimum disturbance and interference to the Project Co. The Trust shall not permit any charitable activity to operate at the Site in competition with the commercial activities undertaken by the Project Co, which would have a material adverse effect on the Commercial Income.

**27.3 Co-operation**

The Project Co undertakes to co-operate fully with any person carrying out any charitable activity at the Site, provided that such obligation shall not extend to the expenditure of monies on the part of the Project Co, other than the reasonable costs of management or administration.

**28. PRIVATE PATIENTS AND COMMERCIAL INCOME**

**28.1 Private Patients**

The Trust shall be entitled to operate all Private Patients facilities at the Site, including the Private Patients Unit and to receive all income from the same.

**28.2 Generation**

The Project Co shall use all reasonable endeavours to generate Commercial Income.

**28.3 Deductions**

The Project Co shall be entitled to deduct from any Commercial Income (save to the extent that the costs in question are covered by the Usage Fee and/or Service Fees) received by it the costs expended or incurred by the Project Co for the purposes of planning, evaluating, implementing and managing the Commercial Income, which costs shall include the following, so far as applicable:-

28.3.1 all reasonable legal costs incurred, together with stamp duty and Land Registry fees and all statutory fees paid in connection with planning applications, building regulations applications or other applications in respect of the generation of Commercial Income;

28.3.2 all fees and expenses payable to contractors, architects, quantity surveyors, engineers, project managers, construction managers and other consultants engaged in connection with the generation of Commercial Income, at rates and in amounts which are reasonable in accordance with market practice at the time;



- 28.3.3 all fees and expenses payable to any agents or brokers or other parties (excluding any Associated Company of the Project Co) appointed by the Project Co for effecting introductions, at rates and in amounts which are reasonable in accordance with market practice at the time;
- 28.3.4 all reasonable promotional, advertising, marketing and related costs relating to the generation of Commercial Income; and
- 28.3.5 any VAT (due account being given for any VAT actually recovered) to the extent the Project Co is unable to recover the same, except for any amount which cannot be recovered by reason of default by the Project Co.

**28.4 Payments**

- 28.4.1 The Project Co shall pay to the Trust 50% of the difference of the Commercial Income less the aggregate of all deductions made in accordance with Clause 28.3.
- 28.4.2 Amounts payable by the Project Co pursuant to Clause 28.4.1 shall be calculated in respect of each Contract Year, from and including the First Contract Year.
- 28.4.3 Within 20 Working Days from the last day of any Contract Year, the Project Co shall deliver to the Trust a Report setting out:
  - (A) the aggregate amount of any Commercial Income received by the Project Co during that Contract Year;
  - (B) the aggregate amount of any deduction from such Commercial Income made by the Project Co pursuant to Clause 28.3;
  - (C) the net amount payable by the Project Co to the Trust pursuant to Clause 28.4.1; and
  - (D) any VAT payable in respect of such amount.
- 28.4.4 The Report delivered pursuant to Clause 28.4.3 shall be accompanied by work-papers clearly setting out the derivation and illustrating the calculation of any amount referred to in Clause 28.4.3. If the Report shows an amount owing by the Project Co to the Trust, the Trust shall issue a valid VAT invoice to the Project Co in respect of such amount, promptly following its receipt of such Report.
- 28.4.5 Without prejudice to Clause 40.4, the Project Co shall pay to the Trust the amount of any invoice issued by the Trust pursuant to Clause 28.4.4 not later than the later of:
  - (A) the last Working Day of the Contract Month following the Contract Year to which the invoice relates; and
  - (B) the 15th Working Day after the Project Co has received such invoice.

**28.5 Liaison**

The Parties shall liaise with each other from time to time in accordance with the Liaison Procedure :

- 28.5.1 as to any proposal raised by either Party in relation to potential sources of Commercial Income;
- 28.5.2 as to any existing sources of Commercial Income and their optimisation; and
- 28.5.3 as to the pricing of any commercial activities carried out by the Project Co at the Site and the marketing and promotion of those commercial activities.

**28.6 First Refusal**

Except in relation to any commercial activity involving data and/or visual information technology services or clinical and related activity (including Private Patients), clinical or pharmaceutical research or clinical education and/or training:

- 28.6.1 the Project Co shall have a right of first refusal to undertake any commercial activity at the Site other than in respect of the Commercial Areas which may generate Commercial Income. Having liaised in accordance with Clause 28.5.1, the Project Co shall notify the Trust as to whether or not it wishes to pursue the particular commercial activity. If, following such liaison, the Project Co notifies the Trust that it does not, the Trust shall be free during the 12 months immediately following such notification to undertake the commercial activity itself or enter into arrangements with a third party relating to that commercial activity. If, during such period, the Trust does not undertake such commercial activity or enter into such arrangements, the Project Co's right of first refusal shall recur in respect of that commercial activity.
- 28.6.2 where the proposed commercial activity requires the grant of any property interest in respect of the Site other than the Commercial Areas, the Trust shall review such requirement with the Project Co.

**28.7 Information and Audit**

- 28.7.1 Without prejudice to the generality of Clause 34.5, the Project Co shall provide to the Trust such information in respect of Commercial Income as the Trust may reasonably require.
- 28.7.2 Without prejudice to its rights under Clauses 35.2 and 40.8, the Trust may, from time to time, audit the information provided to it by the Project Co pursuant to Clause 28.7.1.

**29. CHANGE OF LAW**

**29.1 Adjustments**

The Parties shall be entitled at the times specified in this Clause 29 to seek certain payments, as a result of certain changes of Law and/or NHS Requirements during the periods specified in this Clause 29, in each case payable in accordance with Clause 29.11. Such payments shall fairly reflect the relevant increase or decrease, as the case

may be, in the net costs to the Project Co of carrying out the relevant obligations under the Project Documents. Each Party shall ensure that its intention to exercise such entitlement shall previously have been discussed with the other by way of the Liaison Procedure.

## 29.2 Project Co's Change of Law Adjustment Notice

Upon the occurrence of any of the events set out in Clause 29.3, the Project Co shall be entitled to serve a Project Co's Change of Law Adjustment Notice specifying the relevant event in Clause 29.3 in reasonable detail and demonstrating (as appropriate):-

- 29.2.1 how the event will result in increased costs to the Project Co; and
- 29.2.2 where the event is an event described in Clause 29.3.9 or Clause 29.3.10, how the Project Co (or any of its sub-contractors) will be unable, as a result, to recover 100% of the relevant input tax.

## 29.3 Relevant Events

The relevant events for the purposes of Clause 29.2 are:

- 29.3.1 a change of Hospital Specific Law or the introduction of Hospital Specific Law taking effect after the Commencement Date and before the Phase 1 Completion Date, which will result in increased costs to the Project Co in respect of the design and/or construction of the Phase 1 Works.
- 29.3.2 a change of Hospital Specific Law or the introduction of Hospital Specific Law taking effect after the Amendment Execution Date and before the Phase 2 Completion Date, which will result in increased costs to the Project Co in respect of the design and/or construction of the Phase 2 Works.
- 29.3.3 a change of Hospital Specific Law or the introduction of Hospital Specific Law taking effect after the Commencement Date, which will result in increased costs to the Project Co in respect of the provision of the Maintenance of Buildings and Engineering Services to the Phase 1 Areas but excluding any increased costs to the Project Co in respect of the provision of the renewals element of such Service (including lifecycle renewals and lifecycle replacement).
- 29.3.4 a change of Hospital Specific Law or the introduction of Hospital Specific Law taking effect after the Amendment Execution Date, which will result in increased costs to the Project Co in respect of the provision of the Maintenance of Buildings and Engineering Services to the Phase 2 Areas but excluding any increased costs to the Project Co in respect of the provision of the renewals element of such Service (including lifecycle renewals and lifecycle replacement).
- 29.3.5 a change of Law and/or NHS Requirement or the introduction of Law and/or NHS Requirement taking effect on or after the Phase 1 Completion Date which will result or has resulted in increased costs to the Project Co as a result of the Project Co being or anticipating being required (in a different manner or additionally) to undertake works (which works shall include lifecycle renewals and lifecycle replacement) to the Phase 1 Areas or, after the BOA Completion

Date in respect of the same, any Beneficial Occupation Area or any Post Completion Variation Works whether at the time of the change or introduction or at any time subsequently, provided that due account shall be taken of any increase or reduction in the costs to the Project Co of provision of the Maintenance of Buildings and Engineering Services arising as a result of such works.

- 29.3.6 a change of Law and/or NHS Requirement or the introduction of Law and/or NHS Requirement taking effect on or after the Phase 2 Completion Date which will result or has resulted in increased costs to the Project Co as a result of the Project Co being or anticipating being required (in a different manner or additionally) to undertake works to the Phase 2 Areas or any Post Completion Variation Works whether at the time of the change or introduction or at any time subsequently, provided that due account shall be taken of any reduction in the costs to the Project Co of provision of the Maintenance of Buildings and Engineering Services arising as a result of such works.
- 29.3.7 the introduction of Discriminatory Legislation or a change in Law or NHS Requirement which constitutes Discriminatory Legislation taking effect after the Commencement Date, which will result in increased costs to the Project Co in respect of the construction of the Phase 1 Works and/or the provision of the Maintenance of Buildings and Engineering Services to the Phase 1 Areas and/or any Post Completion Variation Works and/or the cost or availability of insurance and/or the cost or timing of asset renewals and/or the fee to be paid to the Facilities Manager (but, in the case of the fee payable to the Facilities Manager, only to the extent that the amendment to the fee is reasonable) and/or the Project Co's overhead costs, in each case, in relation to the Phase 1 Areas.
- 29.3.8 the introduction of Discriminatory Legislation or a change in Law or NHS Requirement which constitutes Discriminatory Legislation taking effect after the Amendment Execution Date, which will result in increased costs to the Project Co in respect of the construction of the Phase 2 Works and/or the provision of the Maintenance of Buildings and Engineering Services to the Phase 2 Areas and/or any Post Completion Variation Works and/or the cost or availability of insurance and/or the cost or timing of asset renewals and/or the fee to be paid to the Facilities Manager (but, in the case of the fee payable to the Facilities Manager, only to the extent that the amendment to the fee is reasonable) and/or the Project Co's overhead costs, in each case, in relation to the Phase 2 Areas.
- 29.3.9 a change of Law relating to VAT taking effect after the Commencement Date resulting in the Project Co (or any of its sub-contractors) being unable to recover 100% of the input tax directly incurred in respect of the Phase 1 Areas, except to the extent that the same has been addressed through Clause 14.3.7 of the Facilities Management Agreement.
- 29.3.10 a change of Law relating to VAT taking effect after the Amendment Execution Date resulting in the Project Co (or any of its sub-contractors) being unable to recover 100% of the input tax directly incurred in respect of the

Phase 2 Areas, except to the extent that the same has been addressed through Clause 14.3.8 of the Facilities Management Agreement.

**29.4 Trust's Change of Law Adjustment Notice**

Upon the occurrence of any of the events listed in Clause 29.5, the Trust's Works Adviser shall be entitled to serve a Trust's Change of Law Adjustment Notice specifying the relevant event in Clause 29.5 in reasonable detail and demonstrating (as appropriate):-

- 29.4.1 how the event will result in a reduction in costs to the Project Co; and
- 29.4.2 where the event is an event described in Clause 29.5.9 or Clause 29.5.10, how the Project Co (or any of its sub-contractors) will be able, as a result, to recover a greater proportion of its input tax.

**29.5 Relevant Events**

The relevant events for the purposes of Clause 29.4 are:

- 29.5.1 a change of Hospital Specific Law or the introduction of Hospital Specific Law taking effect after the Commencement Date and before the Phase 1 Completion Date, which will result in a reduction in costs to the Project Co in respect of the design and/or construction of the Phase 1 Works.
- 29.5.2 a change of Hospital Specific Law or the introduction of Hospital Specific Law taking effect after the Amendment Execution Date and before the Phase 2 Completion Date, which will result in a reduction in costs to the Project Co in respect of the design and/or construction of the Phase 2 Works.
- 29.5.3 a change of Hospital Specific Law or the introduction of Hospital Specific Law taking effect after the Commencement Date which will result in a reduction in costs to the Project Co in respect of the provision of the Maintenance of Buildings and Engineering Services to the Phase 1 Areas but excluding any reduction in costs to the Project Co in respect of the provision of the renewals element of such Service (including lifecycle renewals and lifecycle replacement).
- 29.5.4 a change of Hospital Specific Law or the introduction of Hospital Specific Law taking effect after the Amendment Execution Date which will result in a reduction in costs to the Project Co in respect of the provision of the Maintenance of Buildings and Engineering Services to the Phase 2 Areas but excluding any reduction in costs to the Project Co in respect of the provision of the renewals element of such Service (including lifecycle renewals and lifecycle replacement).
- 29.5.5 a change of Law and/or NHS Requirement or the introduction of Law and/or NHS Requirement taking effect on or after the Phase 1 Completion Date which will result or has resulted in a reduction in costs to the Project Co as a result of the Project Co being or anticipating being required (in a different manner or not being required) to undertake works (which works shall include lifecycle renewals and lifecycle replacement) to the Phase 1 Areas or, after the BOA Completion Date in respect of the same, any Beneficial Occupation Area

or any Post Completion Variation Works, provided that full account shall be taken of any reduction or increase in the costs to the Project Co of provision of the Maintenance of Buildings and Engineering Services arising as a result of such works.

- 29.5.6 a change of Law and/or NHS Requirement or the introduction of Law and/or NHS Requirement taking effect on or after the Phase 2 Completion Date which will result or has resulted in a reduction in costs to the Project Co as a result of the Project Co being or anticipating being required (in a different manner or not being required) to undertake works (which works shall include lifecycle renewals and lifecycle replacement) to the Phase 2 Areas or any Post Completion Variation Works, provided that full account shall be taken of any reduction or increase in the costs to the Project Co of provision of the Maintenance of Buildings and Engineering Services arising as a result of such works.
- 29.5.7 the introduction of Discriminatory Legislation or a change in the Law or NHS Requirement which constitutes Discriminatory Legislation taking effect after the Commencement Date, which will result in a reduction in costs to the Project Co in respect of the construction of the Phase 1 Works and/or the provision of the Maintenance of Buildings and Engineering Services, in each case, in relation to the Phase 1 Areas and/or any Post Completion Variation Works and/or the cost or availability of insurance and/or the cost or timing of asset renewals and/or the fee to be paid to the Facilities Manager (but, in the case of the fee payable to the Facilities Manager only to the extent that the amendment to the fee is reasonable) and/or the Project Co's overhead costs, in each case, in relation to the Phase 1 Areas.
- 29.5.8 the introduction of Discriminatory Legislation or a change in the Law or NHS Requirement which constitutes Discriminatory Legislation taking effect after the Amendment Execution Date, which will result in a reduction in costs to the Project Co in respect of the construction of the Phase 2 Works and/or the provision of the Maintenance of Buildings and Engineering Services to the Phase 2 Areas and/or any Post Completion Variation Works and/or the cost or availability of insurance and/or the cost or timing of asset renewals and/or the fee to be paid to the Facilities Manager (but, in the case of the fee payable to the Facilities Manager only to the extent that the amendment to the fee is reasonable) and/or the Project Co's overhead costs in each case, relating to the Phase 2 Areas.
- 29.5.9 a change of Law relating to VAT taking effect after the Commencement Date resulting in the Project Co (or any of its sub-contractors) being able to recover a greater proportion of its input tax directly incurred in respect of the Phase 1 Areas, except to the extent that the same has been addressed through Clause 14.5.7 of the Facilities Management Agreement.
- 29.5.10 a change of Law relating to VAT taking effect after the Amendment Execution Date resulting in the Project Co (or any of its sub-contractors) being able to recover a greater proportion of its input tax directly incurred in respect of the Phase 2 Areas, except to the extent that the same has been addressed through clause 14.5.8 of the Facilities Management Agreement.

## 29.6 **Project Co Obligation**

The Project Co shall use its reasonable endeavours to minimise any increase and maximise any reduction in costs referred to in Clauses 29.2.1 and 29.4.1 respectively.

## 29.7 **Other Adjustments**

Any costs or savings referred to in Clauses 29.2.1 and 29.4.1 shall take full account of any adjustment to the Service Fees and/or the Usage Fee, any change to the scope of the Reimbursable Expenses and/or any Up-front Cost Items or Cost Recovery Items already made pursuant to Clauses 11, 13 or 14 of the Facilities Management Agreement.

## 29.8 **Trust's Change of Law Adjustment Confirmation**

29.8.1 As soon as practicable after receipt of any Project Co's Change of Law Adjustment Notice served pursuant to Clause 29.2, the Trust shall issue a response to the Project Co requesting details of the amount of the increased cost by reference to all or any of the payment methods referred to in Clause 29.11. Thereafter, the Parties shall liaise in accordance with the Liaison Procedure to seek to agree the terms of the relevant event and, in particular, the amount of the relevant increased costs by reference to the method of their payment by the Trust.

29.8.2 Where any matter set out in the Project Co's Change of Law Adjustment Notice is not agreed within 10 Working Days of the date of the Project Co's Change of Law Adjustment Notice, the matter shall be referred to the Disputes Resolution Procedure. Once the matters set out in the Project Co's Change of Law Adjustment Notice have been agreed or determined, the Trust shall issue a Trust's Change of Law Adjustment Confirmation in respect of the relevant increased costs within five Working Days.

## 29.9 **Project Co's Change of Law Adjustment Confirmation**

29.9.1 As soon as practicable after receipt of the Trust's Change of Law Adjustment Notice, the Parties shall liaise in accordance with the Liaison Procedure to seek to agree the terms of the relevant event and, in particular the amount of the relevant reduction in costs.

29.9.2 Where any matter set out in the Trust's Change of Law Adjustment Notice is not agreed within 10 Working Days of the date of the Trust's Change of Law Adjustment Notice, the matter shall be referred to the Disputes Resolution Procedure. Once the matters set out in the Trust's Change of Law Adjustment Notice have been agreed or determined, the Project Co shall issue a Project Co's Change of Law Adjustment Confirmation in respect of the relevant reduction in costs within five Working Days.

## 29.10 **Repair and Maintenance: Financial Consequences**

The financial consequences of any relevant event pursuant to Clause 29.3.3 or Clause 29.3.4 and/or 29.5.3 or 29.5.4 arising after the Completion Date shall be borne by the Party which incurs the same until the first or the next Market Testing Date (as the case may be).

**29.11 Payment**

29.11.1 During the Design and Construct Phase, any increased cost to the Project Co agreed or determined pursuant to this Clause 29 shall be paid by the Trust:

- (A) through an adjustment to the Usage Fee made in accordance with Clause 29.12 in respect of the whole amount; or
- (B) by way of a lump sum payment made in one or more instalments in respect of part of the increased cost and calculated to leave the Project Co in no better and no worse position than before such part of the increased cost was incurred, on the basis of the tests in Clause 29.12 and an adjustment to the Usage Fee made in accordance with Clause 29.12 in respect of the remaining part; or
- (C) by way of a lump sum payment made in one or more instalments in respect of the whole amount and calculated to leave the Project Co in no better and no worse position than before the increased cost was incurred, on the basis of the tests in Clause 29.12.

Where any increased cost is to be paid by way of lump sum (whether by way of instalments or not) the Trust shall, at the request and direction of the Project Co, pay all or such part of the lump sum as the Project Co shall specify to such third party as the Project Co shall direct.

29.11.2 Subject to Clause 30, the Trust shall be entitled to elect the method of payment pursuant to Clause 29.11.1. Any such election shall be made by the Trust pursuant to the liaison under Clause 29.8.1 and confirmed once the relevant increased cost has been agreed or determined in accordance with the same.

29.11.3 If the Trust elects to pay the whole of any increased cost pursuant to Clause 29.11.1(A), the Usage Fee shall be adjusted in accordance with Clause 29.12 to reflect the same. Such adjustment will be made by the Project Co and notified to the Trust within five Working Days of the end of the relevant Quarter.

29.11.4 If the Trust elects to pay the increased cost pursuant to Clause 29.11.1(B):

- (A) the Parties shall agree the amount and timing of the relevant instalments in respect of the relevant part of the increased cost, which instalments, unless otherwise agreed shall reflect the amount and timing of the relevant costs as they are incurred and the Trust shall pay the same in accordance with such agreement.
- (B) the Usage Fee shall be adjusted in accordance with Clause 29.12.1 to reflect the remaining part. Such adjustment will be made by the Project Co and notified to the Trust within five Working Days of the end of the relevant Quarter.

29.11.5 If the Trust elects to pay the whole of any increased cost pursuant to Clause 29.11.1(C), the Parties shall agree the amount and timing of the relevant instalments, which instalments, unless otherwise agreed shall reflect the



amount and timing of the relevant costs as they are incurred and the Trust shall pay the same in accordance with such agreement.

29.11.6 If the Trust elects to pay any increased cost through an adjustment to the Usage Fee but is precluded from doing so by Clause 30, the Trust shall pay such amount by way of a lump sum pursuant to Clause 29.11.1(B) or Clause 29.11.1(C), as the case may be.

29.11.7 During the Operational Phase, any increased cost to the Project Co shall be paid:

- (A) through an adjustment to the Usage Fee in respect of the whole amount; or
- (B) by way of a lump sum payment made in one or more instalments in respect of part of the increased cost and calculated to leave the Project Co in no better and no worse position than before the increased cost was incurred and an adjustment to the Usage Fee calculated in like manner in respect of the remaining part; or
- (C) by way of a lump sum payment made in one or more instalments in respect of the whole amount and calculated to leave the Project Co in no better and no worse position than before the increased cost was incurred.

Where any increased cost is to be paid by way of lump sum (whether by way of instalments or not) the Trust shall, at the request and direction of the Project Co, pay all or such part of the lump sum as the Project Co shall specify to such third party as the Project Co shall direct.

29.11.8 Subject to Clause 30, the Trust shall be entitled to elect the method of payment pursuant to Clause 29.11.7. Any such election shall be made by the Trust pursuant to the liaison under Clause 29.8.1 and confirmed once the relevant increased cost has been agreed or determined in accordance with the same.

29.11.9 If the Trust elects to pay the whole of any increased cost pursuant to Clause 29.11.7(A), the Parties shall liaise together following provision of information by the Project Co in accordance with Clause 30.2.4. Following such liaison, the Trust shall notify the Project Co as to whether or not it still wishes to fund the relevant increased cost pursuant to Clause 29.11.7(A). If it does, the Usage Fee shall be adjusted by an amount calculated to leave the Project Co in no better and no worse position than before the increased cost was incurred. Otherwise, the Trust shall pay the increased cost in accordance with Clause 29.11.7(B) or Clause 29.11.7(C).

29.11.10 If the Trust elects to pay the increased cost pursuant to Clause 29.11.7(B):

- (A) the Parties shall agree the amount and timing of the relevant instalments in respect of the relevant part of the increased cost, which instalments, unless otherwise agreed shall reflect the amount and timing of the relevant costs as they are incurred and the Trust shall pay the same in accordance with such agreement;

- (B) in relation to the remaining part, the Parties shall liaise together following provision of information by the Project Co in accordance with Clause 30.2.4. Following such liaison, the Trust shall notify the Project Co as to whether or not it still wishes the Project Co to fund the remaining part of the increased cost pursuant to Clause 29.11.7(B). If it does, the Usage Fee shall be adjusted by an amount calculated to leave the Project Co in no better and no worse position than before the increased cost was incurred. Otherwise, the Trust shall pay the increased cost in accordance with Clause 29.11.7(C).

29.11.11 If the Trust elects to pay the whole of any increased cost pursuant to Clause 29.11.7(C), the Parties shall agree the amount and timing of the relevant instalments, which instalments, unless otherwise agreed shall reflect the amount and timing of the relevant costs as they are incurred and the Trust shall pay the same in accordance with such agreement.

29.11.12 During the Design and Construct Phase:

- (A) any reduction in costs shall be accounted for by the Project Co through an adjustment to the Usage Fee made in accordance with Clause 29.12;
- (B) within five Working Days of the end of the relevant Quarter, the Project Co shall notify the Trust of any reduction in costs specified in any Project Co's Change of Law Adjustment Confirmation issued during such Quarter and the Usage Fee shall be adjusted in accordance with Clause 29.12 to reflect such reduction in costs.

29.11.13 During the Operational Phase, any reduction in costs shall be accounted for by the Project Co through such adjustments to the Usage Fee calculated to leave the Parties in no better and no worse position.

## 29.12 Usage Fee

29.12.1 Where an adjustment to the Usage Fee is to be made pursuant to Clause 29.11.3 or Clause 29.11.4(B), the Project Co shall re-run the Financial Model and ascertain the impact of the increase in costs on the Usage Fee by inputting the change in real (and, where relevant, nominal) costs for all affected periods.

29.12.2 Where an adjustment to the Usage Fee is to be made pursuant to Clause 29.11.12(A) or Clause 29.11.12(B), the Project Co shall re-run the Financial Model and ascertain the impact of the reduction in costs on the Usage Fee by inputting the change in real (and, where relevant, nominal) costs for all affected periods.

29.12.3 Following the re-running of the Financial Model pursuant to Clause 29.12.1 or Clause 29.12.2, the Project Co shall notify the Trust of the adjustments to the Usage Fee necessary to ensure the Maintenance of Ratios as a result of the relevant changes.

29.12.4 If any amount remains outstanding under the Senior Funding Agreements, where the relevant event has given rise to a Delay Event, the Project Co's adjustment to the Usage Fee pursuant to Clause 29.12.1 shall, upon request by

the Trust, assume that each repayment profile of the Senior Creditors has been rescheduled on the basis that:

- (A) the amount of the relevant loan which is due to be repaid on the first repayment date for that loan as specified in the Financial Model as at the Amendment Effective Date shall be reduced by the percentage which the Rescheduling Period bears to six months; and
- (B) the remaining amount of the relevant loan outstanding (including the amount of the first repayment which has been rescheduled) shall be repaid over the remaining repayment dates in respect of that loan for the Senior Creditors in the Financial Model as at the Amendment Effective Date with the amount to be repaid on each such repayment date being recalculated on the same basis and using the same methodology (including as to interest) as was used in the Financial Model as at the Amendment Effective Date.

### **30. ADDITIONAL FUNDING**

#### **30.1 Design and Construct Phase**

During the Design and Construct Phase, the Trust's entitlement to pay any amount through the Usage Fee (other than Variation Usage Fee Costs) from time to time pursuant to all of Clauses 10.7, 16.9.1, 18.1.16 and 29.11 shall be limited in aggregate to £2,000,000 and may not be exercised in respect of any payment after 22<sup>nd</sup> June, 2003.

#### **30.2 Operational Phase**

30.2.1 During the Operational Phase, the Trust's entitlement to pay any amount through the Usage Fee other than the matters referred to in Clauses 16.5.1(D)(2) to 16.5.1(D)(5) (inclusive) from time to time pursuant to the Project Documents shall be limited to the amount of any additional funding procured by the Project Co pursuant to this Clause 30.2.

30.2.2 Where the Trust elects pursuant to Clause 30.2.1 to pay any amount through the Usage Fee in accordance with the Project Documents, the Project Co shall use its reasonable endeavours to procure additional funding for the purposes of this Clause 30.2. Subject to Clause 30.2.3, the Project Co's obligations to use reasonable endeavours shall include:

- (A) the Project Co taking all reasonable steps to procure finance in respect of the amount to be financed through the Usage Fee on the most favourable terms reasonably available to it in the market for projects of a type similar to the Project;
- (B) if requested by the Trust, the Project Co arranging a meeting or meetings between the Trust and the Funders or other appropriate providers of finance for the purposes of discussing the provision of appropriate finance in respect of the amount to be financed through the Usage Fee, provided that such meetings between the Trust and the Funders shall only take place in the presence of the Project Co; and

- (C) where the Funders do not agree to provide finance in respect of the relevant amount, the Project Co seeking the agreement of such Funders to the release or partial release of the Project Co from any undertaking restricting the ability of the Project Co to grant security in favour of a party other than the Funders or any similar undertaking given to or for the benefit of the Funders which, if not released (whether wholly or in part) would preclude the Project Co from obtaining finance in respect of the amount to be financed through the Usage Fee from a provider of funds other than the Funders.

30.2.3 Nothing in Clause 30.2.2 shall imply any obligation on any Consortium Member or any Third Party Investor or the Project Co to provide or procure additional equity or use internal financial resources or other forms of shareholders support, in any such case, by way of additional funding pursuant to this Clause 30.2.

30.2.4 Where the Project Co procures any additional funding or offer of additional funding pursuant to Clause 30.2.2, it shall inform the Trust:

- (A) of the terms and conditions of the relevant funding, including cost, tenor, repayment profile and cover ratios (where relevant); and
- (B) of the Project Co's assessment of the adjustment to the Usage Fee which must be made in respect of the amount to be financed through the Usage Fee, given the terms and conditions of the relevant additional funding.

## **31. LIAISON PROCEDURE**

The Parties shall adopt the Liaison Procedure in accordance with Schedule 11.

## **32. ADVISERS AND REPRESENTATIVE**

### **32.1 The Trust's Works Adviser and Trust's Facilities Adviser**

32.1.1 The Trust has appointed the Trust's Works Adviser to act as its agent in relation to the design, construction, completion, commissioning and testing of the Works. The Trust's Works Adviser shall exercise the functions referred to in this Agreement and such other functions in respect of the Project Documents as the Trust may notify to the Project Co from time to time.

32.1.2 The Trust has appointed the Trust's Facilities Adviser to act as its agent in connection with all Operations other than the design, construction, completion, commissioning and testing of the Works. The Trust's Facilities Adviser shall exercise the functions set out in this Agreement and the Facilities Management Agreement and such other functions in respect of the Project Documents as the Trust may notify to the Project Co from time to time.

32.1.3 The functions of the Trust's Works Adviser and the Trust's Facilities Adviser shall be separate and apart and neither shall have the power to override the other. Where the instructions or actions of the Trust's Works Adviser and those of the Trust's Facilities Adviser conflict, the matter shall be referred to and forthwith resolved by the Trust.

32.1.4 During any period when there is no Trust's Works Adviser or Trust's Facilities Adviser, the Trust shall carry out the functions which would otherwise be performed by the Trust's Works Adviser or Trust's Facilities Adviser, as the case may be. The Trust shall always have a nominated representative whose identity has been communicated to the Project Co and upon whose authority and instructions the Project Co is entitled to rely.

32.1.5 If the Trust's Works Adviser or the Trust's Facilities Adviser relieves the Project Co of any of its obligations under any Project Document, such shall be binding upon the Trust.

32.1.6 Except as previously notified by the Trust to the Project Co, the Project Co shall be entitled to treat any act of the Trust's Works Adviser or the Trust's Facilities Adviser which is authorised by any Project Document as being expressly authorised by the Trust and the Project Co shall not be required to determine whether an express authority has in fact been given.

## 32.2 **The Project Co's Representative**

The Project Co has appointed the Project Co's Representative to act as its agent in connection with the Project Documents. Except as previously notified by the Project Co to the Trust, the Trust's Works Adviser and the Trust's Facilities Adviser shall be entitled to treat any act of the Project Co's Representative in connection with the Project Documents as being expressly authorised by the Project Co and the Trust, the Trust's Works Adviser and the Trust's Facilities Adviser shall not be required to determine whether any express authority has in fact been given.

## 32.3 **Change of Representatives**

32.3.1 The Trust may, at any time and from time to time by notice to the Project Co, terminate the appointment of the Trust's Works Adviser or Trust's Facilities Adviser or appoint a substitute Trust's Works Adviser or Trust's Facilities Adviser. Any such notice shall specify the date on which such termination or substitution shall have effect, which date shall, other than in the case of an emergency, be such as will not cause serious inconvenience to the Project Co in the execution of its obligations hereunder. Such appointment shall be subject to the prior approval of the Project Co (not to be unreasonably withheld or delayed).

32.3.2 Immediately upon the Project Co's Representative ceasing to act, the Project Co shall by notice to the Trust appoint a substitute. Such appointment shall be subject to the prior approval of the Trust (not to be unreasonably withheld or delayed).

## 32.4 **Agency**

The Project Co shall be entitled to appoint the Building Contractor and/or the Facilities Manager as its agent for the purposes of various provisions of the Project Documents, subject to the Project Co giving notice thereof to the Trust identifying the provision and the party appointed agent. Following such appointment, the Project Co may revoke the appointment (in whole or part as it determines) and shall give notice of such revocation to the Trust. Except as previously notified by the Project Co to the Trust following such appointment, the Trust's Works Adviser and the Trust's Facilities

Adviser shall be entitled to treat any act of the Building Contractor and/or the Facilities Manager in connection with such appointment, in respect of a provision for which it is then appointed, as being expressly authorised by the Project Co and the Trust, the Trust's Works Adviser and the Trust's Facilities Adviser shall not be required to determine whether any express authority has in fact been given.

### **33. QUALITY ASSURANCE**

#### **33.1 Quality Management Systems**

33.1.1 Subject to the proviso in Clause 33.1.2, the Project Co shall procure that the Operations are managed using quality management systems. The Trust shall use reasonable endeavours to assist the Project Co in complying with its obligations pursuant to this Clause 33.1, provided that the Trust's obligations shall not extend to the expenditure of monies on the part of the Trust other than the reasonable costs of management. To the extent that the Trust does not share the quality management systems, standards and processes which are relevant to compliance with Clause 33.1.2(A) and the same adversely affects the Project Co's ability to comply with such Clause, the Project Co shall be relieved of its obligation to comply with the same.

33.1.2 The quality management systems referred to in Clause 33.1.1 shall be reflected in appropriate Quality Manuals and shall comply with:

- (A) the relevant BS EN ISO quality standard (or such other quality standard as the Parties may agree);
- (B) the Trust's Requirements; and
- (C) Good Industry Practice,

provided that, in relation to the provision of Services:

- (1) Project Co shall not be obliged to comply with this Clause 33.1.2 until the expiry of 12 months after the Phase 1 Completion Date; and
- (2) as soon as practicable after each BOA Completion Date and the Phase 2 Completion Date, Project Co shall update each Quality Manual to the extent necessary to reflect any change in the Services arising as a result of the relevant Completion.

33.1.3 Without limitation to the generality of Clause 33.1.2, there shall be:

- (A) a Quality Manual for the design and construction of the Works;
- (B) a Quality Manual for facilities management in respect of the Services; and
- (C) a Quality Manual for each Service.

33.1.4 The Project Co shall not commence or permit the commencement of any aspect of the Operations, other than design development pursuant to the Design Development Procedure, before a framework of the Quality Manuals

which concern such aspect has been submitted to the Trust's Works Adviser or the Trust's Facilities Adviser (as the case may be) for approval, such approval not to be unreasonably withheld or delayed, provided always that in the case of the Quality Manuals relating to the Services or any of them, such framework shall be submitted no later than six months before the anticipated Phase 1 Completion Date.

33.1.5 The provisions of Clause 33.1.4 shall not apply in respect of the Quality Manuals which have been agreed between the Parties before the Project Co commences any relevant part of the Operations on the Site.

33.1.6 The Project Co shall comply in all material respects with the Quality Manuals.

33.1.7 Upon request, the Project Co shall, from time to time, submit to the Trust's Works Adviser or the Trust's Facilities Adviser (as the case may be) any changes to any Quality Manual required for such Quality Manual to continue to comply with the requirements set out in Clause 33.1.2.

### 33.2 **Quality Procedures**

If any Quality Manual refers to, relies on or incorporates any quality procedure, such quality procedure or the relevant parts thereof shall be submitted to the Trust's Works Adviser or the Trust's Facilities Adviser, as the case may be, at the time that the relevant Quality Manual or change to a Quality Manual is submitted in accordance with Clauses 33.1.4 or 33.1.7 and the content of such quality procedure shall be taken into account in the consideration of the relevant Quality Manual or change to a Quality Manual pursuant to such Clauses. The Trust's Works Adviser or the Trust's Facilities Adviser, as the case may be, may require the amendment of any such quality procedure to the extent necessary to enable the relevant Quality Manual to satisfy the requirements of Clause 33.1.1.

### 33.3 **Additional Information**

Notwithstanding any other provision of this Clause 33, the Project Co shall provide to the Trust's Works Adviser or the Trust's Facilities Adviser, as the case may be, such information as it may reasonably require to demonstrate compliance with this Clause 33.

### 33.4 **Quality Monitoring**

Without limitation to Clauses 35.2 and 40.8, the Trust may carry out audits of the Project Co's quality system (including all Quality Manuals and any quality procedures) at approximate intervals of three months and may carry out other periodic monitoring, spot checks and auditing of the same.

## 34. **REPORTS AND INFORMATION**

### 34.1 **Required Reports**

The Project Co shall submit to the Trust's Adviser:

34.1.1 the Reports specified in Part 2 of Schedule 9, in such numbers as are provided therein; and

34.1.2 such additional Reports in such numbers as may be agreed between the Parties from time to time.

**34.2 Form**

The Reports shall be in such form as the Trust's Adviser may reasonably require to be consistent with the terms of this Agreement and the Facilities Management Agreement.

**34.3 Objections to Reports**

34.3.1 If the Trust's Adviser considers that any Report either has not been compiled in accordance with the provisions of this Agreement or the Facilities Management Agreement (as the case may be) or has been based on erroneous information or data, it may serve a notice to that effect on the Project Co within 20 Working Days of receipt of such Report, objecting to the same.

34.3.2 If any such objection has not been resolved by agreement between the Trust's Adviser and the Project Co within 10 Working Days after the service of such notice, either of them may refer the Dispute to the Disputes Resolution Procedure.

**34.4 Revisions to Reports**

If :

34.4.1 the resolution (whether by agreement or determination) of any objection made pursuant to Clause 34.3.1; or

34.4.2 the correction of any calculation pursuant to any provision of the Project Documents,

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

**34.5 Further Information**

The Project Co shall, at any time and from time to time, provide to the Trust's Works Adviser or the Trust's Facilities Adviser (as the case may be) such further information in respect of the Project as the Trust's Works Adviser or the Trust's Facilities Adviser (as the case may be) may reasonably require.

**34.6 Information Provision by the Trust**

The Trust shall provide the Project Co, upon reasonable request, with such information in relation to its activities at the Hospital as is necessary to permit the Project Documents to function properly.

**34.7 Financial Information**

34.7.1 Without prejudice to the generality of Clause 34.5, the Project Co shall furnish to the Trust:



- (A) as soon as they become available and, in any event, on or before expiry of the statutory period after the close of each of their respective accounting periods for their delivery to Companies House, copies of the audited financial statements of the Project Co, the Building Contractor and the Facilities Manager for such periods, including in each case a balance sheet prepared as at the end of such accounting period, a profit and loss account and a cashflow statement in respect of such accounting period; and
- (B) as soon as they become available and, in any event, not later than 90 days after the end of the first half of each of their respective financial years, copies of the unaudited financial statements of the Project Co for such financial half year, including a profit and loss account in respect of such period,

provided that the Project Co's obligations in respect of the financial statements of the Building Contractor set out in Clause 34.7.1(A) shall cease on the first anniversary of the Phase 2 Completion Date.

34.7.2 The Project Co shall notify the Trust if it is unable to meet its statutory financial obligations and, in such circumstances, shall forthwith notify the Trust of its intended course of action.

#### 34.8 **Accounting Principles**

The Project Co will procure that:

- 34.8.1 the financial statements in respect of itself referred to in Clause 34.7.1 are prepared on a basis consistently applied in accordance with generally accepted accounting principles and practices in England and Wales and that such financial statements shall present truly and fairly the results of the operations of the Project Co for the period in question;
- 34.8.2 the Building Contract requires that the financial statements in respect of the Building Contractor referred to in Clause 34.7.1 are prepared on a basis consistently applied in accordance with generally accepted accounting principles and practices in England and Wales and that such financial statements shall present truly and fairly the results of the operations of the Building Contractor for the period in question; and
- 34.8.3 the Facilities Provision Contract requires that the financial statements in respect of the Facilities Manager referred to in Clause 34.7.1 are prepared on a basis consistently applied in accordance with generally accepted accounting principles and practices in England and Wales and that such financial statements shall present truly and fairly the results of the operations of the Facilities Manager for the period in question.

#### 34.9 **Audit**

The Trust shall allow the Project Co and its advisers or agents and others authorised by the Project Co at reasonable hours, upon giving the Trust reasonable notice, access to the records of the Trust at the Project Co's own expense to audit the Usage Fee and the levels of activity which determine the Usage Fee and the Project Co and its

accountants shall be entitled to take copies of all such records at their own expense but, subject to not impeding the Trust in the conduct of its administration, utilising the copying facilities of the Trust. If any such audit reveals any inaccuracy in the information upon which the Usage Fee has been calculated, a reconciliation shall be produced by the Project Co and forwarded to the Trust. Where such reconciliation is undisputed or subsequently determined by the Disputes Resolution Procedure, the Project Co shall make an appropriate adjustment in favour of the Project Co or the Trust (as the case may be) in the next Report submitted pursuant to Clause 40.1, which adjustment shall include interest on the relevant amount at the Interest Rate, from the date upon which the adjusted payment should have been made to the date of the relevant Report.

## **35. RECORDS**

### **35.1 Required Records**

The Project Co shall maintain and update:

35.1.1 those Records relating to the Project set out in Part 1 of Schedule 9; and

35.1.2 such additional Records in such numbers as may be agreed between the Parties from time to time.

### **35.2 Audit**

The Records shall be kept in good order and in such form as to be capable of audit (including by electronic means) by the Trust's Adviser. The Project Co shall make such Records available for inspection by or on behalf of the Trust or the Trust's Adviser at all reasonable times.

### **35.3 Copies**

The Trust or the Trust's Works Adviser shall be entitled to take copies of all Records at the Project Co's cost and, for that purpose, to use such copying facilities as are maintained at the place where the Records are kept.

### **35.4 Retention of Records**

35.4.1 Unless the Parties shall agree otherwise and without prejudice to Clause 35.4.4, all Records shall be retained for no less than the period specified in respect of such Records in Part 1 of Schedule 9 or, if no such period is specified, a period of seven years after the end of the Contract Year to which such Records relate.

35.4.2 Where the period for the retention of any Records (as set out against the relevant class of Records in Part 1 of Schedule 9) has expired, the Project Co shall notify the Trust as to what it intends to do with such Records. If it intends to dispose of them or subsequently decides to dispose of them, the Project Co shall notify the Trust. If the Trust, within 20 Working Days of such notice, elects to receive those Records or any part of them, the Project Co shall deliver up such Records (or, where those Records are required by statute to remain with the Project Co, copies thereof) to the Trust in the manner and at the location as the Trust shall reasonably specify.

35.4.3 Upon the termination for whatever reason of this Agreement, the Project Co shall deliver up to the Trust, in the manner and at the location as the Trust shall reasonably specify, all Records which were in existence at the Termination Date (or, where those Records are required by statute to remain with the Project Co, copies thereof) or such part of such Records as the Trust may by notice to the Project Co specify. The Trust shall make available to the Project Co all the Records the Project Co delivers up pursuant to this Clause 35.4.3, subject to reasonable notice.

35.4.4 The Project Co shall retain in safe storage, for a period of not less than seven years following the Termination Date, all such Records as are referred to in Clause 35.4.3 which the Trust does not require to be delivered up to it. The costs of retaining those Records in safe storage shall be borne:

- (A) by the Project Co where the termination arises as a result of an Event of Default;
- (B) by the Trust where the termination arises as a result of a Project Co Termination Event; and
- (C) in cases of termination other than those governed by Clause 35.4.4 (A) or Clause 35.4.4 (B), by the Parties in equal proportions.

### 35.5 **Computer Records**

To the extent that the Records of the Project Co are to be created or maintained on a computer or other electronic storage device, the Project Co shall agree with the Trust's Adviser a procedure for back-up and off-site storage for copies of such Records and shall adhere to such agreed procedure and shall cause each Contractor and any sub-contractor of either of them to implement and adhere to such agreed procedure.

### 35.6 **Provision of drawings etc**

The Project Co shall compile a set of as built drawings relating to the Works which shall be retained in a location agreed with the Trust to which the Trust shall have access.

### 35.7 **Asset Register**

With effect from the Phase 1 Completion Date, the Project Co shall initiate, structure and maintain an asset register of all assets in the Hospital (other than those which belong to the Trust). Upon request by the Trust on or after the Phase 1 Completion Date, the Project Co shall supply a copy of the same to the Trust. Upon any termination of the Project Documents, the Project Co shall hand over to the Trust the original and complete asset register updated to the Termination Date.

## 36. **PERFORMANCE BY PROJECT CO**

### 36.1 **Remedial Steps**

36.1.1 If, at any time, the Project Co has failed to perform any of its obligations under any Project Document or the Custody Agreement and such failure is capable of remedy, the Trust may, within 20 Working Days of becoming

aware of such failure, instruct the Trust's Adviser to serve a notice on the Project Co requiring the Project Co to remedy such failure (and any damage resulting from such failure) within a reasonable period (the "**Remedial Period**"). A failure to perform shall include a failure by the Project Co to remedy any breach, as required by this Clause 36.1.

36.1.2 The Trust's rights under Clause 36.1.1 shall be without prejudice to any rights in respect of the monitoring of Services under Clause 22.2 of the Facilities Management Agreement.

### 36.2 **Performance by Trust**

36.2.1 Without prejudice to any other right of the Trust set out elsewhere in the Project Documents or the Custody Agreement, the Trust shall be entitled to take such steps as are necessary to remedy any failure by the Project Co to perform any of its obligations under any Project Document or the Custody Agreement or engage others to take such steps:-

- (A) upon the occurrence of a Major Incident; or
- (B) on the occurrence of an Event of Default; or
- (C) where the Trust's Adviser serves a notice in accordance with Clause 36.1 in respect of a breach which is material and/or prejudices the health or safety of persons on the Site and the Project Co fails to remedy such failure within the Remedial Period.

For the avoidance of doubt, the Trust shall cease taking the steps referred to above or engaging others to take such steps upon remedy of the failure by the Project Co giving rise to the Trust's entitlement to do so.

36.2.2 The Project Co shall reimburse the Trust for all reasonable additional costs properly incurred by it in taking the steps referred to in Clause 36.2.1 or engaging others to take such steps (including the relevant administrative expenses of the Trust, with an appropriate sum in respect of general staff costs and overheads).

### 36.3 **Removal of Personnel**

The Trust's Adviser may (acting reasonably) require the Project Co to remove forthwith from the Site any person who, in the opinion of the Trust's Adviser (acting reasonably), misconducts himself or is incompetent or negligent in the proper performance of his duties or whose presence on the Site is otherwise considered by the Trust's Adviser (acting reasonably) to be undesirable and such person shall not be allowed upon the Site again without the prior consent of the Trust's Adviser.

## 37. **COOPERATION AND TRUST'S UNDERTAKINGS**

### 37.1 **Cooperation**

Each Party agrees to cooperate with the other in the fulfilment of the purposes and intent of the Project Documents.

**37.2 Trust's Undertakings**

The Trust undertakes to the Project Co that:-

- 37.2.1 it will comply with all applicable Laws and NHS Requirements ;
- 37.2.2 it will not wilfully impede the Project Co in the performance of its obligations under the Project Documents; and
- 37.2.3 it will act as a responsible manager of a hospital facility in respect of the Hospital.

**37.3 Trust's Further Undertaking**

The Trust further undertakes that, to the extent permitted by applicable Law and/or NHS Requirement:-

- 37.3.1 the Trust shall consult with the Project Co as to the facilities and services of the Trust provided at or from the Hospital and as to the optimum utilisation of them;
- 37.3.2 the Trust shall supply to the Project Co full details of the financial objectives set for the Trust by the Secretary of State for Health;
- 37.3.3 the Trust shall consult with the Project Co as to the preparation of its annual business plan and supply to the Project Co a copy of what is produced and what is approved;
- 37.3.4 where the Trust wishes to make new capital investment in the Hospital or at the Site, it shall consult with the Project Co as to the preparation of the outline and (if applicable) full business case and shall supply to the Project Co a copy of what is produced and (if approved) what is approved by the Department of Health (or other applicable body);
- 37.3.5 the Trust shall, upon completion of each purchaser contract, supply a certified complete copy of the same to the Project Co;
- 37.3.6 the Trust shall supply to the Project Co its six monthly summary financial returns and audited annual accounts and annual report when published;
- 37.3.7 the Trust shall consult with the Project Co as to the pricing of its facilities and services and the marketing and promotion of those facilities and services;
- 37.3.8 the Trust shall keep the Project Co advised as to all intended major decisions in the operation of the Hospital;
- 37.3.9 the Trust shall, not later than six months before the Phase 1 Date for Completion, supply to the Project Co such copies of the quality control and risk management procedures which the Trust intends to operate at the Hospital as are available at the time and, as and when the same shall be amended or updated, as soon as reasonably practicable, supply copies of the same to the Project Co;

- 37.3.10 the Trust shall not apply to the Secretary of State for Health pursuant to the National Health Service and Community Care Act 1990 to be dissolved without first giving notice of its intention to do so to the Project Co;
- 37.3.11 the Trust shall notify the Project Co if it is unable to meet its statutory financial obligations and, in such circumstances, if the Secretary of State for Health notifies or requires or recommends any particular course of action, the Trust shall forthwith notify the Project Co of such notification, requirement or recommendation;
- 37.3.12 at the same time as the Trust supplies information to the Secretary of State for Health which has been requested to be supplied pursuant to paragraph 8 of Schedule 2 of the National Health Service and Community Care Act 1990, it shall supply to the Project Co a list of all such information.
- 37.3.13 where the Trust supplies any list of information to the Project Co in accordance with Clause 37.3.12, the Trust shall, within five Working Days of a request by the Project Co, provide the Project Co with copies of such information from the list as may be requested by the Funders for the purpose of enabling the Funders to make or consider making representations to the NHS Executive or the Secretary of State.

For the avoidance of doubt, the obligations of the Trust in Clauses 37.3.1, 37.3.3, 37.3.4 and 37.3.7 to consult with the Project Co shall not in any way fetter the ultimate exercise of the Trust's discretion as to the matters in question. Such consultation shall be effected through the Liaison Procedure.

### **38. THIRD PARTIES**

- 38.1 As between the Parties, the Project Co will bear, without recourse to the Trust, any Loss suffered by the Project Co, its agents, contractors or sub-contractors or the employees of any of them which is:
- 38.1.1 caused by or results from the presence of any persons not entitled to be upon the Site; or
- 38.1.2 caused by the acts or omissions of any third party other than any Third Party Supplier;
- including any damage to property, any personal injury or death and any loss of income, save to the extent that any such Loss arises out of the acts, omissions, negligence or wilful default of the Trust or any of its agents or employees (in the course of such employee's employment) or any Third Party Suppliers.
- 38.2 Nothing in Clause 38.1 shall affect:
- 38.2.1 any right of the Trust to make or recover any Claim against any person referred to in Clause 38.1 for damage suffered by the Trust, its agents, contractors (other than the Project Co) or sub-contractors or the employees of any of them; or

38.2.2 any right of the Project Co to make or recover any Claim against any person referred to in Clause 38.1 for damage suffered by the Project Co, its agents, contractors or sub-contractors or the employees of any of them.

38.3 Subject to the prior consent of the Trust, the Project Co may, if necessary, bring any action against a person referred to in Clause 38.1 in the name of the Trust, provided that the Project Co shall indemnify and keep indemnified the Trust against all costs and expenses of and Losses and Claims arising out of any such action and the provisions set out in Clause 42.2 shall, mutatis mutandis, apply to this indemnity.

**39. MONTHLY FACILITIES CHARGE**

39.1 Subject to adjustments as provided in the Project Documents, the Trust shall pay to the Project Co:

39.1.1 in respect of the First Contract Month, an amount calculated in accordance with the following formula:

$$A = \left[ \frac{UF \times B}{C} \right] - D_1$$

Where:

- A** = the amount payable by the Trust to the Project Co;
- UF** = the Usage Fee in respect of the First Contract Month;
- B** = the number of days in the First Contract Month;
- C** = the number of days in the calendar month in which the Phase 1 Completion Date arises; and
- D<sub>1</sub>** = the Usage Fee Deduction for the First Contract Month.

39.1.2 in respect of each Contract Month, other than the First Contract Month, an amount (the "**Monthly Facilities Charge**") determined in accordance with the following formula:

$$MFC = \left[ \frac{CUF \times B}{C} \right] - D_1$$

Where:

- MFC** = the Monthly Facilities Charge in respect of the Contract Month;
- CUF** = the Core Usage Fee in respect of the Contract Month;
- D<sub>1</sub>** = the Usage Fee Deduction for the Contract Month;

- UFM** = the Usage Fee (Maintenance) in respect of the Contract Month;
- D<sub>2</sub>** = deductions in respect of Maintenance of Buildings and Engineering Services (subject to Clause 22.9 of the Facilities Management Agreement) for the Contract Month, calculated in accordance with Part 4 of Schedule 6; and
- D<sub>3</sub>** = deductions in respect of Dilapidations for the Contract Month (if any), calculated in accordance with Part 4 of Schedule 6,

provided that, in respect of the Contract Month during which the Phase 2 Completion Date arises and in respect of the last Contract Month, the Monthly Facilities Charge shall be calculated proportionately by reference to calendar days.

**39.2 Usage Fee (Maintenance)**

- 39.2.1 If the BOA Date for Completion occurs before the last BOA Completion Date, after the BOA Date for Completion and until the occurrence of the last BOA Completion Date, the Trust shall be entitled to deduct from the Usage Fee such proportion of the Usage Fee (Maintenance) as is reasonably attributable to the Beneficial Occupation Areas in respect of which a BOA Completion Certificate has not been issued, provided that, for the purposes of calculating such proportion, the Usage Fee (Maintenance) shall be subject to appropriate prorating by reference to calendar days in respect of the First Contract Month and any other Contract Month in which the BOA Date for Completion or either BOA Completion Date occurs and provided further that the calculation of such proportion shall have regard to and exclude the fixed costs of the Project Co in providing the Maintenance of Buildings and Engineering Services.
- 39.2.2 If the Trust's Works Adviser shall vary the BOA Date for Completion under Clause 10.5.1(A) or allow the Project Co any period of time under Clause 10.5.1(B), the Trust shall reimburse or allow to the Project Co any amount recovered under Clause 39.2.1 for the period up to such later BOA Date for Completion or during the period of time allowed under Clause 10.5.1(B), as the case may be, together with interest calculated from day to day at a rate per annum equal to the Interest Rate from the date upon which the relevant deduction was made to the date of reimbursement or allowance.

**40. INVOICING AND PAYMENT**

**40.1 Monthly Invoices**

- 40.1.1 Monthly Payments shall be payable by the Trust to the Project Co as set out below.
- 40.1.2 Every Monthly Payment and any other amount payable pursuant to any Report issued in accordance with Clause 40.1.3 or Clause 40.1.5 shall be subject to adjustment to reflect previous over-payments and/or underpayments by either Party



40.1.3 Within 10 Working Days following the last day of each Contract Month, the Project Co shall deliver to the Trust a Report setting out:

- (A) in respect of the Report for the First Contract Month, the amount (if any) due pursuant to Clause 39.1 or, where the Report relates to any other Contract Month, the Monthly Facilities Charge (if any) due in respect of that Contract Month;
- (B) the Reimbursable Expenses arising in respect of the Contract Month preceding the Contract Month to which the Report relates;
- (C) in respect of the Report for the First Contract Month, the amount (if any) due pursuant to Clause 17.2.1 of the Facilities Management Agreement or, where the Report relates to any other Contract Month, the Monthly Service Charge (if any) due in respect of that Contract Month;
- (D) any amount due pursuant to Clause 15.5.23 of the Facilities Management Agreement;
- (E) any adjustments to reflect previous over-payments and/or under-payments (each adjustment stated separately);
- (F) any amount due and payable pursuant to Clause 40.4.3;
- (G) any other amount due and payable from one Party to the other under the Project Documents, insofar as such amount has been finally ascertained or determined;
- (H) any VAT payable in respect of the above amounts; and
- (I) the net amount owing by the Trust to the Project Co or by the Project Co to the Trust.

40.1.4 The Report delivered pursuant to Clause 40.1.3 shall be accompanied by workpapers clearly setting out the derivation of the relevant amounts, illustrating, inter alia, the calculation of:

- (A) each of the amounts referred to in Clauses 40.1.3(A) to (D) (inclusive);
- (B) any adjustments to reflect previous over-payments and/or under-payments; and
- (C) any other amount due and payable from one Party to the other under the Project Documents, insofar as such amount has been finally ascertained.

40.1.5 If the Project Co fails to issue any Report within the time period required pursuant to Clause 40.1.3, the Trust may itself prepare such Report and deliver a copy of the same to the Project Co and the Report so prepared shall be deemed to have been issued by the Project Co but without limitation to the obligation of the Trust to make any subsequent further payment if such Report under-estimates any payment to be made to the Project Co or over-estimates any payment to be made to the Trust.

40.1.6 Where any deduction from or other adjustment to any Monthly Payment has not been agreed or determined as at the date of delivery or preparation of any Report pursuant to Clause 40.1.3 or Clause 40.1.5, the Monthly Payment shown in such Report shall be the relevant amount before such deduction or other adjustment is made.

**40.2 Due Date for Payments**

40.2.1 Without prejudice to Clause 40.4, the Trust shall pay to the Project Co any net amount due to the Project Co and set out in a Report issued pursuant to Clause 40.1 not later than the later of:

- (A) the last Working Day of the Contract Month following the Contract Month to which the Report relates; and
- (B) the 15th Working Day after the date of delivery of the relevant Report.

40.2.2 Without prejudice to Clause 40.4, the Project Co shall pay to the Trust any net amount due to the Trust and set out in a Report issued pursuant to Clause 40.1 not later than the later of:

- (A) the last Working Day of the Contract Month following the Contract Month to which the Report relates; and
- (B) the 15th Working Day after the date of delivery of the relevant Report.

**40.3 Payments**

40.3.1 All payments under the Project Documents, shall be made in pounds sterling by electronic transfer of funds for value on the day in question.

40.3.2 Except pursuant to Clause 24.14 and otherwise pursuant to the Beneficiaries' Direct Agreement, such payments shall be made 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.

**40.4 Disputed Amounts**

40.4.1 Either Party shall have the right to dispute, in good faith, any amount specified in an invoice issued pursuant to any Project Document. The Party disputing any such amount shall pay such amount of the invoice in question as is not in dispute and shall be entitled to withhold the balance pending resolution of the Dispute.

40.4.2 The Parties shall use all reasonable endeavours to resolve the Dispute in question within 10 Working Days of the Dispute arising. If they fail so to resolve it, either Party may refer the matter to the Disputes Resolution Procedure.

40.4.3 Without prejudice to paragraph 12 of Schedule 10, where a Panel has determined that an amount is payable but the relevant amount remains in dispute, the amount shall be paid in accordance with such determination promptly upon demand.

40.4.4 Subject to Clause 40.4.5, following final resolution of the Dispute, any amount agreed or adjudged to be due shall be paid promptly on demand (to the extent not already paid pursuant to Clause 40.4.3), together with interest thereon at a rate per annum equal to the Interest Rate plus one per cent. per annum from the day after the date on which payment was due in accordance with Clause 40.2 to (and including) the date of payment, provided that, where the date of payment arises more than one month after the date on which payment was due in accordance with Clause 40.2, interest will be payable on such amount during the period from the date which is one month after such date until (and including) the date of payment at a rate per annum equal to the Default Interest Rate.

40.4.5 Following resolution of the Dispute, if a Party is adjudged to have disputed the amounts referred to in Clause 40.4.1 in bad faith, the rate of interest payable thereon shall be equal to the Default Interest Rate.

#### 40.5 **Late Payments**

If any undisputed payment due under any Project Document remains unpaid after its due date, such payment shall bear interest calculated from day to day at a rate per annum equal to the Default Interest Rate from the day after the date on which the payment was due to (and including) the date of payment. The right of either Party to receive interest in respect of the late payment of any sum due shall be without prejudice to any other rights that Party may have under the Project Documents.

#### 40.6 **Set-off**

40.6.1 Whenever any sum of money shall be recoverable from or payable by the Project Co under any Project Document, such sum may with prior notice to the Project Co (being not less than 48 hours) be deducted from the amount of any sum then due to the Project Co under that Project Document or any other Project Document.

40.6.2 Whenever any sum of money shall be recoverable from or payable by the Trust under any Project Document, such sum may with prior notice to the Trust (being not less than 48 hours) be deducted from the amount of any sum then due to the Trust under that Project Document or any other Project Document.

40.6.3 Whenever any sum of money shall be recoverable from or payable by the Project Co in each case, by or to the Trust under the IT Agreement, provided such sum has been unconditionally received by Project Co from McKesson, such sum may with prior notice to the Project Co (being not less than 48 hours) be deducted from the amount of any sum then due to the Project Co under any Project Document.

40.6.4 Whenever any sum of money shall be recoverable from or payable by the Trust in each case, by or to the Project Co under the IT Agreement, such sum may with prior notice to the Trust (being not less than 48 hours) be deducted from the amount of any sum then due to the Trust under any Project Document.

**40.7 IT Agreement**

- 40.7.1 Where Project Co is obliged to repay any amount to McKesson under the IT Agreement, having paid a corresponding amount to the Trust under the same, the Trust shall refund the amount paid to it by the Project Co.
- 40.7.2 The Project Co shall (subject to Clause 40.7.3) at the request of the Trust enforce the obligations of any guarantor of the obligations of McKesson contained in the IT Agreement but only where the Trust reimburses to the Project Co on terms to be agreed between the Trust and the Project Co as to timing and security for payment and, failing agreement, on an indemnity basis:
- (A) the reasonable and proper costs incurred by the Project Co in such action (including the costs of Counsel referred to in Clause 40.7.3) to the extent that the same accord with a budget agreed between the Project Co and the Trust before action is taken or Counsel instructed as the same may be updated during the course of such action; and
  - (B) any costs awarded against it in properly pursuing such action against such guarantor.
- 40.7.3 The Project Co shall have no obligation to enforce or to continue to enforce the obligations of any guarantor of the obligations of McKesson pursuant to the IT Agreement where Counsel of not less than seven years call (where Counsel's identity has been approved by the Trust and the instructions to Counsel have been approved by the Trust, each such approval not to be unreasonably withheld or delayed) advises, either initially or at any time thereafter, that there is no reasonable prospect of success.

**40.8 Examination of Records**

Without limitation to Clause 35.2, the Trust and its advisers and agents shall have the right, at reasonable hours upon giving the Project Co reasonable notice and at the Trust's own expense, to examine the Records to the extent necessary to verify the accuracy of any accounting statement, charge, computation or claim made pursuant to any provision of the Project Documents and otherwise to verify compliance by the Project Co with its obligations thereunder, provided that:

- 40.8.1 such Records need not (unless the same contain information relating to a bona fide Dispute) be preserved longer than the period specified in respect of such Records in Part 1 of Schedule 9 or (if no such period is so specified) a period of seven years after the end of the Contract Year to which such Records refer;
- 40.8.2 if any such examination reveals any inaccuracy in any invoice, the necessary adjustment to such invoice and the relevant payment shall be made within 10 Working Days after the date that such adjustment is agreed or determined; and
- 40.8.3 such right to examine must be exercised within the period specified for retention of such Records in Part 1 of Schedule 9 or (if no such period is so specified) a period of seven years after the end of the Contract Year to which such Records refer.

**41. FORCE MAJEURE**

**41.1 Relief from Liability**

In respect of any Project Document, each Party shall be relieved from liability to the extent that, by reason of Force Majeure, it is unable to perform its obligations under the same.

**41.2 Notice**

Relief under Clause 41.1 shall not be given unless the Party intending to claim relief has, by notice to the other Party as soon as reasonably practicable after becoming aware of the event of Force Majeure or, if later, of the failure to perform, informed the other Party that it intends to claim relief. Such notice shall contain such relevant information relating to such failure as is available, including the actions being taken to remedy such failure and an estimate of the period of time required to remedy such failure.

**41.3 Consequences of Force Majeure**

If the Parties agree or it is determined that Force Majeure has:

41.3.1 prior to any Completion Date, prevented the Project Co from or delayed the Project Co in, completing the Works, the Project Co may make application to the Trust's Works Adviser for an extension of time through the fixing of a revised Date for Completion in accordance with Clause 10.5.

41.3.2 on or after any Completion Date:

(A) prevented the Project Co from or delayed the Project Co in, carrying out any Operations, to the extent that the Project Co has, as a result, failed to provide any Service:-

(1) where that Service is Maintenance of Buildings and Engineering Services, the Trust shall be entitled to withhold from the Usage Fee, amounts of up to the Usage Fee (Maintenance) to the extent it would otherwise have been payable during the relevant period; and

(2) where the Service is any other Service, the Trust shall be entitled to withhold the Service Fees which would otherwise have been payable in respect of such Service during the relevant period; or

(B) by reason of damage or otherwise, caused all or part of the Works at the Site not to be available for use by the Trust for the purpose contemplated by the Project Documents, the Trust shall be entitled to deduct from the Usage Fee, amounts of up to the Core Usage Fee to the extent it would otherwise have been payable during the relevant period, mutatis mutandis, as if all or the relevant part of the Hospital (as the case may be) were Unavailable.

41.3.3 at any time, damaged part of the Works at the Site, the Parties shall liaise in accordance with the Liaison Procedure to consider what action is appropriate

in all the circumstances. Any Dispute arising from this Clause 41.3.3 shall not be referred to the Disputes Resolution Procedure.

**41.4 Compensation**

Where any amount is withheld or deducted pursuant to Clause 41.3.2 or the Trust is otherwise relieved from its obligations to pay any Service Fee or any part of the Usage Fee pursuant to Clause 41.1, the Trust shall pay the Project Co compensation in accordance with Part 2 of Schedule 14.

**41.5 Rights to Terminate**

41.5.1 Upon the occurrence of Force Majeure, the Parties shall consult together and use all reasonable endeavours so far as practicable to minimise the effects of the same. In particular, but without prejudice to the generality of the foregoing, the Project Co shall take all steps necessary and consistent with Good Industry Practice to mitigate the consequences of the occurrence of Force Majeure on the Services.

41.5.2 During the Design and Construct Phase:

(A) where an occurrence of Force Majeure has a material effect on the performance of any Project Document for a period longer than 180 days, the Project Co may, so long as such circumstances continue, terminate the Project Documents in their entirety by serving notice on the Trust.

(B) where an occurrence of Force Majeure has a material effect on the performance of any Project Document for a period longer than 270 days, the Trust may, so long as such circumstances continue, terminate the Project Documents in their entirety by serving notice on the Project Co.

41.5.3 During the Operational Phase, where an occurrence of Force Majeure has a material effect on the performance of any Project Document for a period longer than 180 days, either Party may, so long as such circumstances continue, terminate the Project Documents in their entirety by serving notice on the other Party.

41.5.4 During the Design and Construct Phase and during the Operational Phase, where occurrences of Force Majeure having, in each case, a material effect on the performance of any Project Document for a period longer than 10 Working Days, arise for an aggregate period longer than 270 days, either Party may, so long as such effect is continuing in respect of the latest Force Majeure event, terminate the Project Documents in their entirety by serving notice on the other Party.

**41.6 Termination of IT Agreement**

If the IT Agreement terminates at any time before the entirety of the amounts specified in the Payment Schedule have been paid to McKesson or the Trust, the Project Co shall pay to the Trust in accordance with the Payment Schedule such sums as remain outstanding under the Payment Schedule but without any obligations on the

part of any person to comply with the milestone requirements set out in the Payment Schedule. Without prejudice to any accrued rights and obligations as at the Termination Date, the Project Co shall have no further obligations pursuant to this Clause 41.6 on termination of this Agreement.

**42. INDEMNITIES**

**42.1 Project Co's Indemnity**

Save to the extent that any such Claims or Losses arise out of the act, omission, negligence or wilful default of the Trust or any of its agents or employees (in the course of such employee's employment), the Project Co shall indemnify and keep indemnified the Trust in respect of any Claims or Losses of any third party which may arise out of any breach by the Project Co of any of its obligations under the Project Documents.

**42.2 Conduct of Claims Subject to Project Co's Indemnities**

42.2.1 If the Trust receives any notice, demand, letter or other document concerning any Claim from which it appears that the Trust is or may become entitled to indemnification under any Project Document, the Trust shall notify the Project Co as soon as reasonably practicable and shall supply a copy of the relevant document to the Project Co.

42.2.2 Subject to the provisions of this Clause 42.2, on the giving of a notice pursuant to Clause 42.2.1, where it appears that the Trust is or may become entitled to indemnification from the Project Co in respect of all of the liability arising out of the act or omission which is the subject of the Claim, the Project Co shall be entitled to resist the Claim in the name of the Trust and shall have the conduct of any defence, dispute, compromise or appeal of the Claim and of any incidental negotiations and the Trust will give the Project Co all reasonable cooperation, access and assistance for the purposes of considering and resisting such Claim.

42.2.3 In relation to any Claim subject to Clause 42.2.2, the Project Co shall keep the Trust fully informed and consult with it about the conduct of the Claim.

42.2.4 The Trust shall be free to pay or settle any Claim on such terms as it may in its discretion (acting reasonably) think fit and without prejudice to its rights and remedies under any Project Document in the following circumstances but otherwise not without the prior consent of the Project Co (not to be unreasonably withheld or delayed):

- (A) within 20 Working Days of the notice from the Trust under Clause 42.2.1, the Project Co fails to notify the Trust of its intention to dispute the Claim; or
- (B) the Project Co fails to comply in any material respect with the provisions of Clause 42.2.3.

42.2.5 The Trust shall be free at any time to give notice to the Project Co that it is taking over the conduct of any defence, dispute, compromise or appeal of any Claim subject to Clause 42.2.2 or of any incidental negotiations. Upon receipt

of such notice, the Project Co shall promptly take all steps necessary to transfer the conduct of such Claim to the Trust and shall provide to the Trust all reasonable cooperation, access and assistance for the purposes of considering and resisting such Claim. If the Trust gives any notice pursuant to this Clause 42.2.5, the Project Co shall be released from its indemnity in respect of such Claim.

42.2.6 If, following the transfer of the conduct of any Claim pursuant to Clause 42.2.5, the Trust recovers any costs in respect of costs incurred by the Project Co pursuant to the Claim before such transfer, the Trust shall, forthwith upon such recovery, pay such recovered costs to the Project Co.

### 42.3 **Trust's Indemnity**

To the extent that any such Claims or Losses arise out of the act, omission, negligence or wilful default of the Trust or any of its agents or employees (in the course of such employee's employment), the Trust shall indemnify and keep indemnified the Project Co in respect of any Claims or Losses of any third party which may arise out of any breach by the Trust of its obligations under the Project Documents.

### 42.4 **Conduct of Claims Subject to Trust Indemnities**

42.4.1 If the Project Co receives any notice, demand, letter or other document concerning any Claim from which it appears that the Project Co is or may become entitled to indemnification under any Project Document, the Project Co shall notify the Trust as soon as reasonably practicable and shall supply a copy of the relevant document to the Trust.

42.4.2 Subject to the provisions of this Clause 42.4, on the giving of a notice pursuant to Clause 42.4.1, where it appears that the Project Co is or may become entitled to indemnification from the Trust in respect of all of the liability arising out of the act or omission which is the subject of the Claim, the Trust shall be entitled to resist the Claim in the name of the Project Co and shall have the conduct of any defence, dispute, compromise or appeal of the Claim and of any incidental negotiations and the Project Co will give the Trust all reasonable cooperation, access and assistance for the purposes of considering and resisting such Claim.

42.4.3 In relation to any Claim subject to Clause 42.4.2, the Trust shall keep the Project Co fully informed and consult with it about the conduct of the Claim.

42.4.4 The Project Co shall be free to pay or settle any Claim on such terms as it may in its discretion (acting reasonably) think fit and without prejudice to its rights and remedies under any Project Document, in the following circumstances but otherwise not without the prior consent of the Trust (not to be unreasonably withheld or delayed):

- (A) within 20 Working Days of the notice from the Project Co under Clause 42.4.1, the Trust fails to notify the Project Co of its intention to dispute the Claim; or
- (B) the Trust fails to comply in any material respect with the provisions of Clause 42.4.3.



42.4.5 The Project Co shall be free at any time to give notice to the Trust that it is taking over the conduct of any defence, dispute, compromise or appeal of any Claim subject to Clause 42.4.2 or of any incidental negotiations. Upon receipt of such notice, the Trust shall promptly take all steps necessary to transfer the conduct of such Claim to the Project Co and shall provide to the Project Co all reasonable cooperation, access and assistance for the purposes of considering and resisting such Claim. If the Project Co gives any notice pursuant to this Clause 42.4.5, the Trust shall be released from its indemnity in respect of such Claim.

42.4.6 If, following the transfer of the conduct of any Claim pursuant to Clause 42.4.5, the Project Co recovers any costs in respect of costs incurred by the Trust pursuant to the Claim before such transfer, the Project Co shall, forthwith upon such recovery, pay such recovered costs to the Trust.

### **43. DEFAULT**

#### **43.1 Events of Default**

The following shall be Events of Default:

43.1.1 the occurrence of any of the following insolvency events in respect of the Project Co, any Contractor or any Guarantor:

- (A) any meeting of creditors generally of the person in question being held or any arrangement or composition with or for the benefit of its creditors (including any voluntary arrangement as defined in the Insolvency Act 1986) being entered into by or in relation to the person in question;
- (B) a supervisor, receiver, administrator, administrative receiver or other encumbrancer taking possession of or being appointed over or any distress, execution or other process being levied or enforced (and not being discharged within seven days) upon the whole or any part of the assets of the person in question;
- (C) the person in question ceasing or threatening to cease to carry on business or being or becoming unable to pay its debts within the meaning of Section 123 Insolvency Act 1986;
- (D) a petition being presented (and not being discharged within 10 Working Days) or a resolution being passed or an order being made for the administration or the winding-up, bankruptcy or dissolution of the person in question; or
- (E) if the person in question shall suffer any event analogous to any of the foregoing in any jurisdiction in which it is incorporated or resident;

but in the case of any of the above affecting a Contractor or Guarantor, only if the occurrence will have a material adverse effect on the ability of the Project Co to perform its obligations under any of the Project Documents.

43.1.2 the Project Co commits by way of action or omission or a series of actions or omissions a fundamental irremediable breach of its obligations under any Project Document (other than a breach of Clause 8.2 of this Agreement) including:

- (A) abandoning the Works; or
- (B) failing to complete the Hospital to such a standard as would require the issue of a Phase 1 Completion Certificate within 18 months after the expiry of any period of time allowed pursuant to Clause 10.5.1(B) following the Phase 1 Date for Completion.

43.1.3 the Project Co commits by way of action or omission or a series of actions or omissions a fundamental breach of its obligations under the Project Documents (other than a breach of Clause 8.2 of this Agreement) which is capable of remedy and, following the giving of notice by the Trust pursuant to Clause 36.1 requiring the Project Co to remedy the same, it fails to do so in all material respects either at all or within the relevant Remedial Period.

43.1.4 the Project Co failing:

- (A) for six successive Contract Months to achieve in respect of three Services, a level of performance in excess of the level specified for the purposes of this Clause 43.1.4(A) in Part 6 of the Service Schedule for such Services; or
- (B) for 12 successive Contract Months to achieve in respect of three Services, a level of performance in excess of the level specified for the purposes of this Clause 43.1.4(B) in Part 6 of the Service Schedule for such Services; or
- (C) for 36 successive Contract Months to achieve in respect of three Services, a level of performance in excess of the level specified for the purposes of this Clause 43.1.4(C) in Part 6 of the Service Schedule for such Services,

in each case, in accordance with Clause 22 of the Facilities Management Agreement.

43.1.5 any obligations of the Project Co under any Project Document, breach of which would constitute a breach of its obligations as described in Clause 43.1.2 or Clause 43.1.3, become unenforceable, other than where the Project Co is performing such obligations.

43.1.6 breach or repudiation of the Project Documents by Project Co (other than such a breach or repudiation as has given rise to or results from circumstances which have given rise to a right to terminate this Agreement under Clause 41, 44 and 53) which would entitle the Trust to terminate the Project Documents, other than a fundamental breach which has not given rise to an Event of Default pursuant to Clause 43.1.2 or 43.1.3 and/or a breach of its obligations in respect of the level of performance of the Services which has not given rise to an Event of Default pursuant to Clause 43.1.4

43.2 **Notification of Events of Default**

Where either Party believes that an Event of Default or any event or circumstance which would, with the giving of notice, lapse of time, determination of materiality or satisfaction of any other condition, constitute or give rise to an Event of Default, in either case, has arisen, that Party shall be entitled to notify the other Party of the same and the Parties shall liaise in accordance with the Liaison Procedure to consider the matter.

43.3 **Right to Terminate**

Upon the occurrence of an Event of Default and so long only as such Event of Default is subsisting, the Trust may, at its option and without prejudice to any of its other rights or remedies and to any rights of action which shall accrue or shall have already accrued to the Trust (including pursuant to Clause 36.1) but subject always to the rights of Lenders under the Beneficiaries' Direct Agreement, terminate the Project Documents in their entirety by serving notice on the Project Co.

43.4 **Savings**

Subject to Clause 43.7, the rights of the Trust under this Clause 43 are in addition and without prejudice to any other right the Trust may have to claim the amount of any Loss or damage suffered by the Trust on account of the acts or omissions of the Project Co, provided that the amount of all Claims in the aggregate made by the Trust (excluding any Claim pursuant to the IT Agreement), on termination of the Project Documents pursuant to this Clause 43 before the Phase 1 Completion Date, shall be limited to an amount equal to the aggregate of:

43.4.1 any liquidated damages payable by the Project Co pursuant to Clause 9.3.3, subject to a cap of £8,060,000;

43.4.2 such part of the amount by which:

- (A) the costs to the Trust of maintaining and operating its existing hospitals at Brunswick Road, Norwich and at the West Norwich site during the period (not exceeding a period equal to the Step-in Consideration Period) (the "**Capped Period**") from (1) the date on which liquidated damages cease or would cease to be payable pursuant to Clause 9.3.3 to (2) the contractual date fixed for completion in any contract for completion of a hospital at the Site (as referred to in Clause 46.1.2),

exceed:

- (B) the costs it would have incurred had it been operating the Hospital under the Project Documents during the Capped Period,

as may reasonably be attributed to the delay in terminating the Project Documents during the Step-in Consideration Period but taking into account the provisions of the Beneficiaries' Direct Agreement relating to the operation of this Clause 43.4.2. For the purposes of this Clause 43.4.2, the "**Step-in Consideration Period**" shall be the period from the date of any Termination Notice until the earliest of the Termination Date, the date of expiry of the Termination Notice period (absent any extant Step in Notice), the date of

confirmation from the Agent that no Step in Notice will be served, the date on which the Step in Notice is withdrawn, revoked or deemed to have been withdrawn, the Proposed Step in Date (subject to Clause 4.2.14 of the Beneficiaries' Direct Agreement), the Step in Date, the Proposed Novation Date (subject to Clause 5.10 of the Beneficiaries' Direct Agreement) or the Novation Effective Date.

43.4.3 the amount by which the aggregate cost of procuring all of the Works in accordance with the Design Documents exceeds the Anticipated Works Cost, provided that in establishing a market price for all of the Works in accordance with the Design Documents, the Trust shall act in a bona fide manner and take reasonable steps to mitigate the quantum of such market price.

#### **43.5 Trust's Rights to Terminate**

The Trust shall not exercise, or purport to exercise, any right to terminate any Project Document except as expressly set out in the Project Documents.

#### **43.6 No Termination for Relief Events**

43.6.1 Subject to Clauses 43.6.2 and 43.6.3, no right of termination shall rise under the Project Documents by reason of any failure by Project Co to perform any of its obligations under the Project Documents to the extent that such failure to perform occurs because of the occurrence of a Relief Event or an event of Force Majeure. Unless stated to the contrary in the Project Documents, all other rights and obligations of the Parties under the Project Documents remain unaffected by the occurrence of any Relief Event or any event of Force Majeure.

43.6.2 Project Co shall not be entitled to rely upon the relief afforded to it pursuant to Clause 43.6.1 to the extent it is unable to perform or does not perform its obligations under the Project Documents due to its failure (if any) to comply with its obligations under Clause 15.3.5 or Clause 41.5.1 of this Agreement or Clause 19.6 of the Facilities Management Agreement.

43.6.3 Clause 43.6.1 is without prejudice to any rights of termination arising under Clause 41.5.

### **44. TERMINATION BY PROJECT CO**

#### **44.1 Project Co Termination Events**

The following are Project Co Termination Events:

44.1.1 the Trust shall be in material breach of its obligations under Clause 14.1 and such breach shall materially adversely affect the ability of the Project Co to perform its obligations under any Project Document for a period of not less than 30 days.

44.1.2 the Trust shall fail to pay any sum in excess of £100,000 due to the Project Co under any Project Document (which sum is not in dispute or is payable pursuant to Clause 40.4.3, regardless of whether such sum is still in dispute) and such failure continues for 30 days following receipt by the Trust of notice

of non-payment issued by the Project Co or the Trust shall fail to pay any sum due to the Project Co under any Project Document (which sum is not in dispute or is payable pursuant to Clause 40.4.3, regardless of whether such sum is still in dispute) which, when aggregated with any other sums similarly due but unpaid, is in excess of £250,000 and such failure continues for 30 days following receipt by the Trust of notice of non-payment issued by the Project Co, provided that the amounts £100,000 and £250,000 referred to in this Clause 44.1.2 shall each be adjusted on the first day of every Contract Year to reflect any change in RPI arising on or after 1st April, 1995.

44.1.3 an Adverse Law, or a Proposal for an Adverse Law, is made after the Effective Date. For this purpose:-

(A) **"Proposal"** means:

- (1) in the case of a bill, the bill being introduced by the Government or receiving the support of the Government at its second reading in the first House of Parliament into which it is introduced or the bill passing a second reading in the first House of Parliament into which it is introduced; or
- (2) in the case of subordinate legislation, the proposed statutory instrument or order being laid before Parliament in draft; or
- (3) in the case of a directive, regulation or decision of the European Union, its adoption; or
- (4) in the case of an administrative act as referred to in the definition of Adverse Law in Clause 3.1.20(B), any of the following prior or preparatory to the making of such an act:
  - (a) the taking by the Trust, the Government, a minister of the Crown, or a department, agency, regulator or other public body or official of any step in a process defined by Law for the making of such administrative acts, other than any early stages of such process (such as, without limitation, consultation or information gathering) following the completion of which further substantive steps remain in such process before the making of such an administrative act can occur; or
  - (b) any communication from the Government, a minister of the Crown, or the department, agency, regulatory or other public body or official responsible for making such administrative acts, to the effect that such an administrative act will be made.

(B) **"Adverse Law"** means any Change in Law which would if passed into Law have the following effects and any administrative act of the Government or any minister of the Crown, department, agency, regulator or other public body or official not amounting to a Change in Law but which has (or would, if made, have) the following effects:

- (1) remove, transfer to another party or otherwise have a material adverse effect upon the Trust's legal capacity (or obligation) to perform any of its material obligations in relation to the Project which are material to the interests of Project Co and/or its Funders; or
- (2) amend or repeal (without re-enactment, consolidation or replacement by Law having an equivalent effect) the National Health Service (Residual Liabilities) Act 1996 or the National Health Service (Private Finance) Act 1997; or
- (3) disapply or make any or all of the obligations of the Secretary of State under the Deed of Safeguard illegal, invalid, void, voidable, unenforceable or ineffective in any respect,

provided that:

- (a) the relevant Law shall not be an Adverse Law if the Deed of Safeguard enables and requires the Secretary of State to perform the material obligations in relation to the Project which are material to the interests of Project Co and its Funders; and
- (b) in the circumstances referred to in paragraph (1), where a Change in Law would have the effect of transferring the legal capacity or obligation of the Trust in relation to such material obligations to a new entity (a "**Trust Substitute**"), the relevant Law shall not be an Adverse Law if:
  - (i) either
    - (aa) the provisions of the National Health Service (Residual Liabilities) Act 1996 and the National Health Service (Private Finance) Act 1997 (together the "**Protective Legislation**") apply to such Trust Substitute in full (as applied to the Trust as at the date of this Agreement); or
    - (bb) the relevant Law has the same effect in relation to the Trust Substitute as the Protective Legislation; and
  - (ii) the relevant Law does not otherwise have an adverse material effect on the legal capacity or obligation of the Trust Substitute which affects (or could reasonably be expected to affect) the Trust Substitute's ability to perform any material obligations owed to Project Co and/or the Funders in relation to the Project which are material to the interests of Project Co and/or its Funders, when compared to the material

obligations of the Trust under this Agreement;  
or

- (4) would make it unlawful or impossible for Project Co to perform any of its obligations under the Project Documents or the Ancillary Documents or render any of those obligations unenforceable, void or voidable, provided that, where an Adverse Law or Proposal for an Adverse Law of the type referred to in this Clause 44.1.3(B)(4) is made, each of the Project Co and the Trust shall give notice thereof to the other as soon as reasonably practicable after it becomes aware of the same (unless the reason it becomes so aware is the receipt of a notice from that other pursuant to this Clause 44.1.3(B)(4)). The Parties will then meet in good faith and use reasonable endeavours to agree any variation of the Project Documents or the Ancillary Documents (as the case may be) necessary to render the performance of such obligation lawful or possible or enforceable or valid (as the case may be) or to remove or replace the relevant obligation, in each case, whilst leaving the Parties in no better and no worse position than they would be under the Project Documents or the Ancillary Documents (as the case may be) if the Adverse Law or Proposal for Adverse Law had not been made. A Project Co Termination Event shall only arise pursuant to this Clause 44.1.3(B)(4) where the Parties shall not have reached such agreement within 20 Working Days of the date of such notice, provided that the Project Co shall not be liable for its failure to perform any of its obligations under the Project Documents or the Ancillary Documents in any period in which it is unlawful or impossible for it to do so as a result of the operation of such Adverse Law.

- (C) "**Change in Law**" means the coming into effect or repeal (without re-enactment or consolidation) in England and Wales of any law or any amendment or variation to any Law, or any judgement of a relevant court of law which changes binding precedent in England and Wales, in each case after the date of this Agreement.

44.1.4 In respect of the SofS Intentions and Policy Objectives:

- (A) the Secretary of State, or any other minister or any other person to whom the Secretary of State or such minister has delegated any of his functions, makes a statement to the effect that or acts in a way to indicate that:-
- (1) the Secretary of State will not observe the SofS Intentions and Policy Objectives; or
  - (2) the Secretary of State intends to act in a manner which is materially inconsistent with the SofS Intentions and Policy Objectives,

provided that, where, in the reasonable opinion of either the Project Co or the Trust, any such statement or action shall arise, that Party shall give notice thereof to the other as soon as reasonably practicable after it becomes aware of the same. The Parties will then, together, seek clarification of the relevant statement or action and provide the Secretary of State or the relevant other person (as the case may be) with an opportunity (which is reasonable in all the circumstances) to withdraw the statement or revoke the action where, if the same were not revoked or withdrawn, a Project Co Termination Event would otherwise arise under this Clause 44.1.4(A); or

- (B) a court of competent jurisdiction makes an order which has the effect that the issue or the observance of the SofS Intentions and Policy Objectives is invalid unless that order is the subject of an appeal or an application for leave to appeal and no effect is to be given to it pending the decision in such appeal or application; or
- (C) the Secretary of State is otherwise prevented from implementing the SofS Intentions or Policy Objectives.

#### 44.2 **Right to Terminate**

44.2.1 Upon the occurrence of a Project Co Termination Event and so long only as such Project Co Termination Event is subsisting, the Project Co may, at its option, terminate the Project Documents in their entirety by serving notice on the Trust.

44.2.2 Project Co shall not exercise or purport to exercise any right to terminate any Project Document (or accept any repudiation of any Project Document) except as expressly set out in the Project Documents..

### 45. **EFFECT OF TERMINATION**

#### 45.1 **Continued Performance**

Subject to any exercise by the Trust of its rights under Clause 36.2, the Parties shall continue to perform their obligations under the Project Documents, notwithstanding the giving of any notice of default or notice of termination, until the termination of the relevant Project Documents becomes final in accordance with the provisions of this Clause 45.

#### 45.2 **Disputed Termination**

45.2.1 Notwithstanding the provisions of Clauses 41.5, 43.3, 44.2 and 53.4 but subject to Clause 45.2.2, where either Party has given notice of termination of any Project Document and the other Party has, within 10 Working Days of receipt of such notice, referred the question of whether or not such Project Document has been wrongfully terminated to the Disputes Resolution Procedure, termination of the Project Document shall not take effect unless and until it is finally determined in accordance with the Disputes Resolution Procedure that such termination is not wrongful.



45.2.2 Where the Project Co gives a notice of termination pursuant to Clause 44.2.1 as a result of the occurrence of a Project Co Termination Event under either Clause 44.1.2 or Clause 44.1.3, the Disputes Resolution Procedure shall not apply.

**45.3 Transfer of Project Documents**

45.3.1 Following the service of a termination notice by the Project Co pursuant to Clause 41.5 (where the relevant Force Majeure event is preventing the Trust only from performing its obligations under the same) or pursuant to Clause 44.2 (except where the termination notice is served as a result of the occurrence of a Project Co Termination Event under Clause 44.1.3), the Trust shall be entitled to transfer all its rights together with its obligations under the Project Documents, in their entirety to the Secretary of State, another National Health Service trust (except where the termination notice is served as a result of the occurrence of a Project Co Termination Event under Clause 44.1.4), a Health Authority, a Special Health Authority or any other person to whom the Secretary of State in exercising his statutory rights, would be entitled to transfer such rights and obligations, provided that:

- (A) any transfer to such other person shall be effected on the same terms as those on which the Secretary of State would transfer such rights and obligations;
- (B) before such transfer is effected:
  - (1) the Trust shall obtain the approval of the Department of Health to such transfer; and
  - (2) any breach of the Trust's obligations which is remediable shall be remedied and any sum due to the Project Co under the Project Documents which is outstanding shall be paid;
- (C) no such transfer shall be effected where the termination notice is served as a result of the occurrence of a Project Co Termination Event under Clause 44.1.1, unless the relevant breach has been remedied or will be remedied as a result of the transfer.

45.3.2 Termination of any Project Document by the Project Co pursuant to such notice (except where the termination notice is served as a result of the occurrence of a Project Co Termination Event under Clause 44.1.3) shall, in each case, not take effect if, within 120 days of the later of the date of receipt of the relevant termination notice and the date on which the termination is determined not to be wrongful pursuant to Clause 45.2:

- (A) the Trust transfers all its rights and obligations under the Project Documents in their entirety in accordance with Clause 45.3.1; or
- (B) the Secretary of State, in exercising his statutory powers to transfer property, rights and liabilities of the Trust upon the Trust ceasing to exist, transfers all the Trust's rights and obligations under the Project Documents to the Secretary of State, another National Health Service

trust, a Health Authority, a Special Health Authority or any other person provided that:

- (1) any breach of the Trust's obligations which is remediable has been remedied and any sum due to the Project Co under the Project Documents which is outstanding has been paid; and
- (2) where the termination notice is served as a result of the occurrence of a Project Co Termination Event under Clause 44.1.1, the relevant breach shall have been remedied or will be remedied as a result of the transfer.

45.3.3 Upon the Trust (or the relevant transferee) notifying the Project Co of any transfer pursuant to Clause 45.3.2(A) or Clause 45.3.2(B), the relevant termination notice shall be automatically withdrawn and shall cease to have any effect.

#### 45.4 Savings

45.4.1 Save as otherwise expressly provided in any Project Document:

- (A) termination of any Project Document shall be without prejudice to any accrued rights and obligations under such Project Document as at the date of its termination (including the right of the Trust to recover damages from the Project Co where the termination has arisen as a result of an Event of Default); and
- (B) termination of this Agreement shall not affect the continuing rights and obligations of the Project Co and the Trust under Clauses 21 (Leases), 35 (Records), 38 (Third Parties), 39 (Monthly Facilities Charge), 40 (Invoicing and Payment), 42 (Indemnities), 46 (Compensation on Termination), 50 (Taxes), 51 (Intellectual Property) and 52 (Confidentiality), Schedules 9 (Records and Reports) and 10 (Disputes Resolution Procedure) and this Clause 45 or under any other Clause which is expressed to survive termination or which is required to give effect to such termination or the consequences of such termination.

Save as provided in this Clause 45.4, all rights and obligations of the Trust and the Project Co under this Agreement shall cease and be of no further force and effect upon termination of this Agreement.

45.4.2 Notwithstanding any breach of any Project Document by either Party and without prejudice to any other rights which the other Party may have in relation thereto, the other Party may elect to continue to treat such Project Document as in full force and effect and to enforce its rights hereunder or thereunder.

45.5 **Handover**

On termination of the Project Documents in their entirety, the Project Co shall:

45.5.1 cooperate fully with the Trust and any other person designated by the Trust for a period of up to 12 months from the date of such termination to achieve a smooth transfer of the subject matter of the Operations.

45.5.2 upon request by the Trust, which request shall be made within 10 Working Days of the relevant termination, as soon as practicable:

- (A) transfer to the Trust with full title guarantee all or any part of the stocks of material, road vehicles, spare parts, medical equipment and other moveable property owned by the Project Co and reasonably required in connection with the operation and maintenance of the Hospital.
- (B) procure that the benefit of all manufacturer's warranties in favour of Project Co in respect of mechanical and electrical equipment fixed in the Hospital is, so far as the same is assignable to the Trust, assigned to the Trust with full title guarantee.
- (C) in so far as reasonably practicable, procure that the benefit of any finance lease, operating lease, hire purchase agreement, conditional sale agreement or similar Funding Agreement to which Project Co is a party in respect of all of any part of the stocks of material, road vehicles, spare parts, medical equipment and other moveable property used by the Project Co and reasonably required in connection with the operation and maintenance of the Hospital is novated, assigned or otherwise transferred to the Trust.
- (D) provide the Trust with one copy of the draft Operational Manuals which may exist as at the date of the termination notice.

45.5.3 upon request by the Trust, which request shall be made within 10 Working Days of the relevant termination, as soon as practicable:

- (A) remove or procure the removal from the Site of, all or any part of any Plant, temporary buildings, road vehicles, spare parts and other moveable property not the subject matter of any agreement novated, assigned or otherwise transferred to the Trust pursuant to Clause 45.5.2(C) or belonging to the Trust (whether pursuant to any transfer in accordance with Clause 45.5.2(A) or otherwise) or to any employee, agent or sub-contractor of the Trust and, if it has not done so within 20 Working Days after notice from the Trust requiring it to do so, the Trust may (without being responsible for any Loss) remove and sell any such property and shall hold all proceeds, less all costs incurred, to the credit of the Project Co; and
- (B) vacate the Site, leaving it in a clean and orderly condition.

45.5.4 The Trust shall agree and pay a reasonable rate of reimbursement to the Project Co in respect of the services provided by the Project Co in satisfying

its obligations pursuant to Clause 45.5.1 (but not pursuant to Clauses 45.5.2 and 45.5.3), such payment to be made at monthly intervals.

**45.6 Insurance Claims**

On termination of the Project Documents in their entirety, where the Trust has any Claim against the Project Co in respect of any Loss and insurance cover in place in respect of the same, the Trust shall make a Claim in respect of such Loss against the relevant insurance policy.

**46. COMPENSATION ON TERMINATION**

**46.1 Payment Obligation**

If:

- 46.1.1 either Party terminates the Project Documents in their entirety pursuant to Clause 41.5, the Trust will, subject to compliance by the Project Co with its obligations under Clauses 45.5.2 (A), 45.5.2 (B) and 45.5.2 (C), pay the Project Co compensation in accordance with Part 3 of Schedule 14.
- 46.1.2 before the Phase 1 Completion Date, the Trust terminates the Project Documents in their entirety in accordance with Clause 43.3 and subsequently enters into a contract with any person for completion of a hospital at the Site, the Trust will, subject to compliance by the Project Co with its obligations under Clauses 45.5.2 (A), 45.5.2 (B) and 45.5.2 (C), pay the Project Co compensation in accordance with Section A of Part 4 of Schedule 14.
- 46.1.3 on or after the Phase 1 Completion Date but before the Phase 2 Completion Date, the Trust terminates the Project Documents in their entirety in accordance with Clause 43.3, the Trust will, subject to compliance by the Project Co with its obligations under Clauses 45.5.2 (A), 45.5.2 (B) and 45.5.2 (C), pay the Project Co compensation in accordance with Section B of Part 4 of Schedule 14.
- 46.1.4 on or after the Phase 2 Completion Date, the Trust terminates the Project Documents in their entirety in accordance with Clause 43.3, the Trust will, subject to compliance by the Project Co with its obligations under Clauses 45.5.2 (A), 45.5.2 (B) and 45.5.2 (C), pay the Project Co compensation in accordance with Part 5 of Schedule 14.
- 46.1.5 the Project Co terminates the Project Documents in their entirety pursuant to Clause 44.2.1, the Trust will, subject to compliance by the Project Co with its obligations under Clauses 45.5.2 (A), 45.5.2 (B) and 45.5.2 (C), pay the Project Co compensation in accordance with Part 6 of Schedule 14.
- 46.1.6 the Trust terminates the Project Documents in their entirety in accordance with Clause 53.4, the Trust will, subject to compliance by the Project Co with its obligations under Clauses 45.5.2 (A), 45.5.2 (B) and 45.5.2 (C), pay the Project Co compensation, mutatis mutandis, in accordance with Part 5 of Schedule 14.

46.1.7 The above provisions of this Clause 46.1 and the provisions of Schedule 14 shall be subject to the provisions of Part 4 of Schedule 7.

**46.2 Gross Up**

46.2.1 All sums payable by the Trust under this Clause 46 and Part 4 of Schedule 7 (the "**Termination Payment**") shall be increased in the event that the Project Co shall incur any liability for Taxation in respect of any Termination Payment, so as to ensure that the net amount received by the Project Co (after account is taken of the Taxation consequences of the increased payment) is equal to the full amount which would have been received by it had no such liability to Taxation been incurred.

46.2.2 In this Clause 46.2, the expression "**Taxation**" includes the loss of or the use of any loss, relief, allowance, exemption, set-off or deduction in computing, or against, profits, income or gains of any description or from any source, save where such loss, relief, allowance, exemption, set off or deduction is derived from the Project or arises pursuant to the Project Co's obligations under the IT Agreement but shall not include any liability to advance corporation tax or loss or use of any reliefs as a consequence of the distribution of the Termination Payment by the Project Co whether by way of interest, dividend or other distribution, repayment or reduction or redemption of capital or indebtedness or return of assets or otherwise howsoever.

46.2.3 The Project Co shall keep the Trust fully informed of all negotiations with the Inland Revenue relating to any liability for Taxation in respect of any Termination Payment. The Project Co shall not agree, accept or compromise any claim or issue or dispute relating to such 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 the Project Co to resist, appeal, defend or otherwise dispute any assessment relating to its liability for Taxation in respect of the Termination Payment, provided that the costs of any such Dispute shall be at the Trust's expense. However, if the Project Co obtains professional advice from a person with relevant expertise that any resistance, appeal, defence or other mode of Dispute is not likely to result in any diminution of the liability to Taxation, the Project Co need not continue such resistance, appeal, defence or other mode of Dispute. Where a Dispute is prosecuted and results in a diminution in the Project Co's liability for Taxation, an adjustment shall be made between the Parties to reflect the outcome of the Dispute.

46.2.4 The increased amount which is payable under Clause 46.2.1 shall be determined upon the following assumptions and bases:-

- (A) the Project comprises the sole trade and business of the Project Co;
- (B) the assets and equipment held, owned, hired, leased or otherwise used by the Project Co for the purposes of the Project comprise the sole assets and equipment of the Project Co; and

- (C) that full account shall be taken of any unrelieved trading losses or other reliefs derived from the Project (including advance corporation tax attributable to any distribution in respect of profits or other matters properly related to the Project) and the Project Co's interest which can be set off against or against Taxation in respect of, the Termination Payment;
- (D) losses or other amounts eligible for relief from Taxation derived from the Project which have been surrendered by the Project Co by way of group relief or consortium relief shall be assumed for these purposes not to have been surrendered and to remain available as carried forward trading losses or other reliefs;
- (E) that account is taken so far as relevant (having regard to Clause 46.2.5) of timing differences.

46.2.5 The additional payment under Clause 46.2.1 shall be made five Working Days before the Project Co's liability for Taxation in respect of the Termination Payment is due and payable, subject to the provision, at least four weeks in advance, of evidence in sufficient detail for the Trust to satisfy itself of the basis on which such liability has been calculated and to the right of the Trust to make payment directly to the Inland Revenue. If and to the extent that the liability is reduced by a claim, loss or relief which is not derived from the Project, payment will be made when and to the extent that the surrendering company or the Project Co, as the case may be, first makes a payment of Taxation which would not otherwise have been made.

#### 46.3 **Satisfaction in Full**

Compensation paid pursuant to and in accordance with this Clause 46 or paragraph 4 of Part 4 of Schedule 7 shall be in full satisfaction of any Claim by the Project Co in respect of the circumstances leading to the relevant termination of Project Documents referred to in Clause 46.1 or in paragraph 4 of Part 4 of Schedule 7 and the Project Co shall be excluded from all other rights and remedies in respect thereof, save for sums due but unpaid at or prior to termination (which sums are not in dispute at termination or are subsequently finally determined to be payable in accordance with the Disputes Resolution Procedure) provided that there shall be no double counting in respect of such compensation and such sums.

#### 46.4 **Set off**

The Trust's obligations to make any payment to Project Co pursuant to this Clause 46 are subject to the Trust's rights under Clause 40.6, 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 Clause 46.1.1 or Clause 46.1.5 or paragraph 4.1.2 of Part 4 of Schedule 7 (where compensation is payable in accordance with Part 3 of Schedule 14) or paragraph 4.1.3 or paragraph 4.2 of Part 4 of Schedule 7, except to the extent that such payment exceeds the amount of Outstanding Debt as at the relevant Termination Date. For the purposes of this Clause 46.4, the definition of Outstanding Debt shall exclude any subordinated debt.

#### 46.5 **Undisputed Amounts**

If the calculation of any amount payable under this Clause 46 is disputed then any undisputed element of that amount shall be paid in accordance with this Clause 46 and the disputed element shall be dealt with in accordance with the Disputes Resolution Procedure.

**47. ASSIGNMENT**

**47.1 Binding on Successors and Assigns**

The Project Documents shall be binding on and shall enure to the benefit of the Project Co and the Trust and their respective successors and permitted assigns. In the case of the Trust, its successors shall include any person to which the Secretary of State, in exercising his statutory powers to transfer property, rights and liabilities of the Trust upon the Trust ceasing to exist, transfers the property, rights and obligations of the Trust under the Project Documents.

**47.2 Assignment by Project Co**

47.2.1 Subject to Clause 47.2.2, the Project Co shall not in the case of any Project Document, without the prior consent of the Trust, assign or otherwise dispose of any Project Document or any part thereof or any benefit or interest therein or thereunder.

47.2.2 The provisions of Clause 47.2.1 do not apply to the grant of any security in a form previously approved by the Trust, such approval not to be unreasonably withheld or delayed, for any loan made to or for the benefit of the Project Co under the Funding Agreements.

**47.3 Assignment by Trust**

The Trust shall not, except in accordance with Clause 45.3, without the prior consent of the Project Co, assign or otherwise dispose of any Project Document or any part thereof or any benefit or interest therein or thereunder;

**48. NOTICES**

**48.1 Address**

Except as otherwise stated, all notices or other communications required in connection with any Project Document shall be in writing and sent by hand, by first class prepaid post or by facsimile transmission to the relevant address or facsimile number set out below or to such other address or facsimile number as either Party may notify to the other in writing by not less than five Working Days' prior notice.

**Trust**

Norfolk & Norwich Health Care NHS Trust  
 Norfolk & Norwich Hospital  
 Brunswick Road  
 Norwich  
 NR1 3SR  
 Fax: (01603) 287547  
 Attention: Chief Executive

**Project Co**

Octagon Healthcare Limited  
New Norfolk and Norwich Hospital  
Colney Lane  
Norwich NR4 7UZ

Fax: (01603) 251701

Attention: Company Secretary

**Trust's Works Adviser**

Rob Smith

Norfolk & Norwich Health Care NHS Trust  
Norfolk & Norwich Hospital  
Brunswick Road  
Norwich  
NR1 3SR

Fax: (01603) 287547

**Trust's Facilities Adviser**

Rob Smith

Norfolk & Norwich Health Care NHS Trust  
Norfolk & Norwich Hospital  
Brunswick Road  
Norwich  
NR1 3SR

Fax: (01603) 287547

**Project Co's Representative**

Bill Mesquitta

Octagon Healthcare Limited  
New Norfolk and Norwich Hospital  
Colney Lane  
Norwich NR4 7UZ

Fax: (01603) 251701

**48.2 Effective receipt**

Subject to Clause 48.3:-

48.2.1 a letter delivered by hand shall be effective when it is delivered to the addressee;

48.2.2 a letter sent by first class prepaid post shall be deemed received on the second Working Day after it is put in the post; and



48.2.3 a facsimile transmission shall be effective upon completion of transmission.

**48.3 Timing**

A notice or other communication received on a day which is not a Working Day or after 5pm on any Working Day shall be deemed to be received on the next following Working Day.

**49. CONSENTS AND APPROVALS**

**49.1 Approvals**

Each Party shall and shall procure, in the case of the Trust, that the Trust's Works Adviser and/or the Trust's Facilities Adviser and, in the case of the Project Co, that the Project Co's Representative shall act in good faith and deal in a timely and diligent manner in relation to the giving of any approval under any Project Document.

**49.2 Project Co's Obligations**

Save as to the Certificate of Approval of Design issued by the Trust pursuant to the Design Development Procedure and referred to in Clause 11.1.2, neither the giving of any approval, knowledge of the terms of any agreement or document (including the Ancillary Documents) nor the review of any document or course of action by or on behalf of the Trust or the Trust's Adviser, shall relieve the Project Co of any of its obligations under the Project Documents, provided that, the Project Co's obligations in respect of fitness for purpose shall be tested by reference to the purpose as evidenced by the Design Documents.

**49.3 Examination**

Save as to the Certificate of Approval of Design issued by the Trust pursuant to the Design Development Procedure and referred to in Clause 11.1.2, without limitation to Clause 49.2, no examination or lack of examination by the Trust's Adviser of the Project Co's drawings, documents, calculations or details relating to the design, construction, completion, commissioning and testing of the Works or the management or provision of Services or otherwise nor any comment, rejection or approval expressed by such person in regard thereto, either with or without modifications, shall in any respect relieve or absolve the Project Co from any obligations or liability under or in connection with any Project Documents.

**49.4 Inspections**

Save as to the Certificate of Approval of Design issued by the Trust pursuant to the Design Development Procedure and referred to in Clause 11.1.2, without limitation to Clause 49.2, notwithstanding any inspection by the Trust's Adviser under any Project Document or the failure of the Trust's Adviser to make any inspection under any Project Document, the Project Co's responsibility under such Project Document shall not be relieved or absolved or otherwise modified.

**49.5 Review**

Save as to the Certificate of Approval of Design issued by the Trust pursuant to the Design Development Procedure and referred to in Clause 11.1.2, no approval:

49.5.1 given by the Trust, the Trust's Works Adviser or the Trust's Facilities Adviser may be opened up, reviewed or revised by the Trust; or

49.5.2 given by the Project Co or the Project Co's Representative may be opened up, reviewed or revised by the Project Co,

in any such case after the approval has been given, save to the extent that such approval was given in reliance on any misrepresentation or false information or, where referred to in Clause 49.5.1, is challenged or questioned by the Project Co or, where referred to in Clause 49.5.2, is challenged or questioned by the Trust.

## **50. TAXES**

### **50.1 VAT**

50.1.1 All amounts stated to be payable by either Party under the Project Documents shall be exclusive of any VAT properly payable in respect of the supplies to which they relate.

50.1.2 Each Party shall pay to the other Party any VAT properly payable hereunder in respect of any supply made to it under any Project Document, 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.

### **50.2 Deductions from payments**

All sums payable by either Party to the other under the Project Documents shall be paid free and clear of all deductions or withholdings whatsoever in respect of Taxation, save as may be required by Law.

## **51. INTELLECTUAL PROPERTY**

### **51.1 Design and Other Data**

Except pursuant to the IT Agreement but without prejudice to that agreement, the Project Co shall make available to the Trust without charge all data, materials and documents of any nature (including all Design Data) acquired or brought into existence in any manner whatsoever by the Project Co or its sub-contractors for the purposes of the Project and which might reasonably be required by the Trust for the purposes of exercising its rights or carrying out its duties under the Project Documents or carrying out any statutory duty related to the Hospital but not further or otherwise.

### **51.2 Licences**

51.2.1 The Project Co:

- (A) hereby grants to the Trust a perpetual, transferable, non-exclusive, royalty-free licence (carrying the right to grant sub-licences) to use all and any Intellectual Property which is or becomes vested in the Project Co or in respect of which the Project Co has a right to use the same for any purpose (whether during or after the Design and Construct Phase or the Operational Phase) relating to the design, construction,

completion, commissioning or testing of the Works, the management and provision of the Services or the conduct of the Operations or the carrying out by the Trust of any statutory duties in respect of the Hospital and to make any alterations, adaptations or additions to the Design Data which is or becomes vested in the Project Co; and

- (B) where any Intellectual Property is vested in any third party, shall use reasonable endeavours to procure the grant of a like licence to the Trust for any purpose referred to in Clause 51.2.1(A).

51.2.2 The Trust hereby grants to the Project Co a non-transferable, non-exclusive, royalty-free licence (carrying the right to grant sub-licences) to use (during the Design and Construct Phase and the Operational Phase only) all and any Intellectual Property which is or becomes vested in the Trust for any purpose relating to the design, construction, completion, commissioning or testing of the Works, the management and provision of the Services or the conduct of the Operations.

51.2.3 With respect to Intellectual Property arising during the Design and Construct Phase and the Operational Phase, the licence(s) granted pursuant to Clause 51.2.1 or Clause 51.2.2 shall take effect immediately upon the coming into existence of such Intellectual Property.

### 51.3 Computerised Data

51.3.1 To the extent that any of the data, materials and documents referred to in Clause 51.1 are generated by or maintained on a computer or in any other machine readable format, the Project Co shall procure for the benefit of the Trust at no charge the grant of a licence or sub-licence for and supply of any relevant software or database to enable the Trust or the Trust's Adviser to access and otherwise use such data for the purposes set out in the Project Documents or, following termination of all or any of the Project Documents, for the purposes referred to in Clause 51.2.1(A).

51.3.2 Within 20 Working Days after the Effective Date, the Project Co shall submit to the Trust's Works Adviser its proposals for backing-up and storage in safe custody of the data, materials and documents referred to in Clause 51.1. The Trust's Works Adviser shall only be entitled to object and require alterations or additions to such proposals if the same shall not accord with Good Industry Practice. The Project Co shall and shall cause the Contractors and sub-contractors to comply with the procedures to which no such objection has been raised by the Trust's Works Adviser. The Project Co may vary its procedures for such back-up and storage, subject to submitting its proposals for change to the Trust's Works Adviser or, after issue of the Phase 1 Completion Certificate, to the Trust's Facilities Adviser, who may only object on the basis set out above.

### 51.4 Indemnity

The Project Co shall indemnify the Trust from and against all Claims made or brought by any person for or on account of infringement of any Intellectual Property (other than any such provided by the Trust to the Project Co and excluding any such Claims

arising pursuant to the IT Agreement) or any plant, machinery or equipment used in connection with the Works or Operations and the provisions set out in Clause 42.2 shall, mutatis mutandis, apply to this indemnity.

#### 51.5 Further Assurances

The Project Co and the Trust each undertakes at the request of the other to execute all documents and do all acts which may be necessary to bring into effect or confirm the terms of any assignment or licence contained in Clause 51.2.

#### 51.6 FM IPR

Nothing in the Project Documents shall give the Trust any right or licence in respect of any data, material or document of any nature which it is agreed between the Parties represents FM IPR, provided that the Trust shall be entitled to use any Service Level Specifications for any purpose referred to in Clause 51.2.1(A).

### 52. CONFIDENTIALITY

#### 52.1 Confidential Information

In this Clause 52, "**Confidential Information**" means all information relating to the Trust or the Project Co or received from any Prospective Tenderer pursuant to any Market Testing or otherwise relating to the Project (including the tender invitation documentation) which is obtained by the Project Co or any of its Associated Companies or by the Trust or by advisers, directors, officers, employees or agents of the Project Co or of any of its Associated Companies or of the Trust whether before or after the Commencement Date, either in writing, orally or in any other form, directly or indirectly from or pursuant to discussions with the Trust or the Project Co or their respective directors, officers, employees, agents or advisers or which is obtained through observations made by the Project Co or the Trust or their respective advisers or by directors, employees, consultants or other staff or representatives of the Project Co or any of its Associated Companies or the Trust at the offices or other premises of the Trust or the Project Co or the agents or advisers of either Party. "**Confidential Information**" also includes all analyses, compilations, studies and other documents whether prepared by the Project Co or any of the Project Co's Associated Companies (or in the case of a Consortium Member, its Associated Companies) or the Trust or consultants or other staff or representatives, advisers, directors, or employees of any of them which contain or otherwise reflect or are derived from such information.

#### 52.2 Use of Confidential Information

Each Party agrees for itself and its respective directors, officers, employees, servants and agents, that it and any person mentioned in Clause 52.4 to whom the Confidential Information is permitted to be and is disclosed by it (a "**Permitted Recipient**") will use any Confidential Information solely for the purpose of enabling it to perform (or to cause to be performed) or to enforce any of its rights or obligations under the Project Documents or the IT Agreement or the Funding Agreements or to consider participating in the financing of the Project.

### 52.3 **Safeguarding of Confidential Information**

Each Party will treat and safeguard and will procure that each Permitted Recipient will treat and safeguard as private and confidential all the Confidential Information received by it.

### 52.4 **Permitted Recipients**

Neither Party will at any time disclose the Confidential Information to any person other than to such of its directors, employees, consultants, sub-contractors and suppliers, advisers and financiers (potential or committed including any Funders) or insurers or guarantors or reinsurers or providers of any liquidity facility or any rating agency or advisers to any such persons and other staff or representatives (or in the case of Project Co, its Associated Companies and, in the case of a Consortium Member, its Associated Companies or their respective directors, employees, consultants, sub-contractors and suppliers, advisers or financiers (potential or committed including any Funders) or insurers or guarantors or reinsurers or providers of any liquidity facility or any rating agency or advisers to any such persons and other staff or representatives) as are required bona fide to receive the same for the sole purpose of and to the extent necessary to enable them to perform or to cause to be performed or to enforce such Party's rights or obligations under the Project Documents, the IT Agreement or under the Funding Agreements or to consider participating in the financing of the Project. Each Party shall procure that each such recipient (excluding any rating agency and/or any Bondholder) shall:

52.4.1 be informed of the confidential nature of the Confidential Information and that each of such persons to whom Confidential Information is to be disclosed is made aware of the terms of this Clause 52; or

52.4.2 have previously entered into a confidentiality agreement with the Parties, on terms satisfactory to each of them (acting reasonably).

### 52.5 **Exceptions**

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

52.5.1 which is or comes into the public domain otherwise than through an unauthorised disclosure by the Project Co, any of its Associated Companies or, in the case of a Consortium Member, any of its Associated Companies or the Trust or any Permitted Recipient or any other person in breach of an obligation of confidentiality; or

52.5.2 to the extent the Project Co or any of its Associated Companies or, in the case of a Consortium Member, any of its Associated Companies or any Permitted Recipient or the Trust is compelled to disclose such Confidential Information by Law or any regulatory or government authority (but only to that extent), in which event the Parties must nevertheless comply with Clause 52.9.

### 52.6 **Copies**

Neither Party nor (insofar as it is able to procure the same) any of its Permitted Recipients will make any copies in any form of any documents, disc, tape or other

device containing Confidential Information or authorise any other person to do so, except:-

52.6.1 for the purpose of supplying Confidential Information to persons to whom disclosure of Confidential Information is expressly permitted by this Clause 52; or

52.6.2 with the prior written consent of the other Party.

## 52.7 **Security**

Each Party will keep a record of the Confidential Information provided to it or, in the case of the Project Co, to any of its Associated Companies, in writing or stored on any disc, tape or other device and, so far as is reasonably possible, of the location of that Confidential Information and of any persons to whom it, or in the case of the Project Co any of its Associated Companies, has passed any Confidential Information (whether oral or reduced to writing or stored on any disc, tape or other device) and it will, if requested by the other Party, deliver to it a copy of such record. Each Party will ensure that all Confidential Information (save for Confidential Information which was disclosed orally and has not been reduced to writing or stored on any disc, tape or other devices) in its possession or control is kept in a secure place at all times and is properly protected against theft, damage, loss or unauthorised access.

## 52.8 **Announcements**

Except in accordance with Clause 52.9, neither Party will make or permit or procure to be made, any public announcement or disclosure (whether for publication in the press or on the radio, television screen or any other medium or otherwise howsoever) of any Confidential Information or of its or, in the case of the Project Co, any of its Associated Companies' 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).

## 52.9 **Disclosure**

If the Project Co or any of its Associated Companies or the Trust or any Permitted Recipient becomes compelled to disclose any Confidential Information by Law or any regulatory or government authority, the Project Co (in the case of itself or any of its Associated Companies) shall inform the Trust and the Trust shall inform the Project Co, in either case in writing, of such fact or obligation as soon as reasonably possible after it becomes aware of it and, if possible, before any Confidential Information is disclosed. Each Party agrees to ensure that, in any event and insofar as it is able to procure the same, any such disclosure will be limited to the minimum amount of Confidential Information required to satisfy that disclosure obligation (except in the case of any Confidential Information disclosed by Project Co pursuant to Clause 8.2.2 of the Collateral Deed). Each Party agrees to assist and co-operate and, in the case of the Project Co, shall procure that each of its Associated Companies and, insofar as it is able to procure the same, any Associated Companies of the Consortium Members, shall assist and co-operate in any appropriate action which the other Party may decide to take. The Trust acknowledges that compliance by the Project Co with its obligations under Clause 8.2.2 of the Collateral Deed may require Project Co to disclose such information publicly to comply with inter alia the Financial Services

and Markets Act 2000, the Listing Rules of the UKLA and the Criminal Justice Act 1993.

**52.10 Return of Confidential Information**

On the Termination Date, each Party shall return to the other Party such Confidential Information within its possession or control as may belong to that other Party.

**53. CORRUPT GIFTS AND PAYMENTS**

**53.1 Project Co Undertaking**

The Project Co shall not and shall procure that none of its agents, contractors or sub-contractors or the employees of any of them or anyone acting on their behalf shall:-

53.1.1 offer or give or agree to give, 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 for doing or having done or not doing any act in relation to the obtaining or execution of any Project Document or for showing or for not showing favour or disfavour to any person in relation to such Project Document.

53.1.2 enter into any Project Document in connection with which commission has been paid or agreed to be paid by it or on its behalf or to its knowledge unless, before such Project Document is entered into, particulars of any such commission and of the terms and conditions of any agreement for the payment thereof are disclosed in writing to the Trust, provided that fees payable to the Project Co's professional or financial advisers shall not be treated as commission for the purposes of this Clause 53.1.2.

**53.2 Warranty**

The Project Co represents and warrants to the Trust that:-

53.2.1 neither the Project Co nor any of its agents, contractors or sub-contractors or the employees of any of them or anyone acting on their behalf has offered or given or agreed to give, to any person employed by or on behalf of the Trust or any other public body any gift or consideration of the type or for the purposes described in Clause 53.1.1; and

53.2.2 in connection with the Project Documents, no commission (excluding fees payable to the Project Co's professional or financial advisers) has been paid or agreed to be paid by the Project Co or on its behalf or to its knowledge or by or on behalf of or to the knowledge of any of its agents, contractors or sub-contractors or the employees of any of them.

**53.3 Employees**

Nothing contained in Clause 53.1 or Clause 53.2 shall prevent the Project Co or any of its agents, contractors or sub-contractors from, in any such case, paying any proper commission or bonus to its employees within their agreed terms of employment.

### 53.4 **Breach**

Any breach of Clause 53.1 or Clause 53.2 or the commission of any offence by the Project Co or any of its agents, contractors or sub-contractors or the employees of any of them or anyone acting on their behalf under the Prevention of Corruption Acts 1889 to 1916 in relation to any Project Document shall entitle the Trust:

- 53.4.1 where the breach or commission of any offence is occasioned by the Project Co or an employee of the Project Co and such person intended thereby to benefit the Project Co, to terminate the Project Documents in their entirety by serving notice on the Project Co and, at the Trust's option, to recover from the Project Co the amount of any loss resulting from the breach and/or the amount or value of any relevant gift, consideration or commission.
- 53.4.2 where the breach or commission of any offence is occasioned by either Contractor or an employee of that Contractor and such person intended thereby to benefit that Contractor, to terminate the Project Documents in their entirety by serving notice on the Project Co and, at the Trust's option, to recover from the Project Co the amount of any loss resulting from the breach and/or the amount or value of any relevant gift, consideration or commission, unless the Project Co, in the case of the Building Contractor terminates the Building Contract or, in the case of the Facilities Manager terminates the Facilities Provision Contract and, in either case, procures that those parts of the Operations which were performed or to be performed by the relevant Contractor are performed by the Project Co itself or by a substitute appointed pursuant to any replacement of the Building Contract or the Facilities Provision Contract, in either case, in accordance with Clause 6.1.4 and within 20 Working Days of notification to the Project Co of the breach or commission of an offence or within such longer period as shall be reasonable in all the circumstances.
- 53.4.3 where the breach or commission of any offence is occasioned by any person other than the Project Co or either Contractor or an employee of any of them, to terminate the Project Documents in their entirety by serving notice on the Project Co and, at the Trust's option, to recover from the Project Co the amount of any loss resulting from the breach and/or the amount or value of any relevant gift, consideration or commission, unless within 20 Working Days of notification to the Project Co of the breach or commission of an offence or within such longer period as shall be reasonable in all the circumstances, the Project Co has procured that the employment of such person in performing any part of the Operations has been terminated and that those parts of the Operations which were performed or to be performed by the relevant person are performed by the Project Co itself or by a substitute appointed in accordance with Clause 6.1.4 and/or Clause 6 of the Facilities Management Agreement.

### 53.5 **Disputes**

Any Dispute relating to this Clause 53 (other than in respect of Clause 53.4.3) may be referred by either Party to the Disputes Resolution Procedure except that the Panel for the purposes of the Disputes Resolution Procedure shall be a Queens Counsel



nominated by the Chairman of the Bar Council who shall determine the issue on the balance of probabilities.

**54. AGENCY**

**54.1 No Delegation**

No provision of any Project Document shall be construed as a delegation by the Trust of any of its statutory authority to the Project Co.

**54.2 No Agency**

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

**54.3 Independent Contractor**

The Project Co shall at all times be an independent contractor and nothing in any Project Document shall be construed as creating any partnership between the Trust and the Project Co or any relationship of employer and employee between the Trust and the Project Co or any employee of the Project Co.

**54.4 Project Co responsibilities**

As between the Parties, the Project Co shall be responsible for the acts, defaults, omissions and neglect of the Contractors and any sub-contractor and the agents, employees or workmen of any of them arising in connection with the Operations (other than McKesson), as fully as if they were the acts, defaults, omissions or neglect of the Project Co, its agents, employees or workmen.

**54.5 Trust Responsibilities**

As between the Parties and without limitation to the provisions relating to Third Party Suppliers, the Trust shall be responsible for the acts, defaults, omissions and neglect of its suppliers and contractors (other than the Project Co), any tenants or licensees of the Commercial Areas and any sub-contractor and the agents, employees or workmen of any of them arising in connection with the performance of the Trust's obligations pursuant to the Project Documents, as fully as if they were the acts, defaults, omissions or neglect of the Trust, its agents, employees or workmen.

**54.6 Project Co Knowledge**

Without limitation to its actual knowledge, the Project Co shall, for all purposes of the Project Documents, be deemed to have such knowledge in respect of the Project and the Operations as is held (or as ought reasonably to be held) by the Contractors, in the relevant circumstances.

**55. DISPUTES RESOLUTION PROCEDURE**

Except as expressly provided in any other provision of the Project Documents (and notwithstanding any express reference to the procedures set out in Schedule 10), all Disputes shall be resolved in accordance with the procedure set out in Schedule 10. Disputes under the IT Agreement shall be resolved in accordance with that agreement.

**56. WHOLE AGREEMENT**

As at 11<sup>th</sup> December, 2003, except for the Facilities Management Agreement, the supplemental project agreement entered into between (1) the Trust and (2) the Project Co on 14<sup>th</sup> July, 2000, the supplemental facilities management agreement entered into between (1) the Trust and (2) the Project Co on 14<sup>th</sup> July, 2000, the IT Agreement, the supplemental agreement to the IT Agreement entered into between (1) the Trust, (2) Project Co and (3) McKesson on 14<sup>th</sup> July, 2000, the supplemental agreement to the IT Agreement, entered into between (1) the Trust, (2) the Project Co and (3) McKesson on 29<sup>th</sup> November, 2000, the supplemental agreement to the Project Agreement and the Facilities Management Agreement entered into between (1) the Trust and (2) the Project Co on or about 11<sup>th</sup> December, 2003, the wrap-up agreement entered into between (1) the Trust and (2) the Project Co on or about 11<sup>th</sup> December, 2003 and a deed of release in connection with the IT Agreement entered into between (1) the Trust, (2) the Project Co and (3) McKesson on or about 11<sup>th</sup> December, 2003, this Agreement (including the Schedules) constitutes the whole agreement and understanding of the Parties as to the subject matter hereof and there are no prior or contemporaneous agreements between the Parties with respect thereto. Each of the Project Agreement, the Facilities Management Agreement and the IT Agreement shall together comprise one single agreement but without prejudice to the provisions contained in the Project Agreement, the Facilities Management Agreement or the IT Agreement (as appropriate) for the termination of all or any part(s) thereof or the operation of their respective terms.

**57. WAIVER**

Failure by either Party at any time to enforce any provision of any Project Document or to require performance by the other Party of any provision of the Project Documents shall not be construed as a waiver of such provision and shall not affect the validity of such Project Document or any part thereof or the right of the relevant Party to enforce any provision in accordance with its terms.

**58. RTPA**

To the extent that any provision of the Project Documents or Ancillary Documents is a restriction or information provision for the purposes of the RTPA, by virtue of which any Project Document or any Ancillary Document is registrable under the RTPA, no such restriction or provision shall take effect until the day after particulars of such Project Document and/or Ancillary Document have been furnished to the Director General of Fair Trading in accordance with the RTPA.

**59. SUBSTITUTE AGREEMENTS****59.1 Project Documents**

If (other than in accordance with its terms) any Project Document ceases to be in full force and effect or no longer constitutes obligations of the parties thereto which are valid, binding and enforceable in accordance with applicable law, the Parties shall each use all reasonable endeavours to negotiate and enter into an appropriate substitute agreement.

**59.2 Ancillary Documents**

If (other than in accordance with its terms) any Ancillary Document ceases to be in full force and effect or no longer constitutes obligations of the parties thereto which are valid, binding and enforceable in accordance with applicable law, the Project Co shall use its reasonable endeavours to procure that an appropriate substitute agreement is negotiated and entered into by the parties to such Ancillary Document.

**60. COUNTERPARTS**

Each Project Document may be executed in one or more counterparts. Any single counterpart or a set of counterparts executed, in either case, by all the parties thereto shall constitute a full and original Project Document for all purposes.

**61. SEVERABILITY**

If any condition, Clause or provision of any Project Document not being of a fundamental nature, is held to be illegal or unenforceable, the validity or enforceability of the remainder of such Project Document shall not be affected thereby.

**62. COSTS AND EXPENSES**

Subject to Clauses 2.5 and 2.6, each Party shall be responsible for paying its own costs and expenses incurred in connection with the negotiation, preparation and execution of the Project Documents.

**63. AMENDMENTS**

No amendment to any Project Document shall be binding unless in writing and signed by the duly authorised representatives of the Trust and the Project Co.

**64. NO PRIVILEGE**

No provision of this Agreement is intended to or does confer upon any third party including the Building Contractor, the Facilities Manager or any Funder, any benefit or right enforceable at the option of that third party against the Trust.

**65. PROJECT CO LOSSES**

Notwithstanding any other provision of the Project Documents, in respect of any Claim by the Project Co against the Trust arising under the Project Documents, upon request by the Project Co, the Losses of the Project Co shall be deemed to include those of its sub-contractors (without any double counting).

**66. GOVERNING LAW AND JURISDICTION**

**66.1 Law**

This Agreement shall be governed by and construed in all respects in accordance with English Law.

66.2 **Jurisdiction**

Subject to the provisions of Clause 55, the Parties submit to the jurisdiction of the English Courts as regards any claim or matter arising in relation to the Project Documents.

**IN WITNESS WHEREOF** the Parties have executed and delivered this Agreement as a Deed on the date first written above.

**THE SEAL** of the **NORFOLK &** )  
**NORWICH HEALTH CARE NHS** ) L.S.  
**TRUST** was hereunto affixed in the ) SEAL  
presence of: )

..... ANTHONY HOLDEN  
Chairman

..... MALCOLM STAMP  
Chief Executive

**EXECUTED AND DELIVERED** )  
as a Deed by )  
**OCTAGON** )  
**HEALTHCARE LIMITED** )  
acting by two of its directors or a )  
director and its secretary )

..... ANTHONY BRUCE CORNWELL  
Director

..... ANTHONY CHARLES ROPER  
Secretary

**SCHEDULE 1**

**ANCILLARY DOCUMENTS**

1. Memorandum and Articles of Association of Project Co.
2. Funding Agreements.
3. Beneficiaries' Direct Agreement.
4. Construction Collateral Warranty Agreement.
5. Facilities Provision Handover Agreement.
6. Building Contract.
7. Facilities Provision Contract.
8. Agreement for the Appointment of Independent Certifier.
9. Building Contract Performance Guarantee.
10. Facilities Provision Contract Performance Guarantee.
11. Custody Agreement.

**SCHEDULE 2**

**CONDITIONS PRECEDENT**

**1. Project Co's Obligations**

1.1 Delivery by the Project Co to the Trust in form and substance satisfactory to the Trust (acting reasonably) of the documents listed below. Where listed as a duly certified copy, the document is to be certified by a Director or the Secretary of the Project Co as being a true copy, in full force and effect at a date no earlier than the Execution Date:

1.1.1 A copy, duly certified, of the Project Co's Certificate of Incorporation and of any Certificate of Incorporation on change of name.

1.1.2 An executed copy, duly certified of the Shareholders' Agreement between Consortium Members.

1.1.3 A copy, duly certified, of minutes of a meeting of the Board of Directors of the Project Co evidencing:-

(A) consideration by the Directors of:-

(1) drafts of the Project Documents, the IT Agreement and each of the Ancillary Documents to which Project Co is a party;

(2) the Project Co's rights and obligations under the Project Documents, the IT Agreement and each of the Ancillary Documents to which Project Co is a party;

(3) any limit or restriction on any of the Project Co's powers or any limit or restriction on the right or ability of the Directors to exercise any of the Project Co's powers;

(B) a resolution of the Board of Directors approving the execution, delivery and performance by the Project Co of the Project Documents, the IT Agreement and each of the Ancillary Documents to which Project Co is a party and authorising a Director to sign the Project Documents, the IT Agreement and each of the Ancillary Documents to which Project Co is a party on behalf of the Project Co and to approve any amendments to the drafts of the same produced to the Directors and authorising a specified person or persons to sign and despatch all notices and other communications required or permitted to be given by the Project Co under any Project Documents, the IT Agreement and each of the Ancillary Documents to which Project Co is a party.

1.1.4 A specimen of the signature of each person authorised by the Project Co to sign any Project Document, the IT Agreement and each of the Ancillary Documents to which Project Co is a party and to sign and despatch all notices and other communications required or permitted to be given by the Project Co under any Project Document, the IT Agreement and each of the Ancillary Documents to which Project Co is a party.

- 1.1.5 A copy of each Ancillary Document executed by each party thereto, other than the Trust.
- 1.1.6 Notification from the Project Co to the Trust confirming that all conditions precedent to the Funding Agreements becoming unconditional and which need to be satisfied before the Effective Date may occur have been so satisfied or waived, save for the occurrence of the Effective Date itself.
- 1.1.7. A copy of the Facilities Management Agreement executed by the Project Co.
- 1.1.8 A copy of the IT Agreement executed by the Project Co and McKesson.
- 1.1.9 A copy, of the Collateral Warranty in favour of the Trust, required by the Agreement for the Appointment of Independent Certifier and executed by the parties thereto, other than the Trust.
- 1.1.10 Evidence that the insurances referred to in Clause 24.1.1 have been taken out and that the relevant policies comply with the requirements of this Agreement.
- 1.1.11 PKFA's report in respect of its audit of the Financial Model, addressed to the Trust amongst others.
- 1.2 The opening of the Insurance Proceeds Account in accordance with Clause 24.14.2.
- 1.3 The delivery by the Project Co to the Trust of the Financial Model on the Execution Date and of any revised Financial Model in accordance with Clause 5.3.2.

**2. Trust's Obligations**

- 2.1 Delivery by the Trust to the Project Co in form and substance satisfactory to the Project Co (acting reasonably) of the documents listed below. Where listed as a duly certified copy, the document is to be certified by a Director of the Trust as being a true copy, in full force and effect at a date no earlier than the Execution Date:
  - 2.1.1 A copy, duly certified, of minutes of a meeting of the Board of Directors of the Trust evidencing:-
    - (A) consideration by the Directors of:-
      - (1) a draft of the Project Documents, the IT Agreement and each of the Ancillary Documents to which the Trust is a party;
      - (2) the Trust's rights and obligations under the Project Documents, the IT Agreement and each of the Ancillary Documents to which the Trust is a party;
      - (3) any limit or restriction on any of the Trust's powers or any limit or restriction on the right or ability of the Directors to exercise any of the Trust's powers;
    - (B) a resolution of the Board of Directors approving the execution, delivery and performance by the Trust of the Project Documents, the IT Agreement and each of the Ancillary Documents to which the Trust is a party and authorising a Director to sign the Project Documents, the

IT Agreement and each of the Ancillary Documents to which the Trust is a party on behalf of the Trust and to approve any amendments to the drafts of the same produced to the Directors and authorising a specified person or persons to sign and despatch all notices and other communications required or permitted to be given by the Trust under any Project Documents, the IT Agreement and each of the Ancillary Documents to which the Trust is a party.

- 2.1.2 A specimen of the signature of each person authorised by the Trust to sign any Project Document, the IT Agreement and each of the Ancillary Documents to which Project Co is a party and to sign and despatch all notices and other communications required or permitted to be given by the Trust under any Project Document, the IT Agreement and each of the Ancillary Documents to which the Trust is a party.
- 2.1.3 A copy of each Ancillary Document to which the Trust is a party, executed by the Trust.
- 2.1.4 A copy of the Facilities Management Agreement executed by the Trust.
- 2.1.5 A copy of the IT Agreement executed by the Trust.
- 2.1.6 A copy of the Collateral Warranty in favour of the Trust, required by the Agreement for the Appointment of Independent Certifier executed by the Trust.
- 2.2 The acquisition by the Trust of the land and any rights needed for construction and dedication of the Highway Works (but not any agreement with statutory undertakers, bonds, construction contracts, statutory consents, orders, licences, insurance or any other such matters) which are the subject of any Planning Agreement or Planning Approval, save to the extent that the same are already owned by the Trust or the highway authority.
- 2.3 A copy, duly certified, of any confirmatory letter from the NHS Executive which is provided to the Trust in respect of the Project.
- 2.4 A certificate of the Secretary of State issued pursuant to the National Health Service (Private Finance) Act 1997, in respect of any externally financed development agreement.
- 2.5 A letter from the Secretary of State addressed to the Senior Lenders and other Funders from time to time providing financing or funding in respect of the Project clarifying the statutory responsibilities of the Secretary of State in relation to the NHS in general and to NHS trusts in particular.
- 3. **Both Parties**
  - 3.1 The obtaining of Planning Approval and the expiry of a period of three months calculated from the date of its grant without the Planning Approval being the subject of Proceedings or, if the same has been the subject of Proceedings, the Proceedings have been withdrawn or terminated or determined on terms which have left the Planning Approval unamended (except on terms acceptable to both Parties (each acting reasonably)) and in full force and effect.



3.2 The opening of the Insurance Proceeds Reinstatement Account in accordance with Clause 24.14.1.

**SCHEDULE 3  
FORM OF LEASE**

**DATED** \_\_\_\_\_ **200**

**(1) NORFOLK & NORWICH HEALTH CARE NHS TRUST**

and

**(2) SERCO SYSTEMS LIMITED**

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**LEASE**  
of  
**Offices at Acute Hospital**  
**Colney Lane Norwich**

---

**This lease is a new tenancy for the purposes of the Landlord and Tenant (Covenants) Act 1995.**

**Herbert Smith**  
Exchange House  
Primrose Street  
London EC2A 2HS  
Tel: 0171-374 8000  
Fax: 0171-496 0043  
Ref: 284/P411

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THIS LEASE is made on                      day of                      200

**BETWEEN:**

- (1) **NORFOLK & NORWICH HEALTH CARE NHS TRUST** of Brunswick Road, Norwich NR1 3SR (the "**Landlord**"); and
- (2) **SERCO SYSTEMS LIMITED** a company incorporated under the laws of England and Wales with registered number 1861237 whose registered office is at Serco House, Hayes Road, Southall, Middlesex, UB2 5NJ (the "**Tenant**")

**WITNESSES** as follows:

**1. DEFINITIONS**

In this Lease, the following terms shall, unless the context otherwise requires, have the following meanings:

**"Development"** has the meaning ascribed to that expression by Planning Law;

**"Enactment"** means every Act of Parliament directive and regulation now or hereafter to be enacted or made and all subordinate legislation whatsoever deriving validity therefrom;

**"Permitted Use"** means use as offices or as training facilities for the purpose of carrying out work or functions arising from the performance by the Tenant of its obligations under the Facilities Provision Contract;

**"Planning Law"** means every Enactment for the time being in force relating to the use development and occupation of land and buildings and every planning permission statutory consent and agreement made under any Enactment relating to the Hospital;

**"Plans"** means the plans annexed hereto;

**"Premises"** means the premises described in Schedule 1;

**"Project Agreement"** means an agreement so titled dated [                      ] 1998 and made between (1) Norfolk & Norwich Health Care NHS Trust and (2) Octagon Healthcare Limited;

**"Public Authority"** means any Secretary of State and any government department, public, local, regulatory, fire or any other authority or institution having functions which extend to the Premises or their use and occupation and any court of law and the companies or authorities responsible for the supply of water, gas and electricity or any of them and any of their duly authorised officers;

**"Service Media"** means those parts of the Hospital comprising common water supply waste and soil pipes, drains, sewers, gutters, downpipes, gas and other fuel pipes, electricity and telephone cables, wires, ducts, conduits, flues, wires, louvres and cowl and all other common conducting media plant and apparatus for the provision, supply, control and monitoring of services to or from the Hospital and other common equipment;

**"Term"** means the period from the Completion Date until the date 30 years from the Date for Completion;

## 2. CONSTRUCTION

- 2.1 Words importing the singular include the plural and vice versa and words importing one gender include both other genders.
- 2.2 Where a party comprises more than one person covenants and obligations of that party take effect as joint and several covenants and obligations.
- 2.3 A covenant by the Tenant not to do (or omit) any act or thing also operates as a covenant not to permit or suffer it to be done (or omitted) and to prevent (or as the case may be to require) it being done.
- 2.4 References in this Lease to:
- 2.4.1 any Clause or Schedule is a reference to the relevant Clause or Schedule of this Lease and Clause and Schedule headings shall not affect the construction of this Lease;
- 2.4.2 any right of (or covenant to permit) the Landlord to enter the Premises shall also be construed (subject always to the terms of Clause 4.4) as entitling the Landlord to remain on the Premises with or without equipment and permitting such right to be exercised by all persons authorised by the Landlord;
- 2.4.3 any consent, licence or approval of the Landlord or words to similar effect mean a consent, licence or other approval in writing signed by or on behalf of the Landlord and given before the act requiring consent, licence or approval;
- 2.4.4 the Premises (except in Clause 4.8) shall be construed as extending, where the context permits, to any part of the Premises;
- 2.4.5 a specific Enactment includes every statutory modification, consolidation and re-enactment and statutory extension of it for the time being in force, whether or not the same may at any time have been revoked or modified;
- 2.4.6 the last year of the Term includes the final year of the Term if it shall determine otherwise than by effluxion of time and references to the expiry of the Term include such other determination;
- 2.4.7 rent or other sums are references to such sums exclusive of VAT.
- 2.5 Terms used in this Lease that are defined in the Project Agreement shall have the meanings given to them in that Agreement, unless the context otherwise requires.

## 3. DEMISE AND RENTS

The Landlord **DEMISES** unto the Tenant **ALL THAT** the Premises **TOGETHER WITH** the easements and rights specified in Schedule 2 exercisable in common with the Landlord and all others with its authority or otherwise from time to time entitled thereto **EXCEPT** and **RESERVED** unto the Landlord and all other persons authorised by it from time to time during the Term or otherwise from time to time entitled thereto the easements and rights specified in Schedule 3,

**TO HOLD** the Premises unto the Tenant (together with and as so excepted and reserved) for the Term **SUBJECT** to all rights, easements, covenants, stipulations and other matters affecting the same,

**YIELDING AND PAYING** therefor at Michaelmas in every year a peppercorn (if demanded);

#### **4. TENANT'S COVENANTS**

The Tenant covenants with the Landlord throughout the Term:

##### **4.1 Rent**

to pay the rent reserved by this Lease.

##### **4.2 Compliance with Enactments**

to comply with the requirements of all Enactments and of every Public Authority (including the due and proper execution of any works) in respect of the Premises, their use, occupation, employment of personnel in them and any work being carried out to them (whether the requirements are imposed upon the owner, lessee or occupier) and not to do or omit anything by which the Landlord may become liable to make any payment or do anything under any Enactment or requirement of a Public Authority provided that the cost of compliance with any Hospital Specific Law or Discriminatory Legislation shall be borne by the Landlord who shall pay the same to the Tenant to enable the Tenant to comply with the same

##### **4.3 Notices**

as soon as practicable following receipt to give to the Landlord notice of (and a certified copy of) any notice, permission, direction, requisition, order or proposal made by any Public Authority and, without delay to comply in all respects at the Tenant's cost with the provisions thereof, provided that the cost of compliance with any Hospital Specific Law or Discriminatory Legislation shall be borne by the Landlord who shall pay the same to the Tenant to enable the Tenant to comply with the same save that the Tenant shall, if so required by and at the cost of the Landlord, make or join in making such objections or representations in respect of any of them as the Landlord may require, unless in the opinion of the Tenant, acting reasonably, there is no reasonable prospect of success.

##### **4.4 To permit entry**

to permit the Landlord at reasonable times on reasonable prior notice (except in an emergency) to enter the Premises to ascertain that the covenants and conditions of this Lease have been observed and give effect to any other necessary or reasonable purpose.

##### **4.5 Encroachments**

4.5.1 to preserve all rights of light and other easements belonging to the Premises and not to give any acknowledgement that they are enjoyed by consent.

- 4.5.2 not to do or omit anything which might subject the Premises to the creation of any new easement and to give notice to the Landlord forthwith of any encroachment which might have that effect.

**4.6 Alterations and reinstatement**

- 4.6.1 not to carry out any Development of or on the Premises nor (without prejudice to the exclusion of structural parts from the demise of the Premises) any works affecting any structural parts of the Hospital and not to commit any waste.

- 4.6.2 not to make any other alteration or addition to the Premises (including all electrical and other plant and equipment) except internal, non-structural alterations:

- (A) in accordance with plans and specifications (adequately describing the work in question and the manner in which the work will be carried out) previously submitted at the Tenant's expense to and approved by the Landlord (such approval not to be unreasonably withheld or delayed), provided that the Landlord shall not withhold approval to alterations to the Premises, insofar as such alterations are required to be carried out by or by implication are required to enable the Tenant to discharge its obligations under the Facilities Provision Contract or to enable any sub-tenant to discharge its obligations or exercise its rights in each case pursuant to the Project Documents ;
- (B) in a manner which shall not impair any Service Media;
- (C) in accordance with any relevant terms, conditions, recommendations and regulations of any Public Authority and the insurance company with which the Premises are for the time being insured; and
- (D) in a good and workmanlike manner.

**4.7 Use**

not to use the Premises:

- 4.7.1 for any purpose (and not to do anything in or to the Premises) which may be or become or cause a nuisance, disturbance, annoyance, obstruction or damage to any person or property but so that the normal carrying out of the Permitted Use shall not constitute a breach of this provision;
- 4.7.2 for a sale by auction or for any public meeting or for any dangerous, noxious, noisy, illegal, offensive or immoral trade, business or activity or for residential purposes; or
- 4.7.3 (without prejudice to the preceding paragraphs of this Clause) except for the Permitted Use.

**4.8 Alienation**

- 4.8.1 not to assign, mortgage, charge hold on trust for another or underlet or in any other manner part with possession of, the whole or any part (being less than the whole) of the Premises or agree to do so, except that the Tenant may

underlet or grant a non-exclusive licence to use the whole or any part or parts of the Premises if it first complies with the conditions described in Clause 4.8.2.

**Underletting**

4.8.2 not to underlet or grant a licence to use the whole or any part or parts of the Premises except to a person who shall be a duly appointed Service Provider or the Project Co in the case of an underlease by a form of underlease requiring the underlessee to observe and perform all the covenants and other provisions binding on the Tenant under this Lease (other than the covenant by the Tenant to pay rent) and which contains:

- (A) a condition for re-entry by the underlessor on breach of any covenant by the underlessee;
- (B) an absolute covenant not to assign, underlet or otherwise part with possession or share the occupation of the premises or any part of them
- (C) a provision excluding Sections 24 to 28 inclusive Landlord and Tenant Act 1954 in relation to the underlease in pursuance of an order duly made under Section 38(4) of that Act, before the grant of the underlease;
- (D) sufficient exceptions and reservations to enable the underlessor to enter the premises underlet and do such thing as may be necessary in order to perform the Facilities Provision Contract or the other Project Documents, insofar as it affects or relates to such premises or for which access to the premises shall be required;
- (E) a clause permitting the underlessor to terminate the underlease on notice in writing at any time that the appointment of the underlessee as a Service Provider shall terminate (for any reason).

and in the case of a licence contains provisions equivalent to (A), (B), (D) and (E) above;

4.8.3 to enforce the observance and performance by every such underlessee and its successors in title of the provisions of the underlease and not expressly or impliedly to waive any breach of them nor vary the terms of any underlease

4.8.4 not to grant any licensee or person sharing occupation exclusive possession (so that such person occupies as licensee only without creating any relationship of Landlord and Tenant) nor otherwise transfer or create a legal estate and the Tenant shall notify the Landlord of the identity of each company in occupation

**4.9 Registration**

within one month after its date, to deliver to the Landlord a copy of every assignment, transfer, mortgage, charge, underlease or other devolution affecting this Lease and to pay to the Landlord such reasonable registration fee as it may specify.



**4.10 Payment of cost of notices etc**

to pay on demand all expenses (including counsels', solicitors', surveyors' and bailiffs' fees) properly incurred by the Landlord in and incidental to:

4.10.1 the preparation and service of a notice under Section 146 Law of Property Act 1925 or in contemplation of any proceedings under Section 146 of that Act, notwithstanding that forfeiture is avoided otherwise than by relief granted by the court; and

4.10.2 every step taken during or after the expiry of the Term in connection with the enforcement of the Tenant's obligations under this Lease, including the service or proposed service of all notices other than schedules of dilapidations;

4.10.3 every application for consent, licence or approval under this Lease, even if the application is withdrawn or properly refused.

**4.11 Machinery**

not to install in the Premises any plant or machinery other than usual office or training equipment without the Landlord's consent, which shall not be unreasonably withheld.

**4.12 Not to damage Landlord's reversion**

not to do anything on or to or in respect of the Premises which would or would be likely to contaminate the Premises provided that the Tenant shall not be in breach of this Clause by reason of complying with its obligations which shall be derived from the Project Documents.

**4.13 Planning Law and compensation**

4.13.1 to comply with the provisions and requirements of Planning Law relating to or affecting:

- (A) the Premises;
- (B) any operations, works, acts or things carried out executed done or omitted on the Premises;
- (C) the use of the Premises;
- (D) the use of (and the exercise of any other rights hereunder in respect of) any other parts of the Hospital.

4.13.2 not without the Landlord's consent to apply for any planning permission relating to the Premises (and not to apply for any such planning permission relating to any other part of the Hospital).

**4.14 Compliance with covenants affecting title**

to observe and perform the covenants affecting the Premises contained or referred to in a conveyance dated 28th April, 1989 and made between M.P. Kemp Limited (1) and The Secretary of State for Health (2) and to indemnify and keep indemnified the Landlord against all losses, costs, damages, expenses and liabilities arising out of any breach, non-observance or non-performance thereof provided that the Landlord shall

not settle or compromise any claim where it intends to rely upon such indemnity without the prior written consent of the Tenant such consent not to be unreasonably withheld or delayed.

**4.15 Deliveries**

not to permit the delivery or movement of goods at the Premises in a manner which may interfere with the activities of the Trust.

**4.16 Dangerous and contaminative materials**

not to keep, place, store or use or permit or suffer to be kept, placed, stored or used in or upon or about the Premises, any materials, substance or other thing of a dangerous, inflammable, combustible, explosive, corrosive or offensive nature.

**4.17 Yield up**

4.17.1 at the expiry of the Term, to remove all chattels and (to the extent the Landlord may require) tenant's fixtures and quietly to yield up the Premises in the state of repair and condition consistent with the Project Documents and to make good any damage so caused in a proper and workmanlike manner to the Landlord's satisfaction and to return all keys to the Landlord.

4.17.2 the Tenant irrevocably authorises the Landlord to remove and dispose of any chattels which may be left in the Premises five Working Days after the Tenant has quit them (without being obliged to obtain any consideration for the disposal) and the Tenant irrevocably declares that any such chattels will stand abandoned by it.

**4.18 Regulations**

to comply with all Standing Instructions and Procedures (as defined in the Facilities Management Agreement)

**4.19 Security and access**

to use all reasonable endeavours to ensure that the Tenant's visitors to the Premises observe such security regulations which may apply to them.

**4.20 Indemnity**

to indemnify and keep indemnified the Landlord against all expenses, proceedings, costs, claims, damages and any other liability or consequence arising out of or in respect of any breach of any of the Tenant's covenants in this Lease (including all costs reasonably incurred by the Landlord in an attempt to mitigate any such breach) or of any act, omission or negligence of the Tenant or any person at the Premises expressly or impliedly with the Tenant's authority.

**5. LANDLORD'S COVENANTS**

5.1 The Landlord covenants with the Tenant that if the Tenant observes and performs its covenants contained in this Lease the Tenant may peaceably hold and enjoy the Premises without any lawful interruption by the Landlord or any person rightfully claiming through under or in trust for it.

5.2 The Landlord covenants to use all reasonable endeavours to provide or procure the provision of security and cleaning for the Premises as part of the provision of such services for the Hospital following a termination by the Landlord of the provision by the Project Co of such services pursuant to the Facilities Management Agreement

**6. PROVIDED ALWAYS AND IT IS HEREBY AGREED AND DECLARED THAT:**

**6.1 Forfeiture and re-entry**

Without prejudice to any other remedies and powers contained in this Lease or otherwise available to the Landlord, if any of the Tenant's covenants in this Lease are not performed or observed in the manner and at the times herein specified the Landlord may at any time thereafter (and notwithstanding the waiver of any previous right of re-entry) re-enter the Premises, whereupon this Lease shall absolutely determine but without prejudice to any Landlord's right of action in respect of any antecedent breach of the Tenant's covenants in this Lease.

**6.2 Letting scheme use and easements**

No letting or building scheme exists or shall be created in relation to the Hospital and (subject only to those easements expressly granted by this Lease) neither the Tenant nor the Premises shall be entitled to any easement or quasi-easement whatsoever and nothing herein contained or implied shall give the Tenant the benefit of or the right to enforce or to have enforced or to prevent the release or modification of any right easement, covenant, condition or stipulation enjoyed or entered into by any tenant of the Landlord in respect of property not demised by this Lease or prevent or restrict the development or use of the remainder of the Hospital or any other land.

**6.3 Service of notices**

In addition to any other mode of service, any notices to be served under this Lease shall be validly served if served in accordance with Section 196 Law of Property Act 1925 as amended by the Recorded Delivery Service Act 1962 or (in the case of any notice to be served on the Tenant) by sending it to the Tenant at its registered office.

**6.4 No warranty as to use**

Nothing contained in this Lease shall constitute or be deemed to constitute a warranty by the Landlord that the Premises are authorised under Planning Law to be used or are otherwise fit for any specific purpose.

**6.5 Compensation**

Except where any Enactment prohibits the right to compensation being reduced or excluded by agreement, neither the Tenant nor any occupier of the Premises shall be entitled on quitting them to claim from the Landlord any compensation under the Landlord and Tenant Act 1954.

**6.6 Determination**

6.6.1 The Landlord may determine this Lease as follows:-

- (A) on written notice to the Tenant at any time following termination (for any reason) of the Project Documents in their entirety and/or the Facilities Provision Contract;
- (B) on at least three months' written notice at any time, provided that the Landlord shall provide equivalent alternative premises within the Hospital which are equally conveniently located with similar light (having regard to the location and size of the alternative premises).

6.6.2 If the Landlord duly serves a notice under this Clause the Tenant shall be obliged to yield up the Premises in accordance with Clause 4.17, with the benefit of vacant possession, free of occupation by and of any estate or interest vested in the Tenant or any third party on the date for determination of this Lease.

6.6.3 If a notice is duly served and, if applicable, the requirements of Clause 6.6.2 are first satisfied, this Lease shall determine on the relevant date without prejudice to any rights or remedies which may have accrued to either party in respect of any breach of any covenant or obligation contained in it, including obligations under this Clause which shall continue to bind the parties.

6.6.4 If the Landlord duly serves a notice pursuant to Clause 6.6.1((B)), the Landlord shall grant and the Tenant shall accept (on the date of termination of this Lease) a lease of the alternative premises in the same form (mutatis mutandis) as contained in this Lease (including this Clause 6.6) for a term equivalent to the term unexpired hereunder at the date for determination pursuant to the notice. The provisions of Sections 24 to 28 (inclusive) of the Landlord and Tenant Act 1954 shall be excluded in respect of the lease pursuant to a court order which the Landlord and Tenant shall apply for and obtain prior to the grant of the Lease.

6.6.5 The Landlord shall, within 28 days of receipt of relevant invoices from the Tenant, pay to the Tenant the reasonable legal fees (exclusive of Value Added Tax) incurred by the Tenant with respect to the grant of the Lease referred to in Clause 6.6.4.

6.6.6 If the Facilities Provision Contract is terminated for any reason and the Landlord does not within one month thereafter serve notice pursuant to Clause 6.6.1 the Tenant may serve written notice upon the Landlord at any time thereafter to determine this lease and in such circumstances clauses 6.6.2 and 6.6.3 shall apply mutatis mutandis

**6.7 Exclusion of Landlord and Tenant Act 1954**

Having been authorised to do so by an Order of the Shoreditch County Court (No. ) made on [ ] 200 under Section 38(4)(a) Landlord and Tenant Act 1954, the parties agree that the provisions of Sections 24 to 28 (inclusive) of that Act shall be excluded in relation to the tenancy to be granted by this lease.

**7. NEW TENANCY**

This lease is a new tenancy for the purposes of the Landlord and Tenant (Covenants) Act 1995.

**IN WITNESS** whereof this Deed has been executed by the parties hereto and is intended to be and is hereby delivered on the date first above written.

**SCHEDULE 1**

**The Premises**

**ALL THOSE** office premises situate on the [ ] floor[s] and being part of the Hospital which are shown on the Plans and thereon verged red, all which premises include:

1. the plaster linings and other interior coverings and facing materials of all walls and of any columns within or bounding such premises;
2. the fixed floor coverings and all materials lying between the upper surface of the structural floor slab and the floor surface;
3. the ceilings including all materials forming part of them lying below the lower surface of the structural ceiling slab;
4. all non-load bearing walls and partitions lying within such premises;
5. the doors and door frames within and on the boundaries of such premises; and
6. subject to the exclusion in paragraph (c), the window glazing and window frames and other fenestration units lying within such premises,

but exclude:

- (a) all Service Media; and
- (b) the load bearing structure of the Hospital, including the load bearing structure of the roofs, foundations, external and internal walls and columns and the structural slabs of the ceilings and floors; and
- (c) the external surfaces of the Hospital (except the external surfaces of any doors and door frames referred to in paragraph (5)) and the whole of the window glazing and window frames and other fenestration units constructed in the external walls and in the other boundaries of such premises; and
- (d) those parts of the premises shown edged blue [these are to be areas where there is a connection to the drainage system of the Hospital such as toilet facilities and kitchen facilities even if they would normally fall within the demise.]

## SCHEDULE 2

### Easements and rights granted

1. The right in connection with the Permitted Use subject to compliance with all reasonable rules and regulations in connection with the exercise of such right as may be prescribed from time to time by the Landlord:
  - 1.1 for the Tenant, its servants and duly authorised agents, invitees and visitors for the purpose only of ingress and egress to and from the Premises, to pass and repass over the entrance hall, staircases, lifts and corridors of the Hospital and all estate roads and pathways and to use all means of escape but only when needed in an emergency; and
  - 1.2 to use the Service Media; and
  - 1.3 to use such lavatories in the Hospital as the Landlord shall from time to time reasonably designate.
2. The right of support, shelter and protection for the Premises from any adjoining or neighbouring parts of the Hospital as enjoyed by the Premises at the date of this Lease.

**SCHEDULE 3**

**Exceptions and reservations**

- 1. The right for one or more members of any security staff employed by the Landlord or its agents at any time or times to enter the Premises if it shall be considered necessary or desirable so to do in connection with the security of the Hospital.
- 2. The right for the Landlord and its suppliers and contractors and the agents employees or workmen of any of them to enter the Premises at any time in order to fulfil any obligation condition or duty contained in the Project Documents or any of them or to ascertain compliance by the Project Co with its obligations under the Project Documents,

**PROVIDED ALWAYS THAT** if the Landlord exercises such rights by carrying out work on the Premises, it shall forthwith make good any damage caused to them, unless the right has been exercised because of some breach by the Tenant or by any person claiming through it.

**THE SEAL of NORFOLK & NORWICH )**  
**HEALTHCARE NHS TRUST was )**  
hereunto affixed in the presence of: )

Director

Chief Executive

**EXECUTED AND DELIVERED as a )**  
**DEED by SERCO SYSTEMS )**  
**LIMITED )**  
acting by )  
two of its Directors or a Director and )  
its Secretary

Director

Director/Secretary



**SCHEDULE 4**  
**FINANCIAL MATTERS**  
**PART 1**

**Form of Building Contract Performance Guarantee**

**DATED** \_\_\_\_\_ **1998**

**(1) JOHN LAING PLC**

- and -

**(2) OCTAGON HEALTHCARE LIMITED**

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**BUILDING CONTRACT PERFORMANCE GUARANTEE**

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**THIS GUARANTEE** is made the \_\_\_\_\_ day of \_\_\_\_\_, 1998

**BETWEEN:**

- (1) **JOHN LAING PLC**, a company incorporated under the laws of England and Wales whose registered office is situate at Page Street, Mill Hill London NW7 2ER (Company Number 1345670) (the "**Guarantor**"); and
- (2) **OCTAGON HEALTHCARE LIMITED**, a company incorporated under the laws of England and Wales whose registered office is situate at Page Street, Mill Hill London NW7 2ER (Company Number 3112891) (the "**Employer**").

**WHEREAS:**

- (A) Norfolk and Norwich Health Care NHS Trust and the Employer have entered into the Project Agreement dated [ \_\_\_\_\_ ], 1998 (the "**Project Agreement**").
- (B) This Deed is supplemental to a contract made the \_\_\_\_\_ day of \_\_\_\_\_, 1998 between the Employer of the one part and John Laing Construction Limited (hereinafter called the "**Contractor**") on the other part for the design, development, construction and completion of the works as described therein (the "**Contract**").
- (C) The Guarantor is the ultimate parent company of the Contractor and, at the request of the Employer, has agreed to guarantee to the Employer the due performance of the Contract by the Contractor in the manner hereinafter appearing.
- (D) The expression "**the Employer**" includes the assigns of the Employer named herein in accordance with this Deed.

**NOW IT IS HEREBY AGREED** as follows:

- 1.1 In consideration of the Employer entering into the Contract with the Contractor, the Guarantor unconditionally and irrevocably guarantees to the Employer the due and punctual performance by the Contractor of each and all the obligations, duties and undertakings of the Contractor under and pursuant to the Contract, including its obligations to pay damages, as and when such obligations, duties and undertakings shall become due and performable according to the terms of the Contract.
- 1.2 Subject to Clause 5 and without prejudice to the rights of the Employer against the Contractor as primary obligor, the Guarantor shall be a principal debtor in respect of its obligations under this Deed and not merely a surety and, accordingly, the Guarantor shall not be discharged nor shall its liability hereunder be affected by any act or thing or means whatsoever which would not have discharged the Guarantor or affected its liability if it had been a principal debtor.
- 1.3 This Deed shall be in addition to and not in substitution for (and shall not be prejudiced by) any rights which the Employer may have pursuant to any other agreement or security which the Employer may enter into or obtain in relation to the Contract and this Deed may be enforced without first having recourse to any such rights or security.
2. Save for a release under seal given by the Employer, the Guarantor shall not be exonerated by time being given to the Contractor by the Employer or by any concession or arrangement granted or made by the Employer to or with the Contractor

or by any thing that the Employer or the Contractor may do or omit or neglect to do (including but without limitation the assertion or failure or delay to assert any right or remedy of the Employer or the pursuit of any rights or remedies by the Employer or the giving by the Contractor of any security or the release, modification or exchange of any such security or the liability of any person) or by any other circumstance whatsoever which but for this provision might exonerate the Guarantor.

3. The Guarantor hereby authorises the Contractor to agree with the Employer any addendum or variation to the Contract the due and punctual performance of which addendum or variation shall be likewise guaranteed by the Guarantor in accordance with the terms of this Deed.
4. The Guarantor shall not by paying any sum due hereunder or by any means or on any ground claim or recover by the institution of proceedings or the threat of proceedings or otherwise such sum from the Contractor or claim any set-off or counterclaim against the Contractor or prove in competition with the Employer in respect of any payment by the Guarantor hereunder or be entitled in competition with the Employer to claim or have the benefit of any security which the Employer holds or may hold for any money or liabilities due or incurred by the Contractor to the Employer and, in case the Guarantor receives any sums from the Contractor in respect of any payment of the Guarantor hereunder, the Guarantor shall hold such monies in trust for the Employer so long as any sums are payable (contingently or otherwise) under this Deed.
5. The Employer shall pursue its remedies against the Contractor first before proceeding against the Guarantor unless, in the reasonable opinion of the Employer, there is no reasonable prospect of substantive recovery against the Contractor.
- 6.1 The liquidation, receivership, appointment of an administrator, insolvency or other incapacity of the Contractor shall not remove, release or lessen the liability of the Guarantor hereunder.
- 6.2 Without limitation to Clause 1.2, Clause 2, Clause 4 and Clause 6.1 above, the Employer shall have no greater rights against the Guarantor than if the Guarantor had been a party to the Contract and jointly and severally liable with the Contractor and the same defences, set-offs and/or counterclaims which would have been available to the Contractor shall be available to the Guarantor but without double counting any such entitlement and without limitation to the right of the Employer to counter any such defence, set-off and/or counterclaim.
7. This Deed is not assignable save that the Employer shall be entitled to assign this Guarantee to any party providing finance in connection with the works referred to in Recital B above and to any party to whom it shall assign the benefit of or novate the Contract without, in any such case, the consent of the Guarantor being required but subject to the Employer giving notice of such assignment or novation to the Guarantor. The Guarantor may not assign or transfer any of its rights or obligations under this Deed.
8. Upon the expiry of a period of 12 years calculated from the Completion Date (as defined in the Project Agreement), this Guarantee shall (save in respect of any claim notified to the Guarantor in writing prior to such date) expire and be returned to the Guarantor. For the avoidance of doubt and save as aforesaid, the Guarantor shall

remain liable under the terms of this Guarantee for the same period as the Contractor remains liable to the Employer under the Contract.

- 9.1 This Deed shall be governed by and construed in all respects in accordance with English law.
- 9.2 Any dispute or difference which arises between the Guarantor and the Employer in connection with this Deed and which cannot be resolved by mutual agreement shall be dealt with through the Panel Resolution Procedure (as defined in the Contract) as if the same were incorporated herein, with references to the Contractor being treated as references to the Guarantor, mutatis mutandis.

**IN WITNESS** whereof the Guarantor has caused this Guarantee to be executed as a deed but with the intention that it remains undelivered until the date hereof.

**EXECUTED** as a Deed )  
 by )  
**JOHN LAING PLC** acting by two of its )  
 directors or a director and a secretary )

Director

Director/Secretary

**EXECUTED** as a Deed )  
 by )  
**OCTAGON HEALTHCARE LIMITED** )  
 acting by two of its directors or a director )  
 and a secretary )

Director

Director/Secretary

**SCHEDULE 4**  
**FINANCIAL MATTERS**  
**PART 2**

**Form of Facilities Provision Contract Performance Guarantee**

**DATED** \_\_\_\_\_ **1998**

**(1) SERCO GROUP PLC**

- and -

**(2) OCTAGON HEALTHCARE LIMITED**

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**FACILITIES PROVISION CONTRACT  
PERFORMANCE GUARANTEE**

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**THIS GUARANTEE** is made the \_\_\_\_\_ day of \_\_\_\_\_, 1998

**BETWEEN:**

- (1) **SERCO GROUP PLC**, a company incorporated under the laws of England and Wales whose registered office is situate at Serco House, Hayes Road, Southall, Middlesex UB2 5NJ (Company Number 2048608) (the "**Guarantor**"); and
- (2) **OCTAGON HEALTHCARE LIMITED**, a company incorporated under the laws of England and Wales whose registered office is situate at Page Street, Mill Hill London NW7 2ER (Company Number 3112891) (the "**Employer**").

**WHEREAS:**

- (A) Norfolk and Norwich Health Care NHS Trust and the Employer have entered into the Project Agreement dated [ \_\_\_\_\_ ], 1998 (the "**Project Agreement**").
- (B) This Deed is supplemental to a contract made the \_\_\_\_\_ day of \_\_\_\_\_, 1998 between the Employer of the one part and Serco Systems Limited (hereinafter called the "**Contractor**") on the other part for the management and provision of the Services as described therein (the "**Contract**").
- (C) The Guarantor is the ultimate parent company of the Contractor and, at the request of the Employer, has agreed to guarantee to the Employer the due performance of the Contract by the Contractor in the manner hereinafter appearing.
- (D) The expression "**the Employer**" includes the assigns of the Employer named herein in accordance with this Deed.

**NOW IT IS HEREBY AGREED** as follows:

- 1.1 In consideration of the Employer entering into the Contract with the Contractor, the Guarantor unconditionally and irrevocably guarantees to the Employer the due and punctual performance by the Contractor of each and all the obligations, duties and undertakings of the Contractor under and pursuant to the Contract, including its obligations to pay damages, as and when such obligations, duties and undertakings shall become due and performable according to the terms of the Contract.
- 1.2 Subject to Clause 5 and without prejudice to the rights of the Employer against the Contractor as primary obligor, the Guarantor shall be a principal debtor in respect of its obligations under this Deed and not merely a surety and, accordingly, the Guarantor shall not be discharged nor shall its liability hereunder be affected by any act or thing or means whatsoever which would not have discharged the Guarantor or affected its liability if it had been a principal debtor.
- 1.3 This Deed shall be in addition to and not in substitution for (and shall not be prejudiced by) any rights which the Employer may have pursuant to any other agreement or security which the Employer may enter into or obtain in relation to the Contract and this Deed may be enforced without first having recourse to any such rights or security.
2. Save for a release under seal signed by the Employer, the Guarantor shall not be exonerated by time being given to the Contractor by the Employer or by any concession or arrangement granted or made by the Employer to or with the Contractor

or by any thing that the Employer or the Contractor may do or omit or neglect to do (including but without limitation the assertion or failure or delay to assert any right or remedy of the Employer or the pursuit of any rights or remedies by the Employer or the giving by the Contractor of any security or the release, modification or exchange of any such security or the liability of any person) or by any other circumstance whatsoever which but for this provision might exonerate the Guarantor.

3. The Guarantor hereby authorises the Contractor to agree with the Employer any addendum or variation to the Contract the due and punctual performance of which addendum or variation shall be likewise guaranteed by the Guarantor in accordance with the terms of this Deed.
4. The Guarantor shall not by paying any sum due hereunder or by any means or on any ground claim or recover by the institution of proceedings or the threat of proceedings or otherwise such sum from the Contractor or claim any set-off or counterclaim against the Contractor or prove in competition with the Employer in respect of any payment by the Guarantor hereunder or be entitled in competition with the Employer to claim or have the benefit of any security which the Employer holds or may hold for any money or liabilities due or incurred by the Contractor to the Employer and, in case the Guarantor receives any sums from the Contractor in respect of any payment of the Guarantor hereunder, the Guarantor shall hold such monies in trust for the Employer so long as any sums are payable (contingently or otherwise) under this Deed.
5. The Employer shall pursue its remedies against the Contractor first before proceeding against the Guarantor unless, in the reasonable opinion of the Employer, there is no reasonable prospect of substantive recovery against the Contractor.
- 6.1 The liquidation, receivership, appointment of an administrator, insolvency or other incapacity of the Contractor shall not remove, release or lessen the liability of the Guarantor hereunder.
- 6.2 Without limitation and subject to Clause 1.2, Clause 2 and Clause 6.1 above, in no circumstances whatsoever shall the Employer have any greater rights against the Guarantor than if the Guarantor had been a party to the Contract and jointly and severally liable with the Contractor and the same defences, set-offs and/or counterclaims which are, were or would have been available to the Contractor shall be available to the Guarantor but without double counting any such entitlement and without limitation to the right of the Employer to counter any such defence, set-off and/or counterclaim.
7. This Deed is not assignable save that the Employer shall be entitled to assign this Guarantee to any party providing finance in connection with the works referred to in Recital B above and to any party to whom it shall assign the benefit of or novate the Contract without, in any such case, the consent of the Guarantor being required but subject to the Employer giving notice of such assignment or novation to the Guarantor. The Guarantor may not assign or transfer any of its rights or obligations under this Deed.
8. Upon the expiry of a period of 12 years calculated from the date of termination of the Contract, this Guarantee shall (save in respect of any claim notified to the Guarantor in writing prior to such date) expire and be returned to the Guarantor. For the

avoidance of doubt and save as aforesaid, the Guarantor shall remain liable under the terms of this Guarantee for the same period as the Contractor remains liable to the Employer under the Contract.

- 9.1 This Deed shall be governed by and construed in all respects in accordance with English law.
- 9.2 Any dispute or difference which arises between the Guarantor and the Employer in connection with this Deed and which cannot be resolved by mutual agreement shall be dealt with through the Panel Resolution Procedure (as defined in the Contract) as if the same were incorporated herein, with references to the Contractor being treated as references to the Guarantor, mutatis mutandis.

**IN WITNESS** whereof the Guarantor has caused this Guarantee to be executed as a deed but with the intention that it remains undelivered until the date hereof.

**EXECUTED** as a Deed )  
 by )  
**SERCO GROUP PLC** acting by two of its )  
 directors or a director and a secretary )

Director/Secretary

Secretary

**EXECUTED** as a Deed )  
 by )  
**OCTAGON HEALTHCARE LIMITED** )  
 acting by two of its directors or a director )  
 and a secretary )

Director

Director/Secretary



**SCHEDULE 4  
FINANCIAL MATTERS**

**PART 3**

**Form of Construction Collateral Warranty Agreement**

**DATED \_\_\_\_\_ 1998**

**(1) NORFOLK & NORWICH HEALTH CARE NHS TRUST**

- and -

**(2) JOHN LAING CONSTRUCTION LIMITED**

- and -

**(3) JOHN LAING PLC**

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**CONSTRUCTION COLLATERAL  
WARRANTY AGREEMENT**

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**Herbert Smith**  
Exchange House  
Primrose Street  
London EC2A 2HS  
Tel: 0171 374-8000  
Fax: 0171 496-0043  
Ref: 458/30587467

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**THIS AGREEMENT** is made on [ ], 1998

**BETWEEN:**

- (1) **NORFOLK & NORWICH HEALTH CARE NHS TRUST** of Brunswick Road, Norwich NR1 3SR (the "**Trust**");
- (2) **JOHN LAING CONSTRUCTION LIMITED**, a company incorporated under the laws of England and Wales with registered number 172161, whose registered office is at Page Street, Mill Hill, London NW7 2ER (the "**Building Contractor**"); and
- (3) **JOHN LAING PLC**, a company incorporated under the laws of England and Wales with registered number 1345670, whose registered office is at Page Street, Mill Hill, London NW7 2ER (the "**Parent Company**").

**WHEREAS:**

- (A) The Trust and the Project Co have agreed the terms on which the Project Co will design, develop and construct and (subject to the overriding responsibility of the Trust to manage the Hospital) part operate and maintain the Hospital and, accordingly, have entered into the Project Documents.
- (B) The Building Contractor has entered into the Building Contract with the Project Co and is a wholly owned Subsidiary of the Parent Company.
- (C) The Building Contractor has agreed to provide a collateral warranty in favour of the Trust in respect of the Building Contract on the terms and conditions set out in this Agreement.
- (D) The Parent Company has agreed to certain undertakings in relation to the Building Contractor and its obligations under this Agreement.
- (E) This Agreement is the "**Construction Collateral Warranty Agreement**" contemplated by the Project Agreement.

**NOW IT IS AGREED** as follows:

**1. DEFINITIONS AND CONSTRUCTION**

**1.1 Definitions**

In this Agreement, the following terms shall, unless the context otherwise requires, have the following meanings:

"**Accounting Principles**" means accounting principles and practices generally accepted in the United Kingdom and approved by the Institute of Chartered Accountants in England and Wales.

"**Documents**" means all details, plans, specifications, schedules and other documentation and copyright in the designs contained in them prepared or provided by the Building Contractor in connection with the Works.

"**Excluded Share Capital**" means shares in the capital of the Building Contractor which by their terms are or may become redeemable (whether or not subject to the

occurrence of any contingency) at any time whilst any liability of the Building Contractor remains outstanding under this Agreement.

"**Group**" means the Parent Company and any of its Subsidiaries.

"**Minimum Amount**" means £25,000,000,.

"**Project Agreement**" means the Project Agreement dated [ ], 1998 between (1) the Trust and (2) the Project Co.

"**Project Co**" means Octagon Healthcare Limited, a company incorporated under the laws of England and Wales with registered number 3112891 whose registered office is at Page Street, London, NW7 2ER.

"**Relevant Accounts**" means the then latest audited annual accounts of the Building Contractor delivered to the Trust pursuant to Clause 8.2.

"**Tangible Net Worth**" means at any time the aggregate of (without double-counting):

- 1.1.1 the amounts paid up or credited as paid up of the issued share capital of the Building Contractor (other than any Excluded Share Capital); and
- 1.1.2 any amount credited to the share premium account of the Building Contractor (other than any Excluded Share Capital); and
- 1.1.3 any amount standing to the credit of the profit and loss account reserve of the Building Contractor; and
- 1.1.4 any capital redemption reserve of the Building Contractor;

based on the Relevant Accounts but deducting:

- (1) any amount standing to the debit of the profit and loss account reserve of the Building Contractor; and
- (2) any amounts shown in respect of intangible assets of the Building Contractor.

## 1.2 Construction

Save to the extent that the context or the express provisions of this Agreement otherwise require:

- 1.2.1 headings and sub-headings are for ease of reference only and shall not be taken into consideration in the interpretation or construction of this Agreement;
- 1.2.2 all references to Clauses are references to clauses of this Agreement;
- 1.2.3 all references to agreements, documents or other instruments include (subject to all relevant approvals) a reference to that agreement, document or instrument as amended, supplemented, substituted, novated or assigned from time to time;
- 1.2.4 all references to any statute or statutory provision shall include references to any statute or statutory provision which amends, extends, consolidates or

replaces the same and shall include any orders, regulations, codes of practice, instruments or other subordinate legislation made under the relevant statute or statutory provision;

- 1.2.5 any reference to time of day shall be a reference to London time;
- 1.2.6 the words "**herein**", "**hereto**" and "**hereunder**" refer to this Agreement as a whole and not to the particular Clause in which such word may be used;
- 1.2.7 words importing the singular include the plural and vice versa;
- 1.2.8 words importing a particular gender include all genders;
- 1.2.9 "**person**" includes any individual, partnership, firm, trust, body corporate, government, governmental body, authority, agency, unincorporated body of persons or association;
- 1.2.10 any reference to a public organisation shall be deemed to include a reference to any successor to such public organisation or any organisation or entity which has taken over the functions or responsibilities of such public organisation;
- 1.2.11 references to "**Party**" means a party to this Agreement and references to "**Parties**" shall be construed accordingly;
- 1.2.12 all monetary amounts are expressed in pounds sterling;
- 1.2.13 references to the word "**includes**" or "**including**" are to be construed without limitation;
- 1.2.14 the obligations of either Party under this Agreement are to be performed at that Party's own cost and expense;
- 1.2.15 terms used in this Agreement that are defined in the Project Agreement shall have the meanings given to them in the Project Agreement; and
- 1.2.16 terms defined for the purposes of the National Health Service (Residual Liabilities) Act 1996 shall have the same meanings in this Agreement.

## 2. **WARRANTIES**

The Building Contractor warrants and covenants to the Trust:

- 2.1 that the Works have been and will continue to be carried out until termination of the Building Contract in accordance with the Building Contract.
- 2.2 that it has and will continue until termination of the Building Contract to exercise in the design of the works and the selection of goods and materials for incorporation into the Works all the reasonable skill and care to be expected of a qualified designer experienced in the design and construction of works of a size and scope and complexity similar to the Works.

## 3. **COVENANTS**

The Building Contractor covenants with the Trust that:

- 3.1 it shall provide, upon request of the Trust and subject to payment of reasonable photocopying charges, copies of drawings and/or specifications produced by it in connection with the Works.
- 3.2 the Trust shall be fully entitled to a royalty free non-exclusive licence to the Documents for any purpose related to the Works, including the construction, completion, maintenance, letting, promotion, advertisement, reinstatement, rebuilding, renewal, extension and repair of the Works or any part or parts thereof and that the Trust may so authorise others, provided always that the Building Contractor shall not be liable for any use by the Trust or anyone duly authorised by the Trust of any of the Documents for any purpose other than that for which the same were prepared by or on behalf of the Building Contractor.

#### **4. TRUST AUTHORITY AND LIABILITY**

##### **4.1 Authority**

The Trust shall have no authority to issue any direction or instruction to the Building Contractor in relation to performance of the Building Contractor's duty under the Building Contract.

##### **4.2 Liability**

The Trust shall have no liability to the Building Contractor in respect of sums due under the Building Contract or otherwise.

#### **5. PROFESSIONAL INDEMNITY INSURANCE**

Without prejudice to its obligations under the Building Contract, the Building Contractor shall take out and use its best endeavours to maintain professional indemnity insurance for a period of 12 years from the earlier of the date of termination of the Building Contract and the date of issue of the Completion Certificate, with a limit of indemnity of not less than £10,000,000 in aggregate in respect of any negligence, omission or default on the Building Contractor's part in the performance of its obligations under the Building Contract, provided such insurance is available on reasonable commercial terms and at reasonable commercial rates. Such insurance will be with reputable insurers carrying on business in the United Kingdom. As and when required by the Trust, the Building Contractor shall produce for inspection, documentary evidence that such insurance is being properly maintained.

#### **6. GENERAL PROVISIONS**

##### **6.1 No Prejudice**

The Building Contractor agrees that this warranty is without prejudice to and not in substitution for any other right of action whatsoever which the Project Co or the Trust may have against the Building Contractor arising from its involvement with the Project.

##### **6.2 No Greater Obligation**

The Building Contractor shall owe no duty or obligation to the Trust which is greater or of longer duration than would have existed if the Trust had been named as employer or a joint employer under the Building Contract.

### 6.3 **Defences and Set-offs**

There shall be available to the Building Contractor all the same defences and/or set-offs as would have been available against the Project Co in any claim made against it by the Trust but without double counting any such entitlement and without limitation to the right of the Trust to counter any such defence and/or set-off.

### 6.4 **Delay**

The Building Contractor shall have no liability to the Trust under this Agreement for delay in completion of the Works.

### 6.5 **Economic and Consequential Loss**

The Building Contractor shall not be liable to the Trust for any economic or consequential Loss, including lost profit and income for which the Building Contractor might otherwise be liable under the terms hereof, provided always that, for the purposes of this Deed, economic and consequential Loss shall be deemed not to include and the Building Contractor accepts liability for:

- 6.5.1 the cost of making good any defects in the Works or any part of the Works or any physical damage caused to the Works as a result of such defect; and
- 6.5.2 the reasonable professional fees incurred by the Trust arising from any such defect in the Works or physical damage.

### 6.6 **Manufacturer's Warranties**

The Building Contractor shall be relieved of any liability to the Trust under this Agreement in relation to mechanical and electrical equipment included in the Hospital, to the extent that the Trust requests and receives an assignment of the benefit of manufacturer's warranties in respect of the same pursuant to and in accordance with Clause 45.5.2(B) of the Project Agreement.

## 7. **LIMITATIONS**

### 7.1 **12 Years**

No action or proceedings for any breach of this Deed shall be commenced against the Building Contractor after the earlier of the 12th anniversary of the date of termination of the Building Contract and the expiry of 12 years from the Completion Date.

### 7.2 **Termination of Project Documents**

Notwithstanding execution and delivery of this Deed, the Trust shall not be entitled to make any Claim against the Building Contractor pursuant to its terms unless the Project Agreement and the other Project Documents have been terminated in their entirety.

## 8. **PARENT COMPANY UNDERTAKINGS**

### 8.1 **Building Contractor's Tangible Net Worth**

If, on the date of termination of the Project Documents in their entirety or on any anniversary of such date whilst any liability of the Building Contractor under this

Agreement remains outstanding, the Tangible Net Worth of the Building Contractor as shown in the Relevant Accounts is less than the Minimum Amount, the Parent Company shall, as soon as reasonably practicable (and, in any event, within 20 Working Days):

- 8.1.1 take all necessary steps to ensure that the Tangible Net Worth of the Building Contractor is increased to an amount equal to or exceeding the Minimum Amount; or
- 8.1.2 procure that another company in the Group with a Tangible Net Worth which is equal to or exceeds the Minimum Amount enters into an agreement with the Trust in the form of this Agreement to which the Parent Company shall also be a party in the terms of its obligations herein, mutatis mutandis, or, where there is no such other company in the Group, enter into this agreement with the Trust in the form of this Agreement (with the exception of this Clause 8).

## 8.2 Relevant Accounts

The Parent Company shall supply to the Trust as soon as the same are available (and in any event within 180 days of the end of the Building Contractor's financial year) the audited accounts of the Building Contractor for that financial year.

## 8.3 Accounting Principles

- 8.3.1 The Parent Company shall ensure that all Relevant Accounts are prepared in accordance with the Accounting Principles and in the same format and shall present a true and fair view of the financial position and results of the operations of the Building Contractor as at the end of the financial year to which they relate.
- 8.3.2 Where any change arises in the Accounting Principles which would materially affect the components of the definition of Tangible Net Worth as at the date of this Agreement, the definition shall be amended such that the financial position of the Building Contractor in respect of its tangible net worth is reflected in no better and no worse fashion than as at the date of this Agreement.

## 8.4 Replacement

If the Parent Company enters into an Agreement with the Trust in the form of this agreement or procures another company to do so, without prejudice to any of its obligations or liabilities under the Building Contract, the Building Contractor shall cease to be liable under this Agreement.

## 9. ASSIGNMENT

### 9.1 Binding on Successors and Assigns

This Agreement shall be binding on and shall enure to the benefit of the Parties and their respective successors and permitted assigns. In the case of the Trust, its successors shall include any person to which the Secretary of State, in exercising his statutory powers to transfer property, rights and liabilities of the Trust upon the Trust ceasing to exist, transfers the rights and obligations of the Trust under this Agreement.



## 9.2 **Restriction on Assignment**

No Party shall assign or transfer any part of its respective rights or obligations under this Agreement without the prior consent of the others, provided that the Trust shall be entitled, without the consent of any other Party, to transfer all its rights and obligations hereunder, in the circumstances contemplated in Clause 45.3.1 of the Project Agreement, to the Secretary of State, another National Health Service trust, a Health Authority, a Special Health Authority or any other person to whom the Secretary of State, in exercising his statutory rights, would be entitled to transfer such rights and obligations, provided that any transfer to such other person shall be effected on the same terms as those on which the Secretary of State would transfer such rights and obligations.

## 10. **NOTICES**

### 10.1 **Address**

Except as otherwise stated, all notices or other communications required in connection with this Agreement shall be in writing and sent by hand, by first class prepaid post or by facsimile transmission to the relevant address or facsimile number set out below or to such other address or facsimile number as a Party may notify to the others in writing by not less than five Working Days' prior notice.

#### **Trust**

Norfolk & Norwich Health Care NHS Trust  
Norfolk & Norwich Hospital  
Brunswick Road  
Norwich  
NR1 3SR

Fax: (01603) 287547

Attention: The Chief Executive

#### **Building Contractor**

John Laing Construction Limited  
133/139 Page Street  
Mill Hill  
London NW7 2ER

Fax: 0181 906 5297

Attention: Company Secretary

**Parent Company**

John Laing PLC  
133 Page Street  
Mill Hill  
London NW7 2ER

Fax: 0181 906 5297

Attention: Company Secretary

**10.2 Effective receipt**

Subject to Clause 10.3:-

10.2.1 a letter delivered by hand shall be effective when it is delivered to the addressee;

10.2.2 a letter sent by first class prepaid post shall be deemed received on the second Working Day after it is put in the post; and

10.2.3 a facsimile transmission shall be effective upon completion of transmission.

**10.3 Timing**

No notice or other communications received on a day which is not a Working Day or after 5pm on any Working Day in the place of receipt shall be deemed to be received until the next following Working Day.

**11. PAYMENTS AND TAXES**

**11.1 Payments**

All payments under this Agreement to any Party 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 to the other Parties from time to time.

**11.2 VAT**

11.2.1 All amounts stated to be payable by any Party under this Agreement shall be exclusive of any VAT properly payable in respect of the supplies to which they relate.

11.2.2 Each Party shall pay any VAT properly payable hereunder in respect of any supply made to it under this Agreement, provided that it shall first have received a valid tax invoice in respect of that supply which complies with the requirements of Part III VAT Regulations 1995.

**11.3 Deductions from payments**

All sums payable by a Party to any other Party under this Agreement shall be paid free and clear of all deductions or withholdings whatsoever in respect of Taxation, save as may be required by Law.

**12. DEFAULT INTEREST**

Each Party shall be entitled, without prejudice to any other right or remedy, to receive interest on any payment not made on the due date calculated at the Default Interest Rate on a daily basis and on the basis of a 365 day year from the due date up to but excluding the date of payment.

**13. CONFIDENTIALITY**

**13.1 Confidential Information**

Where any dispute arises between any of the Parties to this Agreement in relation to the subject matter of this Agreement, each Party agrees for itself and its respective directors, officers, employees, servants and agents, that it will maintain all information in whichever form coming into its possession or to its knowledge under or in connection with this Agreement in strictest confidence and shall use the same solely for the purpose of enabling it to perform or to enforce any of its rights or obligations under this Agreement.

**13.2 Exceptions**

The obligation to maintain the confidentiality of any information pursuant to Clause 13.1 shall not apply to any such information:-

13.2.1 which is in or comes into the public domain other than through any unauthorised disclosure by any Party or any other person; or

13.2.2 to the extent that any Party or any other person is compelled to disclose such information by Law or any regulatory or governmental authority (but only to that extent) or in connection with any proceedings in which the Parties or any of them are involved.

**14. AGENCY**

**14.1 No Delegation**

No provision of this Agreement shall be construed as a delegation by the Trust of any of its statutory authority to any other Party.

**14.2 No Agency**

Save as otherwise provided in this Agreement, no other Party shall be or be deemed to be an agent of the Trust nor shall the Building Contractor or the Guarantor hold itself out as having authority or power to bind the Trust in any way.

**14.3 Independent Contractor**

The Parties shall, at all times, be independent contractors and nothing in this Agreement shall be construed as creating any partnership between the Parties or any relationship of employer and employee between the Parties.

**15. WHOLE AGREEMENT**

This Agreement contains or expressly refers to the entire agreement between the Parties with respect to the specific subject matter of this Agreement and expressly

excludes any warranty, condition or other undertaking implied at Law or by custom and supersedes all previous agreements and understandings between the Parties with respect thereto and each of the Parties acknowledges and confirms that it does not enter into this Agreement in reliance on any representation, warranty or other undertaking not fully reflected in the terms of this Agreement.

**16. WAIVER**

Failure by any Party at any time to enforce any provision of this Agreement or to require performance by the other Parties of any provision of this Agreement shall not be construed as a waiver of such provision and shall not affect the validity of this Agreement or any part of it or the right of the relevant Party to enforce any provision in accordance with its terms.

**17. RTPA**

To the extent that any provision of this Agreement or any of the Project Documents or other Ancillary Documents is a restriction or information provision for the purposes of the RTPA by virtue of which this Agreement or any Project Document or any other Ancillary Document is registrable under the RTPA, no such restriction or provision shall take effect until the day after particulars of this Agreement and/or the Project Document and/or the Ancillary Document have been furnished to the Director General of Fair Trading in accordance with the RTPA.

**18. COUNTERPARTS**

This Agreement may be executed in one or more counterparts. Any single counterpart or a set of counterparts executed, in either case, by all the Parties shall constitute a full and original instrument for all purposes.

**19. SEVERABILITY**

If any condition, Clause or provision of this Agreement not being of a fundamental nature, is held to be illegal or unenforceable, the validity or enforceability of the remainder of this Agreement shall not be affected thereby.

**20. 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.

**21. AMENDMENTS**

No amendment to this Agreement shall be binding unless in writing and signed by the duly authorised representatives of the Parties.

**22. GOVERNING LAW AND JURISDICTION**

**22.1 Law**

This Agreement shall be governed by and construed in all respects in accordance with English Law.

22.2 **Jurisdiction**

The Parties each submit to the jurisdiction of the English Courts as regards any claim or matter arising in relation to this Agreement.

**IN WITNESS** whereof the Parties have executed and delivered this Agreement as a Deed on the date first written above.

**THE SEAL** of the **NORFOLK &** )  
**NORWICH HEALTH CARE NHS** )  
**TRUST** was hereunto affixed in the )  
presence of:- )

.....  
Director

.....  
Chief Executive

**EXECUTED AND DELIVERED** )  
as a Deed by **JOHN LAING** )  
**CONSTRUCTION LIMITED** acting by )  
two of its directors or a director and its )  
secretary )

.....  
Director

.....  
Director/Secretary

**EXECUTED AND DELIVERED** as a )  
Deed by **JOHN LAING PLC** acting by )  
two of its directors or a director and its )  
secretary )

.....  
Director

.....  
Director/Secretary

**SCHEDULE 4**  
**FINANCIAL MATTERS**  
**PART 5**

**Form of Supplemental Beneficiaries' Direct Agreement**

**DATED** \_\_\_\_\_ **2000**

(1) **NORFOLK & NORWICH HEALTH CARE NHS TRUST**

- and -

(2) **HSBC BANK PLC (AS SECURITY TRUSTEE)**

- and -

(3) **HSBC INVESTMENT BANK PLC (AS AGENT)**

- and -

(4) **OCTAGON HEALTHCARE LIMITED**

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**SUPPLEMENTAL BENEFICIARIES' DIRECT AGREEMENT<sup>1</sup>**

---

**Herbert Smith**  
Exchange House  
Primrose Street  
London EC2A 2HS  
Tel: 020 7374-8000  
Fax: 020 7374-0888  
Ref: 2041/30799251

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<sup>1</sup> Superseded by Beneficiaries' Direct Agreement dated 11<sup>th</sup> December, 2003

**THIS SUPPLEMENTAL AGREEMENT** is made on July, 2000

**BETWEEN:-**

- (1) **NORFOLK & NORWICH HEALTH CARE NHS TRUST** of Brunswick Road, Norwich NR1 3SR (the "**Trust**");
- (2) **HSBC BANK PLC** of 27-32 Poultry, London EC2P 2BX both as security trustee for and on behalf of the Beneficiaries and as agent for and on behalf of the Beneficiaries (the "**Security Trustee**", which expression shall include any successor security trustee for the Beneficiaries and any successor agent for and on behalf of the Beneficiaries);
- (3) **HSBC INVESTMENT BANK PLC** of Vintners Place, 68 Upper Thames Street, London EC4V 3BJ as agent for and on behalf of the Banks (the "**Agent**", which expression shall include any successor agent); and
- (4) **OCTAGON HEALTHCARE LIMITED**, a company incorporated under the laws of England and Wales with registered number 3112891, whose registered office is at New Norfolk and Norwich Hospital, Colney Lane, Norwich NR4 7UZ (the "**Project Co**").

**WHEREAS:**

- (A) On the Execution Date, the Parties entered into the Beneficiaries' Direct Agreement.
- (B) Since the Execution Date, a further increase to the size of the Hospital has been agreed to accommodate 144 additional beds and certain of the Beneficiaries have made available further credit facilities to the Project Co or subscribed for further loan notes in IHC to enable IHC to subscribe for an equal principal amount of loan notes in the Project Co, in each case, for the purpose of financing the performance of the Project Co's obligations under the Project Documents.
- (C) This Supplemental Agreement amends the Beneficiaries' Direct Agreement in the context of these changes.

**NOW IT IS AGREED** as follows:

**1. DEFINITIONS AND CONSTRUCTION**

**1.1 Definitions**

1.1.1 In this Supplemental Agreement (including the Recitals and Schedules), the following terms shall, unless the context otherwise requires, have the following meanings:

**"Amended Beneficiaries' Direct Agreement"** means the Beneficiaries' Direct Agreement as amended by this Supplemental Agreement.

**"Amendment Effective Date"** has the meaning given in the supplemental agreement to the Project Agreement dated with the date of this Supplemental Agreement.



**"Supplemental IT Agreement"** means the supplemental agreement of even date herewith between (1) the Trust, (2) the Project Co and (3) McKesson in respect of the IT Agreement.

1.1.2 Unless the context otherwise requires and save as expressly provided in Clause 1.1.1, words and expressions defined in the Amended Beneficiaries' Direct Agreement shall have the same meanings in this Supplemental Agreement.

**1.2 Construction**

The provisions of Clause 1.2 of the Amended Beneficiaries' Direct Agreement shall, so far as the context permits, apply to this Supplemental Agreement as if expressly set out herein and as if all references to the word **"Agreement"** were references to this Supplemental Agreement.

**2. AGREEMENT CONDITIONAL**

Except for Clause 1 and this Clause 2, the obligations of the Parties hereunder shall be conditional upon the occurrence of the Amendment Effective Date.

**3. AMENDMENT AND CONTINUATION**

On and from the Amendment Effective Date, the Beneficiaries' Direct Agreement shall be amended as identified in the Schedule and the Amended Beneficiaries' Direct Agreement shall continue in full force and effect.

**4. ACKNOWLEDGEMENT AND CONSENT**

**4.1 Notice of Security Interests**

The Security Trustee on behalf of the Beneficiaries hereby gives notice to the Trust of the Security Interests granted by the Project Co to the Security Trustee on behalf of the Beneficiaries under the Debenture over all of the right, title, benefit and interest of the Project Co in and to, inter alia, the Supplemental Project Documents, the Supplemental IT Agreement and the Supplemental Ancillary Documents.

**4.2 Consent to Security Interests**

The Trust acknowledges for the benefit of the Security Trustee and the Beneficiaries that it has received notice of and consents to, the granting of the Security Interests referred to in Clause 4.1.

**4.3 No Other Notice**

The Trust confirms to the Security Trustee for the benefit of the Security Trustee and the Beneficiaries that, except for the notice contained in Clause 4.1, it has not received notice of or consented to any other Security Interests granted by the Project Co over any right, title, benefit or interest in and to any of the Supplemental Project Documents, the Supplemental IT Agreement and the Supplemental Ancillary Documents.

**5. CONTRACTS (RIGHTS OF THIRD PARTIES) ACT**

No term of this Supplemental Agreement is enforceable under the Contracts (Rights of Third Parties) Act 1999 by a person who is not a party to this Supplemental Agreement.

**IN WITNESS WHEREOF** the Parties have executed and delivered this Supplemental Agreement on the date first written above.

**THE SEAL** of the **NORFOLK &** )  
**NORWICH HEALTH CARE NHS** )  
**TRUST** was hereunto affixed in the )  
presence of: )

.....  
Chief Executive

.....  
Director

**HSBC BANK PLC** (as Security Trustee) )  
acting by its duly authorised officer )

.....  
Director

**HSBC INVESTMENT BANK PLC** )  
(as Agent) )  
acting by its duly authorised officer )

.....  
Director

**OCTAGON HEALTHCARE LIMITED** )  
acting by its duly authorised officer )

.....  
Director

**SCHEDULE**

**DATED** 8<sup>th</sup> January 1998

(1) **NORFOLK & NORWICH HEALTH CARE NHS TRUST**

- and -

(2) **HSBC BANK PLC (AS SECURITY TRUSTEE)**

- and -

(3) **HSBC INVESTMENT BANK PLC (AS AGENT)**

- and -

(4) **OCTAGON HEALTHCARE LIMITED**

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**BENEFICIARIES' DIRECT AGREEMENT**  
(as amended by a supplemental agreement  
dated **July, 2000**)

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**Herbert Smith**  
Exchange House  
Primrose Street  
London EC2A 2HS  
Tel: 020 7374-8000  
Fax: 020 7374-0888  
Ref: 2041/30799251

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**THIS AGREEMENT** is made on 8<sup>TH</sup> January 1998

**BETWEEN:**

- (1) **NORFOLK & NORWICH HEALTH CARE NHS TRUST** of Brunswick Road, Norwich NR1 3SR (the "**Trust**");
- (2) **HSBC BANK PLC** of 27-32 Poultry, London, EC2P 2BX (formerly Midland Bank plc) both as security trustee for and on behalf of the Beneficiaries and as agent for and on behalf of the Beneficiaries (the "**Security Trustee**", which expression shall include any successor security trustee for the Beneficiaries and any successor agent for and on behalf of the Beneficiaries);
- (3) **HSBC INVESTMENT BANK PLC** of Vintners Place, 68 Upper Thames Street, London EC4V 6BJ (formerly Midland Bank plc) as agent for and on behalf of the Banks (the "**Agent**", which expression shall include any successor agent); and
- (4) **OCTAGON HEALTHCARE LIMITED**, a company incorporated under the laws of England and Wales with registered number 3112891, whose registered office is at New Norfolk and Norwich Hospital, Colney Lane, Norwich NR4 7UZ (the "**Project Co**").

**WHEREAS:**

- (A) The Trust and the Project Co have agreed the terms on which the Project Co will design, develop and construct and (subject to the overriding responsibility of the Trust to manage the Hospital) part operate and maintain the Hospital and, accordingly, have entered into the Project Documents.
- (B) The Beneficiaries have made available certain credit and hedging facilities to the Project Co or subscribed for loan notes in the Project Co's holding company ("**IHC**") to enable IHC to subscribe for an equal principal amount of loan notes in the Project Co, in each case, for the purpose of financing the performance of the Project Co's obligations under the Project Documents.
- (C) This Agreement is the "**Beneficiaries' Direct Agreement**" contemplated by the Project Agreement.
- (D) HSBC Bank PLC has succeeded Midland Bank plc as Security Trustee and HSBC Investment Bank PLC has succeeded Midland Bank plc as Agent.

**NOW IT IS AGREED** as follows:

**1. DEFINITIONS AND CONSTRUCTION**

**1.1 Definitions**

In this Agreement, the following terms shall, unless the context otherwise requires, have the following meanings:

"**Acceleration Notice**" has the meaning given in Clause 3.3.

"**Additional Beds Planning Approval**" means the Planning Approval dated 6<sup>th</sup> September, 1999 ref: NW07/99/0940/F.

"**Administrator**" means an administrator (as defined in Section 8 Insolvency Act 1986) in respect of the Project Co.

"**Appointments**" means the First Appointment and the Second Appointment.

"**Banks**" has the meaning given in the Senior Bank Facilities Agreement.

"**Beneficiaries**" has the meaning given in the Debenture.

"**Beneficiaries' Entity**" means a company the whole of whose issued share capital is held, directly or indirectly, by the Security Trustee or by or on behalf of one or more of the Beneficiaries or the Beneficiaries' Representative or any Associated Company of any such Person.

"**Beneficiaries' Representative**" means the Security Trustee, an Administrator, a Receiver or a Beneficiaries' Entity.

"**Compensation Account**" has the meaning given in the Senior Bank Facilities Agreement.

"**Confidential Information**" has the meaning given in Clause 12.1.

"**Consequential Liabilities**" has the meaning given in Clause 4.2.1(A).

"**Debenture**" has the meaning given in the Senior Bank Facilities Agreement.

"**Equity Subscription Agreement**" has the meaning given in the Senior Bank Facilities Agreement.

"**First Appointment**" means the appointment of PKFA to act as auditor of the Norfolk and Norwich financial model as contemplated in an appointment letter dated 11th August, 1997 signed by Midland Bank plc and acknowledged by PKFA.

"**First Sign-off Letter**" means the sign-off letter issued by PKFA pursuant to the First Appointment.

"**Hedging Agreement**" has the meaning given in the Senior Bank Facilities Agreement, together with any other such agreements entered into by any of the Beneficiaries in connection with any other facility agreement pursuant to which any of the Banks provides financial facilities or accommodation of any nature to any Beneficiaries' Representative or any Proposed Substitute.

"**IHC Subordinated Financing Documents**" has the meaning given in the Senior Bank Facilities Agreement.

"**Interim Novation Notice**" has the meaning given in Clause 5.2.4.

"**Interim Step-in Notice**" has the meaning given in Clause 4.2.4.

"**Novation Consequential Liabilities**" has the meaning given in Clause 5.2.1(A).

"**Novation Effective Date**" means the date of performance of the obligations set out in Clauses 5.11.1(A) and 5.11.1(B).

"**Novation Payment Obligations**" has the meaning given in Clause 5.2.1(A).

**"Novation Performance Obligations"** has the meaning given in Clause 5.2.1(B).

**"Novation Schedule of Works and Services"** has the meaning given in Clause 5.2.5.

**"Payment Obligations"** has the meaning given in Clause 4.2.1(A).

**"Performance Obligations"** has the meaning given in Clause 4.2.1(B).

**"Period of Dispute"** has the meaning given in Clause 4.2.12.

**"Permitted Recipient"** has the meaning given in Clause 12.4.

**"PKFA"** means Pannell Kerr Forster Associates of New Garden House, London EC1A 8JA.

**"Proceeds Account"** has the meaning given in the Senior Bank Facilities Agreement.

**"Project Agreement"** means the Project Agreement dated 8th January, 1998 between (1) the Trust and (2) the Project Co.

**"Project Assets"** means the rights, benefits, interests and assets charged or purported to be charged by the Project Co under the Debenture.

**"Project Documents"** has the meaning given in the Project Agreement but shall also include the Custody Agreement.

**"Proposed Novation Date"** has the meaning given in Clause 5.1.1.

**"Proposed Novation Notice"** has the meaning given in Clause 5.1.1.

**"Proposed Step-in Date"** has the meaning given in Clause 4.1.1.

**"Proposed Substitute"** has the meaning given in Clause 5.1.1.

**"Receiver"** means any receiver, manager or administrative receiver appointed under the Debenture.

**"Second Appointment"** means the appointment of PKFA to act as auditor of the revised Norfolk and Norwich financial model as contemplated in an appointment letter dated on or about the Amendment Execution Date signed by HSBC Bank plc and acknowledged by PKFA.

**"Second Sign-off Letter"** means the Sign-off Letter issued or to be issued by PKFA pursuant to the Second Appointment.

**"Security Interest"** means any mortgage, pledge, charge, lien, hypothecation, deed of trust, encumbrance, retention of title, preferential arrangement, security interest and any other agreement or arrangement having substantially the same economic effect.

[**"Senior Bank Documents"** means the Senior Bank Facilities Agreement, the Debenture, any security instrument entered into by a Beneficiaries' Representative or Proposed Substitute securing Senior Facilities, the Hedging Agreements, the Account Bank Agreement (as defined in the Senior Bank Facilities Agreement) and the Intercreditor Agreement or any of them.]



**"Senior Bank Facilities Agreement"** means the facility agreement dated on or about the date of the Project Agreement between the Project Co, Octagon Healthcare Holdings (Norwich) Limited, Midland Bank plc as the Agent, Midland Bank plc as the Security Trustee and certain of the Beneficiaries relating to the provision of up to £197,000,000 facilities to the Project Co and each other facility agreement pursuant to which any of the Banks provides financial facilities or accommodation of any nature to any Beneficiaries' Representative or Proposed Substitute.

**"Senior Discharge Date"** means the date upon which all Senior Facilities have been irrevocably and unconditionally repaid in full, together with all interest, fees, costs, expenses and other sums payable in connection therewith, in circumstances where no member of the Senior Syndicate is under any further obligation or liability (actual or contingent) in respect of the Senior Facilities.

**"Senior Facilities"** means all loan, standby, hedging and other facilities or other banking accommodation of any nature from time to time made available to the Project Co or to any Beneficiaries Representative or Proposed Substitute by the Senior Syndicate (or any member thereof) pursuant to the Senior Bank Documents.

**"Senior Syndicate"** means and includes reference to ABN AMRO Bank N.V., the Governor and Company of the Bank of Scotland, Barclays Bank PLC, HSBC Bank PLC (formerly Midland Bank Plc), Société Générale, any Hedging Counterparty (as defined in the Senior Bank Facilities Agreement) and each other financial institution which may from time to time become part of the syndicate of senior lenders providing loan, standby, hedging and/or other facilities and accommodation of any nature to the Project Co, any Beneficiaries Representative or any Proposed Substitute or which may from time to time agree to act as security trustee or agent in respect of any of the foregoing, in each case, pursuant to the Senior Bank Documents and shall include their respective assignees and transferees.

**"Sign-off Letters"** means the First Sign-off Letter and the Second Sign-off Letter.

**"Step-in Date"** means the date of issue of the Step-in Undertaking.

**"Step-in Notice"** has the meaning given in Clause 4.1.1.

**"Step-in Obligations"** has the meaning given in Clause 4.6.1.

**"Step-in Period"** means the period commencing on the Step-in Date and ending on the earliest of:

- (A) the date of the second anniversary of the Step-in Date (but subject always to Clause 5.16);
- (B) the Step-out Date;
- (C) the Novation Effective Date; and
- (D) termination of the Project Documents under Clause 4.4.

**"Step-in Schedule of Works and Services"** has the meaning given in Clause 4.2.5.

**"Step-in Undertaking"** has the meaning given in Clause 4.2.15.

"**Step-out Date**" has the meaning given in Clause 4.5.

"**Supplemental Ancillary Documents**" means the documents listed in Schedule 1 to the supplemental agreement to the Project Agreement between (1) the Trust and (2) the Project Co made on the Amendment Execution Date.

"**Termination Notice**" has the meaning given in Clause 3.2.2.

## 1.2 Construction

Save to the extent that the context or the express provisions of this Agreement otherwise require:

- 1.2.1 headings and sub-headings are for ease of reference only and shall not be taken into consideration in the interpretation or construction of this Agreement;
- 1.2.2 all references to Clauses are references to clauses of this Agreement;
- 1.2.3 all references to agreements, documents or other instruments include (subject to all relevant approvals) a reference to that agreement, document or instrument as amended, supplemented, substituted, novated or assigned from time to time;
- 1.2.4 all references to any statute or statutory provision shall include references to any statute or statutory provision which amends, extends, consolidates or replaces the same and shall include any orders, regulations, codes of practice, instruments or other subordinate legislation made under the relevant statute or statutory provision;
- 1.2.5 any reference to time of day shall be a reference to London time;
- 1.2.6 the words "**herein**", "**hereto**" and "**hereunder**" refer to this Agreement as a whole and not to the particular Clause in which such word may be used;
- 1.2.7 words importing the singular include the plural and vice versa;
- 1.2.8 words importing a particular gender include all genders;
- 1.2.9 "**person**" includes any individual, partnership, firm, trust, body corporate, government, governmental body, authority, agency, unincorporated body of persons or association;
- 1.2.10 any reference to a public organisation shall, except in the case of the Trust, be deemed to include a reference to any successor to such public organisation or any organisation or entity which has taken over the functions or responsibilities of such public organisation;
- 1.2.11 references to "**Party**" means a party to this Agreement and references to "**Parties**" shall be construed accordingly;
- 1.2.12 all monetary amounts are expressed in pounds sterling;
- 1.2.13 references to the word "**includes**" or "**including**" are to be construed without limitation;

1.2.14 the obligations of either Party under this Agreement are to be performed at that Party's own cost and expense; and

1.2.15 terms used in this Agreement that are defined in the Project Agreement shall have the meanings given to them in the Project Agreement.

## **2. ACKNOWLEDGEMENT AND CONSENT**

### **2.1 Notice of Security Interests**

The Security Trustee on behalf of the Beneficiaries hereby gives notice to the Trust of the Security Interests granted by the Project Co to the Security Trustee on behalf of the Beneficiaries under the Debenture over all of the right, title, benefit and interest of the Project Co in and to, inter alia, the Project Documents, the Agreement for Appointment of Independent Certifier, the Building Contract, the Facilities Provision Contract, the Building Contract Performance Guarantee, the Facilities Provision Contract Performance Guarantee and the Project Assets.

### **2.2 Consent to Security Interests**

The Trust acknowledges for the benefit of the Security Trustee and the Beneficiaries that it has received notice of and consents to, the granting of the Security Interests referred to in Clause 2.1.

### **2.3 No Other Notice**

The Trust confirms to the Security Trustee for the benefit of the Security Trustee and the Beneficiaries that, except for the notice contained in Clause 2.1, it has not received notice of or consented to any other Security Interests granted by the Project Co over any right, title, benefit or interest in and to any of the Project Documents, the Agreement for Appointment of Independent Certifier, the Building Contract, the Facilities Provision Contract, the Building Contract Performance Guarantee, the Facilities Provision Contract Performance Guarantee or any of the Project Assets.

### **2.4 Trust's Step-in Rights**

2.4.1 The Security Trustee on behalf of the Beneficiaries acknowledges that nothing in the Senior Bank Facilities Agreement, the Debenture, the Intercreditor Agreement or this Agreement;

2.4.2 the Agent on behalf of the Banks acknowledges that nothing in the Senior Banks Facilities Agreement or this Agreement; and

2.4.3 the Project Co acknowledges that nothing in the Funding Agreements, the Debenture, this Agreement or any other agreement between it and the Trust;

(including the service by the Security Trustee of a Step-in Notice) shall affect in any way the rights of the Trust under Clause 36.2 of the Project Agreement, provided that the Trust shall not be entitled to take any action under Clause 36.2 of the Project Agreement during the Step-in Period or prior to the completion of any Novation Schedule of Works and Services or prior to the completion of any Step-in Schedule of Works and Services applicable to Step-in Obligations assumed by a Proposed Substitute save:

- (A) upon the occurrence of a Major Incident; or
- (B) where the Beneficiaries' Representative has breached any of its obligations under the Step-in Undertaking or the Proposed Substitute has breached any of its obligations under the Project Documents, the Novation Schedule of Works and Services or in respect of the Step-in Obligations assumed by it, which breach in any case:
  - (1) is material; and/or
  - (2) prejudices the health and safety of persons on the Site; and
  - (3) where remediable, is not remedied within a reasonable period following receipt of notice of such breach from the Trust.

## 2.5 **Assignment**

- 2.5.1 Without prejudice to the Trust's obligations under Clause 47.3 of the Project Agreement, the Trust shall not, except in accordance with Clause 45.3 of the Project Agreement, without the prior consent of the Security Trustee and the Agent, assign, transfer or otherwise dispose of any Project Document or any part thereof or any benefit therein or thereunder.
- 2.5.2 The Trust undertakes that it will only effect any such assignment, transfer or disposal (including pursuant to Clause 45.3 of the Project Agreement) where the person to whom it so assigns, transfers or otherwise disposes, on or before such assignment, transfer or disposal becoming effective, enters into a direct agreement with the Project Co, the Security Trustee and the Agent in like terms to this Agreement or replaces the Trust as a party to this Agreement and accedes to any arrangements then existing between any Beneficiaries' Representative or Proposed Substitute (by replacement or otherwise).

## 2.6 **Senior Bank Documents**

The Agent and the Project Co hereby notify the Trust of the restrictive covenants contained in Clauses 15.3 (*Restriction on Disposals and Assignments*), 15.6 (*Acquisitions and Additional Services*), 15.11 (*Documents*), 15.14 (*Usage Fee, Lump Sum Payments and Up-Front Costs*) and 15.15 (*Variations*) of the Senior Bank Facilities Agreement. The Trust confirms that it has seen a copy of the Senior Bank Facilities Agreement as at the date of this Agreement and acknowledges such restrictive covenants as at such date.

## 2.7 **Beneficiaries' obligations under the Project Documents**

Save as provided in or effected pursuant to the terms of this Agreement, the Trust agrees and accepts that none of the Agent, Security Trustee or the Beneficiaries shall have any obligation under the Project Documents.

## 2.8 **Enforcement of Security**

The Security Trustee undertakes on termination of the Project Documents, insofar as it is able to do so:

- 2.8.1 to enforce (by whatever means it considers appropriate, including the appointment of a Receiver) the Security Interests referred to in Clause 2.1 over the Project Co's cash accounts subject to those Security Interests and over such other Project Assets as the Trust has not requested be transferred, assigned or novated pursuant to Clause 45.5 of the Project Agreement, provided that:
- (A) in the absolute and unfettered discretion of the Security Trustee (acting on the instructions of the Beneficiaries), the relevant Security Interests and Project Assets can be readily and speedily enforced and realised;
  - (B) the Security Trustee (acting on the instructions of the Beneficiaries) shall have an absolute and unfettered discretion as to the timing and order in which the relevant Security Interests are enforced and the relevant Project Assets realised; and
  - (C) it is reasonable to do so having regard to:
    - (1) any actual or contingent liability; and
    - (2) the likely net proceeds of such enforcement.
- 2.8.2 following unconditional and irrevocable repayment of all sums outstanding to the Beneficiaries under the Senior Bank Documents and the IHC Subordinated Financing Documents, upon request of the Trust, to release such of the Security Interests as have not then been enforced or released.

### **3. TERMINATION NOTICE AND ACCELERATION NOTICE**

- 3.1 The Trust shall notify the Agent:
- 3.1.1 of any Event of Default, promptly upon and, in any event, within five Working Days of becoming aware of the same or, if sooner, at the same time as it notifies the Project Co thereof.
  - 3.1.2 at the same time as it notifies the Project Co pursuant to Clause 43.2 of the Project Agreement of any event or circumstance which it believes would, with the giving of notice, lapse of time, determination of materiality or satisfaction of any other condition, constitute or give rise to an Event of Default.
  - 3.1.3 promptly and, in any event, not later than when it notifies the Project Co thereof, where it proposes to commence the procedures set out in Clause 43.4 or Clause 43.5 of the Project Agreement.
  - 3.1.4 promptly and, in any event, not later than when it notifies the Project Co thereof, where it proposes to terminate the provision of any Service pursuant to Clause 23.1.1 of the Facilities Management Agreement.
  - 3.1.5 in relation to the Maintenance of Buildings and Engineering Services, promptly upon and, in any event, not later than the earlier of:
    - (A) the fifth Working Day after the Trust resolves to require the Project Co to procure the termination of the relevant Service Provider's contract with the Facilities Manager pursuant to Clause 23.1.1 of the Facilities Management Agreement; and

- (B) the Trust notifying the Project Co of the requirement referred to in Clause 3.1.5(A).

### 3.2 Termination Notice

The Trust undertakes to the Agent not to give notice to terminate or rescind or treat as repudiated all or any part of the Project Documents or any Service or the appointment of any Service Provider providing Maintenance of Buildings and Engineering Services without first giving the Agent:

- 3.2.1 any relevant notice referred to in Clause 3.1; and
- 3.2.2 except in relation to the termination for any reason of any Service or the termination of the appointment of any Service Provider providing Maintenance of Buildings and Engineering Services, not less than 60 days prior notice specifying the grounds for that termination and the date on which that termination is to take effect. Any notice given pursuant to this Clause 3.2.2 (other than one given pursuant to Clause 3.5.2 of the Project Agreement) shall be a "**Termination Notice**".

### 3.3 Acceleration Notice

The Security Trustee (in respect of the matters referred to in Clause 3.3.1) and the Agent (in respect of the matters referred to in Clauses 3.3.2 and 3.3.3) undertakes:

- 3.3.1 to notify the Trust as soon as reasonably practicable following receipt of valid and binding instructions from the Beneficiaries pursuant to which it is obliged to enforce the Debenture or, if earlier, at the same time as it gives notice to the Beneficiaries of its intention to enforce the Debenture;
- 3.3.2 to give the Trust, at the same time as it notifies the Project Co, a copy of any notice calling an event of default under the Senior Bank Facilities Agreement; and
- 3.3.3 to give notice promptly to the Trust of any acceleration of amounts due and owing under the Senior Bank Facilities Agreement, as a result of the occurrence of an event of default thereunder, when any such acceleration is effected, specifying the grounds for that acceleration,

each notice given under this Clause 3.3 being an "**Acceleration Notice**".

### 3.4 Ancillary Documents

The Trust shall not be entitled to exercise or seek to exercise any of its rights under either the Construction Collateral Warranty Agreement or the Facilities Provision Handover Agreement, until the Project Documents have been terminated in accordance with this Agreement.

### 3.5 Rights of Access

Upon the issue of a Termination Notice or receipt of an Acceleration Notice, as the case may be, the Trust shall immediately and automatically grant the Security Trustee and its representatives, on reasonable notice and at reasonable times, until the earliest of the expiry of the Termination Notice, the issue of a Step-in Notice and the issue of

a Proposed Novation Notice, full access to the Site, the Works, the Hospital and all information the Trust is required to maintain under the Project Documents and, to the extent that the Trust is reasonably able to procure the same, to all persons engaged in the Project.

#### 4. STEP-IN AND STEP-OUT

##### 4.1 Step-in Notice

4.1.1 The Security Trustee may, at any time before the expiry of the relevant Termination Notice or, if no Termination Notice is then outstanding, at any time after service of an Acceleration Notice, give at least 60 days but no more than 90 days prior notice to the Trust (a "**Step-in Notice**") of the intention that a Beneficiaries' Representative will issue a Step-in Undertaking on a specified date (the "**Proposed Step-in Date**") on behalf of the Beneficiaries.

4.1.2 There shall be no restriction on the number of Step-in Notices which may be given by the Security Trustee, provided that, after exercising any right to serve a Step-in Notice pursuant to Clause 4.1.1:

- (A) during the period up to the earliest of (1) the Step-in Date, (2) the date of revocation of the Step-in Notice or any Interim Step-in Notice and (3) the date of withdrawal or deemed withdrawal of a Step-in Notice or any Interim Step-in Notice, the Security Trustee shall use its reasonable endeavours to minimise any disruption at the Hospital, having regard to the Trust's obligations to provide clinical services, caused by the Security Trustee exercising its rights of access under Clause 4.2.2; and
- (B) where required by the Trust, after the Step-In-Date the Beneficiaries' Representative shall continue to use any person engaged by the Trust to carry out any of the Services during the period following the relevant Termination Notice for such period as is reasonable having regard to the fees and other terms of the relevant contract, provided that the Trust shall consult with the Security Trustee with regard to any such engagement and shall not, without the consent of the Security Trustee (not to be unreasonably withheld or delayed) engage any such person for a period in excess of six months.

4.1.3 Subject to Clause 6.1, the Trust shall not be entitled to terminate or rescind all or any part of the Project Documents during the notice period specified in a Step-in Notice, provided that such period shall be extended where the Proposed Step-in Date is postponed pursuant to Clause 4.2.14. For the avoidance of doubt, the issue of a Step-in Notice shall not impose any legal obligation on the Security Trustee, the Agent, any Beneficiary or any Beneficiaries' Representative to issue or procure the issue of a Step-in Undertaking.

##### 4.2 Step-in Undertaking

4.2.1 As soon as reasonably practicable after and, in any event, within 21 days of receipt of any Step-in Notice, the Trust shall notify the Security Trustee of:

- (A) the amount of any sums which are due and payable but unpaid by the Project Co to the Trust as at the date of the Step-in Notice and of any further sums which shall become so due and payable up to and including the Proposed Step-in Date, such sums (the "**Payment Obligations**") to include any sums due and payable or which shall become due and payable up to and including the Proposed Step-in Date pursuant to Clause 36.2 of the Project Agreement but to exclude any liabilities (the "**Consequential Liabilities**") for Loss or damage suffered by the Trust on account of the acts or omissions of the Project Co; and
- (B) any other material obligations or liabilities under any Project Document, excluding any Payment Obligations and Consequential Liabilities (the "**Performance Obligations**") which should have been performed or discharged by the Project Co but which have not been so performed or discharged as at the date of the Step-in Notice and of any further such obligations and liabilities which shall become outstanding up to and including the Proposed Step-in Date; and
- (C) the amount of the Consequential Liabilities outstanding as at the date of the Step-in Notice and of any further Consequential Liabilities which shall become outstanding up to and including the Proposed Step-in Date,

in each case, of which the Trust has actual knowledge. The Trust shall take all reasonable steps to ascertain what sums are or will be so due and payable and what liabilities and obligations are or will be so outstanding.

4.2.2 The Trust shall, during the period following the issue of a Step-in Notice (unless and until such Step-in Notice is withdrawn or revoked) and during any Step-in Period, provide either the Security Trustee or, as the case may be, the Beneficiaries' Representative with such additional information as is reasonably requested from time to time in relation to the Trust, the Project and the Project Documents and the transactions contemplated therein and shall grant the Security Trustee, the Beneficiaries' Representative and their respective representatives, on reasonable notice and at reasonable times, full access to the Site, the Works, the Hospital and all information the Trust is required to maintain under the Project Documents and, to the extent that the Trust is reasonably able to procure the same, to all persons engaged in the Project.

4.2.3 The Trust shall notify the Security Trustee as soon as reasonably practicable of:

- (A) any change in such sums, obligations or liabilities referred to in Clause 4.2.1; and
- (B) any further such sums, obligations or liabilities falling due and payable but unpaid or falling due for performance or discharge and unperformed or undischarged (as the case may be) or suffered by the Trust;

in each case, of which the Trust has actual knowledge, before the Step-in Date.



- 4.2.4 Within 10 Working Days of receipt of all the information referred to in Clause 4.2.1 or, if before expiry of such period further information is provided pursuant to Clause 4.2.3, within 10 Working Days of receipt of the last of such further information, the Security Trustee shall give notice to the Trust (an "**Interim Step-in Notice**") if it is still its intention to issue or procure the issue by a Beneficiaries' Representative of a Step-in Undertaking on the Proposed Step-in Date. For the avoidance of doubt, none of the Security Trustee, the Agent, the Beneficiaries or the Beneficiaries' Representative shall incur any liability or obligation as a result of issuing an Interim Step-in Notice, notwithstanding that a Step-in Undertaking is not subsequently issued.
- 4.2.5 During the period between receipt by the Trust of an Interim Step-in Notice and the Proposed Step-in Date, the Trust and the Security Trustee shall negotiate in good faith to agree a schedule (the "**Step-in Schedule of Works and Services**") of action to be taken by the Beneficiaries' Representative, in respect of Performance Obligations notified by the Trust pursuant to Clauses 4.2.1(B) or 4.2.3, to remedy any breach by the Project Co of such Performance Obligations (where remediable) or place the Trust in substantially the same position as if such breach had not occurred (where irremediable), and of any consequential effect such schedule will have on the continued performance of the obligations of the Project Co under the Project Documents. The Step-in Schedule of Works and Services shall specify the time within which each such breach must be rectified, the action to be taken, any such consequential effect and any period within which each such affected obligation must be performed after the Proposed Step-in Date. The Step-in Schedule of Works and Services shall provide for reasonable grace periods which shall, in any event, be no shorter than those in respect of the relevant obligation (if any) in the Project Documents. In addition, the Step-in Schedule of Works and Services shall, where relevant, provide for reasonable periods during which the Beneficiaries' Representative shall be deemed to have achieved the Required Performance Standard in respect of Services for the purposes of Clauses 22.6 and 23.1 of the Facilities Management Agreement and Clause 43.1.4 of the Project Agreement.
- 4.2.6 If, at any time prior to the Proposed Step-in Date, any further information is provided in respect of Performance Obligations pursuant to Clause 4.2.3, the Trust and the Security Trustee shall negotiate in good faith to seek to agree consequential amendments to any previously agreed Step-in Schedule of Works and Services.
- 4.2.7 The issue of a Step-in Undertaking by a Beneficiaries' Representative (other than the Security Trustee) shall be subject to the consent of the Trust. Following agreement or determination of the Step-in Schedule of Works and Services or any amendments thereto effected pursuant to Clause 4.2.6, the Security Trustee shall, within five Working Days, provide the following information to the Trust:
- (A) in relation to a Step-in Undertaking to be issued by a Beneficiaries' Entity:

- (1) the names of the shareholders in the Beneficiaries' Entity and the share capital owned by each of them; and
  - (2) the names of the directors and the secretary of the Beneficiaries' Entity.
- (B) in relation to a Step-in Undertaking to be issued by any Beneficiaries' Representative:
- (1) the name and registered address of the Beneficiaries' Representative; and
  - (2) reasonable details of the means by which it is proposed to finance the Beneficiaries' Representative (including in reasonable detail the extent to which such finance is committed and any conditions precedent as to its availability for drawing).
- 4.2.8 The Trust shall have the right to withhold its consent to the issue of a Step-in Undertaking if, but only if, the Security Trustee has failed to show that:
- (A) the Beneficiaries' Representative has the legal capacity, power and authorisation to become a party to and perform its obligations under the Step-in Undertaking; and
  - (B) if credit approval is obtained, the technical competence and financial standing of or the technical and financial resources available to the Beneficiaries' Representative would be sufficient to perform its obligations under the Step-in Undertaking.

The Trust shall notify the Security Trustee within 15 Working Days of receipt of all information required under Clause 4.2.7 as to whether or not it has decided to grant such consent and, if it fails to give such notice within such period, the Trust shall be deemed to have given its consent. Any notice given by the Trust pursuant to this Clause 4.2.8 shall only be revocable where the Trust subsequently notifies the Security Trustee of any further matter in accordance with Clause 4.2.3 and the Security Trustee fails to show that the matters referred to in (A) and (B) above are satisfied in respect of or as a result of such further matter.

- 4.2.9 Without prejudice to Clause 4.2.11, if the Trust withholds its consent to the issue of a Step-in Undertaking, the Security Trustee shall be entitled (if necessary, more than once) to provide changed particulars relating to the same Beneficiaries' Representative or particulars relating to another Beneficiaries' Representative pursuant to Clause 4.2.7 which the Security Trustee has good cause to believe would fulfil the requirements of Clauses 4.2.8(A) and 4.2.8(B).
- 4.2.10 If the Trust exercises or continues to exercise its rights under Clause 36 of the Project Agreement between the date of any Step-in Notice and the Step-in Date, it shall liaise and co-operate fully with the Security Trustee and the Beneficiaries' Representative with regard to the transfer by it of performance of the Project Co's obligations to the Beneficiaries' Representative on the Step-in Date.

- 4.2.11 If the Security Trustee disputes any information provided by the Trust pursuant to Clauses 4.2.1 or 4.2.3 or if there is any disagreement between the Parties in respect of the Step-in Schedule of Works and Services pursuant to Clauses 4.2.5 or 4.2.6 or as to whether the Security Trustee has complied with Clause 4.2.7 or Clause 4.2.8, or as to the provision of consent by the Trust pursuant to Clauses 4.2.7 and 4.2.8, which is not resolved within 10 Working Days, the matter in dispute or the subject of that disagreement shall be determined by reference to the Disputes Resolution Procedure as if the same were incorporated herein, with references to the Project Co being treated as references to the Security Trustee, mutatis mutandis.
- 4.2.12 Where any matter is determined by reference to the Disputes Resolution Procedure pursuant to Clause 4.2.11 and, during the period from the date of dispute or disagreement until the relevant determination (the "**Period of Dispute**"), the Project Co is liable to pay or allow liquidated damages pursuant to Clause 9.3.3 of the Project Agreement or an amount continues to accrue under Clause 43.6.2 of the Project Agreement for the purposes of calculating the limit on the amount which the Trust may claim on termination of the Project Documents pursuant to Clause 43.6 of the Project Agreement:
- (A) if the Dispute is decided entirely in favour of the Trust, the Project Co shall remain liable for such liquidated damages or, as the case may be, the maximum amount which the Trust shall be entitled to claim shall include the relevant amount under Clause 43.6.2 of the Project Agreement in respect of the Period of Dispute for the purposes of Clause 43.6 of the Project Agreement;
  - (B) if the Dispute is decided entirely in favour of the Security Trustee, the Project Co shall not be liable for any liquidated damages which occur during such period nor shall the amount under Clause 43.6.2 of the Project Agreement in respect of the Period of Dispute be included in calculating the maximum amount which the Trust is entitled to claim for the purposes of Clause 43.6 of the Project Agreement; and
  - (C) if the Dispute is decided only partly in favour of each Party, the question of the extent to which the Project Co shall remain liable for liquidated damages occurring during such period or, as the case may be, the extent of the relevant amount which shall be included for the purpose of Clause 43.6.2 of the Project Agreement of the Project Agreement in respect of the Period of Dispute shall, itself, be a matter for determination pursuant to the Disputes Resolution Procedure.
- 4.2.13 If:
- (A) during the 10 Working Days period referred to in Clause 4.2.4, the Security Trustee decides not to issue or procure the issue of a Step-in Undertaking, it shall promptly notify the Trust of such decision; or
  - (B) by the expiry of the 10 Working Days period referred to in Clause 4.2.4, the Security Trustee shall not have given the Trust an Interim Step-in Notice; or

- (C) subject to Clause 4.2.14, the Step-in Schedule of Works and Services shall not have been agreed or determined by the Proposed Step-in Date; or
- (D) by the expiry of the five Working Days period referred to in Clause 4.2.7, the Security Trustee shall not have provided the information referred to in Clause 4.2.7; or
- (E) subject to Clause 4.2.14, where applicable, the Trust shall not have provided or be deemed to have provided its consent pursuant to Clauses 4.2.7 and 4.2.8 by the Proposed Step-in Date,

in any such case, the Step-in Notice shall be deemed to have been withdrawn and the rights and obligations of the Parties shall be construed as if the Step-in Notice had not been given and no liability shall be incurred by any Party as a result thereof.

4.2.14 The Proposed Step-in Date shall be postponed from time to time by such period as is reasonable in all the circumstances, having regard to the time periods provided for in this Clause 4.2, the time reasonably required by the Security Trustee, the Beneficiaries' Representative and the Beneficiaries to evaluate any further information relating to Payment Obligations and Consequential Liabilities notified pursuant to Clause 4.2.3 and to avoid the occurrence of the Proposed Step-in Date before the procedures contemplated by this Clause 4.2 have been carried out:

- (A) where the Trust has provided further information to the Security Trustee pursuant to Clause 4.2.3; or
- (B) where any matter is determined or in the process of being determined pursuant to Clause 4.2.11.

4.2.15 Following service of an Interim Step-in Notice and provided the Step-in Notice shall not have been deemed to have been withdrawn under Clause 4.2.13 or revoked under Clause 7, the Security Trustee shall deliver or, where the Beneficiaries' Representative is not the Security Trustee, shall procure that the Beneficiaries' Representative shall deliver to the Trust on the Proposed Step-in Date (subject to Clause 4.2.14) a written undertaking (in form and substance satisfactory to the Trust) (the "**Step-in Undertaking**"), incorporating a clause in terms similar to Clause 11 (but only to the extent that there will not be double counting of default interest accruing under any Project Document and this Agreement) and incorporating a clause permitting the Trust to set off or withhold payments due to the Beneficiaries' Representative as contemplated in Clause 25.1.2:

- (A) to pay or procure the payment to the Trust, within 15 days of demand by the Trust, any Payment Obligation notified by the Trust pursuant to Clause 4.2.1(A) as amended in any notice served pursuant to Clause 4.2.3, as agreed or determined pursuant to this Clause 4.2 and unpaid by the Step-in Date; and

- (B) to perform or discharge or procure the performance or discharge of its obligations under the Step-in Schedule of Works and Services as agreed or determined pursuant to this Clause 4.2; and
- (C) to perform or discharge or procure the performance or discharge of all the obligations of the Project Co under the Project Documents falling due for performance or discharge on or after the Step-in Date (except for any such obligations arising in respect of any Consequential Liabilities) provided that during the performance or discharge of the Beneficiaries' Representative's obligations under the Step-in Schedule of Works and Services, the Project Documents shall be deemed to be amended to reflect the terms of the same.

4.2.16 Nothing in this Agreement shall prejudice the rights of the Security Trustee and the Beneficiaries to appoint a Receiver or to petition for or consent to the making of an order for the appointment of an Administrator, provided the Security Trustee notifies the Trust in accordance with Clause 3.3.1.

4.2.17 On or before the Step-in Date and conditional upon the delivery of the Step-in Undertaking, the Trust shall:

- (A) grant the Beneficiaries' Representative a non-exclusive right to occupy, enter onto and remain on the Site for the purposes of carrying out the Operations and all purposes ancillary and related thereto; and
- (B) grant the Beneficiaries' Representative all such other rights, titles and interests as have been granted to the Project Co under or in connection with the Project Documents.

The Beneficiaries' Representative's rights, titles and interests pursuant to this Clause 4.2.17 shall terminate on expiry of the Step-in Period.

4.2.18 With effect from the Step-in Date and conditional upon the delivery of the Step-in Undertaking, the Beneficiaries' Representative shall, during the Step-in Period, have the benefit of and shall be entitled to enforce against the Trust, any and all of the Trust's obligations to the Project Co under the Project Documents and the Trust undertakes to perform such obligations in favour of the Beneficiaries' Representative, which performance shall constitute performance and discharge of such obligations as regards the Project Co.

#### 4.3 **Additional Obligations**

4.3.1 During the Step-in Period, the Trust shall, within 20 Working Days of becoming aware of the same, notify the Security Trustee of any further Performance Obligations which were due for performance or discharge by the Project Co but which were unperformed or undischarged, in each case, as at the Step-in Date, provided that, in each such case, the Trust had no actual knowledge of the same as at the Step-in Date and could not reasonably have been expected to have had such knowledge. If the Trust fails to give such notice within 20 Working Days of becoming aware of such further Performance Obligations, it shall lose the right to require an amendment to the Step-in Schedule of Works and Services and the Beneficiaries' Representative shall have no obligation or liability in respect thereof. Following receipt of

any such notice by the Security Trustee, the Trust and the Security Trustee shall negotiate in good faith for a period of up to 20 Working Days to seek to agree consequential amendments to the scope of the Beneficiaries' Representative's obligations in respect of the Step-in Schedule of Works and Services. Any disagreement between the Parties in respect of any such consequential amendments, which is not resolved by the expiry of such 20 Working Day period, shall be determined by reference to the Disputes Resolution Procedure as if the same were incorporated herein, with reference to the Project Co being treated as references to the Security Trustee or the Beneficiaries' Representative (as the case may be), mutatis mutandis.

- 4.3.2 Following agreement or determination of any such consequential amendments pursuant to Clause 4.3.1, the Security Trustee shall, within 15 Working Days thereafter, decide whether to deliver and deliver or, where the Beneficiaries' Representative is not the Security Trustee, shall procure that the Beneficiaries' Representative shall decide whether to deliver and deliver to the Trust, an amended Step-in Schedule of Works and Services, in each case, in form and substance satisfactory to the Trust.
- 4.3.3 If the Beneficiaries' Representative decides not to deliver and/or does not deliver an amended Step-in Schedule of Works and Services:
- (A) the Trust shall be entitled to terminate the Step-in Period on giving the Beneficiaries' Representative prior notice of at least seven days on or before the Phase 1 Completion Date and at least 28 days after the Phase 1 Completion Date; and
  - (B) the Beneficiaries' Representative may terminate the Step-in Period on giving the Trust prior notice of at least seven days on or before the Phase 1 Completion Date and at least 28 days after the Phase 1 Completion Date.

In either case, where the Step-in Period is terminated after the Phase 1 Completion Date, the Beneficiaries' Representative shall be released from any obligation to expend capital in providing, renewing or replacing any assets at the Hospital pursuant to any of the Services or in effecting any Variation or in connection with completing the Phase 2 Works, where such obligation would otherwise fall due for performance during the period after service of the termination notice. Such release shall be without prejudice to any liability of the Beneficiaries' Representative arising from any failure to perform any such obligation during any period before service of the termination notice.

- 4.3.4 Without prejudice to the operation of Clause 5.13, following the Step-in Date the Project Co shall have no obligation or liability in respect of any Performance Obligation due for performance before the Step-in Date where the Trust had actual knowledge of such Performance Obligation as at the Step-in Date and failed to notify the same to the Security Trustee pursuant to Clauses 4.2.1 or 4.2.3 or where the Trust becomes aware of such Performance Obligation during the Step-in Period and fails to notify the Beneficiaries' Representative of such Performance Obligation within 20 Working Days.

4.3.5 For the avoidance of doubt, the Trust shall have no claim against the Beneficiaries' Representative in respect of any Payment Obligations except to the extent that the same have been notified to the Security Trustee pursuant to Clause 4.2.1 or 4.2.3 and agreed or determined pursuant to Clause 4.2;

4.3.6 The Trust shall have no claim against the Beneficiaries' Representative in respect of Consequential Liabilities.

#### 4.4 **Restriction of Rights of Termination**

4.4.1 During the Step-in Period, the Trust shall only be entitled to exercise its rights of termination under the Project Documents:

- (A) where the same arise as a result of Force Majeure; or
- (B) if the Beneficiaries' Representative fails to pay within 14 days of the due date, any amount owed by it to the Trust; or
- (C) if a material breach by the Beneficiaries' Representative of its obligations under the Step-in Schedule of Works and Services (which the Trust reasonably considers to be a material obligation) shall arise which (where remediable) is not remedied within any applicable grace period, provided that the Trust shall have notified the Beneficiaries' Representative of such material breach within 20 Working Days of becoming aware of the same; or
- (D) if a material breach by the Beneficiaries' Representative of any of its other obligations under the Step-in Undertaking (which the Trust reasonably considers to be a material obligation) shall arise which (where remediable) is not remedied within any applicable grace period, provided that the Trust shall have notified the Beneficiaries' Representative of such material breach within 20 Working Days of becoming aware of the same; or
- (E) if the Trust exercises its rights to terminate any of the Project Documents pursuant to Clause 3.5.1 of the Project Agreement.

4.4.2 Notwithstanding the provisions of Clause 4.4.1, following any exercise of its rights of termination by the Trust pursuant to such Clause, the Security Trustee or the Beneficiaries' Representative may within 10 Working Days, refer the question of whether or not such rights have been wrongfully exercised to the Disputes Resolution Procedure, as if the same were incorporated herein, with references to the Project Co being treated as references to the Security Trustee or the Beneficiaries' Representative (as the case may be), mutatis mutandis. Termination of the Project Documents shall not take effect unless and until it is finally determined in accordance with the Disputes Resolution Procedure (as so incorporated) that such exercise is not wrongful.

#### 4.5 **Step-Out**

The Beneficiaries' Representative may, at any time, terminate the Step-in Period on giving the Trust prior notice of at least seven days on or before the Phase 1

Completion Date and at least 28 days after the Phase 1 Completion Date. The date of expiry of such notice shall be the "**Step-out Date**". The occurrence of the Step-out Date shall not affect the continuation of the Project Co's obligations towards the Trust under the Project Documents.

#### 4.6 **Expiry of Step-in Period**

Where the Step-in Period expires:

- 4.6.1 by reason of the occurrence of the Novation Effective Date, the Beneficiaries' Representative shall be automatically released from all its obligations, liabilities and duties under or in respect of the Step-in Undertaking (the "**Step-in Obligations**") but without prejudice to the obligations of the Proposed Substitute in respect of the same.
- 4.6.2 in all other circumstances, the Beneficiaries' Representative shall be automatically released from all Step-in Obligations, except for any which have fallen due for performance or discharge on or before the expiry of the Step-in Period and which have not been fully and unconditionally performed or discharged.

#### 4.7 **Termination Notice**

Any Termination Notice shall be deemed to be automatically withdrawn upon the Step-in Date.

### 5. **NOVATION**

#### 5.1 **Proposed Substitute**

5.1.1 At any time:

- (A) before the expiry of the relevant Termination Notice or, if no Termination Notice is then outstanding, at any time after service of an Acceleration Notice, in either case, where no Step-in Notice has been given; or
- (B) before the Proposed Step-in Date, where a Step-in Notice has been given; or
- (C) during the Step-in Period,

the Security Trustee, a Receiver or an Administrator may give notice (a "**Proposed Novation Notice**") to the Trust that it wishes another person (a "**Proposed Substitute**") to assume, by way of sale, transfer or other disposal, the rights and obligations of the Project Co under the Project Documents (as deemed amended to reflect any Step-in Schedule of Works and Services then outstanding), together with any Step-in Obligations outstanding on the Proposed Novation Date. Such notice shall specify a date on which such assumption is to be effective (the "**Proposed Novation Date**"), which date shall where, notice is served under Clause 5.1.1 (A) or Clause 5.1.1 (C), fall not later than 90 days after the date of the Proposed Novation Notice and, where notice is served under Clause 5.1.1 (B), fall not later than the Proposed Step-in Date.



- 5.1.2 There shall be no restriction on the number of Proposed Novation Notices which may be given pursuant to Clause 5.1.1, provided that, after exercising any right to serve a Proposed Novation Notice pursuant to this Clause 5.1 and where no Step-in Undertaking is outstanding:
- (A) during the period up to the earliest of (1) the Novation Effective Date, (2) the date of revocation of a Proposed Novation Notice or any Interim Novation Notice and (3) the date of withdrawal or deemed withdrawal of a Proposed Novation Notice or any Interim Novation Notice, the Security Trustee shall use its reasonable endeavours to minimise any disruption at the Hospital, having regard to the Trust's obligations to provide clinical services, caused by the Security Trustee exercising its rights of access under 5.2.2; and
  - (B) where required by the Trust, after the Novation Effective Date, the Proposed Substitute shall continue to use any person engaged by the Trust to carry out any of the Services during the period following the relevant Termination Notice for such period as is reasonable having regard to the fees and other terms of the relevant contract, provided that the Trust shall consult with the Security Trustee with regard to any such engagement and shall not, without the consent of the Security Trustee (not to be unreasonably withheld or delayed), engage any such person for a period in excess of six months..
- 5.1.3 Subject to Clause 6.1, the Trust shall not be entitled to terminate or rescind all or any part of the Project Documents during the notice period specified in a Proposed Novation Notice, except pursuant to Clause 4.4.1, provided that such period shall be extended where the Proposed Novation Date is postponed pursuant to Clause 5.10. For the avoidance of doubt, the issue of a Proposed Novation Notice shall not impose any legal obligation on the Security Trustee, the Agent, any Beneficiary, any Beneficiaries' Representative or any Proposed Substitute to execute or procure the execution of any novation.

## 5.2 Information

Where no Step-in Undertaking has been given:

- 5.2.1 as soon as reasonably practicable after and, in any event, within 21 days of receipt of any Proposed Novation Notice, the Trust shall notify the Security Trustee of:
- (A) the amount of any sums which are due and payable but unpaid by the Project Co to the Trust as at the date of the Proposed Novation Notice and of any further sums which shall become so due and payable up to and including the Proposed Novation Date, such sums (the "**Novation Payment Obligations**") to include any sums due and payable or which shall become due and payable up to and including the Proposed Novation Date pursuant to Clause 36.2 of the Project Agreement but to exclude any liabilities (the "**Novation Consequential Liabilities**") for Loss or damage suffered by the Trust on account of the acts or omissions of the Project Co; and

- (B) any other material obligations or liabilities under any Project Document, excluding any Novation Payment Obligations and Novation Consequential Liabilities (the "**Novation Performance Obligations**") which should have been performed or discharged by the Project Co but which have not been so performed or discharged as at the date of the Proposed Novation Notice and of any further such obligations and liabilities which shall become outstanding up to and including the Proposed Novation Date; and
- (C) the amount of any Novation Consequential Liabilities outstanding at the date of the Proposed Novation Notice and of any further Novation Consequential Liabilities which shall become outstanding up to and including the Proposed Novation Date,

in each case, of which the Trust has actual knowledge. The Trust shall take all reasonable steps to ascertain what sums are or will be so due and payable and what liabilities and obligations are or will be so outstanding.

5.2.2 the Trust shall, during the period following the issue of any Proposed Novation Notice (unless and until such Proposed Novation Notice is withdrawn or revoked) and prior to any Proposed Novation Date, provide either the Security Trustee or, as the case may be, the Proposed Substitute with such additional information as is reasonably requested from time to time in relation to the Trust, the Project and the Project Documents and the transactions contemplated therein and shall grant the Security Trustee, the Proposed Substitute and their respective representatives, on reasonable notice and at reasonable times, full access to the Site, the Works, the Hospital and all information the Trust is required to maintain under the Project Documents and, to the extent that the Trust is reasonably able to procure the same, to all persons engaged in the Project.

5.2.3 the Trust shall notify the Security Trustee as soon as reasonably practicable of:

- (A) any change in such sums, obligations or liabilities referred to in Clause 5.2.1; and
- (B) any further such sums, obligations or liabilities falling due and payable but unpaid or falling due for performance or discharge and unperformed or undischarged (as the case may be) or suffered by the Trust;

in each case, of which the Trust has actual knowledge, before the Novation Effective Date.

5.2.4 within 10 Working Days of receipt of all the information referred to in Clause 5.2.1 or, if before expiry of such period, further information is provided pursuant to Clause 5.2.3, within 10 Working Days of receipt of the last of such further information, the Security Trustee shall give notice to the Trust (an "**Interim Novation Notice**") if it is still its intention to proceed with the proposed novation. For the avoidance of doubt, none of the Security Trustee, the Agent, the Beneficiaries or the Proposed Substitute shall incur any liability

or obligation as a result of issuing an Interim Novation Notice, notwithstanding that the proposed novation is not subsequently effected.

- 5.2.5 during the period between receipt by the Trust of an Interim Novation Notice and the Proposed Novation Date, the Trust and the Security Trustee shall negotiate in good faith to agree a schedule (the "**Novation Schedule of Works and Services**") of action to be taken by the Proposed Substitute in respect of Novation Performance Obligations notified by the Trust pursuant to Clauses 5.2.1 or 5.2.3, to remedy any breach by the Project Co of such Novation Performance Obligations (where remediable) or place the Trust in substantially the same position as if such breach had not occurred (where irremediable), and of any consequential effect such schedule will have on the continued performance of the obligations of the Project Co under the Project Documents. The Novation Schedule of Works and Services shall specify the time within which each such breach must be rectified, the action to be taken, any such consequential effect and any period within which each such affected obligation must be performed after the Proposed Novation Date. The Novation Schedule of Works and Services shall provide for reasonable grace periods which shall, in any event, be no shorter than those in respect of the relevant obligation (if any) in the Project Documents. In addition, the Novation Schedule of Works and Services shall, where relevant, provide for reasonable periods during which the Proposed Substitute shall be deemed to have achieved the Required Performance Standard in respect of Services for the purposes of Clauses 22.6 and 23.1 of the Facilities Management Agreement and Clause 43.1.4 of the Project Agreement.
- 5.2.6 if, at any time prior to the Proposed Novation Date, any further information is provided in respect of Novation Performance Obligations pursuant to Clause 5.2.3, the Trust and the Security Trustee shall negotiate in good faith to seek to agree consequential amendments to any previously agreed Novation Schedule of Works and Services.

### 5.3 **Consent to Novation**

A novation in accordance with a Proposed Novation Notice shall be subject to the consent of the Trust. Following agreement or determination of the Novation Schedule of Works and Services or any amendments thereto effected pursuant to Clause 5.2.6, or if there is no Novation Schedule of Works and Services, no later than 20 Working Days before the Proposed Novation Date the Security Trustee shall or shall request that the Proposed Substitute shall, within five Working Days, provide the Trust with such information as the Trust reasonably requires to enable it to decide whether or not to grant such consent, including:

- 5.3.1 the name and registered address of the Proposed Substitute;
- 5.3.2 the names of the shareholders in the Proposed Substitute and the share capital owned by each of them;
- 5.3.3 the names of the directors and the secretary of the Proposed Substitute;

- 5.3.4 details of the means by which it is proposed to finance the Proposed Substitute (including the extent to which such finance is committed and any conditions precedent as to its availability for drawing); and
- 5.3.5 details of the resources (including contractual arrangements) which are to be available to the Proposed Substitute to enable it to perform:
  - (A) its obligations under the Project Documents (as deemed amended to reflect any Novation Schedule of Works and Services or, as the case may be, Step-in Schedule of Works and Services then outstanding); and
  - (B) where a Step-in Undertaking has been given, the Step-in Obligations outstanding at the Proposed Novation Date.

#### 5.4 **Grant of Consent**

The Trust may withhold or delay consent to a novation if, but only if, the Security Trustee or the Proposed Substitute has failed to show that:

- 5.4.1 the Proposed Substitute has the legal capacity, power and authorisation to become a party to and perform the obligations of the Project Co under the Project Documents (as deemed amended to reflect any Novation Schedule of Works and Services or, as the case may be, Step-in Schedule of Works and Services then outstanding) and, where a Step-in Undertaking has been given, the Step-in Obligations outstanding at the Proposed Novation Date;
- 5.4.2 if credit approval required by any funder of the Proposed Substitute is obtained, the technical competence and financial standing of or the technical and financial resources available to, the Proposed Substitute would be sufficient to perform the obligations of the Project Co under the Project Documents (as deemed amended to reflect any Novation Schedule of Works and Services or, as the case may be, Step-in Schedule of Works and Services then outstanding) and, where a Step-in Undertaking has been given, any Step-in Obligations outstanding on the Proposed Novation Date; and
- 5.4.3 there are no other material grounds which render the Proposed Substitute unacceptable to the Trust (acting reasonably).

The Trust shall notify the Security Trustee within 15 Working Days of the later of receipt of a Proposed Novation Notice and all information required under Clause 5.3 as to whether or not it has decided to grant such consent and, if it fails to give such notice within such 15 Working Days period, the Trust shall be deemed to have given its consent. Any notice given by the Trust pursuant to this Clause 5.4 shall only be revocable where the Trust subsequently notifies the Security Trustee of any further matter in accordance with Clause 5.2.3 and the Security Trustee or the Proposed Substitute fails to show that the matters referred to in Clauses 5.4.1, 5.4.2 and 5.4.3 are satisfied in respect of or as a result of such further matter.

**5.5 Consent withheld**

Without prejudice to Clause 5.7, if the Trust withholds its consent to a novation:

- 5.5.1 the Security Trustee, a Receiver or an Administrator shall be entitled (if necessary, more than once) to provide changed particulars relating to the same Proposed Substitute or particulars relating to another Proposed Substitute pursuant to Clause 5.3, which the Security Trustee or the Receiver or the Administrator (as the case may be) has good cause to believe would fulfil the requirements of Clauses 5.4.1, 5.4.2 and 5.4.3.
- 5.5.2 where the Proposed Novation Notice was served during the Step-in Period, the Step-in Period shall continue.

**5.6 Trust Step-in**

If the Trust exercises or continues any earlier exercise of its rights under Clause 36 of the Project Agreement between the date of any Proposed Novation Notice and the Novation Effective Date, it shall liaise and co-operate fully with the Security Trustee and the Proposed Substitute with regard to the transfer by it of performance of the Project Co's obligations or those of the Beneficiaries' Representative, to the Proposed Substitute on the Novation Effective Date.

**5.7 Disputes**

If the Security Trustee disputes any information provided by the Trust pursuant to Clauses 5.2.1 or 5.2.3 or if there is any disagreement between the Parties in respect of any Novation Schedule of Works and Services pursuant to Clauses 5.2.5 or 5.2.6 or as to whether the Security Trustee or the Proposed Substitute has complied with Clause 5.3 or 5.4 or as to the provision of consent by the Trust pursuant to Clauses 5.3 and 5.4 which is not resolved within 10 Working Days, the matter in dispute or the subject of that disagreement shall be determined by reference to the Disputes Resolution Procedure as if the same were incorporated herein, with references to the Project Co being treated as references to the Security Trustee, mutatis mutandis.

**5.8 Liquidated Damages**

Where no Step-in Undertaking has been given and any matter is determined by reference to the Disputes Resolution Procedure pursuant to Clause 5.7 and, during the Period of Dispute the Project Co is liable to pay or allow liquidated damages pursuant to Clause 9.3.3 of the Project Agreement or an amount equal to liquidated damages continues to accrue under Clause 43.6.2 of the Project Agreement for the purposes of calculating the limit on the amount which the Trust may claim on termination of the Project Documents pursuant to Clause 43.6 of the Project Agreement:

- 5.8.1 if the Dispute is decided entirely in favour of the Trust, the Project Co shall remain liable for such liquidated damages or, as the case may be, the maximum amount which the Trust shall be entitled to claim shall include the relevant amount under Clause 43.6.2 of the Project Agreement in respect of the Period of Dispute for the purposes of Clause 43.6 of the Project Agreement;

- 5.8.2 if the Dispute is decided entirely in favour of the Security Trustee, the Project Co shall not be liable for any liquidated damages which occur during such period nor shall the amount under Clause 43.6.2 of the Project Agreement in respect of the Period of Dispute be included in calculating the maximum amount which the Trust is entitled to claim for the purposes of Clause 43.6 of the Project Agreement; and
- 5.8.3 if the Dispute is decided only partly in favour of each Party, the question of the extent to which the Project Co shall remain liable for liquidated damages occurring during such period or, as the case may be, the extent of the relevant amount which shall be included for the purpose of Clause 43.6.2 of the Project Agreement in respect of the Period of Dispute shall, itself, be a matter for determination pursuant to the Disputes Resolution Procedure.

**5.9 Withdrawal of Proposed Novation Notice**

If:

- 5.9.1 during the 10 Working Days period referred to in Clause 5.2.4, the Security Trustee decides not to proceed with the novation, it shall promptly notify the Trust of such decision; or
- 5.9.2 by the expiry of the 10 Working Days period referred to in Clause 5.2.4, the Security Trustee shall not have given the Trust an Interim Novation Notice; or
- 5.9.3 subject to Clause 5.10, any Novation Schedule of Works and Services shall not have been agreed or determined by the Proposed Novation Date; or
- 5.9.4 by the expiry of the five Working Days period referred to in Clause 5.3, the Security Trustee or the Proposed Substitute shall not have provided the information referred to in Clause 5.3; or
- 5.9.5 subject to Clause 5.10, the Trust shall not have provided or be deemed to have provided its consent pursuant to Clauses 5.3 and 5.4 by the Proposed Novation Date,

in any such case, the Proposed Novation Notice shall be deemed to have been withdrawn and the rights and obligations of the Parties shall be construed as if the Proposed Novation Notice had not been given and no liability shall be incurred by any Party as a result thereof.

**5.10 Proposed Novation Date**

The Proposed Novation Date shall be postponed from time to time by such period as is reasonable in all the circumstances, having regard to the time periods provided for in this Clause 5, the time reasonably required by the Security Trustee, the Proposed Substitute and the Beneficiaries to evaluate any further information relating to Novation Payment Obligations and Novation Consequential Liabilities notified pursuant to Clause 5.2.3 and to avoid the occurrence of the Proposed Novation Date before the procedures contemplated by this Clause 5 have been carried out:

- (A) where the Trust has provided further information to the Security Trustee pursuant to Clause 5.2.3; or

- (B) where any matter is determined or in the process of being determined pursuant to Clause 5.7.

**5.11 Implementation of Novation**

5.11.1 Following service of an Interim Novation Notice and provided the Proposed Novation Notice shall not have been deemed to have been withdrawn under Clause 5.9 or revoked under Clause 7, on the Proposed Novation Date subject to Clause 5.10 or, if such date has already passed, on a date which is as soon as reasonably practicable and, in any event, not later than 15 Working Days after the date of notification in accordance with Clause 5.4:

- (A) the Trust and the Project Co shall enter into a novation agreement and any other requisite agreements with the Proposed Substitute, in form and substance satisfactory to each Party (acting reasonably), pursuant to which the Proposed Substitute shall be granted all of the rights and assume all of the obligations and liabilities of the Project Co under the Project Documents, becoming a party to the Project Documents in place of the Project Co and, thereafter, being treated as if named as a party to the Project Documents in place of the Project Co, provided that neither the Agent nor the Security Trustee will be in breach of any of its obligations under this Agreement if the Proposed Substitute does not enter into any such agreement; and
- (B) the Trust shall enter into any requisite agreements with the Proposed Substitute and the Beneficiaries' Representative, in form and substance satisfactory to each Party (acting reasonably), pursuant to which the Proposed Substitute shall assume all of the Step-in Obligations then outstanding and any other rights and obligations of the Security Trustee under this Agreement which are specified by the Security Trustee, provided that neither the Agent nor the Security Trustee will be in breach of any of its obligations under this Agreement if the Proposed Substitute or, as the case may be, the Beneficiaries' Representative does not enter into any such agreement.

5.11.2 During the performance or discharge of the Proposed Substitute's obligations under any Step-in Schedule of Works and Services or Novation Schedule of Works and Services, the Project Documents shall be deemed to be amended to reflect the terms of the same.

5.11.3 On and after the Novation Effective Date, the Trust shall owe its obligations under the Project Documents arising on and after such date to the Proposed Substitute and the receipt, acknowledgement or acquiescence of the Proposed Substitute shall be a good discharge.

## 5.12 Direct Agreement

Without prejudice to the generality of the foregoing, if so requested, the Trust shall execute, on or prior to the Novation Effective Date, a direct agreement with the financiers of the Proposed Substitute substantially in the form, mutatis mutandis, of this Agreement.

## 5.13 Amendment of Schedule of Works and Services

5.13.1 After the Novation Effective Date, the Trust shall, within 20 Working Days of becoming aware of the same, notify the Proposed Substitute of any further Performance Obligations or Novation Performance Obligations which were due for performance or discharge and unperformed or undischarged at that date provided that, where such obligations were due for performance on or before any earlier Step-in Date, the Trust had no actual knowledge of the same as at the Step-in Date and had not lost the right to require an amendment to the Step-in Schedule of Works and Services by operation of Clause 4.3 and provided further that where no Step-in Undertaking has been given, the Trust had no actual knowledge of the same as at the Novation Effective Date.

5.13.2 Following receipt of any such notice by the Proposed Substitute, the Trust and the Proposed Substitute shall negotiate in good faith for a period of up to 20 Working Days to seek to agree consequential amendments to the scope of the Proposed Substitute's obligations in respect of any Step-in Schedule of Works and Services or Novation Schedule of Works and Services. Any disagreement between the Parties in respect of any such consequential amendments, which is not resolved by the expiry of such 20 Working Days, shall be determined by reference to the Disputes Resolution Procedure.

5.13.3 If the Trust fails to give notice of any further Performance Obligations or Novation Performance Obligations within 20 Working Days of becoming aware of the same, it shall lose the right to require an amendment to the Step-in Schedule of Works and Services or Novation Schedule of Works and Services (as the case may be) and the Proposed Substitute shall have no obligation or liability in respect thereof.

## 5.14 Exclusions

5.14.1 Where a Step-in Undertaking has been given, the Trust shall have no claim against the Proposed Substitute or Project Co in respect of Payment Obligations except to the extent that the same were notified to the Security Trustee pursuant to Clause 4.2.1 or 4.2.3 and agreed or determined pursuant to Clause 4.2.11.

5.14.2 Where no Step-in Undertaking has been given, the Trust shall have no claim against the Proposed Substitute or Project Co in respect of Novation Payment Obligations except to the extent that the same were notified to the Security Trustee pursuant to Clause 5.2.1 or 5.2.3 and agreed or determined pursuant to Clause 5.7.

5.14.3 Where a Step-in Undertaking has been given, the Trust shall have no claim against the Proposed Substitute or Project Co in respect of Consequential Liabilities except to the extent that:



- (A) the same were notified to the Security Trustee pursuant to Clause 4.2.1 or 4.2.3 and agreed or determined pursuant to Clause 4.2.11; or
- (B) the same are notified to the Security Trustee during the Step-in Period and within 20 Working Days of the Trust becoming aware of the same.

5.14.4 Where no Step-in Undertaking has been given, the Trust shall have no claim against the Proposed Substitute or the Project Co in respect of Novation Consequential Liabilities except to the extent that:

- (A) the same were notified to the Security Trustee pursuant to Clause 5.2.1 or 5.2.3 and agreed or determined pursuant to Clause 5.7; or
- (B) the same are notified to the Proposed Substitute, during the period of six months following the Novation Effective Date and within 20 Working Days of the Trust becoming aware of the same.

#### 5.15 Termination After Novation

5.15.1 Subject to Clause 5.15.2, after the Novation Effective Date, the Trust shall be entitled to exercise its rights of termination under the Project Documents only in respect of any event arising or breach discovered after that date (any expiry of any remedy period referred to in the Project Agreement or any other Project Document where the act or omission giving rise to the commencement of such remedy period remains unremedied being deemed for these purposes to be an event arising after that date) in each case, subject to:

- (A) expiry of any applicable remedy period provided for in the relevant Project Document; and/or
- (B) the terms of any applicable Step-in Schedule of Works and Services or Novation Schedule of Works and Services (as amended pursuant to Clause 5.13).

5.15.2 The Trust shall not have any right of termination under the Project Documents for any act, omission or non-payment for which the Proposed Substitute or the Project Co is excluded from liability under Clause 5.13.3 or Clause 5.14.

#### 5.16 Novation and Expiry of Step-in Period

If the Step-in Period shall not previously have ended and as at the date of the second anniversary of the Step-in Date:

- 5.16.1 the Security Trustee, a Receiver or an Administrator shall be in the course of conducting discussions in good faith with a Proposed Substitute, the Step-in Period shall not expire but shall continue until such date as is proposed by the Security Trustee, Receiver or Administrator (as the case may be) and agreed by the Trust (acting reasonably); or
- 5.16.2 contracts have been exchanged with a Proposed Substitute (which has been approved by the Trust in accordance with Clauses 5.3 and 5.4) as at such date, the Step-in Period shall not expire but shall continue until the date such contracts are completed, provided that such date shall not be later than 30 days

after exchange or such later period as may be agreed by the Trust (acting reasonably); or

5.16.3 any matter is the subject of a reference to the Disputes Resolution Procedure pursuant to Clause 5.7, the Step-in Period shall not expire but shall continue until the Proposed Novation Date (as may be postponed pursuant to Clause 5.10).

## **6. RIGHTS AND OBLIGATIONS UNDER THE PROJECT DOCUMENTS**

### **6.1 Rights of Termination**

If:

6.1.1 no Step-in Notice or Proposed Novation Notice is given before the relevant Termination Notice expires; or

6.1.2 a Step-in Undertaking is not issued on the date required by Clause 4.2.15; or

6.1.3 the Step-in Notice is withdrawn or, pursuant to Clause 4.2.13, deemed to have been withdrawn; or

6.1.4 the Step-in Period ends other than on the occurrence of the Novation Effective Date; or

6.1.5 in the absence of a Step-in Undertaking, the Trust withholds its consent to a novation pursuant to a Proposed Novation Notice, in accordance with Clauses 5.3 and 5.4; or

6.1.6 in the absence of a Step-in Undertaking, the obligations of the Proposed Substitute set out in Clauses 5.11.1(A) and 5.11.1(B) are not performed on the date required by Clause 5.11.1,

the Trust shall be entitled to:

6.1.7 exercise all of its rights under the Project Documents and act upon any and all grounds for termination available to it in relation to the Project Documents whenever occurring; and/or

6.1.8 pursue any and all claims and exercise any and all rights and remedies against the Project Co.

### **6.2 Project Co's Obligations to Continue**

Subject to the terms of this Agreement, the novation and other agreements referred to in Clause 5.11, the Project Co shall continue to be liable for all its obligations and liabilities, whenever occurring, under or arising from the Project Documents notwithstanding:

6.2.1 the service of a Step-in Notice or the issue of a Step-in Undertaking or the expiry of the Step-in Period or the release of a Step-in Undertaking; or

6.2.2 the service of a Proposed Novation Notice.

### 6.3 Custody Agreement

6.3.1 The Trust shall, upon request by the Security Trustee, notify the Custodian in accordance with Clause 8.1.3 of the Custody Agreement, in respect of the Beneficiaries' Representative or the Proposed Substitute, such that the Beneficiaries' Representative or the Proposed Substitute is permitted to perform or discharge all the obligations of the Project Co under the Custody Agreement with effect from the Step-in Date or the Proposed Novation Date, as the case may be.

6.3.2 Where the Trust has consented to a novation to a Proposed Substitute pursuant to Clause 5, the Trust shall, upon request, cooperate with the Security Trustee and/or the Proposed Substitute in seeking the consent of the Custodian to a novation of the Custody Agreement pursuant to which the Proposed Substitute shall be granted all of the rights and assume all of the liabilities of the Project Co under the Custody Agreement.

## 7. REVOCATION OF NOTICES

A Termination Notice, an Acceleration Notice, a Step-in Notice, an Interim Step-in Notice, an Interim Novation Notice and a Proposed Novation Notice may each be revoked (in writing to the recipient) by the persons giving the notice before the expiry of its respective notice period (which in the case of a Termination Notice shall be the earlier of the giving of a Step-in Notice and the 60 day period referred to in Clause 3.2.2). Upon any such revocation, the rights and obligations of the Parties shall be construed as if the relevant notice had not been given and no liability shall attach to the persons revoking such notice as a result thereof.

## 8. ASSIGNMENT

### 8.1 Binding on Successors and Assigns

This Agreement shall be binding on and shall enure to the benefit of the Parties and their respective successors and permitted assigns and transferees and reference to each Party shall be construed accordingly. In the case of the Trust, its successors shall include any person to which the Secretary of State, in exercising his statutory powers to transfer property, rights and liabilities of the Trust upon the Trust ceasing to exist, transfers the rights and obligations of the Trust under this Agreement.

### 8.2 Restriction on Assignment

No Party shall assign or transfer any part of its respective rights or obligations under this Agreement without the prior consent of the others, provided that:

8.2.1 the Agent may assign or transfer all its rights and obligations under this Agreement to a successor agent under the Senior Bank Facilities Agreement and the Security Trustee may assign or transfer all its rights and obligations to a successor security trustee under the Debenture, in each case, without the consent of the Trust or the Project Co and this Clause 8.2 shall not prevent any Beneficiary assigning or transferring its rights under the Funding Agreements and the Debenture (or any of them) in accordance with the terms thereof; and

8.2.2 subject to Clause 2.5.2, the Trust shall be entitled, without the consent of any other Party, to transfer all its rights and obligations hereunder, in the circumstances contemplated in Clause 45.3.1 of the Project Agreement, to any person to whom the Trust transfers all its rights and obligations under the Project Documents at the same time and provided that:

- (A) any transfer to such other person shall be effected on the same terms as those on which the Trust transfers such rights and obligations; and
- (B) before such transfer is effected:
  - (1) the Trust shall obtain the approval of the Department of Health to such transfer;
  - (2) any breach of the Trust's obligations which is remediable shall be remedied and all sums due to the Project Co or any Beneficiaries Representative under the Project Documents which is outstanding shall be paid; and
  - (3) where the transfer is to another National Health Service trust or any other person with legal personality besides the Secretary of State, the Trust shall procure the delivery of a letter from the Secretary of State to the Beneficiaries from time to time providing financing or funding to the Project Co, any Beneficiaries' Representative or a Proposed Substitute (including by way of hedging arrangements) in respect of the Project or the performance by a Beneficiaries' Representative or Proposed Substitute of its obligations hereunder, mutatis mutandis, in the form of the letter issued pursuant to paragraph 2.5 of Schedule 2 to the Project Agreement.

8.2.3 Upon notification to the Trust that the Agent or the Security Trustee (as the case may be) has resigned:

- (A) where all the liabilities, obligations and rights of the Agent or Security Trustee have been assumed by any replacement agent or, as the case may be, security trustee, the Agent or Security Trustee shall cease to have any liability, obligation or right hereunder (but without prejudice to any liability, obligation or right assumed by the replacement agent or, as the case may be, security trustee);
- (B) if the Agent has resigned without replacement, it will cease to have any continuing liability, obligation or right hereunder (but without prejudice to any accrued liability, obligation or right of any Party as at the date of the Agent's resignation);
- (C) if the Security Trustee has resigned without replacement, this Agreement shall automatically terminate (but without prejudice to any accrued liability, obligation or right of any Party as at the date of the Security Trustee's resignation).

**9. NOTICES**

**9.1 Address**

Except as otherwise stated, all notices or other communications required in connection with this Agreement shall be in writing and sent by hand, by first class prepaid post or by facsimile transmission to the relevant address or facsimile number set out below or to such other address or facsimile number as a Party may notify to the others in writing by not less than five Working Days' prior notice.

**Trust**

Norfolk & Norwich Health Care NHS Trust  
Norfolk & Norwich Hospital  
Brunswick Road  
Norwich  
NR1 3SR

Fax: (01603) 287547

Attention: The Chief Executive

**Security Trustee**

HSBC Bank plc  
27-32 Poultry  
London  
EC2P 2BX

Fax: (020) 7260 8532

Attention: Gary Lindsey, Project Finance

**Agent**

HSBC Investment Bank plc  
Vintners Place  
68 Upper Thames Street  
London EC4V 6BJ

Fax: (020) 7336 9176

Attention: Manager, Project Finance

**Project Co**

Octagon Healthcare Limited

New Norfolk and Norwich Hospital  
Colney Lane  
Norwich  
NR4 7UZ

Fax: (01603) 251701

Attention: Company Secretary

**9.2 Effective receipt**

Notices and other communications shall only be effective when received by the relevant addressee.

**10. PAYMENTS AND TAXES**

**10.1 Payments**

All payments under this Agreement to any Party 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 to the other Parties from time to time.

**10.2 VAT**

10.2.1 All amounts stated to be payable by any Party under this Agreement shall be exclusive of any VAT properly payable in respect of the supplies to which they relate.

10.2.2 Each Party shall pay any VAT properly payable hereunder in respect of any supply made to it under this Agreement, provided that it shall first have received a valid tax invoice in respect of that supply which complies with the requirements of Part III VAT Regulations 1995.

**10.3 Deductions from payments**

All sums payable by a Party to any other Party under this Agreement shall be paid free and clear of all deductions or withholdings whatsoever in respect of Taxation, save as may be required by Law.

**10.4 Payments under the Project Documents**

10.4.1 All payments by the Trust to the Project Co of Usage Fees, Service Fees and IT Service Fees shall be paid to the Proceeds Account and all other payments from the Trust to the Project Co shall be paid to the Compensation Account or to such other account as is designated by the Agent and the Project Co;

10.4.2 All payments by the Trust to the Project Co by way of compensation on termination of the Project Documents shall be paid to such account as the Security Trustee notifies to the Trust;

10.4.3 All payments by the Trust to the Beneficiaries' Representative shall be paid to such account as the Beneficiaries' Representative notifies to the Trust;

10.4.4 All payments by the Trust to a Proposed Substitute shall be paid to such account as the Proposed Substitute notifies to the Trust.

**10.5 Project Co Acknowledgement**

The Project Co acknowledges and confirms that payment by the Trust pursuant to Clause 10.4 shall constitute as good and valid discharge of the Trust's obligations to the Project Co as if payment had been made to it direct.

**11. DEFAULT INTEREST**

Each Party shall be entitled, without prejudice to any other right or remedy, to receive interest on any payment not made on the due date calculated at the Default Interest Rate on a daily basis and on the basis of a 365 day year from the due date up to but excluding the date of payment.

**12. CONFIDENTIALITY**

**12.1 Confidential Information**

In this Clause 12, "**Confidential Information**" means all information relating to any Party, any Beneficiaries' Representative, any Proposed Substitute or any of the Beneficiaries or otherwise relating to the Project (including the tender invitation documentation) which is obtained by any Party or (except in the case of the Agent, the Beneficiaries and the Security Trustee) by any of its Associated Companies or by advisers, directors, officers, employees or agents of any Party or (except in the case of the Agent, the Beneficiaries and the Security Trustee) of any of its Associated Companies whether before or after the Execution Date in writing, orally or in any other form, directly or indirectly from or pursuant to discussions with any Party or its respective directors, officers, employees, agents or advisers in relation to the Project or which is obtained through observations made by any Party or (except in the case of the Agent, the Beneficiaries and the Security Trustee) by any of its Associated Companies or its respective advisers or by directors, employees, consultants or other staff or representatives of any Party or (except in the case of the Agent, the Beneficiaries and the Security Trustee) of any of its Associated Companies at the offices or other premises of any other Party or its agents or advisers. "**Confidential Information**" also includes all analyses, compilations, studies and other documents prepared by any Party or (except in the case of the Agent, the Beneficiaries and the Security Trustee) by any of its Associated Companies or consultants or other staff or representatives, advisers, directors, or employees of any of them which contain or otherwise reflect or are derived from such information.

**12.2 Use of Confidential Information**

Each Party agrees for itself and its respective directors, officers, employees and servants, that it will use any Confidential Information solely for the purpose of enabling it to perform (or to cause to be performed) or to enforce or to consider any of its rights or obligations under this Agreement, the Project Documents, the Funding Agreements, the Senior Bank Documents, the Equity Subscription Agreement and otherwise in respect of the Project.

**12.3 Safeguarding of Confidential Information**

Each Party will treat and safeguard as private and confidential all the Confidential Information received by it.

**12.4 Permitted Recipients**

No Party will at any time disclose the Confidential Information to any person other than to another Party, such of its directors, employees, consultants, advisers and financiers, the Beneficiaries or other financial institutions (potential or committed) considering participating or sub-participating in the funding provided under the Funding Agreements and the Equity Subscription Agreement, any Beneficiaries' Representative or Proposed Substitute or advisers to any of the foregoing and other staff and representatives or of any of its Associated Companies (including, in the case of a Consortium Member, its Associated Companies) as are required bona fide to receive the same for the sole purpose of and to the extent necessary to enable them to perform (or to cause to be performed) or to enforce any of its rights or obligations under this Agreement, the Project Documents, the Equity Subscription Agreement, the Senior Bank Documents and the Funding Agreements and otherwise in respect of the Project or to consider participating or sub-participating in the funding provided under the Funding Agreements or becoming a Beneficiaries' Representative or Proposed Substitute or Agent or Security Trustee. The Party disclosing such information shall procure that each such recipient (a "**Permitted Recipient**") shall:

12.4.1 be informed of the confidential nature of the Confidential Information and that each of such persons to whom Confidential Information is to be disclosed is made aware of the terms of this Clause 12; or

12.4.2 have previously entered into a confidentiality agreement with the Parties on the terms set out in this Clause 12 (mutatis mutandis).

**12.5 Exceptions**

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

12.5.1 which is or comes into the public domain otherwise than through an unauthorised disclosure by that Party or (except in the case of the Agent, any of the Beneficiaries or the Security Trustee) any of its Associated Companies; or

12.5.2 to the extent any Party is compelled to disclose such Confidential Information by Law or any regulatory or government authority (but only to that extent), in which event, the Parties must nevertheless comply with Clause 12.9.

**12.6 Copies**

No Party will make any copies in any form of any documents, disc, tape or other device containing Confidential Information or authorise any other person to do so, except:

12.6.1 for the purpose of supplying Confidential Information to persons to whom disclosure of Confidential Information is expressly permitted by this Clause 12



and for the purpose of using that information in a way permitted by this Clause 12; or

12.6.2 with the prior written consent of the other Party; or

12.6.3 for the use of such Party itself.

## 12.7 **Security**

Each Party will ensure that all Confidential Information (save for Confidential Information which was disclosed orally and has not been reduced to writing or stored on any disc, tape or other devices) in its possession or control is kept in a secure place at all times and is properly protected against theft, damage, loss or unauthorised access.

## 12.8 **Announcements**

Subject to Clause 12.9, no Party will make or permit or procure to be made, any public announcement or disclosure (whether for publication in the press or on the radio, television screen or any other medium or otherwise howsoever) of any Confidential Information or any matters relating thereto, without the prior written consent of the other Parties (which shall not be unreasonably withheld or delayed).

## 12.9 **Disclosure**

If any Party or, except in the case of the Agent, any of the Beneficiaries or the Security Trustee, any of its Associated Companies becomes compelled to disclose any Confidential Information by Law or any regulatory or government authority, the relevant Party (in the case of itself or, except in the case of the Agent, any of the Beneficiaries or the Security Trustee, any of its Associated Companies) shall inform the others in each case in writing of such fact or obligation as soon as reasonably possible after it becomes aware of it and, if possible, before any Confidential Information is disclosed. Each Party agrees to ensure that, in any event and insofar as it is able to procure the same, any such disclosure will be limited to the minimum amount of Confidential Information required to satisfy that disclosure obligation.

## 12.10 **Project Agreement**

The terms of this Clause 12 shall be without prejudice to the obligations of the Trust and the Project Co under Clause 52 of the Project Agreement.

## 13. **PRIORITY OF CLAIMS**

### 13.1 **PKFA**

13.1.1 The Trust confirms that it has made its own independent appraisal of the terms of the Appointments and the Sign-off Letters and of the ability and appropriateness of PKFA to perform the function of model auditor. The Trust covenants and agrees with the Agent and the Security Trustee (for the benefit of the Beneficiaries) that neither the Security Trustee, the Agent nor any Beneficiary accepts or shall have any responsibility to the Trust or shall otherwise be liable to the Trust by reason of or in connection with:

- (A) the adequacy of effectiveness (or otherwise) of the terms of the Appointments or the Sign-off Letters;
- (B) any acts or omissions of PKFA in the performance of the work contemplated in the Appointments or the Sign-off Letters;
- (C) any waivers, amendments, consents, instructions or directions of any nature effected (or not effected) at any time by the Agent, the Security Trustee or any Beneficiary in respect of the Appointments, the Sign-off Letters and/or the work contemplated therein; or
- (D) any other action of any nature taken (or not taken) at any time by the Agent, the Security Trustee or any Beneficiary in respect of the Appointments, the Sign-off Letters and/or the work contemplated therein.

13.1.2 The Trust agrees and acknowledges that, other than pursuant to Clauses 13.1.5 to 13.1.11, neither the Agent, the Security Trustee nor any Beneficiary will be under any fiduciary or other duty or obligation to the Trust in connection with the Appointments, the Sign-off Letters, the work contemplated therein and/or any other arrangements from time to time relating thereto.

13.1.3 Subject to Clauses 13.1.4 and 13.1.5, the Trust undertakes that it will, if so required by the Agent or the Security Trustee before the later to occur of the Senior Discharge Date and the sixth anniversary of the date of this Agreement, make, enforce and prove for any claims that it may have against PKFA (or PKFA's insurers) in respect of the First Appointment, the First Sign-off Letter and/or any work undertaken or to be undertaken by PKFA in connection therewith. All payments and distributions (howsoever described) received by or for the account of the Trust from PKFA (or PKFA's insurers) or in connection with any such claim or otherwise before the later of the Senior Discharge Date and the sixth anniversary of the date of this Agreement will be paid to the Security Trustee for application as contemplated in the Intercreditor Agreement and, until so paid, will be held on trust for the Security Trustee. In addition the Trust will, if so required by the Agent or the Security Trustee before such date, direct any relevant trustee in bankruptcy, liquidator, receiver or other person or officer distributing the assets of PKFA (or PKFA's insurers) to pay distributions and to make payments in respect of any such claims direct to the Security Trustee.

13.1.4 Subject to Clauses 13.1.5 and 13.1.6, the Trust undertakes that it will, if so required by the Agent or the Security Trustee before the later to occur of the Senior Discharge Date and the sixth anniversary of the Amendment Execution Date, make, enforce and prove for any claims that it may have against PKFA (or PKFA's insurers) in respect of the Second Appointment, the Second Sign-off Letter and/or any work undertaken or to be undertaken by PKFA in connection therewith. All payments and distributions (howsoever described) received by or for the account of the Trust from PKFA (or PKFA's insurers) or in connection with any such claim or otherwise before the later of the Senior Discharge Date and the sixth anniversary of the Amendment Execution Date will be paid to the Security Trustee for application as contemplated in the Intercreditor Agreement and, until so paid, will be held on trust for the

Security Trustee. In addition the Trust will, if so required by the Agent or the Security Trustee before such date, direct any relevant trustee in bankruptcy, liquidator, receiver or other person or officer distributing the assets of PKFA (or PKFA's insurers) to pay distributions and to make payments in respect of any such claims direct to the Security Trustee.

- 13.1.5 The Agent or the Security Trustee, as the case may be, shall, forthwith on demand, pay all costs and expenses properly incurred by the Trust (including legal fees and any costs awarded against it) in connection with any claims required by the Agent or the Security Trustee pursuant to Clause 13.1.3 or Clause 13.1.4.
- 13.1.6 The Trust shall have no obligation to make, enforce and prove for any claim or to continue to do so pursuant to Clause 13.1.3 or Clause 13.1.4 where counsel of not less than seven years' call (whose identity has been approved by the Agent or the Security Trustee, such approval not to be unreasonably withheld or delayed) advises either initially or at any time thereafter that there is no reasonable prospect of success or otherwise with the consent of the Agent or the Security Trustee, such consent not to be unreasonably withheld or delayed.
- 13.1.7 Save as contemplated in Clause 13.1.3, the Trust undertakes that it will not, prior to the later of the Senior Discharge Date and the sixth anniversary of the date of this Agreement, commence proceedings or litigation of any nature against PKFA (or PKFA's insurers) or otherwise make any claim against or seek to obtain any recovery from, PKFA (or PKFA's insurers) in respect of the First Appointment, the First Sign-off Letter and/or any work undertaken or to be undertaken by PKFA in connection therewith, without obtaining the prior written consent of the Agent or the Security Trustee. Such consent shall not be withheld or delayed:
- (A) where any such action is required to preserve any potential claims by the Trust; or
  - (B) where neither the Agent nor the Security Trustee has commenced any such proceedings or litigation or otherwise made any such claim against or sought to obtain any recovery from, PKFA (or PKFA's insurers) in respect of the First Appointment, the First Sign-off Letter and/or any work undertaken or to be undertaken by PKFA in connection therewith and the Agent (on behalf of itself and the Banks) and the Security Trustee (on behalf of itself and the Beneficiaries) each confirms that there is no intention of commencing such proceedings or litigation or otherwise making any such claim.

Where consent to such proceedings or litigation or claim or recovery has already been given, no further consent shall be required in respect of any action by the Trust in continuing with the same.

- 13.1.8 Upon the occurrence of the later of the Senior Discharge Date and the sixth anniversary of the date of this Agreement, the Security Trustee shall forthwith:
- (A) inform the Trust of the same;

- (B) account to the Trust for the balance of any amount paid to it pursuant to Clause 13.1.3 which has not been applied by it as contemplated in the Intercreditor Agreement.

13.1.9 Save as contemplated in Clause 13.1.4, the Trust undertakes that it will not, prior to the later of the Senior Discharge Date and the sixth anniversary of the Amendment Execution Date, commence proceedings or litigation of any nature against PKFA (or PKFA's insurers) or otherwise make any claim against or seek to obtain any recovery from, PKFA (or PKFA's insurers) in respect of the Second Appointment, the Second Sign-off Letter and/or any work undertaken or to be undertaken by PKFA in connection therewith, without obtaining the prior written consent of the Agent or the Security Trustee. Such consent shall not be withheld or delayed:

- (A) where any such action is required to preserve any potential claims by the Trust; or
- (B) where neither the Agent nor the Security Trustee has commenced any such proceedings or litigation or otherwise made any such claim against or sought to obtain any recovery from, PKFA (or PKFA's insurers) in respect of the Second Appointment, the Second Sign-off Letter and/or any work undertaken or to be undertaken by PKFA in connection therewith and the Agent (on behalf of itself and the Banks) and the Security Trustee (on behalf of itself and the Beneficiaries) each confirms that there is no intention of commencing such proceedings or litigation or otherwise making any such claim.

Where consent to such proceedings or litigation or claim or recovery has already been given, no further consent shall be required in respect of any action by the Trust in continuing with the same.

13.1.10 Upon the occurrence of the later of the Senior Discharge Date and the sixth anniversary of the Amendment Execution Date, the Security Trustee shall forthwith:

- (A) inform the Trust of the same;
- (B) account to the Trust for the balance of any amount paid to it pursuant to Clause 13.1.4 which has not been applied by it as contemplated in the Intercreditor Agreement.

13.1.11 The Trust shall not effect any transfer, assignment or disposal or take any other action by which any person that is not already party to this Agreement is or may become entitled to any contractual rights against or duty of care from, PKFA pursuant to or in connection with the Appointments, without procuring that each proposed transferee, assignee or other relevant person first accedes to the provisions of this Clause 13.1 by executing accession documentation satisfactory to the Security Trustee and the Agent (acting reasonably).

13.1.12 The obligations of the Trust under this Clause 13.1 shall not be affected or diminished by any waivers, consents, amendments, instructions or other actions of any nature from time to time effected or taken by the Security

Trustee, the Agent or any Beneficiary in respect of the Appointments, the Sign-off Letters and/or the work contemplated therein.

- 13.1.13 The obligations of the Security Trustee and the Agent under this Clause 13.1 shall not be affected or diminished by any waivers, consents, amendments, instructions or other actions of any nature from time to time effected or taken by the Trust in respect of the Appointments, the Sign-off Letters and/or the work contemplated therein.

**13.2 Building Contractor**

13.2.1 The Trust undertakes that it will not, prior to the later of the Senior Discharge Date and the sixth anniversary of the Amendment Execution Date, commence proceedings or litigation of any nature against the Building Contractor or the Building Contractor's Parent Company or otherwise make any claim against or seek to obtain any recovery from the Building Contractor or the Building Contractor's Parent Company or the Building Contractor's insurers or the Building Contractor's Parent Company's insurers in respect of the Construction Collateral Warranty Agreement, without obtaining the prior written consent of the Agent or the Security Trustee. Such consent shall not be withheld or delayed:

- (A) where any such action is required to preserve any potential claims by the Trust; or
- (B) where neither the Agent nor the Security Trustee has commenced any proceedings or litigation or otherwise made any claim against or sought to obtain any recovery from the Building Contractor or the Building Contractor's Parent Company or the Building Contractor's insurers or the Building Contractor's Parent Company's insurers in respect of the Project and the Agent (on behalf of itself and the Banks) and the Security Trustee (on behalf of itself and the Beneficiaries) each confirms that there is no intention of commencing such proceedings or litigation or otherwise making any such claim.

Where consent to such proceedings or litigation or claim or recovery has already been given, no further consent shall be required in respect of any action by the Trust in continuing with the same.

13.2.2 The Trust shall not effect any transfer, assignment or disposal or take any other action by which any person that is not already party to this Agreement is or may become entitled to any contractual rights against or duty of care from the Building Contractor or the Building Contractor's Parent Company pursuant to the Construction Collateral Warranty Agreement, without procuring that each proposed transferee, assignee or other relevant person first accedes to the provisions of this Clause 13.2 by executing accession documentation satisfactory to the Security Trustee and the Agent (acting reasonably).

13.2.3 The obligations of the Trust under this Clause 13.2 shall not be affected or diminished by any waivers, consents, amendments, instructions or other actions of any nature from time to time effected or taken by the Security Trustee, the Agent or any Beneficiary in relation to the Building Contractor or the Building Contractor's Parent Company in respect of the Project.

## **14. AUTHORITY**

### **14.1 Security Trustee's Warranty and Undertaking**

14.1.1 The Security Trustee represents and warrants to and undertakes to the Trust that the Security Trustee is duly authorised by each of the Beneficiaries to assume the obligations expressed to be assumed by it under this Agreement.

14.1.2 The Agent represents and warrants to and undertakes to the Trust that the Agent is duly authorised by each of the Banks to assume the obligations expressed to be assumed by it under this Agreement.

### **14.2 Trust**

The Trust shall not be obliged to make any enquiry as to the authority of the Agent or Security Trustee in doing any act or entering into any document or making any agreement under or in connection with this Agreement.

### **14.3 Trust Representations and Warranties**

14.3.1 The Trust represents and warrants to the Security Trustee and to the Project Co as at the Execution Date that:

- (A) so far as it is aware, there are no outstanding material disputes or material differences between the Trust and any person (besides the Project Co) with respect to the Project or any element of it;
- (B) so far as it is aware, no action, arbitration or administrative proceedings of or before any court or agency has been started or threatened by or against the Trust in relation to the Project Documents;
- (C) to the best of its knowledge and belief, having made all reasonable enquiries of its legal advisers and such other persons as it considers appropriate, the Trust has complied in all material respects with the requirements of all procurement Laws, of the Department of Health and of HM Treasury, in connection with entering into the Project Documents, this Agreement and the Ancillary Documents to which it is a party; and
- (D) to the best of its knowledge and belief, having made all reasonable enquiries of its legal advisers and such other persons as it considers appropriate, the Trust has the necessary power and has taken all steps necessary to enter into the Project Documents, this Agreement and the Ancillary Documents to which it is a party and that its obligations in connection therewith and herewith are legal, valid, binding and enforceable upon it in accordance with applicable law.

14.3.2 The Trust represents and warrants to the Security Trustee and to the Project Co as at the Amendment Execution Date that:

- (A) so far as it is aware, there are no outstanding material disputes or material differences between the Trust and any person (besides the Project Co) with respect to the Project or any element of it;

- (B) so far as it is aware, no action, arbitration or administrative proceedings of or before any court or agency has been started or threatened by or against the Trust in relation to the Supplemental Project Documents;
- (C) to the best of its knowledge and belief, having made all reasonable enquiries of its legal advisers and such other persons as it considers appropriate, the Trust has complied in all material respects with the requirements of all procurement Laws, of the Department of Health and of HM Treasury, in connection with entering into the Supplemental Project Documents, this Agreement and the Supplemental Ancillary Documents to which it is a party;
- (D) to the best of its knowledge and belief, having made all reasonable enquiries of its legal advisers and such other persons as it considers appropriate, the Trust has the necessary power and has taken all steps necessary to enter into the Supplemental Project Documents, this Agreement and the Supplemental Ancillary Documents to which it is a party and that its obligations in connection therewith and herewith are legal, valid, binding and enforceable upon it in accordance with applicable law;
- (E) the Additional Beds Planning Approval permits the development to which it relates to be carried out in accordance with the Project Documents and is, to the best of its knowledge having made all due enquiries, valid and binding and in full force and effect and no approvals are required in relation to planning or highway works in respect of the development to which the Additional Beds Planning Approval relates other than those referred to within the Additional Beds Planning Approval and/or the Planning Agreements;
- (F) to the best of its knowledge having made all due enquiries, no Planning Agreement is or has been required in connection with the development referred to in the Additional Beds Planning Approval other than those in place on the Execution Date;
- (G) condition 3 to the Additional Beds Planning Approval has been satisfied;
- (H) there is no matter on the title to the Site which will prevent the implementation of the development referred to in the Additional Beds Planning Approval; and
- (I) the implementation of the development referred to in the Additional Beds Planning Approval will not breach the Trust's obligations contained in the Call Option Agreement dated 15<sup>th</sup> May, 1997 made between the Trust (1) The Official Custodian for Charities (2) and The Trustees of the John Innes Foundation (3) or the Deed of Grant dated 27<sup>th</sup> September, 1990 made between The University of East Anglia (1) and the Secretary of State for Health (2) or make the compliance with any such obligations materially more onerous on the Trust.

**15. EXPIRY**

Without prejudice to any Step-in Obligations and to the accrued rights and obligations of any Party at the relevant time:

- 15.1 the continuing rights and obligations of the Agent under this Agreement shall be extinguished upon the irrevocable and unconditional repayment of the amounts arising under the Senior Bank Facilities Agreement or when the Project Documents are terminated in accordance with this Agreement, whichever is the earlier; and
- 15.2 notwithstanding the provisions of Clause 15.1, all rights and claims under Clauses 1, 11, 13 and 14 shall survive and continue beyond the termination of the Project Documents until the unconditional repayment of all sums due and owing to the Beneficiaries under the Funding Agreements.

**16. AGENCY**

**16.1 No Delegation**

No provision of this Agreement shall be construed as a delegation by the Trust of any of its statutory authority to the Agent or the Security Trustee or to the Project Co.

**16.2 No Agency**

Save as otherwise provided in this Agreement, none of the Agent, the Security Trustee and the Project Co shall be or be deemed to be an agent of the Trust nor shall the Agent, the Security Trustee or the Project Co hold itself out as having authority or power to bind the Trust in any way.

**16.3 Independent Contractor**

The Parties shall, at all times, be independent contractors and nothing in this Agreement shall be construed as creating any partnership between the Parties or any relationship of employer and employee between the Parties.

**17. WHOLE AGREEMENT**

This Agreement (when read together with the Project Documents and the Ancillary Documents but without prejudice, save to the extent affected hereby, thereto and to any agreement between the Project Co and any of the Security Trustee, the Agent and the Beneficiaries) contains or expressly refers to the entire agreement between the Parties with respect to the specific subject matter of this Agreement and expressly excludes any warranty, condition or other undertaking implied at Law or by custom and supersedes all previous agreements and understandings between the Parties with respect thereto and each of the Parties acknowledges and confirms that it does not enter into this Agreement in reliance on any representation, warranty or other undertaking not fully reflected in the terms of this Agreement and the Project Documents.

**18. WAIVER**

Failure by any Party at any time to enforce any provision of this Agreement or to require performance by the other Parties of any provision of this Agreement shall not be construed as a waiver of such provision and shall not affect the validity of this



Agreement or any part of it or the right of the relevant Party to enforce any provision in accordance with its terms.

**19. RTPA**

To the extent that any provision of this Agreement or any of the Project Documents or other Ancillary Documents is a restriction or information provision for the purposes of the RTPA by virtue of which this Agreement or any Project Document or any other Ancillary Document is registrable under the RTPA, no such restriction or provision shall take effect until the day after particulars of this Agreement and/or the Project Document and/or the Ancillary Document have been furnished to the Director General of Fair Trading in accordance with the RTPA.

**20. COUNTERPARTS**

This Agreement may be executed in one or more counterparts. Any single counterpart or a set of counterparts executed, in either case, by all the Parties shall constitute a full and original instrument for all purposes.

**21. SEVERABILITY**

If any condition, Clause or provision of this Agreement, not being of a fundamental nature, is held to be illegal or unenforceable, the validity or enforceability of the remainder of this Agreement shall not be affected thereby.

**22. COSTS AND EXPENSES**

Subject to Clauses 2.5 and 2.6 of the Project Agreement and to the Senior Bank Facilities Agreement, each Party shall be responsible for paying its own costs and expenses incurred in connection with the negotiation, preparation and execution of this Agreement.

**23. AMENDMENTS**

No amendment to this Agreement shall be binding unless in writing and signed by the duly authorised representatives of the Parties.

**24. EVIDENCE OF AMOUNTS DUE**

In any legal action or proceeding arising out of or in connection with this Agreement, the entries made in records maintained by the Trust in connection with this Agreement shall be prima facie evidence of the existence and amounts of the obligations of the Project Co or the Security Trustee (as the case may be) expressed in this Agreement.

**25. SET-OFF AND WITHHOLDING**

25.1 Without prejudice to Clause 25.2, the Project Co and the Security Trustee each acknowledge that the Trust is entitled to set-off and/or withhold payments due to the Project Co under the Project Documents and the Project Co and the Security Trustee each further acknowledge that:

25.1.1 any right, title or interest in the Project Documents or any rights thereunder acquired by the Security Trustee or any of the Beneficiaries under this

Agreement, the Funding Agreements or the Debenture shall, at all times, be subject to any such entitlement to set-off or withhold payments or contractual requirement or any other right or equity of or in favour of the Trust in respect of the Project Documents; and

25.1.2 any right, title or interest in the Project Documents or any rights thereunder acquired by the Beneficiaries' Representative pursuant to any Step-in Undertaking shall at all times be subject to the same entitlement to set off or withhold payments or (subject to the terms of the Step-in Undertaking) any contractual requirement or any other right or equity of or in favour of the Trust in respect of the Project Documents.

25.2 Notwithstanding Clause 25.1, the Trust undertakes that during the Step-in Period it will not exercise against the Project Co or any Beneficiaries' Representative (except pursuant to any Step-in Undertaking) any right of set-off under the Project Documents in respect of Claims (including for payment) arising against the Project Co prior to the Proposed Step-in Date.

## **26. INSURANCE PROCEEDS**

26.1 Except as provided in Clause 26.2, the Trust and the Project Co each undertake to direct any insurers to pay any monies received by it in respect of the construction all risks insurance effected pursuant to Clause 24.1.1 of the Project Agreement and the material damage all risks insurance effected pursuant to Clause 24.1.2 of the Project Agreement

26.1.1 where the amount of the relevant Claim exceeds £50,000, forthwith into the Insurance Proceeds Reinstatement Account; and

26.1.2 where the amount of the relevant Claim is £50,000 or less, forthwith into the Insurance Proceeds Account.

26.2 Notwithstanding Clause 26.1, each Party shall direct any insurers to pay any monies receivable by it pursuant to the construction all risks insurance effected pursuant to Clause 24.1.1.(A) of the Project Agreement in respect of:

26.2.1 Medical Equipment and Used Other Equipment used for or intended for incorporation within the Hospital (as referred to in paragraph 1.2.2 of Part 1 of Schedule 7 to the Project Agreement); or

26.2.2 the sewers referred to in the UEA Deed of Grant (as referred to in paragraph 1.2.3 of Part 1 of Schedule 7 to the Project Agreement),

forthwith to the Trust.

26.3 Without prejudice to Clause 26.1 or Clause 26.2, the Trust and the Project Co each undertake to pay any monies received by it under any of the insurances referred to in Clause 26.1.

(A) where the monies are in respect of a Claim exceeding £50,000, forthwith into the Insurance Proceeds Reinstatement Account; and

(B) where the monies are in respect of a Claim of £50,000 or less, forthwith into the Insurance Proceeds Account.

- 26.4 Without prejudice to Clause 26.2, the Project Co undertakes to pay any monies received by it in respect of the construction all risks insurance effected pursuant to Clause 24.1.1(A) of the Project Agreement in respect of the matters referred to in Clauses 26.2.1 and 26.2.2, forthwith to the Trust.
- 26.5 The amount £50,000 referred to in Clauses 26.1 and 26.3 shall be adjusted during the Phase 1 Design and Construct Phase, on each anniversary of the Execution Date and during the Phase 1 Operational Phase, on the first day of every Contract Year, to reflect any change in RPI arising on or after 1st April, 1995.
- 26.6 All monies in the Insurance Proceeds Reinstatement Account shall be applied in accordance with Part 4 of Schedule 7 to the Project Agreement to the extent permitted by Law. The Security Trustee shall only be obliged to make any such application once the same has been agreed or determined in accordance with Part 4 of Schedule 7 to the Project Agreement.
- 26.7 The Trust shall indemnify and keep indemnified the Security Trustee in respect of any Losses arising by reason of any Claim made by any person other than a Party in respect of any payment by the Security Trustee to the Trust of any monies in the Insurance Proceeds Reinstatement Account in accordance with Clause 26.6.
- 26.8 The Trust and the Project Co shall each act as soon as practicable in relation to satisfying any requirement in Part 4 of Schedule 7 to deliver any item to the Agent.
- 26.9 Neither the Trust nor the Project Co shall revoke any mandate in respect of the Insurance Proceeds Reinstatement Account before the occurrence of the Senior Discharge Date.
- 26.10 Each of the Trust and the Project Co irrevocably consents to the Security Trustee and/or its appointed representatives having access to review the books and records relating to the Insurance Proceeds Reinstatement Account at the bank referred to in Clause 24.14.1 of the Project Agreement and consents to the Security Trustee and its appointed representatives passing on any information so obtained to any Beneficiary.

## **27. DETERMINATION**

Any determination by any Party required under this Agreement shall be prima facie evidence of the matters contained therein.

## **28. LIABILITIES SEVERAL**

The obligations of each Beneficiary, the Agent and the Security Trustee under this Agreement are several and none of them shall be responsible for the obligations of any other of the same under this Agreement. Failure of a Beneficiary, the Agent or the Security Trustee to perform those obligations shall not relieve any other Beneficiary or any other Party from any of its or their respective obligations under this Agreement or any Project Document.

## **29. GOVERNING LAW AND JURISDICTION**

### **29.1 Law**

This Agreement shall be governed by and construed in all respects in accordance with English Law.

29.2 **Jurisdiction**

Subject to reference to the Disputes Resolution Procedure as provided herein, the Parties each submit to the jurisdiction of the English Courts as regards any claim or matter arising in relation to this Agreement.

**IN WITNESS WHEREOF** the Parties have executed this Agreement on the date first written above.

**THE SEAL** of the **NORFOLK &** )  
**NORWICH HEALTH CARE NHS** )  
**TRUST** was hereunto affixed in the )  
presence of:- )

ANNE OSBORNE  
Director

MALCOLM STAMP  
Chief Executive

**MIDLAND BANK PLC** (as Security Trustee)<sup>2</sup>  
acting by its duly authorised officer

MARK SMITH

**MIDLAND BANK PLC** (as Agent)<sup>1</sup>  
acting by its duly authorised officer

MARK SMITH

**OCTAGON HEALTHCARE LIMITED**

TIM PEARSON  
Director

---

<sup>2</sup> See Recital (D).

**SCHEDULE 4**  
**FINANCIAL MATTERS**  
**PART 6**  
**Form of Custody Agreement**

**DATED**

**1998**

---

(1) **NORFOLK & NORWICH HEALTH CARE NHS TRUST**

- and -

(2) **OCTAGON HEALTHCARE LIMITED**

- and -

(3) **NCC ESCROW INTERNATIONAL LIMITED**

- and -

(4) **MIDLAND BANK PLC (AS SECURITY TRUSTEE)**

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**CUSTODY AGREEMENT**

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**Herbert Smith**  
Exchange House  
Primrose Street  
London EC2A 2HS  
Tel: 0171 374-8000  
Fax: 0171 496-0043  
Ref:458/30587467

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**SCHEDULE**

**THIS AGREEMENT** is made on [ ], 1998

**BETWEEN:-**

- (1) **NORFOLK & NORWICH HEALTH CARE NHS TRUST** of Brunswick Road, Norwich NR1 3SR (the "**Trust**");
- (2) **OCTAGON HEALTHCARE LIMITED**, a company incorporated under the laws of England and Wales with registered number 3112891, whose registered office is at Page Street, London NW7 2ER (the "**Project Co**");
- (3) **NCC ESCROW INTERNATIONAL LIMITED**, a company incorporated under the laws of England and Wales with registered number 3081952, whose registered office is at Oxford House, Oxford Road, Manchester M1 7ED (the "**Custodian**"); and
- (4) **MIDLAND BANK PLC** of 27-32 Poultry, London EC2P 2BX as security trustee for and on behalf of the Beneficiaries (the "**Security Trustee**", which expression shall include any successor security trustee)

**WHEREAS:**

- (A) The Trust and the Project Co have agreed the terms on which the Project Co will design, develop and construct and part operate the Hospital and, accordingly, have entered into the Project Agreement and Facilities Management Agreement.
- (B) The Financial Model is required for determining the financial consequences of certain events under the Project Agreement and/or the Facilities Management Agreement.
- (C) The Trust and the Project Co wish to provide, amongst other things, for the safe custody of the Financial Model and, accordingly, the Parties have agreed to enter into this Agreement.
- (D) This Agreement is the "**Custody Agreement**" contemplated by the Project Agreement.

**NOW IT IS AGREED** as follows:

**1. DEFINITIONS AND CONSTRUCTION**

**1.1 Definitions**

In this Agreement, the following terms shall, unless the context otherwise requires, have the following meanings:

"**Fees**" means all fees referred to in the Schedule and payable to the Custodian.

"**Lenders' Representative**" has the meaning given in Clause 8.1.3.

"**Project Agreement**" means the project agreement dated [ ], 1998 and made between (1) the Trust and (2) the Project Co.

"**Step-Out Date**" has the meaning given in Clause 8.3.1.

## 1.2 Construction

Save to the extent that the context or the express provisions of this Agreement otherwise require:

- 1.2.1 headings and sub-headings are for ease of reference only and shall not be taken into consideration in the interpretation or construction of this Agreement;
- 1.2.2 all references to Clauses or to the Schedule are references to clauses of or the Schedule to this Agreement.
- 1.2.3 all references to agreements, documents or other instruments include (subject to all relevant approvals) a reference to that agreement, document or instrument as amended, supplemented, substituted, novated or assigned from time to time.
- 1.2.4 all references to any statute or statutory provision shall include references to any statute or statutory provision which amends, extends, consolidates or replaces the same and shall include any orders, regulations, codes of practice, instruments or other subordinate legislation made under the relevant statute or statutory provision.
- 1.2.5 any reference to time of day shall be a reference to London time.
- 1.2.6 the words "**herein**", "**hereto**" and "**hereunder**" refer to this Agreement as a whole and not to the particular Clause in which such word may be used.
- 1.2.7 words importing the singular include the plural and vice versa.
- 1.2.8 words importing a particular gender include all genders.
- 1.2.9 "**person**" includes any individual partnership, firm, trust, body corporate, government, government body, authority, agency, unincorporated body of persons or association.
- 1.2.10 any reference to a public organisation shall be deemed to include a reference to any successor to such public organisation or any organisation or entity which has taken over the functions or responsibilities of such public organisation.
- 1.2.11 references to "**Party**" means a party to this Agreement and references to "**Parties**" shall be construed accordingly.
- 1.2.12 all monetary amounts are expressed in pounds sterling.
- 1.2.13 references to the word "**includes**" or "**including**" are to be construed without limitation.
- 1.2.14 the obligations of any Party under this Agreement are to be performed at that Party's own cost and expense.
- 1.2.15 terms used in this Agreement that are defined in the Project Agreement shall have the meanings given to them in the Project Agreement.



1.2.16 terms defined for the purposes of the National Health Service (Residual Liabilities) Act 1996 shall have the same meanings in this Agreement.

## **2. DELIVERY AND CUSTODY OF THE FINANCIAL MODEL**

### **2.1 Verification**

On the Execution Date and following any delivery of the Financial Model to the Trust in accordance with Clause 5.3.2 of the Project Agreement or in accordance with Clause 5.3.7 of the same, the Trust and the Project Co will verify the identity of two copies of the Financial Model. Following such verification, the Project Co shall deliver the same to the Custodian.

### **2.2 Safe Custody**

The Custodian shall hold all copies of the Financial Model delivered in accordance with Clause 2.1 in safe custody and shall ensure that, at all times, an equal or approximately equal number of copies of the Financial Model is stored in at least two separate vaults or safes.

### **2.3 No Obligation**

The Custodian shall have no obligation or responsibility to any person, whatsoever to determine:

2.3.1 the existence, relevance, completeness, accuracy, effectiveness or any other aspect of the Financial Model; or

2.3.2 that whatever is deposited or accepted by it for deposit is or is not the Financial Model.

## **3. RELEASE OF MODEL**

### **3.1 Instructions and Signatures**

The Custodian shall hold the Financial Model to the order of the Trust and the Project Co and shall act upon but only upon the instructions of:

3.1.1 David Stout or Anna Dugdale (or such substitute(s) as the Trust may appoint and notify the Custodian in writing) for and on behalf of the Trust; and

3.1.2 Philip Rees (or such substitute(s) as Project Co may appoint and notify to the Custodian in writing) for and on behalf of the Project Co.

### **3.2 Release**

The Custodian shall, upon receiving duly signed instructions from both the Trust and the Project Co (but only upon receiving such instructions) release one copy of the Financial Model to the person either named in such instructions or previously identified in writing by the Trust and the Project Co.

**3.3 Records**

3.3.1 The Custodian shall maintain a record of any release made pursuant to Clause 3.2, including details of the person to whom such release was made and the date of the same.

3.3.2 The Trust and the Project Co shall be entitled, at reasonable hours and upon giving the Custodian reasonable notice, to inspect the records kept in accordance with Clause 3.3.1.

**4. CONFIDENTIALITY**

The Custodian agrees for itself, its directors, officers, employees, sub-contractors and agents to maintain all information in whatever form coming into its possession or to its knowledge under or in connection with this Agreement in strictest confidence and secrecy, not to make use of the same other than for the purposes of this Agreement and not to disclose such information other than in accordance with the terms of this Agreement.

**5. REMUNERATION**

**5.1 Fees**

The Trust and the Project Co shall each pay one half of the Fees to the Custodian when the same fall due for payment as provided for in the Schedule or, if later, within 20 Working Days of being invoiced for the same.

**5.2 VAT**

5.2.1 All amounts stated to be payable under this Agreement shall be exclusive of any VAT properly payable in respect of the supplies to which they relate.

5.2.2 The Trust and the Project Co shall each pay to the Custodian any VAT properly payable hereunder in respect of the Fees paid by it under this Agreement, provided that it shall first have received from the Custodian a valid tax invoice in respect of that supply which complies with the requirements of Part III VAT Regulations 1995.

**6. TERMINATION**

**6.1 Termination by Custodian**

6.1.1 The Custodian may terminate this Agreement on giving 30 days' prior written notice to the Trust and the Project Co, after any failure by the Trust or the Project Co to pay any amount payable by it on the day the same is due hereunder, provided the default is then continuing unremedied. The Trust and the Project Co shall each be afforded a reasonable opportunity to pay any amount payable by the other hereunder before any such termination and the Custodian shall accept such payment in satisfaction of the relevant Party's obligation to pay the same. Any such payment by the Trust or the Project Co shall be reimbursed by the Party on whose behalf the payment is made within 20 Working Days of a written request for the same being made by the Trust or the Project Co (as the case may be).

6.1.2 The Custodian may terminate this Agreement with effect from any anniversary of the date hereof by giving not less than 90 days' prior written notice to the Trust and the Project Co.

**6.2 Termination by Trust and Project Co**

The Trust and the Project Co may terminate this Agreement with effect from any anniversary of the date hereof by both giving not less than 90 days' prior written notice to the Custodian.

**6.3 Savings**

6.3.1 Termination of this Agreement shall be without prejudice to any accrued rights and obligations hereunder as at the date of termination and shall not affect the obligations of the Custodian under Clause 4 (Confidentiality) and this Clause 6 (each of which shall survive termination) or under any other Clause which is expressed to survive termination or which is required to give effect to such termination or the consequences of such termination. Save as provided in this Clause 6.3.1, all rights and obligations of the Parties under this Agreement shall end and be of no further force and effect upon termination.

6.3.2 Notwithstanding any breach of this Agreement by any Party and without prejudice to any other rights which any Party may have in relation thereto, the other Parties may elect to treat this Agreement as in full force and effect and to enforce their rights hereunder.

**6.4 Delivery Up**

On termination of this Agreement, the Custodian will deliver all copies of the Financial Model held by it in equal or approximately equal numbers to the Trust (for the attention of the Project Director) and to the Project Co (for the attention of the Managing Director).

**6.5 New Custodian**

If this Agreement is terminated, the Trust and the Project Co shall each use all reasonable endeavours to appoint a mutually acceptable new custodian on terms as nearly identical to those contained in this Agreement as possible, subject to such modifications as the new custodian shall deem necessary and which shall be acceptable to the Trust and the Project Co (acting reasonably).

**7. LIMITATION OF LIABILITY**

**7.1 Limit**

The Custodian shall not be liable for any loss caused to any other Party either jointly or severally arising from loss of or damage to the Financial Model except to the extent that such loss or damage is caused by breach of this Agreement or the negligent acts or omissions of the Custodian, its officers, employees, agents or sub-contractors and, in each case, the Custodian's total liability in respect of all claims arising under or by virtue of this Agreement shall not (except in the case of claims for personal injury or death) exceed the sum of £500,000.

## 7.2 Consequential Loss

The Custodian shall, in no circumstances, be liable to any other Party either jointly or severally for indirect or consequential loss of any nature whatsoever whether for loss of profit, loss of business or otherwise.

## 8. STEP-IN

### 8.1 Commencement

The Custodian shall, from time to time:

- 8.1.1 permit the Trust to perform or discharge any obligation of the Project Co under this Agreement, where the Project Co is in breach of the same;
- 8.1.2 permit the Project Co to perform or discharge any obligation of the Trust under this Agreement, where the Trust is in breach of the same; and
- 8.1.3 following notification by the Trust and the Security Trustee, permit the Security Trustee or another person specified in such notice (the "**Lenders' Representative**") with effect from the date specified in the same to perform or discharge all the obligations of the Project Co under this Agreement, provided that the Lenders' Representative shall have the benefit of and be entitled to enforce against the Custodian, any and all of the Custodian's obligations to the Project Co under this Agreement and the Custodian undertakes to perform such obligations in favour of the Lenders' Representative.

### 8.2 Consent

- 8.2.1 The Project Co consents to the performance or discharge of its obligations by the Trust pursuant to Clause 8.1.1.
- 8.2.2 The Trust consents to the performance or discharge of its obligations by the Project Co pursuant to Clause 8.1.2.
- 8.2.3 The Trust and the Project Co consent to the performance or discharge of the Project Co's obligations by the Lenders' Representative pursuant to Clause 8.1.3.

### 8.3 Termination

- 8.3.1 The Trust and the Security Trustee or the Lenders' Representative shall be entitled to terminate the Lenders' Representative's obligations pursuant to Clause 8.1.3 on giving the Custodian prior notice of at least 21 days. On and from the date of expiry of such notice (the "**Step-Out Date**"), the Lenders' Representative shall be automatically released from all obligations pursuant to this Agreement, except for any which have fallen due for performance or discharge on or before the Step-Out Date and which have not been fully and unconditionally performed or discharged.
- 8.3.2 The occurrence of the Step-Out Date shall not affect the continuation of the Project Co's obligations towards the Custodian under this Agreement.

#### **8.4 Security Trustee**

The Security Trustee is a party to this Agreement solely for the purposes of taking the benefit of its rights under this Clause 8 and shall have no obligation or liability hereunder, except pursuant to the operation of this Clause 8.

### **9. NOTICES**

#### **9.1 Address**

Except as otherwise stated, all notices or other communications required in connection with this Agreement shall be in writing and sent by hand, by first class prepaid post or by facsimile transmission to the relevant address or facsimile number as any Party may notify to each of the other Parties in writing by not less than five Working Days' prior notice.

#### **9.2 Effective receipt**

Subject to Clause 9.3:-

9.2.1 a letter delivered by hand shall be effective when it is delivered to the addressee;

9.2.2 a letter sent by first class prepaid post shall be deemed received on the second Working Day after it is put in the post; and

9.2.3 a facsimile transmission shall be effective upon completion of transmission.

#### **9.3 Timing**

A notice or other communication received on a day which is not a Working Day or after 5 p.m. on any Working Day shall be deemed to be received on the next following Working Day.

#### **Trust**

Norfolk & Norwich Health Care NHS Trust  
Norfolk & Norwich Hospital  
Brunswick Road  
Norwich  
NR1 3SR

Fax: (01603) 287547

Attention: The Chief Executive

#### **Project Co**

Octagon Healthcare Limited  
Page Street  
London NW7 2ER

Fax: (0181) 906 5747

Attention: Company Secretary

**Custodian**

NCC Escrow International Limited  
Oxford House  
Oxford Road  
Manchester M1 7ED

Fax: (0161) 242 2275

Attention: Graham Wood

**Security Trustee**

Midland Bank plc  
Midland Corporate Banking - Project Finance  
27-32 Poultry  
London EC2P 2BX

Fax: (0171) 260 8532

Attention: Manager, Project Finance

**10. ASSIGNMENT**

**10.1 Binding on Successors and Assigns**

This Agreement shall be binding on and shall enure to the benefit of the Parties and their respective successors and permitted transferees or assigns. In the case of the Trust, its successors shall include any person to which the Secretary of State, in exercising his statutory powers to transfer property, rights and liabilities of the Trust upon the Trust ceasing to exist, transfers the rights and obligations of the Trust under this Agreement.

**10.2 Restriction on Assignment**

No Party shall assign or transfer any part of its respective rights or obligations under this Agreement without the prior consent of the others, provided that the Trust shall be entitled, without the consent of any other Party, to transfer all its rights and obligations hereunder, in the circumstances contemplated in Clause 45.3.1 of the Project Agreement and at the same time and to the same person as it transfers all its rights and obligations under the Project Documents, to the Secretary of State, another Health Service trust, a Health Authority, a Special Health Authority or to any other person to whom the Secretary of State, in exercising his statutory rights, would be entitled to transfer such rights and obligations. Each of the Trust and the Custodian consents to an assignment by the Project Co of its rights hereunder as security for any loan made to or for the benefit of the Project Co under the Funding Agreements. Each of the Trust, the Project Co and the Custodian consents to the transfer or assignment by the Security Trustee of its rights hereunder to any successor agent appointed pursuant to the Funding Agreements and shall enter into any novation or other agreement to give effect thereto reasonably requested by the Security Trustee, provided the same does not impose any additional obligations on such parties.

**11. AGENCY**

**11.1 No Delegation**

No provision of this Agreement shall be construed as a delegation by the Trust of any of its statutory authority to the Project Co or the Custodian.

**11.2 No Agency**

Save as otherwise provided in this Agreement, no Party shall be or be deemed to be an agent of any other Party nor shall it hold itself out as having authority or power to bind any other Party in any way.

**11.3 Independent Contractor**

The Parties shall at all times be independent contractors and nothing in this Agreement shall be construed as creating any partnership between the Parties or any relationship of employer and employee between the Parties.

**12. WHOLE AGREEMENT**

This Agreement constitutes the whole agreement and understanding of the Parties as to the subject matter hereof and there are no prior or contemporaneous agreements between the Parties with respect thereto.

**13. WAIVER**

Failure by any Party at any time to enforce any provision of this Agreement or to require performance by the other Parties of any provision of this Agreement shall not be construed as a waiver of such provision and shall not affect the validity of this Agreement or any part hereof or the right of the relevant Party to enforce any provision in accordance with its terms.

**14. RTPA**

To the extent that any provision of this Agreement or of any of the Project Documents or other Ancillary Documents is a restriction or information provision for the purposes of the RTPA, by virtue of which this Agreement or any Project Document or any other Ancillary Document is registrable under the RTPA, no such restriction or provision shall take effect until the day after particulars of this Agreement and/or the Project Document and/or the Ancillary Document have been furnished to the Director General of Fair Trading in accordance with the RTPA.

**15. COUNTERPARTS**

This Agreement may be executed in one or more counterparts. Any single counterpart or a set of counterparts executed, in either case, by all the Parties shall constitute a full and original instrument for all purposes.

**16. SEVERABILITY**

If any condition, Clause or provision of this Agreement not being of a fundamental nature, is held to be illegal or unenforceable, the validity or enforceability of the remainder of this Agreement shall not be affected thereby.

**17. COSTS AND EXPENSES**

Subject to Clause 2.5 of the Project Agreement, each Party shall be responsible for paying its own costs and expenses incurred in a connection with the negotiation, preparation and execution of this Agreement.

**18. AMENDMENTS**

No amendment to this Agreement shall be binding unless in writing and signed by the duly authorised representatives of the Parties.

**19. GOVERNING LAW AND JURISDICTION**

**19.1 Law**

This Agreement shall be governed by and construed in all respects in accordance with English Law.

**19.2 Jurisdiction**

The Parties each submit to the jurisdiction of the English Courts as regards any claim or matter arising in relation to this Agreement.

**IN WITNESS WHEREOF** the Parties have executed and delivered this Agreement as a Deed on the date first written above.

**THE SEAL** of the )  
**NORFOLK & NORWICH** )  
**HEALTH CARE NHS TRUST** )  
was hereunto affixed )  
in the presence of:- )

.....  
Director

.....  
Chief Executive



**EXECUTED AND DELIVERED** )  
as a Deed by )  
**OCTAGON HEALTHCARE** )  
**LIMITED** acting by two of )  
its directors or a director and )  
its secretary )

.....  
Director

.....  
Director/Secretary

**EXECUTED AND DELIVERED** )  
as a Deed by )  
**NCC ESCROW** )  
**INTERNATIONAL LIMITED** )  
acting by two of its directors )  
or a director and its secretary )

.....  
Director

.....  
Director/Secretary

**EXECUTED AND DELIVERED** )  
as a Deed by )  
**MIDLAND BANK PLC** )  
**(as Security Trustee)** )  
acting by its duly authorised Officer )

.....

**CUSTODY AGREEMENT**

**SCHEDULE**

**FEEES**

**1. INITIAL FEE**

1.1 **Amount:** £450

1.2 **Payable:** On date of Agreement

**2. ANNUAL FEE**

2.1 **Amount:** £250

2.2 **Payable:** On date of Agreement and on each anniversary of date of Agreement.

**3. UPDATE FEE**

3.1 **Amount:** £50

3.2 **Payable:** Per delivery of the Financial Model in accordance with Clauses 5.3.2 or 5.3.7 of the Project Agreement under Clause 2.1 after the first four such deliveries in any one year.

**4. STORAGE FEE**

4.1 **Amount:** £50

4.2 **Payable:** Per annum per cubic foot when the source code exceeds one cubic foot.

**5. RELEASE FEE**

5.1 **Amount:** £100 plus the Custodian's reasonable expenses.

5.2 **Payable:** Upon release of a copy of the Financial Model in accordance with Clause 3.2.

**SCHEDULE 5**

**WORKS**

**PART 1**

**Trust's Requirements**

The documents comprising the Trust's Requirements are listed below and contained in ten separate volumes. The Trust's Requirements in volumes 1 to 4 are subject to any Variations effected before the Amendment Execution Date. The Trust's Requirements in volumes 5 to 10 are specific to the Phase 2 Areas. Where the Trust's Requirements in volumes 5 to 10 relate to any part of the Hospital referred to in the Trust's Requirements in volumes 1 to 4, in the event of any inconsistency, the Trust's Requirements in volumes 5 to 10 shall prevail. Each of the documents has been initialled for the purposes of identification by or on behalf of the Parties.

**VOLUME 1**

**1.0 ACTIVITY LEVELS**

**2.0 SCHEDULE OF ACCOMMODATION (EXCLUDING ADDITIONAL BEDS)**

- 2.1 Introduction
- 2.2 Introductory Note regarding Mis-Used Space
- 2.3 Schedule of Accommodation
  - Schedule of Accommodation Index
  - Summary of Mis-Used Space

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**VOLUME 2**

**4.0 ROOM DATA SHEETS**

- 4.1 Introduction
- 4.2 List of Rooms

The following is a list of the generic rooms for which the Room Data Sheets are included:



<b>Rooms</b>	<b>Code</b>
<b>Patient Care Areas</b>	
Multi Bed Ward	B0213-C1
Multi Bed Room: 6 Beds, Children/Young People	B2002-C1A
Single Bedroom	B0301-C2
Single Bedroom – Paediatric	B1801-C2A
Single Bedroom – Private Patient	B0301-C2C
Single Bedroom – Isolation Room	B0302S-C3
Single Bedroom – Paediatric Room – For isolation purposes – barrier nursing	B1801-C3A
ITU Single Bedroom	B1601-C4
ITU : Single Bed Space for Multi-Bed Room	iH-001-C4A
High dependency Room – Single Room	B0301-C5
Neonatal : Intensive Ward	B1407-C6
SCBU Special Care (Level 1)	B1407-C7
SCBU Isolation Room	B1401-C8
Lobby/Gowning	G0510-C9
Gowning Alcove	G0510-C9A
Single Bedroom : CCU	B0302S-C10
Twin Bedroom : General	B0301-C11
 <b>Diagnostic Facilities</b>	
Radiodiagnostic Room – General Purpose	E0516-D1
Radiology – Chest X-Ray	E0516-D1A
Radiology – Darkroom (Theatres)	E0201-D2
Computer Tomography – Scanner Room	E0601-D4
Computed Tomography – Control Room	E0604-D5
Radiology, MRI – Control Room	E0804-D6
Radiology, MRI – Scanner Room	E0801-D7
MRI Computer Cabinet Room	D8
ECG Room	D9

<b>Rooms</b>	<b>Code</b>
Radiology – Ultrasound Examination Room	E0113-D10
EEG Procedure Room	CA-001-D12
Endoscopy Treatment Room	X0221-D13
Endoscopy Treatment Room – ERCP	X0221-D13A
Nuclear Medicine – Gamma Camera Room	E0712-D14
Nuclear Medicine – Injection Room	E0710-D15
Nuclear Medicine – Post Injection, ‘Hot Waiting Room’	E0701-D16
Catheterisation Laboratory	CD-001-D17
Radiology – Central Reporting, Seminar	E0510-D18
Endoscope Cleaning	Y0418-D20
Linear Accelerator Room	ON-002-D21
Linear Accelerator Control Room	ON-01-D21A
Angiography Room	CD-003-D22
Patient Prep/Recovery – Angiography/Catheterisation – 8 places	CD-002-D25
Mortuary : Post Mortem Room, 4 tables	MO-001-D26
<b>Services Support Areas</b>	
Equipment Store – Ward	W1550-E1
Clean Utility – Ward	T0601-E2
Dirty Utility – Ward	Y0302-E3
Dirty Utility – Theatres	Y0415-E3A
Cleaners Room – Ward	Y1501-E4
Cleaners Room – Outpatients	Y1501-E4A
Cleaners Room – Theatres	Y1216-E4B
Cleaners Room – Mortuary	Y1204-E4C
Disposal Hold – Ward	Y0604-E5
Electrical Switchroom	E6
Bulk Stores : NHS & Hospital Supplies	E7
Medical Gas Stores	E8
Equipment Cleaning – CSSD	E9

<b>Rooms</b>	<b>Code</b>
IT MDF Room	E10
IT IDF Room	E11
Security Control Room	E12
IT Training Room	E13
<b>General Areas</b>	
Entrance Areas	G1
Corridors – Not Wards	G2
Day Room	G3
Lecture Hall 175 places	H0403-G4
Seminar Room : 60 persons	H0501-G5
Seminar Room : 20 persons	H0501-G6
Projection Room	ED-004-G7
<b>Laboratories/Pharmacy</b>	
Laboratory Appliance : Maxillo-Facial, Prosthetic & Orthodontic	MF-001-L1
Technical Skills Laboratory : Orthodontic	ED-001-L2
Clinical Skills Laboratory	ED-002-L3
Inpatient Pharmacy/Dispensary	PH1
<b>Procedure &amp; Treatment Areas</b>	
Triage Room	C0310-P1
Resuscitation Space (4 Bays)	X0238-P2
Urgent Care	X0217-P3
Plaster Room	X0203-P4
Treatment Room – General	X0103-P5
Treatment Room – Colposcopy	X0111-P5A
Examination/Treatment Room – GUM Female	X0110-P5B
Examination/Treatment Room – GUM Male	X0110-P5BB
Treatment Room – within Private Patients Ward	X0103-P5C

**Rooms**

	<b>Code</b>
Treatment Room – Ward	X0103-P5D
Procedure Room – Diabetes	X0103-P7
Examination – Audiometric Testing Area	C0514-P8
Speech Therapy – Individual – Treatment	X0114-P9
Consulting/Examination Room – ENT	C0203-P10
Consulting/Examination Room – Ophthalmology	C1010-P11
Hydrotherapy Pool Room	Q0519-P12
Treatment Room – Maxillo Facial, Prosthetics	MF-002-P13
Treatment – Dialysis Area, 1 Place	RE-001-P14

**Provider Support Areas**

Consulting/Examination Room	C0201-S1
Consulting/Examination Room – Private Patients	C0209-S1A
Office – Secretary	M0220-S2
Administrator	M0201-S3
Consultant Office	M0304-S3A
Consultant Office – 2 Senior Staff	M0307-S3B
Sister’s Office	M0202S-S3C
General Office	M0115-S4
Rest Room	S5
Seminar Room	H0102-S6
Meeting Room	H0104-S7
Staff Base/Nurse Station – 5 Staff	T0101-S8
Staff Base – ICU/HDU	T0103-S8A
Staff Base – Private Patients Ward	T0103S8B
Staff Sub-Base – Ward	T0101-S8C
Registration/Clerical Area	M1004-S9
Bereavement/Quiet Room	S10
Beverage Bay – Ward	S11
Relatives Room	S12
On-Call Room	S13

Consulting Room – General C0106S-S14

Examination Room – General C0603-S15

Interview Room M0708-S16

Staff Change/Locker Room – 14 person (Female) V0307-S17

Staff Change : Theatre – Male V0622-S18

Pantry – ITU Patient P0614-S19

Beverage Bay - Staff P0704-S20

**Operating Theatres**

Operating Theatre (General) N0106-T1A

Operating Theatre (Cardio Thoracic) N0108-T1B

Operating Theatre (Orthopaedic) N0106-T1C

Operating Theatre (Ophthalmology)) N0106-T1D

Anaesthetic Room N0304-T2

Recovery : Stage 2 – Day Procedure Unit B2513-T4

Recovery : Pre-Discharge,  
Stage 2 – Day Procedure Unit B2514-T5

Scrub Up : 3 Places N0203-T6

Preparation Room – Operating Theatre N0206-T7

**Sanitary Accommodation**

Bathroom/WC/Wash V1708S-W1

Bathroom/WC/Wash/Bidet V1706-W1A

Bath/WC/Wash : With medical gases V1708S-W1B

Bath/WC/Wash: with variable height bath V17085-W1C

Shower/WC Ensuite V1301-W2

Patient WC Assisted Ambulant V1217-W3

WC : Specimen Collection – Wheelchair Use V0906-W4

Patient WC : Assisted Dual Access V1206-W5

<b>Rooms</b>	<b>Code</b>
Staff WC : Female	V0901-W6
Staff Shower : 1 Person	V0801-W7
Baby Feeding & Nappy Changing Room	V1210-W8

**VOLUME 3**

**5.0 PERFORMANCE SPECIFICATIONS**

5.1 Architectural Performance Specification:

<b>No.</b>	<b>Ref.</b>	<b>Title</b>	<b>Number of Pages</b>
1.	F10	Brick and Blockwork Walling	1 to 10
2.	F30	Brick and Blockwork Accessories	1 to 8
3.	G20	Carpentry/Timber/Framing/First Fixing	1 to 9
4.	H11	Windows, Curtain Walling & Roof Glazing	1 to 12
5.	H12	Plant Room Wall Cladding	1 to 9
6.	H31	Metal Roofing Systems	1 to 12
7.	H71	Lead Sheet Coverings and Flashings	1 to 8
8.	J20	Tanking and Waterproofing	1 to 7
9.	J21	Applied Roofing Systems	1 to 8
10.	J41	Built Up Felt Roof Covering	1 to 8
11.	J42	Single Ply Polymeric Roof Coverings	1 to 8
12.	K30	Demountable Partitions	1 to 8
13.	K31	Internal Fixed Partitions and Linings	1 to 9
14.	K40	Suspended Ceiling Systems	1 to 10
15.	K41	Raised Access Floors	1 to 15
16.	L20	Internal and External Doors	1 to 10
17.	L21	Joinery Fixtures	1 to 9
18.	L31	Metal Stairways, Walkways and Balustrades	1 to 6
19.	M10	Screeds	1 to 7
20.	M20	Plaster and Render Finishes	1 to 6
21.	M40	Ceramic Wall Tiling	1 to 6

<b>No.</b>	<b>Ref.</b>	<b>Title</b>	<b>Number of Pages</b>
22.	M50	Floor Finishes	1 to 9
23.	M60	Painting and Finishing	1 to 6
24.	N10	General Fixtures and Equipment	1 to 8
25.	N15	Signs and Notices	1 to 6
26.	P10	Sundry Insulation/Fire Stopping	1 to 7
27.	X22	Travelling Cradles and Fall Arrest Systems	1 to 7
28.	Z10	Construction and Fabrication Requirements	1 to 25

5.2 Civil and Structural Engineering Performance Specification:

<b>Ref.</b>	<b>Title</b>	<b>Number of Pages</b>
	Scope of Works	1 to 7
	Performance Specification	
D20	Excavating and Filling	1 to 6
D30	Piling	1
E05	Insitu Concrete Construction Generally	1 to 2
E10	Insitu Concrete Mixes, Casting and Curing	1 to 5
E20	Formwork for Insitu Concrete	1 to 4
E30	Reinforcement for Insitu Concrete	1 to 2
E40	Designed Joints in Insitu Concrete	1 to 2
E41	Worked Finishes/Cutting to Insitu Concrete	1
E60	Precast/Composite Concrete Floors/Roof Decks	1 to 2
G10	Structural Steel Framing	1 to 8
P30	Trenches/Pipeways/Pits or Buried Engineering Services	1 to 2
P31	Holes/Chases/Covers/Supports for Services	1
Q10	Stone/Concrete/Brick Kerbs/Edgings/Channels	1 to 2
Q24	Interlocking Brick/Block Roads/Pavings	1 to 3
R12	Drainage Below Ground	1 to 8
Z21	Mortars	1

<b>Ref.</b>	<b>Title</b>	<b>Number of Pages</b>
Z22	Sealants	1
5.3	M&E Engineering Performance Specification	
1.	Introduction	
2.	Operation/Maintenance of the Finished Building	
3.	Energy Policy	
4.	Mechanical Engineering Systems	
5.	Electrical Engineering Systems	
	Appendix 1 – Commissioning Statement	

5.4 Landscape Performance Specification:

<b>Ref.</b>	<b>Title</b>	<b>Number of Pages</b>
LW10	Landscape General Information/Requirements	1 to 2
LW20	Maintenance	1 to 6
Q25	Slab/Brick/Sett/Cobble Pavings	1 to 4
Q30	Seeding/Turfing	1 to 3
Q31	Planting	1 to 8
Q40	Fencing	1 to 4
Q50	Site/Street Furniture/Equipment	1 to 2
Z10	Purpose-made Joinery	1
Z11	Purpose-made Metalwork – External Working	1 to 2
Z12	Preservative/Fire Retardant Treatment - External Working	1
Z20	Fixings/Adhesives - External Working	1 to 2

**VOLUME 4**

**6.0 OPERATIONAL POLICIES**

6.1 INDEX A – ALPHABETICAL LISTING BY DIRECTORATE/DEPARTMENT

<b>Dept Code</b>	<b>Directorate/Department</b>	<b>Page No.</b>
AE	Accident & Emergency	1
AW	Acute Care Ward	5



<b>Dept Code</b>	<b>Directorate/Department</b>	<b>Page No.</b>
AN	Anaesthetic Department – Offices	9
XX-1	Bed Management & Bed Allocation	10
BS	Breast Imaging Services	12
CD-1	Cardiology – Cardiac Catheter Laboratory	14
CC	Cardiology – Coronary Care Unit	29
CD-2	Cardiology – Directorate Offices	23
CD-3	Cardiology – ECG Services	17
CD-4	Cardiology – Outpatients	26
CD-5	Cardiology – Technical	19
CD-6	Cardiology – Ward	32
CH	Chaplaincy Services	34
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CO	Commercial Space	41
TM-1	Communications	42
TM-2	Contracts & Billing	43
DP	Day procedure Unit	44
DE	Dermatology	46
DA-2	Diabetes – Bertram Diabetes Centre	51
ED-2	Education Centre – General	53
ED-3	Education Centre – Video Link	55
EC	Emergency Assessment Unit	56
OD-1	Endocrinology – Outpatients	58
GA-1	Endoscopy Unit	59
EN-1	ENT – Outpatients	66
EN-2	ENT – Audiology	68
MM-1	External Goods Transport	71
XX-8	Externally Accessed Clinical Services	72
GA-1	Gastroenterology	59
OD-2	General Medical Outpatient Services	73

<b>Dept Code</b>	<b>Directorate/Department</b>	<b>Page No.</b>
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ES-4	Hospital Entry Services – Telecoms, Switchboard & Reception	95
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TM-4	Information Systems (Trust Management)	97
TH	Inpatient Operating Theatres	102
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LD-1	Low Dependency Ward	107
MM-2	Materials Management (NHS Supplies)	110
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MF-1	Maxillofacial Prosthetics Clinic & Orthodontic Laboratory	114
ML	Medical Equipment Library	116
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<b>Dept Code</b>	<b>Directorate/Department</b>	<b>Page No.</b>
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MY-4	Medical Equipment Management Services – Physics Workshop	122
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MO	Mortuary	131
NN-1	Neurology Department/Clinics	132
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OC	On-Call Rooms	169
HA-1	Oncology/Haematology – Day Unit	170
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<b>Dept Code</b>	<b>Directorate/Department</b>	<b>Page No.</b>
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OP-3	Ophthalmology – Eye Bank	182
OP-4	Ophthalmology – Eye Screening	183
OP-1	Ophthalmology – General Policy incl. Directorate Office Accommodation	180
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PE-6	Paediatrics (Children’s Services) – Assessment Service	209
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PE-8	Paediatrics (Children’s Services) – SCBU	214
LD-2	Pain Relief Service	215
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<b>Dept Code</b>	<b>Directorate/Department</b>	<b>Page No.</b>
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PH	Pharmacy – Inpatient, Night Storage & Clinical Services	223
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<b>Dept Code</b>	<b>Directorate/Department</b>	<b>Page No.</b>
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RM-3	Respiratory Medicine – Lung Function Laboratory	316
ED-5	Resuscitation Training & Cardiac Arrest Service	318
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ES-6	Smoking Rooms	325
SS	Social Services	326
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CS	Sterile Services Department	333
GA-2	Stoma Care	341
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<b>Dept Code</b>	<b>Directorate/Department</b>	<b>Page No.</b>
UR-2	Urology – Outpatient Services	349
GS	Vascular Studies Laboratory	351
ES-5	Voluntary Services	352

6.2 APPENDIX 1 – EQUIPMENT ALLOCATION

**VOLUME 5**

**7.0 SCHEDULE OF ACCOMMODATION – PHASE 2 AREAS SPECIFIC**

<u>Summary</u>	<u>Sheet No.</u>
1. East Diagnostic & Treatment, Level 1	13.1
2. East Diagnostic & Treatment, Level 2	13.2
3. East Diagnostic & Treatment, Level 3	13.3
4. East Diagnostic & Treatment, Level 4	13.4
5. Ward Block 25, Level 2	25.2
6. Ward Block 26, Level 2	26.2
7. Ward Block 40, Level 1	40.1
8. Ward Block 40, Level 2	40.2
9. Shell Space Block 40, Level 3	40.3
10. Ward Block 40, Level 4 – Plant Room	40.4
11. Ward Block 41, Level 1	41.1
12. Ward Block 41, Level 2	41.2
13. Shell Space Block 41, Level 3	41.3
14. Ward Block 41, Level 4 – Plant Room	41.4
15. Ward Support Block 42, Level 1	42.1
16. Ward Support Block 42, Level 2	42.2
17. Ward Support Block 42, Level 3	42.3

**VOLUME 6**

**8.0 SIGNED OFF LOADED PLANS – PHASE 2 AREAS SPECIFIC**

Drawing Register

NA 25 Z 4201	Room Loaded Plan	Block 25, Level 2
NA 26 Z 4201	Room Loaded Plan	Block 26, Level 2
NA 40 Z 4101	Room Loaded Plan	Block 40, Level 1

NA 40 Z 4201	Room Loaded Plan	Block 40, Level 2
NA 40 Z 4301	Room Loaded Plan	Block 40, Level 3
NA 41 Z 4101	Room Loaded Plan	Block 41, Level 1, Zone 1
NA 41 Z 4201	Room Loaded Plan	Block 41, Level 2, Zone 1
NA 41 Z 4301	Room Loaded Plan	Block 41, Level 3, Zone 1
NA 42 Z 4101	Room Loaded Plan	Block 42, Level 1, Zone 1
NA 42 Z 4102	Room Loaded Plan	Block 42, Level 1, Zone 2
NA 42 Z 4201	Room Loaded Plan	Block 42, Level 2, Zone 1
NA 42 Z 4202	Room Loaded Plan	Block 42, Level 2, Zone 2
NA 42 Z 4301	Room Loaded Plan	Block 42, Level 3, Zone 1
NA 42 Z 4302	Room Loaded Plan	Block 42, Level 3, Zone 2
NA 13 Z 4101	Room Loaded Plan	Block 13, Level 1, Zone 1
NA 13 Z 4102	Room Loaded Plan	Block 13, Level 1, Zone 2
NA 13 Z 4201	Room Loaded Plan	Block 13, Level 2, Zone 1
NA 13 Z 4202	Room Loaded Plan	Block 13, Level 2, Zone 2
NA 13 Z 4301	Room Loaded Plan	Block 13, Level 3, Zone 1
NA 13 Z 4302	Room Loaded Plan	Block 13, Level 3, Zone 2

**VOLUMES 7, 8 & 9**

**9.0 SIGNED OFF ROOM DATA SHEETS – PHASE 2 AREAS SPECIFIC**

Summary

1. Ward Block 25, Level 2
2. Ward Block 26, Level 2
3. Ward Block 40, Level 1
4. Ward Block 40, Level 2
5. Ward Block 41, Level 1
6. Ward Block 41, Level 2
7. Ward Support, Block 42, Level 1
8. Ward Support, Block 42, Level 2
9. Ward Support, Block 42, Level 3
10. Ward Support Kitchen
11. East D&T, Block 13, Level 1
12. East D&T, Block 13, Level 2
13. East D&T, Block 13, Level 3



**VOLUME 10**

**10.0 EQUIPMENT INFORMATION – PHASE 2 AREAS SPECIFIC**

Schedule of components by room

1. Ward Block 40, Level 1
2. Ward Block 40, Level 2
3. Ward Block 41, Level 1
4. Ward Block 41, Level 2
5. Ward Support, Block 42, Level 1
6. Ward Support, Block 42, Level 2

**11.0 HELIPAD REPORT – PHASE 2 AREAS SPECIFIC**

The New Norfolk & Norwich Hospital Helipad Report Supplement – July 1999

**12.0 PERFORMANCE SPECIFICATIONS – PHASE 2 AREAS SPECIFIC**

The performance specifications for the Phase 2 Areas shall be as detailed in Schedule 5, Part 1, Volume 3 as further developed through the Design Development Procedure and subject to any Variations effected before the Amendment Execution Date.

**SCHEDULE 5**

**WORKS**

**PART 2**

**Project Co's Proposals**

The documents comprising the Project Co's Proposals are listed below. Each of the documents has been initialled for the purpose of identification by or on behalf of the Parties.

The Project Co's Proposals comprise eleven volumes under the heads 1 to 10 listed in Section A below and a further nine volumes specific to the Phase 2 Areas listed in Section B below. The information included in each section together with lists of drawings etc., is identified at the beginning of each section of the documentation. This Schedule lists a summary of some of the significant issues covered but does not describe the full contents of the documentation which should be established by reference to each section. The Project Co's Proposals in volumes 1 to 11 are subject to any Variations effected before the Amendment Execution Date. Where the Project Co's Proposals in volumes 12 to 20 relate to any part of the Hospital referred to in the Project Co's Proposals in volumes 1 to 11, in the event of any inconsistency, the Project Co's Proposals in volumes 12 to 20 shall prevail.

**SECTION A**

**VOLUMES 1 - 11**

**1. DESCRIPTION OF FACILITIES**

This includes a brief description of the main aspects of the facilities and defines in general terms the works to be provided.

This is cross referenced with other parts of the Project Co's Proposals where more detailed definition is provided in relation to the facilities (i.e. the Schedule of Accommodation) or the requirements are identified in terms of location and size (i.e. the outline design drawings).

**2. DRAWN INFORMATION**

The following drawn information is included as part of the Project Co's Proposals:-

**2.1 Architectural**

<b>Description</b>	<b>Drawing No.</b>
Context Elevations	A01Z301/H
Context Elevations	A01Z302/G
Context Elevations	A01Z303/J
Context Section/Elevations	A01Z304/J
Context Section/Elevations	A01Z305/H
Context Elevations	A01Z312
	A01Z313
	A01Z314

Proposed Site Plan	A02Z101/P
Level 1 West Wing Plan	A03Z201/J
Level 2 West Wing Plan	A03Z202/H

Description	Drawing No.
Level 3 West Wing Plan	A03Z203/G
Level 4 West Wing Plan	A03Z204/E
Level 1 Centre Block Plan	A04Z201/F
Level 2 Centre Block Plan	A04Z202/F
Level 3 Centre Block Plan	A04Z203/F
Level 4 Centre Block Plan	A04Z204/F
Level 1 East Wing Plan	A05Z201/F
Level 2 East Wing Plan	A05Z202/E
Level 3 East Wing Plan	A05Z203/E
Level 4 East Wing Plan	A05Z204/E
Block 10 Sections & Elevations	A10Z301/H
Block 11 Sections & Elevations	A11Z301/H
Block 11 Sections & Elevations	A11Z302/H
Block 11 Sections & Elevations	A11Z311
Block 12 Sections & Elevations	A12Z301/G
Block 13 Sections & Elevations	A13Z301/G
Block 17 Sections & Elevations	A17Z301/G
Block 18 Sections & Elevations	A18Z301/G
Block 20 Sections & Elevations	A20Z301/F
Block 22 Sections & Elevations	A22Z301/G
Block 27 Sections & Elevations	A27Z301/G
Block 28 Sections & Elevations	A28Z301/G
Block 30 Sections & Elevations	A30Z301/G
Block 30 Sections & Elevations	A30Z302/H
Block 35 & 36 Sections & Elevations	A35Z301/K
Block 35 & 36 Sections and Elevations	A35Z311

2.2 **Civil and Structural Engineering**

Description	Drawing No.
Level 1 General Arrangement Sh 1	FO1Z102/P5
Level 1 General Arrangement Sh 2	FO1Z103/P5
Level 1 General Arrangement Sh 3	FO1Z104/P5

Description	Drawing No.
Level 2 General Arrangement Sh 1	FO1Z202/P5
Level 2 General Arrangement Sh 2	FO1Z203/P5
Level 2 General Arrangement Sh 3	FO1Z204/P5
Level 2 General Arrangement Sh 4	FO1Z205/P5
Level 3 General Arrangement Sh 1	FO1Z302/P5
Level 3 General Arrangement Sh 2	FO1Z303/P5
Level 3 General Arrangement Sh 3	FO1Z304/P5
Level 3 General Arrangement Sh 4	FO1Z305/P5
Level 4 General Arrangement Sh 1	FO1Z402/P5
Level 4 General Arrangement Sh 2	FO1Z403/P5
Level 4 General Arrangement Sh 3	FO1Z404/P5
Level 4 General Arrangement Sh 4	FO1Z405/P5
Level 5 General Arrangement Sh 1	FO1Z502/P5
Level 5 General Arrangement Sh 2	FO1Z503/P5
Level 5 General Arrangement Sh 3	FO1Z504/P5
Level 5 General Arrangement Sh 4	FO1Z505/P5
Level 6 General Arrangement Sh 1	FO1Z602/P5
Site Layout Infrastructure Sh 1 of 2	FO2Z900/P6
Site Layout Infrastructure Sh 2 of 2	FO2Z901/P6
Site Layout Coordinated Servs Sh 1	FO3Z900/P6
Site Layout Coordinated Servs Sh 2	FO3Z901/P6
Blocks 10 & 27 Pile Layout	S10Z001/P1
Blocks 11 & 28 Pile Layout Sh 1	S11Z001/P1
Blocks 11 & 28 Pile Layout Sh 2	S11Z002/P1
Blocks 12 & 29 Pile Layout	S12Z001/P1
Block 13 Pile Layout	S13Z001/P1
Block 17 & 18 Pile Layout	S17Z001/P1
Block 20 & 21 Pile Layout	S20Z001/P1
Blocks 22,23 & 24 Pile Layout Sh 1	S22Z002/P2
Blocks 25 & 26 Pile Layout	S25Z001/P1
Block 30 Pile Layout	S30Z001/P1
Block 31 Pile Layout	S31Z001/P1
Block 35 & 36 Pile Layout	S35Z001//P1
Section thru Ward Blocks Sh 1 of 1	F2-ZS01/P4
Section thru Outpats and D&T 1 of 1	F2-ZS01/P4
Sect thru Central D&T Block 1 of 2	F11ZS01/P4

Description	Drawing No.
Section thru Central D&T Block 2 of 2	F11ZS02/P4
Sect thru A&E and D&T Block 1 of 1	F13ZS01/P5
Sect thru Atrium (Block 17)	F17ZS01/P5
Sect thru Outpatients & D&T 1 of 1	F31ZS01/P4
Sect thru Energy Centre & Materials Handling	F35ZS01/P5

2.3 Mechanical and Electrical Engineering

Description	Drawing No.
MTHW/LTHW Schematic	M00Z001/C
Medical Gas Schematic	M00Z002/C
CWS Schematic	M00Z003/CB
DHWS Schematic	M00Z004/D
Chilled Water Schematic Sh 1 of 2	M00Z005/C
Chilled Water Schematic Sh2 of 2	M00Z006/C
Air Handling Unit Arrangement	M00Z007/D
Above Ground Drainage Strategy Sh 1 of 2	M00Z008/B
Above Ground Drainage Strategy Sh 2 of 2	M00Z009/B
The Energy Centre Heating Schematic	M00Z0010/C
The Energy Centre System Concept Schematic Fuels	M00Z0011/C
Water Infrastructure Schematic	M00Z0012/C
Level 1 West Wing Environmental Treatment	M03Z101/C
Level 2 West Wing Environmental Treatment	M03Z102/C
Level 3 West Wing Environmental Treatment	M03Z103/C
Level 4 West Wing Environmental Treatment	M03Z104/C
Level 1 Centre Block Environmental Treatment	M04Z101/C
Level 2 Centre Block Environmental Treatment	M04Z102/C
Level 3 Centre Block Environmental Treatment	M04Z103/C
Level 4 Centre Block Environmental Treatment	M04Z104/C
Level 1 East Wing Environmental Treatment	M05Z101/C
Level 2 East Wing Environmental Treatment	M05Z102/C
Level 3 East Wing Environmental Treatment	M05Z103/C
Level 4 East Wing Environmental Treatment	M05Z104/C
D&T Block (West) Plantroom 1 Block Plan	M10Z001/D
D&T Block (West) Plantroom 2 Block Plan	M10Z002/C
D&T Block (Central) Plantroom 3 Block Pln	M11Z001/C
D&T Block (Central) Plantroom 4 Block Pln	M11Z002/D
D&T Block (Central) Plantroom 5 Block Pln	M11Z003/C

Description	Drawing No.
D&T Block (East) Plantroom 6 Block Pln	M12Z001/E
D &T Block (East) Plantroom 7 Block Plan	M12Z002/C
A&E Oncology Block Plantroom 8 Block	M13Z001/C
Ward Block A&B Plantroom 13-14 Block	M20Z001/D
Ward Block C-E Plantroom 15-17 Block	M23Z001/D
Ward Block F&G Plantroom 18-19 Block	M25Z001/D
Outpatients Blocks (East & West) Plantroom 9-12 Block Plan	M30Z001/D
The Energy Centre Plantroom Layout	M35Z001/C
Electrical Schematic HV Distribution	E00Z001/D
Electrical Schematic LV Distribution	E00Z002/A
Level 1 : Access Control Systems	E01Z001/C
Level 2 : Access Control Systems	E01Z002/C
Level 3 : Access Control Systems	E01Z003/C
Level 4 : Access Control Systems	E01Z004/C
CCTV Proposal	E02Z001/C
Miscellaneous External Serv. Details	E02Z501/A
Site Layout Infrastructure	Z00Z001D
Plantroom Key Plan	Z00Z003E

## 2.5 Landscape Proposals

Description	Drawing No.
Landscape Masterplan	L01Z001/C
Landscape Proposals – Sheet 1	L01Z002/C
Landscape Proposals – Sheet 2	L01Z003/C

## 3. SYSTEMS

- 3.1 Lift traffic analysis;
- 3.2 Network and Telecommunications infrastructure concept statement;
- 3.3 Car parking management concept statement.

## 4. PERFORMANCE SPECIFICATION

Performance Specification covers all of the main construction disciplines: Architectural, Civil and Structural Engineering, Mechanical and Electrical Engineering and Landscape. These specifications focus primarily on performance

related issues to establish the requirements for the construction. The mechanical and electrical engineering sections are based on design philosophies with reference to HTMs for performance and quality.

Detailed definition of the following is included in respective parts of the specifications as follows:-

#### 4.1 **Architectural Performance Specification**

This is an elementally based specification identifying materials, performance and testing standards appropriate to the design proposals.

#### 4.2 **Civil and Structural Engineering Specification**

This is an elementally based specification identifying materials, performance and testing standards appropriate to the design proposals. Specific information is included in relation to:

4.2.1 design loadings assumed for typical areas of the Hospital.

4.2.2 specific loadings assumed in specialist areas.

#### 4.3 **Mechanical & Electrical Specification**

This Specification is based on a system description for each of the main mechanical and electrical service installations. Statements in terms of design philosophy and approach will be included in relation to the follows:-

4.3.1 Plant Policy - statement on policy in relation to plant selection and resilience of the installation. The quality of selected plant will be defined by reference to HTMs and the Model Engineering Specifications.

4.3.2 Energy Policy - statement in relation to the choice of fuel and proposals regarding heat recovery systems.

4.3.3 Vertical transportation proposals and performance criteria.

4.3.4 Commissioning Policy - statement identifying the proposed commissioning procedures and standards.

#### 4.4 **Landscape Specification**

This specification provides a description of the soft landscape features and performance criteria to reflect the layout drawings.

#### 4.5 **Commissioning and Testing**

The basis of the requirements for sampling, mock ups, commissioning and testing is included in the respective parts of the specification for each discipline. This will establish the outline framework for the development of a detailed commissioning and testing programme jointly by the Trust and Project Co.

## **5. SCHEDULE OF ACCOMMODATION**

The Schedule of Accommodation included in the Project Co's Proposals is an agreed document between the Trust and the Project Co. The document identifies the area requirements for both clinical and non-clinical areas on a room by room basis. The basis for the measurement of room areas is described in the introduction to the Schedule.

## **6. ROOM DATA SHEETS**

6.1 Room Data Sheets are included for "generic" rooms covering the main clinical functions within the Hospital. These Room Data Sheets identify the following:

- 6.1.1 Room uses and areas;
- 6.1.2 Room finishes;
- 6.1.3 Specialist requirements (shielding etc);
- 6.1.4 Mechanical and electrical service requirements;
- 6.1.5 Equipment lists.

6.2 The equipment lists are identified on a comprehensive basis together with clarification for the responsibility for the supply and fix of particular items between the different parties.

6.3 Room Data Sheets have been prepared on a pro-forma to include information consistent with the level of the development of the design.

## **7. FIRE SAFETY STRATEGY**

7.1 A Fire Safety Strategy is included, indicating the current approach to fire safety for the Project.

7.2 The Fire Safety Strategy is established on a set of 1:500 drawings overlaid with the main compartments, hospital streets, vertical circulation points and final exits. This drawn information is supported by a report outlining the strategic approach to:

- 7.2.1 means of escape;
- 7.2.2 fire protection/compartimentation;
- 7.2.3 active fire safety measures (including extent/category of sprinklers);
- 7.2.4 smoke control; and
- 7.2.5 assistance for the Fire Brigade, including access.

## **8. HEALTH & SAFETY PLAN**

The Health and Safety Plan prepared by the Planning Supervisor is included. This covers all of the main areas required under the CDM Regulations at this stage of the design and will be the document used by the Principal Contractor in the preparation of the Construction Health and Safety Plan and, ultimately, the Health and Safety File.



**9. QUALITY MANAGEMENT PROCEDURES**

9.1 Quality Management procedures are included to define the proposed arrangements to be adopted by the Building Contractor for the Design and Construction activities. These establish the approach to design and construction quality issues, risk management, audit and feedback and cover the following topics amongst others:

- 9.1.1 Construction Method Statement;
- 9.1.2 Design Management Proposals;
- 9.1.3 Construction Management Proposals;
- 9.1.4 Proposals for the strategy of commissioning and testing.

**10. PLANNING APPLICATION**

- 10.1 The Planning Application documentation, covering the original submission in April 1996 and the Amendment to Full Planning Submission submitted in August 1996, is included.
- 10.2 The Planning Application is included for information purposes only and the information included in other parts of the Project Co's Proposals will take precedence.

**SECTION B – PHASE 2 SPECIFIC**

**VOLUMES 12 – 20**

**1.0 Description of Facilities**

- 1.1 Introductory Note
- 1.2 Description of Additional / Altered Accommodation
- 1.3 Trust Approval

**2.0 Drawn Information**

- 2.1 Architects Drawings
- 2.2 Civil & Structural Drawings
- 2.3 Services Drawings
- 2.4 Kitchen Drawings
- 2.5 Landscape Drawings

**3.0 Specifications**

- 3.1 Architects Specifications
- 3.2 Civil & Structural Specifications
- 3.3 Services Specifications
- 3.4 Kitchen Specification
- 3.5 Landscape Specification

**4.0 Specifications**

- 4.1 Introduction
- 4.2 Schedule of Accommodation
- 4.3 Room Data Sheets

**5.0 Impact on whole Hospital Services**

- 5.1 Introduction
- 5.2 Agreed Infrastructure Variation
- 5.3 Additional Infrastructure Changes
- 5.4 Impact on Main Kitchens

**6.0 Additional Ward Services & Commissioning Philosophy**

- 6.1 Introduction
- 6.2 Additional Ward Services Philosophy
- 6.3 Services Accommodation
- 6.4 Commissioning of Services
- 6.5 Commissioning of Areas

**7.0 Network and Communications Infrastructure**

- 7.1 Introduction
- 7.2 Network & Communication Infrastructure
- 7.3 Information Systems Service
- 7.4 Network Infrastructure & Resilience
- 7.5 Utilisation & Hours of Use
- 7.6 General Comments

**8.0 Fire Safety Strategy**

- 8.1 Fire Safety Strategy Report
- 8.2 Fire Safety Strategy Drawings

**9.0 Radiation Protection Report**

- 9.1 Introduction
- 9.2 General X-Ray Rooms
- 9.3 Selectron & Iodine Rooms
- 9.4 Design Solution

**10.0 Lift Traffic Analysis**

**11.0 Helipad Report**

- 11.1 Introduction
- 11.2 Helipad Report

**12.0 Planning Application**

- 12.1 Planning Approval 6/9/99
- 12.2 Application for Planning
- 12.3 Traffic Impact Analysis
- 12.4 Amendment to Planning Approval 3/3/00

**13.0 Construction Method Statement**

**14.0 Programme Proposals**

**AMENDMENTS**

**Volumes 15 – 19 are subject to the following amendments.**

<b>VOLUME</b>	<b>REFERENCE</b>		
Volume 15	N_E40Z2110	150mm Comms Tray missing from Block 41  Distribution boards wrongly sited in both IDF rooms  Comms Tray incorrectly shown in room 13.1.067	Drawings will be Amended
Volume 15	N_E40Z2210	150mm Comms Tray missing from Block 41  Distribution boards wrongly sited in both IDF rooms	
Volume 15	N_E40Z2310	IDF rooms in Blocks 40 & 41 are not on drawing  150mm Comms Tray missing from Block 41  Distribution boards wrongly sited in both IDF rooms	
Volume 16	K41/100	There are only 4 IDF rooms listed to receive raised access floors. There should be 6 – two on each level.	Agreed
Volume 17	3.3.2	Para 3.6 states that a telephone connection point will be positioned within the area. This is not a requirement that we have been asked to price.	Agreed
Volume 18		There are no room data sheets for the IDF rooms on Level 3 for Block 40.	To be issued
Volume 19		There are no room data sheets for the IDF rooms on Level 3 for Block 41.	

**SCHEDULE 5****WORKS****PART 3****Design Development Procedure****1. Introduction**

- 1.1 The purpose of the Design Development Procedure is to have in place a mechanism whereby the specification of the Works can be reviewed and the design of the Works finalised to meet the Trust's Requirements following the Execution Date.
- 1.2 Whilst the Trust has submitted the Trust's Requirements to the Project Co and the Project Co has submitted the Project Co's Proposals to the Trust, the Parties hereby expressly recognise that certain elements of the design of the Works need to be worked up to final form. This procedure is intended to achieve that purpose, and will involve the Trust in the development and review of the design of the Works as part of an iterative design process.

**2. The Review Procedure**

- 2.1 The Project Co shall from time to time during the period from the Effective Date until the completion of detailed design supply to the Trust's Works Adviser a programme for the production of design information and such programme shall relate to a period of not less than six months from the date of its submission. As each such programme is submitted to the Trust's Works Adviser it shall supersede any programme which has been previously supplied pursuant to this paragraph. The programme current for the time being shall be the "**Design Approval Programme**".
- 2.2 The Project Co shall submit to the Trust's Works Adviser, at intervals provided for in the Design Approval Programme, information, as set out below, to enable the Trust's Works Adviser to assess whether the Project Co is fulfilling its obligations under this Agreement.
- 2.3 The information to be supplied by the Project Co to the Trust's Works Adviser shall be supplied to the detailed design stage, being the completion of the 1:50 layouts of all areas to define the detailed room layouts and requirements (the "**Detailed Design Stage**"):-
- 2.3.1 Medical Planning**
- (A) 1:50 room layout plans plus sections, elevations and reflected ceiling plans as required. The 1:50 room layouts will include building structural services engineering and equipment items on one drawing (e.g. columns, radiators, windows, socket outlets, cupboards, chairs).
- (B) During the preparation of the 1:50 detailed design, simple full scale sample areas of spaces will be prepared to allow spatial arrangements to be tested in three dimensions. These will not be construction mock-ups and will be formed in space allocated by the Trust within the existing hospital at the West Norwich site.

- (C) Room Data Sheets for all rooms identifying material selection, mechanical and electrical design criteria and equipment. (Trust provided medical equipment to be identified separately to allow the basis of design to be agreed). Where Room Data Sheets have not been prepared, the Parties will seek to agree a design and specification based on the nearest typical Room Data Sheet. If agreement is not reached as to the appropriate Room Data Sheet the DHS/ADB standards will apply, insofar as these standards are relevant to the design and generic specification.

**2.3.2 Architectural Design Information (Envelope)**

- (A) Amendments, as required by design development, to 1:200 Elevations set out in Project Co's Proposals.
- (B) Amendments, as required by design development, to 1:100 Sections set out in Project Co's Proposals.
- (C) 1:50 Detail Elevations of typical bays of the elevation to Ward Blocks, Diagnostic and Treatment areas and Outpatient Building.
- (D) 1:50 Detail Sections of typical bays of the building to Ward Blocks, Diagnostic and Treatment areas and Outpatient Building.

**2.3.3 External Works Site Information**

- (A) Amendments, as required by design development, to 1:500 layouts submitted in Project Co's Proposals.
- (B) Typical details of finishes and interfaces between different materials.

**2.3.4 Interior Design**

Interior design proposals for agreed areas of the building identifying colours, materials, finishes and fittings as represented by drawings and sample boards.

**2.3.5 Civil & Structural Engineering**

- (A) Amendments, as required by design development, to 1:200 layouts set out in Project Co's Proposals.
- (B) 1:50 Structural Layouts of the following:-
  - (1) standard concrete trough slab structural bay including column sizes, main beams sizes, trough locations and secondary ribs;
  - (2) standard structural steel bay with metal deck layout for outpatient buildings including allowances for service penetrations and structural topping arrangements;
  - (3) standard structural steel bay for nursing ward with metal deck layout and detail information as above;
  - (4) structural drawings for specialist areas covering linear accelerator rooms and MRI room.

- (C) Amendments, as required by design development, to 1:500 to 1:100 Site Layout and services/drainage drawings set out in Project Co's Proposals.

**2.3.6 Mechanical & Electrical Engineering**

- (A) The following mechanical and electrical engineering information will be provided. This will encompass the design, size, location and system/connection arrangements for:

- (1) Boilers.
- (2) Chillers.
- (3) Stand-By Generators.
- (4) Medical Gas Installations.
- (5) Steam Generators.
- (6) CHP Plant.
- (7) Water Storage.

and will also include the following information:

- (1) Site Services Infrastructure.
  - Amendments, as required by design development, to 1:500 layouts set out in Project Co's Proposals.
- (2) Engineering Schematics
  - Amendments, as required by design development, to Engineering Schematics set out in Project Co's Proposals.

**(B) Mechanical Engineering Design**

- (1) 1:100 Layout Drawings for Heating:
  - Ward Area LTHW Heating.
  - Diagnostic & Treatment Area LTHW Heating.
  - Outpatient Area LTHW Heating.
  - Ward Block LTHW Heating Plantroom.
  - Diagnostic & Treatment LTHW Heating Plantroom.
  - Outpatient Area LTHW Heating Plantroom.
- (2) 1:100 Layout Drawings for Ventilation:
  - Radiodiagnostic Ventilation Layout.

- Typical Ward Ventilation Layout.
  - Operating Theatre Ventilation Layout.
  - CSSD Ventilation Layout.
  - Pharmacy Ventilation Layout.
  - Operating Theatre Airflow and Room Design Pressures.
  - Diagnostic & Treatment Area Ventilation Layout.
  - Ward Block & Ventilation Layout.
  - Diagnostic & Treatment Area Ventilation Plantroom.
  - Chiller Installation.
  - Catering Area Layout
- (3) 1:100 Layout Drawings for Water Services:
- Radiodiagnostic Water Services.
  - CSSD Water Services.
  - Ward Block Water Services.
  - Diagnostic & Treatment Area Water Services.
  - Ward Block Plantroom Water Services.
  - Diagnostic & Treatment Area Plantroom Water Services.
  - Catering Area Layout
- (4) 1:100 Layout Drawings for Fire Engineering:
- Sprinkler Schematic.
  - Sprinkler Layout - Level 1.
  - Hospital Street Dry Riser Layout.
- (5) 1:100, 1:50 and 1:20 Layout Drawings for Energy Centre & Plantrooms:
- Boiler Installation.
  - CHP Installation.
  - External Oil Installation.
  - Generator Installation.

- (6) 1:100 Layout Drawings for Ancillary Services:
- CSSD Process Equipment Steam Installation.
  - Catering Facility - Layout of Equipment.
  - Security System.
  - Information technology and communications system.
  - Lift installation including final lift traffic analysis.
  - Car parking control system.
- (7) Zoning Drawings:
- Section for Corridor in Ward Block.
  - Section for Corridor in Diagnostic and Treatment Block.

**(C) Electrical Services**

1:100 Layout Drawings for Electrical Systems for Ward Block:

- Diagnostics and Treatment Block and Outpatients Block.
- Sub-main distribution.
- Lighting installation.
- Power and ancillary systems.
- Fire alarm and detection system.
- Emergency lighting.

**(D) Drainage Services**

1:100 Above-ground Soil and Waste Drainage Layout Drawings:

- Layouts for typical Ward Block.
- Layouts for Diagnostic and Treatment Block.
- Layouts for Ward Block.

**2.3.7 Landscape Proposals**

- (A) Amendments, as required by design development, to the 1:500 Landscape Proposals set out in Project Co's Proposals.
- (B) External works typical details.
- (C) Planting plans.



- (D) Proposed external works fixtures and fittings.

#### 2.3.8 Fire Strategy

- (A) 1:200 Fire Strategy drawings, together with Fire Safety Report, will be issued to the Trust's Works Adviser.
- (B) This will be developed following discussion with the Local Authority Building Control. This will represent information which will be submitted for Building Regulations Approval for this particular aspect.
- (C) As the operation of any fire safety system in a hospital is dependent on the staff and management procedures operating correctly in any incident, there is a need to have the Trust involved in the development of this strategy, which will include a management statement requiring input from both the Trust and the Project Co.

#### 2.3.9 Samples

- (A) As part of the design process, selected samples of the proposed materials and finishes identified in the above design information will be made available to the Trust for the Trust to retain for the duration of the Design and Construct Phase. Where appropriate for major construction elements, visits to view similar installations will be arranged.
- (B) This use of samples and visits will be further enhanced during the construction period on Site with the construction of sample areas for a number of agreed key rooms, including:
  - (1) bed bay.
  - (2) nurses station.
  - (3) dirty utility room.
  - (4) ward storage area and system.
  - (5) theatre panel.
  - (6) ward kitchen.
  - (7) laboratory benching.
  - (8) ambulatory treatment room.

#### 2.3.10 Specifications

During the Detailed Design Stage, the Performance Specification will be updated to reflect the materials and systems selections made during this stage. These will cover detailed requirements for sampling, commissioning and testing and will be submitted to the Trust.

**2.3.11 Quality Management Procedures**

Updated Design and Construction Quality Plans will be issued, including updated management proposals, Construction Method Statement and commissioning methodology

2.4 As soon as practicable after the Effective Date, the Parties shall develop a design protocol which shall include the following principles:

2.4.1 on issue of any detailed design information, the Project Co shall note that any change from the Project Co's Proposals (unless required by the Trust pursuant to a Variation) is cost neutral.

2.4.2 at design meetings, if any change to the detailed design information is dismissed, Project Co shall:

(A) confirm the cost neutrality of such change; or

(B) provided there is a change to the Project Co's Proposals requested by the Trust, record the matter as one which may not be cost neutral and which requires further action.

**3. Trust's Works Adviser's Response**

3.1 Upon receipt of any element of such information, the Trust's Works Adviser shall respond as follows:-

3.1.1 acknowledge receipt within three Working Days; and

3.1.2 respond to the information under the following categories:-

(A) Status A

Issue a Certificate of Approval of Design.

(B) Status B

Issue a Certificate of Approval of Design conditional on a number of minor comments by the Trust's Works Adviser being addressed to his satisfaction.

(C) Status C

By notice in writing to the Project Co, make such comments on the information as the Trust's Works Adviser shall deem necessary specifying the details of the elements of information which should be amended by the Project Co to comply with the Project Co's obligations under this Agreement and to meet the Trust's Requirements but such comments shall be for no other purpose whatsoever.

One of the responses outlined above will be issued by the Trust's Works Adviser to the Project Co within seven Working Days of receipt of information by the Trust's Works Adviser from the Project Co, provided always that the information is submitted by the Project Co to the Trust's Works Adviser in accordance with the Design Approval Programme. The

seven Working Day time limit for response shall not apply to any information submitted by the Project Co to the Trust's Works Adviser outside the dates provided for in the Design Approval Programme, to which the Trust's Works Adviser shall respond within 14 Working Days of receipt.

- 3.1.3 In the event of no response being issued by the Trust's Works Adviser within the seven Working Day period or the 14 Working Day period referred to in paragraph 3.1.2 (as appropriate) or a response which is not in accordance with paragraph 3.1.2 it will be deemed that the information will have the same status as if a Certificate of Approval of Design had been issued.
- 3.1.4 Thereafter and within a reasonable period of the receipt of any comment under paragraph 3.1.2(C), Status C, the Project Co shall re-submit to the Trust's Works Adviser any amended information as required to satisfy the comments made by the Trust's Works Adviser, to the extent that such comments are agreed or determined to be in accordance with paragraph 3.1.2.
- 3.1.5 In the event of the Trust's Works Adviser or the Project Co failing to agree on the necessity of the amendments requested by the Trust's Works Adviser to allow a Certificate of Approval of Design to be issued or in the event that there is a Dispute as to whether the Trust's Works Adviser's response is in accordance with paragraph 3.1.2, the matter shall be referred to the Disputes Resolution Procedure.
- 3.1.6 Where the Trust has issued a Certificate of Approval of Design in relation to any element of such information consisting of scheme design, the Trust shall not be entitled to issue a Status C Certificate in relation to the same element of such information consisting of detailed design which is consistent with the scheme design for the same element the subject of the Certificate of Approval of Design.

3.2 In relation to:

- 3.2.1 a change to the specification, the Trust's Works Adviser may raise comments on any matter which is contrary to the Project Co's obligations under the Project Documents.
- 3.2.2 any submission of any design, the Trust's Works Adviser may raise comments only on the grounds that such design is not in accordance with the Trust's Requirements and any previously approved design.

**4. Approval**

- 4.1 Upon the issue of a Certificate of Approval of Design in accordance with Clause 11.4, the Project Co shall produce a set of documents consisting of the approved information for such element and, in each case, such documents shall be initialled for the purpose of identification by or on behalf of the Parties.
- 4.2 The Project Co shall compile and maintain a register of the initialled sets of Design Documents comprising all information produced in accordance with the Design Development Procedure in a location to be agreed by the Parties.

**5. Resubmission**

- 5.1 If, following the issue of a Certificate of Approval of Design in relation to any element of such information, the Project Co wishes to change the whole or any part of it, the Project Co shall be entitled to do so subject to the submission by the Project Co to the Trust of details of the change comprising a level of detail consistent with that which the Project Co proposes to change.
- 5.2 On receipt of the details of the proposed change, the provisions of paragraphs 3.1 and 3.2 shall apply to the consideration of such details by the Trust's Works Adviser, save that the reference to the Design Approval Programme shall be excluded and the Trust's Works Adviser shall make one of the responses within 14 Working Days of receipt of the details.

**SCHEDULE 5****WORKS****PART 4****Deleterious Materials**

The Deleterious Materials are:

1. high alumina cement in concrete element.
2. wood wool slabs in permanent formwork to concrete or structural elements.
3. calcium chloride in admixtures for use in reinforced concrete.
4. asbestos or asbestos-based products.
5. aggregates for use in reinforced concrete which do not comply with British Standard Specifications 882:1992 and aggregates for use in concrete which do not comply with the provisions of British Standard Specification 8110:1985.
6. any materials containing lead which may be ingested inhaled or absorbed except where copper alloy fittings containing lead are specifically required in drinking water pipework by any relevant statutory requirement.
7. urea formaldehyde in quantities which may be hazardous with reference to the limits set out at the time of use by the Health & Safety Executive.
8. cement containing calcium chloride save where the concrete is not reinforced or pre-stressed and the quantities of calcium chloride conform to BS8110: 1985 with latest amendments.
9. materials which are generally composed of mineral fibres either man-made or naturally occurring which have a diameter of 3 microns or less and a length of 200 microns or less or which contain any such fibres not sealed or otherwise stabilised to ensure that fibre migration is prevented.
10. other materials not in conformity with applicable British Standards or Codes of Practice and good building practice at the date of the Building Contract or which the Building Contractor ought reasonably to have known to be deleterious to the health and safety or to the durability of the Works at the date of the Building Contract.

**SCHEDULE 5****WORKS****PART 5****Health Technical Memoranda**

The following Health Technical Memoranda which give guidance in the design and selection of materials and engineering systems, will be followed where relevant to the design and construction of the Works. There shall be no departures from Health Technical Memoranda without the prior written agreement of the Trust, which agreement shall not be unreasonably withheld or delayed.

<b>NO.</b>	<b>TITLE</b>	<b>ISSUE DATE</b>
1	Anti-static precautions: rubber, plastics and fabrics	August 1977
2	Anti-static precautions flooring in anaesthetising areas	August 1977
	Report of a working party to review the anti-static requirements for anaesthetising areas	1990
17	Health building engineering installations	August 1978
	<b>Building Components:</b>	
54	User manual	October 1989
54.1	User manual update	November 1993
55	Windows	October 1989
56	Partitions	December 1989
57	Internal glazing	January 1995
58	Internal doorsets	December 1989
59	Ironmongery	December 1989
60	Ceilings	October 1989
61	Flooring	July 1995
62	Demountable storage systems	December 1989
63	Fitted storage systems	October 1989
64	Sanitary assemblies	August 1995
66	Cubicle curtain track	October 1989
67	Laboratory fitting out systems	November 1993

NO.	TITLE	ISSUE DATE
68	Duct and panel assemblies	November 1993
69	Protection	November 1993
70	Fixings	November 1993
81	Fire precautions in new hospitals	March 1996
82	Alarm and detection systems	June 1995
83	Fire safety in healthcare premises - general fire precautions	April 1994
85	Fire precautions in existing hospitals	April 1994
86	Fire risk assessment in existing hospitals	April 1994
87	Textiles and furniture	September 1993
2007	<b>Electrical services supply and distribution:</b>	
	Management policy	December 1993
	Design considerations	December 1993
	Validation and verification	December 1993
	Operational management	December 1993
2009	<b>Pneumatic air tube transport systems:</b>	
	Management policy	April 1995
	Design considerations and Good practice guide	April 1995
2010	<b>Sterilisation:</b>	
	Management policy	March 1994
	Design considerations	April 1995
	Validation and verification	April 1994
	Good practice guide	April 1995
2011	<b>Emergency electrical services:</b>	
	Management policy	February 1993
	Design considerations	February 1993
	Validation and verification	February 1993
	Operational management	February 1993

NO.	TITLE	ISSUE DATE
2014	<b>Abatement of electrical interference:</b>	
	Management policy	November 1993
	Design considerations	November 1993
	Validation and verification	November 1993
2015	<b>Operational management</b>	November 1993
	<b>Bedhead services:</b>	
	Management policy	March 1994
	Design considerations	January 1995
2020	Validation and verification and Operational management	January 1995
	<b>Electrical safety code for low voltage systems (Escore-LV):</b>	
	Management policy	March 1993
2021	Operational management (2nd edition)	March 1993
	<b>Electrical safety code for high voltage systems (Escore-HV):</b>	
2021	Management policy	March 1993
	Operational management	August 1994
2020	<b>Supplementary Publications:</b>	
	Electrical safety rules for low voltage systems	June 1994
	Log book for low voltage systems	June 1994
	Limitation-of-access for low voltage systems	June 1994
	Live working permit for low voltage systems	June 1994
	Safe-to-work permit for low voltage systems made dead	June 1994
	Safety programmes for low voltage systems	June 1994
2021	<b>Supplementary Publications:</b>	
	Electrical safety rules for high voltage systems	June 1994
	Log book for high voltage systems	June 1994



NO.	TITLE	ISSUE DATE
	Limitation-of-access for high voltage systems	June 1994
	Sanction-for test for high voltage systems	June 1994
	Permit-to-work for high voltage systems	June 1994
	Safety programmes for high voltage systems	June 1994
	A2 Abstract poster	June 1994
	A3 Electric shock poster	June 1994
2022	<b>Medical gas pipeline systems:</b>	
	Management policy	April 1994
	Design considerations	April 1994
	Validation and verification	April 1994
	Operational management	April 1994
	Good practice guide	April 1994
2023	<b>Access and accommodation for engineering services:</b>	
	Management policy	April 1995
	Good practice guide	April 1995
2024	<b>Lifts:</b>	
	Management policy	September 1995
	Design considerations	September 1995
	Validation and verification	September 1995
	Operational management	September 1995
2025	<b>Ventilation in healthcare premises:</b>	
	Management policy	April 1994
	Design considerations	April 1994
	Validation and verification	April 1994
	Operational management	April 1994
2027	<b>Hot and cold water supply, storage and mains services:</b>	
	Management policy	March 1995

NO.	TITLE	ISSUE DATE
	Design considerations	March 1995
	Validation and verification	March 1995
	Operational management	March 1995
2031	<b>Steam supply for sterilisation:</b> (DC, OM, VV (= 1 vol))	March 1996
2040	<b>The control of legionellae in healthcare premises - A code of practice:</b> Management policy	January 1994
	Design considerations	January 1994
	Validation and verification	January 1994
	Operational management	January 1994
	Good practice guide	January 1994
2045	<b>Acoustics:</b> Management policy	February 1996
	Design considerations	February 1996
	Validation and verification/ Operational management	February 1996
	Audiology	February 1996
2050	<b>Risk management in the NHS estate:</b> Management policy	April 1994
	Design considerations	April 1994
	Validation and verification	April 1994
	Operational management	April 1994
2055	<b>Telecommunications (Telephone exchanges):</b> Management policy	March 1994
	Design considerations	April 1994
	Validation and verification	April 1994
	Operational management	March 1994

<b>NO.</b>	<b>TITLE</b>	<b>ISSUE DATE</b>
	Fire Practice Notes:	
2	Storage of flammable liquids	November 1987
3	Escape bed lifts	November 1987
4	Hospital main kitchens	February 1994
5	Commercial enterprises on hospital premises	April 1992
6	Arson prevention and control in NHS healthcare premises	March 1994
7	Fire precautions in patient hotels	February 1995
8	Atria on hospital premises	April 1995
9	NHS healthcare fire statistics 1994/95	March 1996
10	Laboratories	March 1996

**SCHEDULE 5**

**WORKS**

**PART 6**

**Health Building Notes**

The following list of Health Building Notes will be used as informed guidance in developing the design. However, the information included in the Schedule of Accommodation and other design documentation will take precedence over the Health Building Notes.

<b>NO.</b>	<b>TITLE</b>	<b>ISSUE DATE</b>
1	Buildings for the Health Service	July 1988
2	The Whole Hospital briefing and operational policies	February 1993
4	Adult acute wards	April 1990
6	Radiology department	February 1993
	Sp1 Magnetic resonance imaging	March 1994
8	Rehabilitation - Accommodation for physiotherapy occupational and speech therapy	May 1991
12	Out-patients department	March 1990
	Sp1 Genito-urinary medicine clinic	September 1990
	Sp2 Oral surgery, orthodontics, restorative dentistry	February 1993
	Sp3 ENT and audiology clinics, hearing aid centre	April 1994
13	Sterile services department	February 1993
	Sp1 Ethylene oxide sterilisation section	April 1994
15	Accommodation for pathology services	October 1991
18	Office accommodation in health buildings	May 1991
20	Mortuary and post-mortem room	August 1991
22	Accident and emergency department in an acute general hospital	April 1995
23	Hospital accommodation for children and young people	April 1994
25	Laundry	April 1994

<b>NO.</b>	<b>TITLE</b>	<b>ISSUE DATE</b>
26	Operating department	May 1991
27	Intensive therapy unit	February 1993
29	Accommodation for pharmaceutical services	April 1988
34	Estate maintenance and works operations	April 1992
37	Hospital accommodation for elderly people	December 1981
40	Common activity spaces	
	Vol 1: Public areas	April 1995
	Vol 2: Treatment areas	April 1995
	Vol 3: Staff areas	April 1995
	Vol 4: Circulation areas	April 1995
41	Accommodation for staff changing and storage of uniforms	August 1984
42	Accommodation for education and training	
44	Accommodation for ambulance services	February 1994
45	External works for health buildings	June 1992
47	Health records department	May 1991
51	Accommodation at the main entrance of a DGH	August 1991
	Sp1 Miscellaneous spaces in a DGH	August 1991
52	Vol 1: Accommodation for day care day surgery unit	May 1993
	Vol 2: Accommodation for day care endoscopy unit	March 1994
	Vol 3: Accommodation for day care medical investigation and treatment unit	March 1995

Note - Sp: Supplement

**SCHEDULE 5**

**WORKS**

**PART 7**

**Minimum Design Life to First Replacement**

The anticipated life expectancies for the following architectural and engineering systems included in the Works are as follows:-

**1 Architectural Elements**

<b>Roof Coverings:</b>	<b>Minimum Design Life to First Replacement</b>
• Terne coated stainless steel	75 years
• Single ply membrane	20 years
• Profile metal sheeting (Plastisol coating)	10-20 years (depends on colour selection)
 <b>External Finishes:</b>	
• Composite Cladding Panels PVF2	20 years (finish)
• Windows and Curtain Walling polyester powder coated (matt finish)	20 years (finish and seals)
 <b>Internal Wall and Partitions:</b>	
• Plasterboard partitions	25 years
• Masonry partitions	50 years
 <b>Internal Ceiling Finishes:</b>	
• Metal tiles	15 years
• Mineral Fibre tiles (normal humidity)	10 years
 <b>External Decorations:</b>	
(Where they do not form part of a cladding system)	3 years

**2. Civil and Structural**

- Reinforced concrete structure 60 years
- Structural steel work 60 years

3. **Mechanical & Electrical Installations**

- Boilers and CHP Plant 15 years
- Flues and Chimney Liners 10 years
- Calorifiers and Heat Exchangers 20 years
- Steel and Cooper Pipework 25 years
- Pumps 15 years
- Radiant Panels/Radiators 20 years
- Tanks (Water) 20 years
- Tanks (Oil) 25 years
- Valves 20 years
- Chillers 15 years
- Air Handling Units (5 and 10 tons capacity) 15 years
- Sanitary Appliances 25 years
- Electrical Mains Cables, Switchgear and Distribution Equipment 18 years
- Final Circuits and Outlets 18 years
- Light Fittings 20 years
- Standby Generators 25 years
- Nurse Call and Fire Alarm Systems 20 years
- Medical Gas System 25 years
- CCTV System 15 years
- Lifts 20 years

**SCHEDULE 5**

**PART 8**

**Liquidated Damages**

1. The rates of liquidated damages for the purposes of Clause 9.3.3 are as follows:
  - 1.1 In any week or part week during the first six calendar months following the Date for Completion: £48,000.
  - 1.2 For any week or part week during the six calendar months immediately following the six calendar months referred to in 1.1: £213,000.
  - 1.3 For any week or part week during the six calendar months immediately following the six calendar months referred to in 1.2: £49,000.
2. Where a part week arises at the end of the period specified for the purposes of paragraphs 1.1 or 1.2 (as the case may be) and a corresponding part week arises in relation to the remaining part of the relevant calendar week at the beginning of the period specified for the purposes of paragraphs 1.2 or 1.3 (as the case may be), the first part week shall be added to the second part week so that a whole week arises for the purposes of the latter paragraphs.



**SCHEDULE 5**  
**PART 9**  
**CONTRACTORS' ACCOMMODATION**  
**SECTION A**

**SCHEDULE 5**  
**PART 9**  
**CONTRACTORS' ACCOMMODATION**  
**SECTION B**

**SCHEDULE 5**  
**WORKS**  
**APPENDIX A**  
**CONSTRUCTION COST BREAKDOWN**

**SCHEDULE 5**  
**WORKS**  
**APPENDIX B**  
**CONSTRUCTION PROGRAMME**

**SCHEDULE 5**

**WORKS**

**APPENDIX C**

**MEDICAL PLANNING PROGRAMME**

**Note: The Medical Planning Programme has been completed.**

**SCHEDULE 5**

**WORKS**

**APPENDIX D**

**HIGH LEVEL DECANT AND COMMISSIONING PROGRAMME**

**SCHEDULE 5**

**WORKS**

**APPENDIX E**

**SERVICES CONNECTIONS PLAN**

**Note: The Services Connection Plan is subject to Variations effected before the Amendment Execution Date**

WATER	All works and capital charges necessary to bring water to a point (identified on drawing 4860/Z00Z001 Rev D and abstract from 4860/M00Z012 Rev B) inside the boundary of the Site including the meters, valve chambers and fireman's by pass valves including connecting the on site distribution main to a valve installed adjacent to the by-pass return as part of the Services Connections.
ELECTRICITY	All works and capital charges necessary to bring the electricity supply to a point (identified on drawing 4860/Z00Z001 Rev D and abstract from 4860/E00Z001 Rev C and 4860/M35Z001 Rev B) inside the energy centre including the sub-station, transformers and switchgear and including is connecting the on site HV distribution main to the switchgear installed as part of the Services Connections.
GAS	All works and capital charges necessary to bring the gas supply to a point (identified on drawing 4860/Z00Z001 Rev D and abstract from 4860/M00Z011 Rev B) adjacent to the energy centre including the governors, meter and any slab and housing, including connecting the on site low pressure distribution main to a valve installed adjacent to the meter point as part of the Highway Works and Services Connections.
COMMUNICATION AND DATA	<p>All works and capital charges necessary to meet Project Co obligations for connection of the Hospital to external telecommunications infrastructure.</p> <p>All works will be carried out as part of the Services, Connections with the exception of necessary manholes, trenches, installation of underground ducts for shared use by all data and communications media (supplied by the relevant service provider) within the Site boundary from two points identified on drawing 4860/Z00Z001 Rev D to the MDF room. These exceptions are part of the Works included in the Anticipated Construction Cost.</p> <p>The primary route is to be completed within 16 weeks of Effective Date and the ducts will be used during construction. The installation of the permanent installation is to meet the Construction Programme requirements.</p>
FOUL & SURFACE	All charges necessary to allow the connection of the foul

**DRAINAGE & WATER  
INFRASTRUCTURE**

pumping mains and to discharge water and surface water into the Local Authority mains are part of the Services Connections.

All the above charges will be recovered by Project Co under and in accordance with Clauses 4.3 and 4.4.



**SCHEDULE 5**

**WORKS**

**APPENDIX F**

**PHASE 1 DROP DEAD DATES**

In this Appendix, references to weeks are to the last Working Day in the relevant week following the Effective Date.

<b>WORKS ELEMENT</b>	<b>WEEK NO. FOLLOWING THE EFFECTIVE DATE</b>
<b>1. Ground Works</b>	
1.1 Piling layouts or loadings	1
1.2 Foundations and work up to and including ground slabs	15
1.3 Drainage and services under ground slabs	3
<b>2. Building Structure</b>	
2.1 Structural steel frame, upper floors and roof	10
2.2 Concrete frame, upper floors and roof	3
2.3 Retaining walls (where changes do not affect piling)	1
2.4 Linac bunkers and other areas requiring specific foundation design	1
2.5 Staircases, landings and link balconies	1
<b>3. Elevations/Envelope</b>	
3.1 The envelope of the building (where changes result in the need for a revised Planning Application)	1
3.2 The envelope of the building (with no impact on Planning Approvals)	3
3.3 Quality and physical attributes of fenestration elements including openings (where changes do not impact on structure)	16
3.4 External wall detailing	16
3.5 Roof structure (where changes do not impact on roof loading)	
- OPD & Wards	10

WORKS ELEMENT	WEEK NO. FOLLOWING THE EFFECTIVE DATE
- D&T roof steel	10
3.6 Roof finishes	11
<b>4. Internal Walls</b>	
4.1 Internal Structural Walls - lift shafts, staircase or other structural walls	10
4.2 Firewalls - where changes impact on fire strategy and compartmentation	11
4.3 Internal partitions including door openings, doors, screens, any concealed fixings or access requirements or special screening	51
<b>5. Services</b>	
5.1 Plant areas, size and performance of main elements of plant and service distribution routes	1
5.2 Riser sizes and positions, soil stack and rainwater downpipe positions	1
5.3 Distribution and sizing of services within the building fabric (first fix/carcassing work)	1
5.4 Final position and specification of service outlets (lights, switches etc) and Medical Equipment (where changes do not affect the distribution of services within the building fabric or the building fabric itself)	51
5.5 The position of all fixed Medical Equipment, Used Fixed Equipment fixtures and fittings supplied and fixed by Project Co	51
5.6 Fixings for Medical Equipment built into the fabric	39
<b>6. Finishes</b>	
6.1 The basic criteria of dimensions and specification for wall, floor and ceiling finishes	10
6.2 Finishing materials within the criteria already established	28
6.3 Visual appearance (eg. colour schedules) (with no impact on basic design criteria)	58
6.4 Joinery, furniture, metal work and fittings (where changes affect other finishes or services)	24

WORKS ELEMENT	WEEK NO. FOLLOWING THE EFFECTIVE DATE
6.5 Joinery, ironmongery furniture, metal work, signage and fittings (where changes do not affect other finishes or services)	58
<b>7. External Works</b>	
7.1 Levels of formation -anything which impacts on bulk excavation levels, including type of finish	1
7.2 Landscaping levels - anything which impacts on cut and fill	1
7.3 External works layouts	1
7.4 Hard paving areas - type and colour of finish (without impact on construction depths)	
- perimeter	49
- courtyards	49
7.5 External drainage - where change affects infrastructure/main drainage and services	1
7.6 External services - where change affects layout of ducts and pipework	1
7.7 External metal work, street furniture, signs and finals	49
7.8 Soft Landscaping: perimeter courtyards (ground level) courtyards (upper levels)	1 23 1
<b>8. Other</b>	
Any other element not defined above will be related to the date given to the nearest defined element.	

**SCHEDULE 5**

**WORKS**

**APPENDIX G**

**BENEFICIAL OCCUPATION AREA DROP DEAD DATES**

In this Appendix, references to weeks are to the last Working Day in the relevant week following the Amendment Execution Date.

<b>WORKS ELEMENT</b>	<b>WEEK NO. FOLLOWING THE AMENDMENT EXECUTION DATE</b>
<b>1. Ground Works</b>	0
1.1 Piling layouts or loadings	0
1.2 Foundations and work up to and including ground slabs	0
1.3 Drainage and services under ground slabs	0
<b>2. Building Structure</b>	
2.1 Structural steel frame, upper floors and roof	0
2.2 Concrete frame, upper floors and roof	0
2.3 Retaining walls (where changes do not affect piling)	0
2.4 Linac bunkers and other areas requiring specific foundation design	0
2.5 Staircases, landings and link balconies	0
<b>3. Elevations/Envelope</b>	
3.1 The envelope of the building (where changes result in the need for a revised Planning Application)	0
3.2 The envelope of the building (with no impact on Planning Approvals)	0
3.3 Quality and physical attributes of fenestration elements including openings (where changes do not impact on structure)	0
3.4 External wall detailing	0
3.5 Roof structure (where changes do not impact on roof loading)	
- OPD & Wards	0

<b>WORKS ELEMENT</b>	<b>WEEK NO. FOLLOWING THE AMENDMENT EXECUTION DATE</b>
- D&T roof steel	0
3.6 Roof finishes	0
<b>4. Internal Walls</b>	
4.1 Internal Structural Walls - lift shafts, staircase or other structural walls	0
4.2 Firewalls - where changes impact on fire strategy and compartmentation	0
4.3 Internal partitions including door openings, doors, screens, any concealed fixings or access requirements or special screening	0
<b>5. Services</b>	
5.1 Plant areas, size and performance of main elements of plant and service distribution routes	0
5.2 Riser sizes and positions, soil stack and rainwater downpipe positions	0
5.3 Distribution and sizing of services within the building fabric (first fix/carcassing work)	0
5.4 Final position and specification of service outlets (lights, switches etc) and Medical Equipment (where changes do not affect the distribution of services within the building fabric or the building fabric itself)	0
5.5 The position of all fixed Medical Equipment, Used Fixed Equipment fixtures and fittings supplied and fixed by Project Co	0
5.6 Fixings for Medical Equipment built into the fabric	0
<b>6. Finishes</b>	
6.1 The basic criteria of dimensions and specification for wall, floor and ceiling finishes	0
6.2 Finishing materials within the criteria already established	0
6.3 Visual appearance (eg. colour schedules) (with no impact on basic design criteria)	0
6.4 Joinery, furniture, metal work and fittings (where changes affect other finishes or services)	0

WORKS ELEMENT	WEEK NO. FOLLOWING THE AMENDMENT EXECUTION DATE
other finishes or services)	
6.5 Joinery, ironmongery furniture, metal work, signage and fittings (where changes do not affect other finishes or services)	0
<b>7. External Works</b>	
7.1 Levels of formation -anything which impacts on bulk excavation levels, including type of finish	0
7.2 Landscaping levels - anything which impacts on cut and fill	0
7.3 External works layouts	0
7.4 Hard paving areas - type and colour of finish (without impact on construction depths)	
- perimeter	0
- courtyards	0
7.5 External drainage - where change affects infrastructure/main drainage and services	0
7.6 External services - where change affects layout of ducts and pipework	0
7.7 External metal work, street furniture, signs and finals	0
7.8 Soft Landscaping: perimeter	0
courtyards (ground level)	0
courtyards (upper levels)	0
<b>8. Other</b>	
Any other element not defined above will be related to the date given to the nearest defined element.	

**SCHEDULE 5**

**WORKS**

**APPENDIX H**

**PHASE 2 DROP DEAD DATES**

In this Appendix, references to weeks are to the last Working Day in the relevant week following the Amendment Execution Date.

<b>WORKS ELEMENT</b>	<b>WEEK NO. FOLLOWING THE AMENDMENT EXECUTION DATE</b>
<b>1. Ground Works</b>	
1.1 Piling layouts or loadings	0
1.2 Foundations and work up to and including ground slabs	0
1.3 Drainage and services under ground slabs	0
<b>2. Building Structure</b>	
2.1 Structural steel frame, upper floors and roof	0
2.2 Concrete frame, upper floors and roof	0
2.3 Retaining walls (where changes do not affect piling)	0
2.4 Linac bunkers and other areas requiring specific foundation design	0
2.5 Staircases, landings and link balconies	0
<b>3. Elevations/Envelope</b>	
3.1 The envelope of the building (where changes result in the need for a revised Planning Application)	0
3.2 The envelope of the building (with no impact on Planning Approvals)	0
3.3 Quality and physical attributes of fenestration elements including openings (where changes do not impact on structure)	0
3.4 External wall detailing	0
3.5 Roof structure (where changes do not impact on roof loading)	
- OPD & Wards	0

WORKS ELEMENT	WEEK NO. FOLLOWING THE AMENDMENT EXECUTION DATE
- D&T roof steel	0
3.6 Roof finishes	0
<b>4. Internal Walls</b>	
4.1 Internal Structural Walls - lift shafts, staircase or other structural walls	0
4.2 Firewalls - where changes impact on fire strategy and compartmentation	0
4.3 Internal partitions including door openings, doors, screens, any concealed fixings or access requirements or special screening	0
<b>5. Services</b>	
5.1 Plant areas, size and performance of main elements of plant and service distribution routes	0
5.2 Riser sizes and positions, soil stack and rainwater downpipe positions	0
5.3 Distribution and sizing of services within the building fabric (first fix/carcassing work)	0
5.4 Final position and specification of service outlets (lights, switches etc) and Medical Equipment (where changes do not affect the distribution of services within the building fabric or the building fabric itself)	5
5.5 The position of all fixed Medical Equipment, Used Fixed Equipment fixtures and fittings supplied and fixed by Project Co	5
5.6 Fixings for Medical Equipment built into the fabric	5
<b>6. Finishes</b>	
6.1 The basic criteria of dimensions and specification for wall, floor and ceiling finishes	5
6.2 Finishing materials within the criteria already established	10
6.3 Visual appearance (eg. colour schedules) (with no impact on basic design criteria)	10
6.4 Joinery, furniture, metal work and fittings (where changes affect other finishes or services)	5



<b>WORKS ELEMENT</b>	<b>WEEK NO. FOLLOWING THE AMENDMENT EXECUTION DATE</b>
other finishes or services)	
6.5 Joinery, ironmongery furniture, metal work, signage and fittings (where changes do not affect other finishes or services)	10
<b>7. External Works</b>	
7.1 Levels of formation -anything which impacts on bulk excavation levels, including type of finish	0
7.2 Landscaping levels - anything which impacts on cut and fill	0
7.3 External works layouts	0
7.4 Hard paving areas - type and colour of finish (without impact on construction depths)	
- perimeter	0
- courtyards	0
7.5 External drainage - where change affects infrastructure/main drainage and services	0
7.6 External services - where change affects layout of ducts and pipework	0
7.7 External metal work, street furniture, signs and finals	0
7.8 Soft Landscaping: perimeter	0
courtyards (ground level)	0
courtyards (upper levels)	0
<b>8. Other</b>	
Any other element not defined above will be related to the date given to the nearest defined element.	

**SCHEDULE 5**  
**WORKS**  
**APPENDIX I**  
**BENEFICIAL OCCUPATION AREAS**  
**PART 1**  
Plan of Parts of Block 13, Level 2

**SCHEDULE 5**  
**WORKS**  
**APPENDIX I**  
**BENEFICIAL OCCUPATION AREAS**  
**PART 2**  
Plan of Blocks 25 and 26 Level 2

**SCHEDULE 5**  
**WORKS**  
**APPENDIX J**  
**PHASE 2 AREAS**  
**SECTION A**

**SCHEDULE 5**  
**WORKS**  
**APPENDIX J**  
**PHASE 2 AREAS**  
**SECTION B**

**SCHEDULE 5**

**WORKS**

**APPENDIX K**

**OCCUPATION PROGRAMME**

<b>Event</b>	<b>Date</b>
Anticipated Phase 1 Completion Date	20/09/2001
Blocks 25 and 26, Level 2 – Date for Occupation	22/01/2002
Block 13, Level 2 – Date for Occupation	05/03/2002
BOA Date for Completion	The earlier of nine months after the Phase 1 Completion Date and 08/11/2002

**SCHEDULE 6**

**USAGE FEE**

**PART 1**

**Calculation**

**1. USAGE FEE**

1.1 The Usage Fee for every Contract Month shall be the sum of the Bed Days Usage Fee and the Outpatients Usage Fee for such Contract Month.

**1.2 Usage Fee until Phase 2 Completion Date**

1.2.1 The Bed Days Usage Fee for any Contract Month before the Phase 2 Completion Date (including in respect of the Contract Month in which the Phase 2 Completion Date occurs, that part of the Contract Month which falls before the Phase 2 Completion Date) shall be determined in accordance with the following formula and adjusted in accordance with paragraph 1.6:

$$\text{BDUF} = \frac{(A \times B)}{6}$$

Where:

BDUF = the Bed Days Usage Fee;

A = the Bed Days Block Activity Amount, as shown in the activity table in paragraph 1.2.3;

B = the Bed Days Block Activity Unit Price, as shown in the price table in paragraph 1.2.4.

1.2.2 The Outpatients Usage Fee for any Contract Month before the Phase 2 Completion Date (including in respect of the Contract Month in which the Phase 2 Completion Date occurs, that part of the Contract Month which falls before the Phase 2 Completion Date) shall be determined in accordance with the following formula and adjusted in accordance with paragraph 1.6:

$$\text{OUF} = \frac{(C \times D)}{6}$$

Where:

OUF = the Outpatients Usage Fee;

C = the Outpatient Units Block Activity Amount, as shown in the activity table in paragraph 1.2.3;

D = the Outpatient Units Block Activity Unit Price, as shown in the price table in paragraph 1.2.4.

1.2.3 Semi Annual Activity Table Until Phase 2 Completion Date

<b>Block and Bands</b>	<b>Activity Band (- 1)</b>	<b>Block Activity Amount</b>	<b>Activity Band (+ 1)</b>
<b>Bed Days</b>	105,000-139,999	140,000	140,001-175,000
<b>Outpatient Units</b>	90,000-124,999	125,000	125,001-160,000

1.2.4 Price Table Until Phase 2 Completion Date

<b>Unit and Marginal Prices (£)</b>	<b>Activity Band (-1) Marginal Price</b>	<b>Block Activity Unit Price</b>	<b>Activity Band (+ 1) Marginal Price</b>
<b>Bed Days</b>	3.000	70.196	3.000
<b>Outpatient Units</b>	0.500	13.855	0.500

1.3 Usage Fee after Phase 2 Completion Date

1.3.1 The Bed Days Usage Fee for any Contract Month after the Phase 2 Completion Date (including in respect of the Contract Month in which the Phase 2 Completion Date occurs, that part of the Contract Month which falls on or after the Phase 2 Completion Date) shall be determined in accordance with the following formula and adjusted in accordance with paragraph 1.6:

$$BDUF = \frac{(A \times B)}{6}$$

Where:

BDUF = the Bed Days Usage Fee;

A = the Bed Days Block Activity Amount, as shown in the activity table in paragraph 1.3.3;

B = the Bed Days Block Activity Unit Price:

1. before the Phase 2 Date for Completion, as shown in the price table in paragraph 1.3.4; and



- 2. on or after the Phase 2 Date for Completion, as shown in the price table in paragraph 1.3.5.

1.3.2 The Outpatients Usage Fee for any Contract Month after the Phase 2 Completion Date (including in respect of the Contract Month in which the Phase 2 Completion Date occurs, that part of the Contract Month which falls on or after the Phase 2 Completion Date) shall be determined in accordance with the following formula and adjusted in accordance with paragraph 1.6:

$$\text{OUF} = \frac{(C \times D)}{6}$$

Where:

- OUF = the Outpatients Usage Fee;
- C = the Outpatient Units Block Activity Amount, as shown in the activity table in paragraph 1.3.3;
- D = the Outpatient Units Block Activity Unit Price:
  - 1. before the Phase 2 Date for Completion, as shown in the price table in paragraph 1.3.4; and
  - 2. on or after the Phase 2 Date for Completion, as shown in the price table in paragraph 1.3.5.

**1.3.3 Semi Annual Activity Table After Phase 2 Completion Date**

<b>Block and Bands</b>	<b>Activity Band (- 1)</b>	<b>Block Activity Amount</b>	<b>Activity Band (+ 1)</b>
<b>Bed Days</b>	121,500– 161,999	162,000	162,001– 202,500
<b>Outpatient Units</b>	90,000– 124,999	125,000	125,001– 160,000

1.3.4 **Price Table After Phase 2 Completion Date but before Phase 2 Date for Completion**

<b>Unit and Marginal Prices (£)</b>	<b>Activity Band (-1) Marginal Price</b>	<b>Block Activity Unit Price</b>	<b>Activity Band (+ 1) Marginal Price</b>
<b>Bed Days</b>	1.500	63.716	1.500
<b>Outpatient Units</b>	0.500	13.855	0.500

1.3.5 **Price Table After Phase 2 Completion Date and on or after Phase 2 Date for Completion<sup>3</sup>**

<b>Unit and Marginal Prices (£)</b>	<b>Activity Band (-1) Marginal Price</b>	<b>Block Activity Unit Price</b>	<b>Activity Band (+ 1) Marginal Price</b>
<b>Bed Days</b>	2.621	57.646	2.621
<b>Outpatient Units</b>	0.451	12.503	0.451

1.4 **Activity Levels Adjustments**

1.4.1 Within 10 Working Days following the end of each Reporting Period which is not the first Reporting Period or the last Reporting Period, the Trust shall deliver to the Project Co a Report setting out:

- (1) the number of:
  - (a) Day Case Attendances;
  - (b) Inpatient Occupied Bed Days;
  - (c) Ambulatory/Outpatient Attendances; and
  - (d) Regular Day Patient Attendances;

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<sup>3</sup> This table was inserted pursuant to the amendment dated 11<sup>th</sup> December, 2003 and is applicable only in respect of the period after 1<sup>st</sup> April, 2003

in each case, arising during the relevant Reporting Period.

- (2) the activity level adjustment for the relevant Reporting Period determined in accordance with the following formula:

$$A = (\Sigma BDUF + \Sigma OUF) - (ABDUF + AOUF)$$

Where:

A = the adjustment to the Usage Fee. If positive such amount shall be payable by Project Co to the Trust. If A is negative, the absolute value of A shall be payable by the Trust to Project Co;

$\Sigma BDUF$  = is the aggregate of the Bed Days Usage Fees which were payable in respect of Contract Months during the Reporting Period;

$\Sigma OUF$  = the aggregate of the Outpatients Usage Fees which were payable in respect of Contract Months during the Reporting Period;

ABDUF = the Actual Bed Days Usage Fee for the Reporting Period determined in accordance with (3) below;

AOUF = the Actual Outpatients Usage Fee for the Reporting Period determined in accordance with (4) below;

- (3) the Actual Bed Days Usage Fee for the relevant Reporting Period calculated in accordance with the following formula and adjusted in accordance with paragraph 1.6:

$$ABDUF = (A \times B) + (C \times D) - (E \times F)$$

Where:

A = the Bed Days Block Activity Amount, as shown in the activity table in paragraph 1.2.3 or 1.3.3 (as the case may be);

B = the Bed Days Block Activity Unit Price, as shown in the price table in paragraph 1.2.4, 1.3.4 or 1.3.5 (as the case may be);

C = if the number of Bed Days for such Reporting Period is less than or equal to the Bed Day Block Activity Amount, C shall equal zero. Otherwise C shall equal the lesser of (1) the number of Bed Days for such Reporting Period less the Bed Days Block Activity Amount and (2) the upper limit of Bed Day Activity Band (+1) less the Bed Days Block Activity Amount,

in each case as shown in the activity table in paragraph 1.2.3 or 1.3.3 (as the case may be);

D = the Bed Days Marginal Price for Bed Days Activity Band (+1), as shown in the price table in paragraph 1.2.4, 1.3.4 or 1.3.5 (as the case may be);

E = if the number of Bed Days for such Reporting Period is greater than or equal to the Bed Days Block Activity Amount, E shall equal zero. Otherwise, E shall equal the Bed Days Block Activity Amount less the greater of (1) the number of Bed Days for such Reporting Period and (2) the lower limit of Bed Days Activity Band (-1) as shown in the activity table in paragraph 1.2.3 or 1.3.3 (as the case may be);

F = the Bed Days Marginal Price for Bed Day Activity Band (-1), as shown in the price table in paragraph 1.2.4, 1.3.4 or 1.3.5 (as the case may be);

(4) the Actual Outpatients Usage Fee for the relevant Reporting Period calculated in accordance with the following formula and adjusted in accordance with paragraph 1.6:

$$\text{AOUF} = (\text{G} \times \text{H}) + (\text{I} \times \text{J}) - (\text{K} \times \text{L})$$

Where:

G = the Outpatients Block Activity Amount, as shown in the activity table in paragraph 1.2.3 or 1.3.3 (as the case may be);

H = the Outpatients Block Activity Unit Price, as shown in the price table in paragraph 1.2.4, 1.3.4 or 1.3.5 (as the case may be);

I = if the number of Outpatient Units for such Reporting Period is less than or equal to the Outpatient Units Block Activity Amount, I shall equal zero. Otherwise I shall equal the lesser of (1) the number of Outpatient Units for such Reporting Period less the Outpatients Block Activity Amount and (2) the upper limit of Outpatient Units Activity Band (+1) less the Outpatient Units Block Activity Amount, in each case as shown in the activity table in paragraph 1.2.3 or 1.3.3 (as the case may be);

J = the Outpatient Units Marginal Price for Outpatient Units Activity Band (+1), as shown

in the price table in paragraph 1.2.4, 1.3.4 or 1.3.5 (as the case may be);

K = if the number of Outpatient Units for such Reporting Period is greater than or equal to the Outpatient Units Block Activity Amount, K shall equal zero. Otherwise, K shall equal the Outpatient Units Block Activity Amount less the greater of (1) the number of Outpatient Units for such Reporting Period and (2) the lower limit of Outpatient Units Activity Band (-1) as shown in the activity table in paragraph 1.2.3 or 1.3.3 (as the case may be);

L = the Outpatient Units Marginal Price for Outpatient Units Activity Band (-1), as shown in the price table in paragraph 1.2.4, 1.3.4 or 1.3.5 (as the case may be);

1.4.2 In respect of the Reporting Period during which the Phase 2 Completion Date occurs, the Actual Bed Days Usage Fee and the Actual Outpatients Usage Fee shall be calculated applying in respect of any period during the Reporting Period the activity levels during such periods and the activity table and the price table which is then applicable in accordance with paragraph 1.2 or 1.3 (as the case may be), with the Activity Bands and Block Activity Amounts (as shown in the relevant activity table) calculated proportionately by reference to calendar days.

1.4.3 Each Report delivered pursuant to paragraph 1.4.1 shall be accompanied by workpapers clearly setting out the determination of the relevant amounts.

1.4.4 The invoicing and payment of amounts owing by either Party to the other pursuant to this paragraph 1.4 shall be effected in the manner specified in and otherwise in accordance with Clause 40.

**1.5 Usage Fee Adjustments**

Where an adjustment to the Usage Fee is required under the Project Documents , such adjustment shall be made by changing the Block Activity Unit Price amounts in the price table in paragraph 1.2.4 and/or 1.3.4 and/or 1.3.5 (as the case may be). Any such changes shall ensure that the Usage Fee adjustment shall be made pro rata between the Bed Days Usage Fee and the Outpatients Usage Fee immediately prior to such adjustment, unless otherwise agreed between the Parties.

**1.6 Other Adjustments**

**1.6.1 RPI Indexation**

Each of the amounts set out below shall be indexed as of the first day of each Reporting Period to reflect any change in RPI since 1st April, 1995 such that:

(A) For the purpose of Usage Fees payable in respect of the first Reporting Period:

$$BDUF_A \times (RPI_C/RPI_A) = BDUF_C$$

and

$$OUF_A \times (RPI_C/RPI_A) = OUF_C$$

Where:

$BDUF_A$  = the Bed Days Usage Fee in 1st April, 1995 prices, using the amounts set out in the price table in paragraph 1.2.4;

$OUF_A$  = the Outpatients Usage Fee in 1st April, 1995 prices, using the amounts set out in the price table in paragraph 1.2.4;

$BDUF_C$  = the Bed Days Usage Fee indexed to the Phase 1 Completion Date, which shall be used for the purpose of calculating the Usage Fees during the first Reporting Period;

$OUF_C$  = the Outpatients Usage Fee indexed to the Phase 1 Completion Date, which shall be used for the purpose of calculating the Usage Fees during the first Reporting Period;

$RPI_A$  = RPI as at 1st April, 1995;

$RPI_C$  = RPI as at the Phase 1 Completion Date.

- (B) For the purpose of Usage Fees payable in respect of each Reporting Period ("N") after the first Reporting Period:

$$BDUF_A \times (RPI_N/RPI_A) = BDUF_N$$

and

$$OUF_A \times (RPI_N/RPI_A) = OUF_N$$

Where:

$BDUF_A$  = the Bed Days Usage Fee in 1st April, 1995 prices, using the amounts set out in the price table in paragraph 1.2.4, 1.3.4 or 1.3.5 (as the case may be);

$OUF_A$  = the Outpatients Usage Fee in 1st April, 1995 prices, using the amounts set out in the price table in paragraph 1.2.4, 1.3.4 or 1.3.5 (as the case may be);

$BDUF_N$  = the Bed Days Usage Fee indexed to the first day of the Reporting Period N, which shall be used for the purpose of calculating the Usage Fees during that Reporting Period;

$OUF_N$  = the Outpatients Usage Fee indexed to the first day of the Reporting Period N, which shall be used for the purpose of calculating the Usage Fees during that Reporting Period;

$RPI_A$  = RPI as at 1st April, 1995;

$RPI_N$  = RPI as at the first day of the Reporting Period N.

(C) For the purpose of calculating activity level adjustments respect of each Reporting Period ("N") after the first Reporting Period:

$$ABDUF_A \times (RPI_N/RPI_A) = ABDUF_N$$

and

$$AOUF_A \times (RPI_N/RPI_A) = AOUF_N$$

Where:

$ABDUF_A$  = the Actual Bed Days Usage Fee in 1st April, 1995 prices, using the amounts set out in the price table in paragraph 1.2.4, 1.3.4 or 1.3.5 (as the case may be);

$AOUF_A$  = the Actual Outpatients Usage Fee in 1st April, 1995 prices, using the amounts set out in the price table in paragraph 1.2.4, 1.3.4 or 1.3.5 (as the case may be);

$ABDUF_N$  = the Actual Bed Days Usage Fee indexed to the first day of the Reporting Period N, which shall be used for the purpose of calculating the Usage Fees during that Reporting Period;

$AOUF_N$  = the Actual Outpatients Usage Fee indexed to the first day of the Reporting Period N, which shall be used for the purpose of calculating the Usage Fees during that Reporting Period;

$RPI_A$  = RPI as at 1st April, 1995;

$RPI_N$  = RPI as at the first day of the Reporting Period N.

### 1.6.2 Indexation Adjustment

Where, on any relevant date on which an adjustment is to be made pursuant to paragraph 1.6.1, a relevant index has not yet been published for any particular month required to be taken into consideration for the purposes of that adjustment, the relevant adjustment shall be made on an interim basis, applying the index for the then latest published month. Once the index has been published for any relevant outstanding month(s), the adjustment pursuant to paragraph 1.6.1 shall be made on a final basis, applying the same. Following any such adjustment, appropriate consequential adjustments shall

be made (including in respect of any Usage Fee calculated since the relevant date) such that the adjustment as finally made takes effect for all purposes from the relevant date.

**1.6.3 Price Reduction**

On 8<sup>th</sup> January, 2037, the amounts set out in the price tables in paragraphs 1.2.4, 1.3.4 and 1.3.5 (each as previously adjusted in accordance with this paragraph 1.6) shall each be adjusted in accordance with the following formula:

$$A_2 = A_1 \times 35\%$$

Where:

**A<sub>1</sub>** = the amount immediately before such adjustment;

**A<sub>2</sub>** = the amount after adjustment.

**1.6.4 Activity Units**

(A) Where any change or series of changes in methods of healthcare delivery means that any of the units of activity listed in paragraph 1.4 cease to be workable or valid methods of computing clinical activity at the Hospital (excluding any such activity in respect of Private Patients), the Parties shall liaise together in accordance with the Liaison Procedure to consider:

- (1) what amendments shall be made to the method of calculation of the Usage Fee to ensure that the financial position of each Party shall be no better and no worse than it was before the relevant change (or series of changes), taking into account any subsequent adjustments to the Usage Fee made pursuant to any other provision of the Project Documents; and
- (2) where the liaison arises on or after the Phase 1 Completion Date, the date from which any amendment shall take effect.

If such amendments are not agreed within 20 Working Days of the date of commencement of the liaison, the matter shall be referred to the Disputes Resolution Procedure.

(B) Any amendment to the method of calculation of the Usage Fee agreed by the Parties or determined pursuant to paragraph 1.6.4(A) before the Phase 1 Completion Date, shall be made with immediate effect. Any such amendment agreed or determined on or after the Phase 1 Completion Date shall be made with effect from the date agreed or determined pursuant to paragraph 1.6.4(A).

**2. USAGE FEE (MAINTENANCE)**

**2.1 Amount**

The Usage Fee (Maintenance) shall be:



- 2.1.1 for the First Contract Month, £143,417 adjusted proportionately by reference to calendar days;
- 2.1.2 for every Contract Month after the Phase 1 Completion Date (excluding the First Contract Month), until the Contract Month in which the Phase 2 Completion Date occurs, £143,417;
- 2.1.3 for the Contract Month in which the Phase 2 Completion Date occurs, an amount calculated proportionately by reference to calendar days and by reference to the amount in paragraph 2.1.2 for that part of the Contract Month which falls before the Phase 2 Completion Date and by reference to the amount in paragraph 2.1.4 for that part of the Contract Month which falls on or after the Phase 2 Completion Date; and
- 2.1.4 for every Contract Month after the Phase 2 Completion Date (excluding the Contract Month in which the Phase 2 Completion Date occurs), £151,934,

in each case, adjusted in accordance with paragraph 2.2.

## 2.2 RPI Indexation

The Usage Fee (Maintenance) specified in paragraph 2.1 shall be indexed as of the first day of each Reporting Period to reflect any change in RPI since 1st April, 1995 such that:

- (A) For the purpose of the Usage Fee (Maintenance) payable in respect of the first Reporting Period:

$$UF(M)_A \times (RPI_C/RPI_A) = UF(M)_C$$

Where:

$UF(M)_A$  = the Usage Fee (Maintenance) in 1st April, 1995 prices, as defined in paragraph 2.1;

$UF(M)_C$  = the Usage Fee (Maintenance) indexed to the Phase 1 Completion Date, which shall be used for the purpose of calculating the Usage Fee (Maintenance) during the first Reporting Period;

$RPI_A$  = RPI as at 1st April, 1995;

$RPI_C$  = RPI as at the Phase 1 Completion Date.

- (B) For the purpose of the Usage Fee (Maintenance) payable in respect of each Reporting Period ("N") after the first Reporting Period:

$$UF(M)_A \times (RPI_N/RPI_A) = UF(M)_N$$

Where:

$UF(M)_A$  = the Usage Fee (Maintenance) in 1st April, 1995 prices, as defined in paragraph 2.1;

- $UF(M)_N$  = the Usage Fee (Maintenance) indexed to the first day of the Reporting Period N, which shall be used for the purpose of calculating the Usage Fee (Maintenance) during that Reporting Period;
- $RPI_A$  = RPI as at 1st April, 1995;
- $RPI_N$  = RPI as at the first day of the Reporting Period N.

### 2.3 Indexation Adjustment

Where, on any relevant date on which an adjustment is to be made pursuant to paragraph 2.2, a relevant index has not yet been published for any particular month required to be taken into consideration for the purposes of that adjustment, the relevant adjustment shall be made on an interim basis, applying the index for the then latest published month. Once the index has been published for any relevant outstanding month(s), the adjustment pursuant to paragraph 2.2 shall be made on a final basis, applying the same. Following any such adjustment, appropriate consequential adjustments shall be made (including in respect of any Usage Fee (Maintenance) calculated since the relevant date) such that the adjustment as finally made takes effect for all purposes from the relevant date.

**SCHEDULE 6**

**USAGE FEE**

**PART 2**

**Design and Construct Phase Variation Costs Adjustments**

Adjustments to the Usage Fee pursuant to Clause 16.9.1(A) or Clause 16.9.1(B) shall be made in accordance with the following:

1. the Project Co shall re-run the Financial Model and ascertain the impact of the relevant Design and Construct Phase Variation Cost on the Usage Fee by inputting the change in real (and, where relevant, nominal) costs for all affected periods;
2. following the re-running of the Financial Model pursuant to paragraph 1, the Project Co shall notify the Trust of the adjustments to the Usage Fee necessary to ensure the Maintenance of Ratios following the Variation.

**SCHEDULE 6**

**USAGE FEE**

**PART 3**

**Design and Construct Phase Variation Savings Adjustments**

Adjustments to the Usage Fee pursuant to Clause 16.10.1(A) or Clause 16.10.1(B) shall be made in accordance with the following:

1. the Project Co shall re-run the Financial Model and ascertain the impact of the relevant Design and Construct Phase Variation Saving on the Usage Fee by inputting the change in real (and, where relevant, nominal) costs for all affected periods;
2. following the re-running of the Financial Model pursuant to paragraph 1, the Project Co shall notify the Trust of the adjustment to the Usage Fee to ensure the Maintenance of Ratios, following the Variation.

## SCHEDULE 6

### USAGE FEE

#### PART 4

#### Deductions

In respect of any Contract Month, the Trust shall be entitled to make deductions in accordance with the following:

#### 1. DILAPIDATIONS

- 1.1 On or around every third anniversary of the Phase 1 Completion Date, the Trust shall procure that a survey of the Hospital is carried out and a schedule of Dilapidations produced. Each such survey shall be carried out by an independent, reputable firm of surveyors and/or other experts (including mechanical and electrical engineers), in any such case, with appropriate knowledge of hospitals and as proposed by the Trust and approved by the Project Co from time to time (such approval not to be unreasonably withheld or delayed).
- 1.2 The persons appointed to carry out the survey pursuant to paragraph 1.1 shall be instructed to survey the Hospital for compliance with the requirements of the Maintenance of Buildings and Engineering Services
- 1.3 Following each such survey, the Trust shall send the Project Co a copy of the relevant schedule of Dilapidations and the Project Co shall remedy all Dilapidations specified in such schedule to the satisfaction of the Trust's Facilities Adviser (acting reasonably):
  - 1.3.1 where the Project Co's Annual Programme for the relevant Contract Year already contemplates planned maintenance, repair or renewal work by the Project Co which will remedy a particular Dilapidation, by no later than the date specified in the Annual Programme as the date by which such work is to be completed; and
  - 1.3.2 in the case of any other Dilapidation, within three months of receipt of the copy schedule of Dilapidations or such other period as may be agreed pursuant to Clause 8.5 of the Facilities Management Agreement.
- 1.4 On the date referred to in paragraph 1.3.1 or, as the case may be, on expiry of the period referred to in paragraph 1.3.2, the Trust shall procure that the Trust's Facilities Adviser either confirms to the Project Co that the relevant Dilapidation has been remedied to its satisfaction (acting reasonably) or notifies the Project Co that the Dilapidation remains unremedied. Such notice (an "**Outstanding Dilapidation Notice**") shall specify:-
  - 1.4.1 the Dilapidation which remains unremedied (the "**Outstanding Dilapidation**"); and
  - 1.4.2 the Trust's Adviser's reasonable estimate of the cost of remedying the Outstanding Dilapidation (the "**Outstanding Dilapidation Amount**").

- 1.5 Following the issue of any Outstanding Dilapidation Notice, the Trust shall be entitled to deduct the Outstanding Dilapidation Amount in accordance with Clause 39.2.
- 1.6 If a deduction is made under paragraph 1.5, once the Outstanding Dilapidation has been remedied to the satisfaction of the Trust's Facilities Adviser (acting reasonably) the Trust shall procure that the Trust's Facilities Adviser notifies the Project Co of the same. Thereafter, the Trust shall pay the Outstanding Dilapidation Amount to the Project Co by adding such amount to the Monthly Facilities Charge next payable pursuant to Clause 39.1.
- 1.7 The Trust shall pay the costs of any surveyor or other expert appointed pursuant to paragraph 1.1.
- 1.8 If the aggregate Outstanding Dilapidation Amounts deducted by the Trust in respect of the Dilapidations referred to in any survey carried out under paragraph 1.1 exceed £100,000 (provided that this amount shall be adjusted on the first day of every Contract Year to reflect any change in RPI arising on or after 1st April, 1995), the Project Co shall pay to the Trust an amount equal to any costs paid by the Trust in respect of the relevant survey pursuant to paragraph 1.7, less interest at a rate per annum equal to the Interest Rate calculated from day to day on each such Outstanding Dilapidation Amount from the date of its deduction under paragraph 1.5 until payment of such Outstanding Dilapidation Amount under paragraph 1.6.

## 2. UNAVAILABILITY

### 2.1 Unavailability Notice

Where, during any Contract Month, an event occurs which causes any Unavailability Unit to become Unavailable (an "**Unavailability Event**") the Trust shall, forthwith upon becoming aware of the same, issue a notice to the Project Co with a copy to the Project Co's Contract Manager to that effect (an "**Unavailability Notice**") specifying:

2.1.1 the relevant Unavailability Units which are Unavailable due to that Unavailability Event, being:

- (A) those which are physically Unavailable; and
- (B) those which are Unavailable as a consequence of (A) except:
  - (1) pursuant to any Unavailability Event arising in respect of Unavailability Units in Phase 1 Areas during the first six months after the Phase 1 Completion Date; or
  - (2) pursuant to any Unavailability Event arising in respect of Unavailability Units in any Beneficial Occupation Area until the expiry of the first six months after the relevant BOA Completion Date; or
  - (3) pursuant to any Unavailability Event arising in respect of Unavailability Units in Phase 2 Areas (excluding the Beneficial Occupation Areas) until the expiry of the first three months after the Phase 2 Completion Date; and

2.1.2 the apparent cause of the Unavailability Event.

The Unavailability Notice shall identify which Unavailability Units fall within paragraph 2.1.1(A) and, separately, which fall within paragraph 2.1.1(B).

## 2.2 Rectification Period

2.2.1 Immediately following receipt of any Unavailability Notice, the Project Co shall inspect the Unavailability Units referred to in paragraph 2.1.1(A) with the Trust.

2.2.2 At such inspection, the Parties shall agree and record the relevant Rectification Period. Immediately following such inspection:

(A) the Rectification Period shall commence.

(B) the Project Co shall use all reasonable endeavours to remedy the relevant Unavailability Event by way of emergency measures.

2.2.3 Details of the Rectification Period and the time of its commencement shall be noted by the Parties on the relevant Unavailability Notice.

## 2.3 Consequential Unavailability Units

2.3.1 Immediately following receipt of any Unavailability Notice, the Project Co shall notify the Trust of any Unavailability Units referred to in paragraph 2.1.1(B) whose inclusion in the Unavailability Notice is disputed by the Project Co. If the Parties are unable to agree on such matter within five Working Days, either may refer the Dispute for resolution under the Disputes Resolution Procedure.

2.3.2 Where requested by the Project Co, the Trust shall, in respect of any Unavailability Units whose inclusion in the Unavailability Notice is disputed pursuant to paragraph 2.3.1, provide evidence of the interlinkage between the Unavailability Units which are physically Unavailable (as referred to in paragraph 2.1.1(A)) and those which it believes are Unavailable as a consequence (as referred to in paragraph 2.1.1(B)). Such evidence shall be by reference to the Trust's activity in the Hospital in the 12 months before the occurrence of the relevant Unavailability Event or, prior to the first anniversary of the Phase 1 Completion Date, the period from the Phase 1 Completion Date to the occurrence of the relevant Unavailability Event.

2.3.3 Following agreement or determination of any matter notified by the Project Co pursuant to paragraph 2.3.1 in its entirety, the Trust shall procure that the Trust's Facilities Adviser issues a certificate attaching a definitive version of the Unavailability Notice, which version shall, thereafter, constitute the Unavailability Notice for all purposes hereunder.

## 2.4 Withdrawal

On or before expiry of the Rectification Period, the Trust shall, upon request by the Project Co, inspect all of the relevant Unavailability Units. If, as a result of the remedial action taken by the Project Co pursuant to paragraph 2.2.2(B) or otherwise, upon such inspection:

- 2.4.1 all of the relevant Unavailability Units referred to in paragraph 2.1.1(A) are found by the Trust (acting reasonably) no longer to be Unavailable, no deduction shall be made pursuant to this paragraph 2 in respect of the Unavailability Event notified under the relevant Unavailability Notice and the relevant Unavailability Notice shall be deemed to have been withdrawn.
- 2.4.2 some of the relevant Unavailability Units are found by the Trust (acting reasonably) no longer to be Unavailable, this shall be noted on the Unavailability Notice and such Unavailability Units shall be deemed not to have been Unavailable. Where the relevant Unavailability Units are Unavailability Units referred to in paragraph 2.1.1(A), the Unavailability Units which are deemed not to have been Unavailable shall include any Unavailability Units which were Unavailable pursuant to paragraph 2.1.1(B) as a consequence of the relevant Unavailability Units being physically Unavailable regardless of the Rectification Period applicable to the same (unless the same remain Unavailable as a consequence of the continued Unavailability of any other Unavailability Units referred to in paragraph 2.1.1(A)).

**2.5 Renewed Availability**

- 2.5.1 Where an Unavailability Notice has been issued in relation to any Unavailability Units and has not been deemed to have been withdrawn pursuant to paragraph 2.4, the Project Co shall be entitled, from time to time, to require further inspections of the relevant Unavailability Units (to the extent that the same have not been deemed to have ceased to be Unavailable pursuant to paragraph 2.4.2) by the Trust with the Project Co if the Project Co (acting reasonably) believes that all or some of the relevant Unavailability Units are no longer Unavailable. If, upon such inspection, all or some of the relevant Unavailability Units are found no longer to be Unavailable, the Trust shall forthwith issue a notice to the Project Co with a copy to the Project Co's Contract Manager to that effect (a "**Notice of Renewed Availability**") specifying:
  - (A) the Unavailability Units which are no longer Unavailable due to the particular Unavailability Event; and
  - (B) the date and time when the Unavailability Units ceased to be Unavailable; and
  - (C) the Unavailability Units which remain Unavailable due to that Unavailability Event.
- 2.5.2 Where the relevant Unavailability Units are Unavailability Units referred to in paragraph 2.1.1(A), the Unavailability Units which are no longer Unavailable shall include any Unavailability Units which were Unavailable pursuant to paragraph 2.1.1(B) as a consequence of the relevant Unavailability Units being physically Unavailable (unless the same remain Unavailable as a consequence of the continued Unavailability of any other Unavailability Units referred to in paragraph 2.1.1(A)).



2.5.3 This process shall be repeated until all of the Unavailability Units which were Unavailable due to the Unavailability Event cease to be Unavailable. Each Notice of Renewed Availability will be numbered from Z=1, 2, ..., p, where p is defined as the number of Partial Unavailability Periods associated with that Unavailability Event.

2.6 **Unavailability Deduction Notice**

Within five Working Days of the end of each Contract Month, the Trust shall issue a notice to the Project Co (an "**Unavailability Deduction Notice**") specifying:

2.6.1 each Unavailability Event<sub>x</sub> (where x = 1, 2, ..., n) in relation to which an Unavailability Notice was issued either during that Contract Month or any previous Contract Month where:

- (A) the Unavailability Notice has not subsequently been deemed to have been withdrawn pursuant to paragraph 2.4.1; or
- (B) a Notice of Renewed Availability has not since been issued in respect of all Unavailability Units which were Unavailable pursuant to the relevant Unavailability Event; or
- (C) a Notice of Renewed Availability has been issued during that Contract Month in respect of some of the Unavailability Units which were Unavailable pursuant to the relevant Unavailability Event.

2.6.2 for each Unavailability Event<sub>x</sub> specified pursuant to paragraph 2.6.1 and for each Unavailability Category<sub>y</sub> (where y = 1, 2, ..., m), the percentage (the "**Unavailability Event (%)**")<sub>xy</sub> in respect of that Unavailability Category determined in accordance with the following formula:

$$UE(\%)_{xy} = \frac{\sum_{z=1 \text{ TO } p} (HU_z * UU_z) - (RP_y * UU_{z=1})}{(TH * TUU_y)}$$

Where:

UE(%)<sub>xy</sub> = Unavailability Event (%)<sub>xy</sub> for the Unavailability Event<sub>x</sub> for the Unavailability Category<sub>y</sub> (where not less than zero);

HU<sub>Z</sub> = the number of hours within the Contract Month during the Partial Unavailability Period<sub>z</sub> that the relevant Unavailability Units of the Unavailability Category<sub>y</sub> were Unavailable due to Unavailability Event<sub>x</sub>, although no Unavailability Unit shall be calculated as Unavailable for a particular hour pursuant to Unavailability Event<sub>x</sub> where such Unavailability Unit was calculated as Unavailable for that hour pursuant to some other Unavailability Event;

RP<sub>y</sub> = the number of hours specified for the Rectification Period for the Unavailability Category<sub>y</sub> in the applicable

Unavailability Notice where the same was issued during the Contract Month in respect of the Unavailability Event<sub>x</sub> but only in respect of the First Partial Unavailability Period for that Unavailability Event. For subsequent Partial Unavailability Periods and Contract Months, such amount shall be zero;

UU<sub>z</sub> = the number of Unavailability Units of Unavailability Category<sub>y</sub> which were Unavailable due to Unavailability Event<sub>x</sub> during the Partial Unavailability Period<sub>z</sub> during the Contract Month, although no Unavailability Unit shall be calculated as Unavailable for a particular hour pursuant to Unavailability Event<sub>x</sub> where such Unavailability Unit was calculated as Unavailable for that hour pursuant to some other Unavailability Event;

TH = the total number of hours in the relevant Contract Month;

TUU<sub>y</sub> = the total number of Unavailability Units for such Unavailability Category during the relevant Contract Month.

2.6.3 for each Unavailability Category<sub>y</sub>, a percentage (the "**Unavailability Deduction (%)**")<sub>y</sub> determined in accordance with the following formula:

$$UD(\%)_y = \sum_{x=1 \text{ to } n} UE(\%)_{xy}$$

Where:

UD(\%)<sub>y</sub> = the Unavailability Deduction (\%)<sub>y</sub> for the Unavailability Category<sub>y</sub>;

UE(\%)<sub>xy</sub> = the Unavailability Event (\%)<sub>xy</sub> for the Unavailability Event<sub>x</sub> for the Unavailability Category<sub>y</sub>, as calculated in paragraph 2.6.2.

2.6.4 a percentage deduction from the Usage Fee, (the "**Usage Fee Deduction (%)**") determined in accordance with the following formula:

$$UFD(\%) = \sum_{y=1 \text{ to } m} UD(\%)_y * UFW_y$$

Where:

UFD(\%) = Usage Fee Deduction (\%);

UD(\%)<sub>y</sub> = the Unavailability Deduction (\%)<sub>y</sub> for the Unavailability Category<sub>y</sub>, as calculated pursuant to paragraph 2.6.3;

UFW<sub>y</sub> = the Usage Fee Weighting for Unavailability Category<sub>y</sub> during the Contract Month.

2.6.5 a deduction from the Usage Fee (the "**Usage Fee Deduction**") in respect of the relevant Contract Month, determined in accordance with the following formula:

$$\text{UFD} = \text{CUF} * \text{UFD}(\%)$$

Where:

UFD = the Usage Fee Deduction;

CUF = the Core Usage Fee in respect of the relevant Contract Month, assuming that activity is at the lowest point of Band (-1);

UFD(%) = the Usage Fee Deduction (%) in respect of the relevant Contract Month, calculated in accordance with paragraph 2.6.4.

## 2.7 Unavailability Units

2.7.1 Any Unavailability Units which are attributable to the Phase 2 Areas shall be excluded from the Total Number of Unavailability Units and from the calculation of any Usage Fee Deduction until:

(A) in respect of any Unavailability Units attributable to any Beneficial Occupation Area, the earlier of:

(1) the BOA Completion Date; and

(2) the later of the BOA Date for Completion and the date of expiry of any period of time allowed pursuant to Clause 10.5.1(B) following the BOA Date for Completion;

(B) in respect of any Unavailability Units attributable to the Phase 2 Areas shown in Section A of Appendix J to Schedule 5, the earlier of:

(1) the Phase 2 Completion Date; and

(2) the later of the Phase 2 Date for Completion and the date of expiry of any period of time allowed pursuant to Clause 10.5.1(B) following the Phase 2 Date for Completion;

(C) in respect of any Unavailability Units attributable to the Phase 2 Areas shown in Section B of Appendix J to Schedule 5, the Phase 2 Completion Date.

2.7.2 If the Trust's Works Adviser shall later vary the BOA Date for Completion under Clause 10.5.1(A) or allow the Project Co any period of time under Clause 10.5.1(B), the Trust shall reimburse or allow to the Project Co any deduction made in respect of any Unavailability Units attributable to any Beneficial Occupation Area for the period up to such later BOA Date for Completion or during the period of time allowed under Clause 10.5.1(B), as the case may be, together with interest calculated from day to day at a rate per annum equal to the Interest Rate from the date upon which the relevant

deduction was made to the date of reimbursement or allowance provided that no such reimbursement or allowance shall be made in respect of deductions made in respect of periods after the BOA Completion Date.

- 2.7.3 If the Trust's Works Adviser shall later vary the Phase 2 Date for Completion under Clause 10.5.1(A) or allow the Project Co any period of time under Clause 10.5.1(B), the Trust shall reimburse or allow to the Project Co any deduction made in respect of any Unavailability Units attributable to the Phase 2 Areas shown in Section A of Appendix J to Schedule 5 for the period up to such later Phase 2 Date for Completion or during the period of time allowed under Clause 10.5.1(B), as the case may be, together with interest calculated from day to day at a rate per annum equal to the Interest Rate from the date upon which the relevant deduction was made to the date of reimbursement or allowance provided that no such reimbursement or allowance shall be made in respect of deductions made in respect of periods after the Phase 2 Completion Date.

## 2.8 Unavailability Response

The Project Co shall, within five Working Days of receipt of any Unavailability Deduction Notice, issue a written response to the Trust (the "**Unavailability Response**") stating whether or not the Project Co agrees with the amounts specified in the Unavailability Deduction Notice and, if not, the reasons for such disagreement. Where any amount is not agreed, the Parties shall seek to agree the same. Where any amount is not agreed within 10 Working Days of the date of the Unavailability Response, the Dispute shall be referred to the Disputes Resolution Procedure.

## 2.9 Deduction

Once agreed or determined, the Trust shall be entitled to deduct from the amount of the Usage Fee for the relevant Contract Month, an amount equal to the Usage Fee Deduction, provided that the amount of the Usage Fee Deduction shall not exceed the Core Usage Fee for that Contract Month. For the purposes of this paragraph 2.9 and the calculations of CUF in paragraph 2.6.5, it shall be assumed that the number of Bed Days and the number of Outpatient Units for the relevant Contract Month was, in each case, the lowest number shown from time to time in Activity Band (-1) in paragraph 1.2.3 or 1.3.3 (as the case may be) of Part 1 of Schedule 6.

## 2.10 Other Claims

2.10.1 Subject to paragraph 2.10.2, the rights of the Trust under this paragraph 2 are in addition and without prejudice to any other right the Trust may have to claim the amount of any Loss or damage suffered by the Trust on account of the acts or omissions of the Project Co, provided that the amount of any damages payable by the Project Co in respect of any Claim made by the Trust in relation to any Unavailability Event shall be reduced by the amount (if any) deducted by way of Usage Fee Deduction as a result of the Unavailability Event to which the Claim relates.

2.10.2 Where, pursuant to paragraph 2.4, any Unavailability Unit is found no longer to be Unavailable as a result of remedial action taken by the Project Co pursuant to paragraph 2.2.2(B) or otherwise, the Trust shall not make any

Claim against the Project Co in relation to such Unavailability Event other than:

- (A) by reason of any directly incurred physical Loss, save to the extent that the Trust has the benefit of any insurance policy relating to such Loss; and
- (B) any act or omission, wilful default or negligence of the Project Co or any of its agents or employees giving rise to death or personal injury.

## 2.11 Mitigation

2.11.1 The Trust shall take all reasonable steps to mitigate the consequences of any Unavailability Event and/or any Loss suffered by it as a result of such Unavailability Event .

2.11.2 Without limitation to paragraph 2.11.1, the Trust shall:

- (A) liaise with the Project Co to agree what reasonable steps the Trust may take in respect of Unavailability Units referred to in paragraph 2.1.1(B) and pursuant to the matters referred to in paragraphs 2.11.2(B) 2.11.2(C) and 2.11.2(D).
- (B) render all reasonable assistance to enable the Project Co to discharge its obligations under Clause 2.2.2(B) and, where the Project Co is unable to remedy the relevant Unavailability Event before the expiry of the Rectification Period, render reasonable assistance to the Project Co in mitigating the consequences of the Unavailability Event.
- (C) where reasonably practicable in all the circumstances, adapt space from within another Unavailability Category at the Hospital for the purposes for which the Unavailability Unit, the subject of any Unavailability Event is used. In such circumstances, the Usage Fee Weightings for the respective Unavailability Categories shall be compared and the lower of the Usage Fee Weightings for the Unavailability Categories shall be used for the purpose of calculating the Usage Fee Deduction (%) in paragraph 2.6.4 for such time as the adapted area is used pursuant to this paragraph 2.11.2(C). Any Unavailability Unit which is adapted to an alternative use pursuant to this paragraph 2.11.2(C) shall not be treated as Unavailable for the purposes of this paragraph 2.
- (D) where reasonably practicable in all the circumstances, use the Unavailability Units referred to in paragraph 2.1.1(B) for other purposes which are consistent with its obligations to act as a responsible manager of a hospital facility in respect of the Hospital. Any Unavailability Unit which is so used shall, during the period of such use, not be treated as being Unavailable for the purposes of this paragraph 2.

2.12 Annual Programme

2.12.1 Where, pursuant to paragraph 2.4 or paragraph 2.5, any Unavailability Unit is found no longer to be Unavailable as a result of remedial action taken by the Project Co pursuant to paragraph 2.2.2(B), the Parties shall, upon request by the Project Co, liaise together in accordance with the Liaison Procedure to consider any change proposed by the Project Co to the Annual Programme to include the performance of additional planned maintenance, repair or renewal in respect of the relevant Unavailability Unit. Any request by the Project Co for an amendment to the Annual Programme pursuant to this paragraph 2.12 shall identify the part of the Site which will be affected by such planned maintenance, repair or renewal and the relevant period during which such part will, as a result, be unavailable for use by the Trust for the purposes contemplated by the Project Documents (but which shall not be Unavailable by reason of planned maintenance, repair or renewal).

2.12.2 If the Parties are unable to agree on any matter in relation to any change to the Annual Programme submitted pursuant to paragraph 2.12.1 and, in particular, the extent and timing of any such relevant periods, within 10 Working Days of the Trust's receipt of the same, either may refer the Dispute for resolution under the Disputes Resolution Procedure. In determining the Dispute, the Disputes Resolution Procedure shall have due and proper regard to:

- (A) the obligations of the Project Co in relation to maintenance, repair and renewal, the economic consequences to the Project Co of the deferral of such activities and the Project Co's interest in carrying out such matters in a manner which represents the most economical and efficient way of doing so; and
- (B) the obligations of the Trust in respect of the provision of clinical services and/or pursuant to contracts with its purchasers.

2.13 Unavailability Calculation Table

Unavailability Category	Usage Fee Weighting	Unavailability Unit	Total No of Unavailability Units	Rectification Period
<b>Band 1</b>				
A&E	5.0%	m <sup>2</sup>	1532	2 hours
Patient Spaces (includes related bathrooms/wc's etc)				
Acute Inpatient Beds		Beds	823	
Low Dependency Beds		Beds	36	
Emergency Assessment Beds		Beds	72	
Selectron Rooms		Beds	2	
Day Beds (includes day recovery beds)		Beds	122	
Inpatient Recovery Bays		Spaces	31	
Labour Delivery Rooms		Beds	13	

Unavailability Category	Usage Fee Weighting	Unavailability Unit	Total No of Unavailability Units	Rectification Period
<b>Total Patient Spaces</b>	29.0%		1,099	2 hours
Theatre/Angio Suites	25.0%	Suites	23	2 hours
ITU/HDU/CCU/SCBU Areas	4.5%	Beds & Cots	55	2 hours
Diagnostic Imaging:				
MRI/CT & Special Procedure Rooms - Satellite Radiology	2.0%	Units	3	2 hours
Ultrasound/Doppler & Gamma Camera	4.0%	Units	12	2 hours
Plain Film, Dental, Fluoroscopy & Mammography	6.5%	Units	19	2 hours
Inpatient/Outpatient Examination/Consulting & Treatment Includes Inpatient/Outpatient Utility, Support & Storage	5.0%	Rooms	308	2 hours
Linear Accelerators	3.0%	Units	4	2 hours
Gastro Suites Ambulatory Assessment Rooms and Physiology	1.5%	Rooms	7	2 hours
Renal Dialysis	2%	Bays	22	2 hours
Dedicated Treatment & Treatment Planning Rooms	2.0%	Rooms	35	2 hours
Private Patients	2.0%	Rooms	20	2 hours
Switchboard	1.0%		119	2 hours
<b>Band 2</b>				
General Waiting & Support Areas and Direct Provider Support - (Staff WC, rest rooms etc)	1.0%	m <sup>2</sup>	13,261	4 hours
Clinical Support Areas:				4 hours
Rehab OPD & Inpatient Rehab (includes Physiotherapy, Occupational Therapy, Speech Therapy Chiropody, Dietetics and Social Services)		m <sup>2</sup>	2,320	4 hours
Radiation Therapy Physics		m <sup>2</sup>	336	4 hours
Pharmacy (Inpatient, Outpatient and Ward Based)		m <sup>2</sup>	803	4 hours
Medical Photography		m <sup>2</sup>	196	4 hours
<b>Total Clinic Support</b>	1.0%		3,655	4 hours
Pathology (including mortuary)	2.0%	m <sup>2</sup>	2,268	4 hours
CSSD & Medical Physics	2.0%	m <sup>2</sup>	1,655	4 hours
<b>Band 3</b>				
Office Areas, Materials Handling, Education Centre and Entry Services	1.5%	m <sup>2</sup>	11,149	1 day
<b>Total Percentage</b>	100%			

**2.14 Adjustment to Total Number of Unavailability Units**

During the Design and Construct Phase, the Parties shall liaise together from time to time in accordance with the Liaison Procedure to review the Total Number of Unavailability Units once construction in respect of each Unavailability Category has reached a sufficient stage to identify the precise extent of the same. Following such review, the Total Number of Unavailability Units shown in the Unavailability Calculation Table shall be amended to reflect any change to the same since the Amendment Execution Date.

**3. MAINTENANCE OF BUILDINGS AND ENGINEERING SERVICES**

Subject to Clauses 22.9 and 22.10 of the Facilities Management Agreement, where, in relation to any Contract Month and in respect of Maintenance of Buildings and Engineering Services, the Required Performance Standard exceeds the Achieved Performance Standard, as adjusted (if applicable) in accordance with Clause 22.7.2 of the same, the Trust shall be entitled to deduct from the amount of the Usage Fee (Maintenance) for the Contract Month, an amount determined in accordance with the following formula:

$$D = UFM \times (RPS - APS)$$

Where:

D = the amount of the relevant deduction;

UFM = the Usage Fee Maintenance payable for the relevant Contract Month;

RPS = the Required Performance Standard for the Service (expressed as a percentage);

APS = the Achieved Performance Standard for the Service (expressed as a percentage) agreed or determined pursuant to Clause 22.4.1 of the Facilities Management Agreement, as adjusted (if applicable) in accordance with Clause 22.7.2 of the same.



**SCHEDULE 7**

**INSURANCE**

**PART 1**

**Design and Construct Phase**

**1. CONSTRUCTION ALL RISKS**

**1.1 The Insured**

1.1.1 The Project Co, the Building Contractor and its sub-contractors and other contractors and their sub-contractors engaged on the Project;

1.1.2 the Trust; and

1.1.3 the Funders,

each for its respective rights and interests.

**1.2 The Insured Property**

1.2.1 All permanent and temporary Works, materials and goods and all other things comprised as part of the Hospital or used for or intended for incorporation within the Hospital, the subject of the Project, together with all ancillary and associated works thereto but excluding Medical Equipment and Used Other Equipment.

1.2.2 Medical Equipment and Used Other Equipment used for or intended for incorporation within the Hospital.

1.2.3 The sewers referred to in the UEA Deed of Grant.

**1.3 Interest**

**1.3.1 Material Damage -**

Item 1 - The permanent and temporary Works, materials, temporary and or permanent buildings and/or contents, constructional plant, tools and equipment, survey and other instruments (other than constructional plant, tools and equipment survey and other instruments belonging to or the responsibility of the Building Contractor and/or its sub-contractors) and other property used or for use in connection with the Project, the Insured's own or that for which he is responsible.

Item 2 - Any existing structures, facilities and buildings retained on Site during the Design and Construct Phase to be worked upon or demolished.

Item 3 - The sewers referred to in the UEA Deed of Grant.

**1.3.2 Additional Costs of Completion -**

Additional costs (being limited to labour and materials only) of completing unbuilt portion of the Project caused solely by delays following loss or

damage to built portions of Works and/or existing structures etc. and/or sewers which are covered.

**1.4 Geographical limits**

The Site and anywhere else in the United Kingdom in connection with the Project, including inland transit and offsite temporary storage.

**1.5 Sum Insured**

Insured Property at paragraph 1.2.1: £213,000,000

Insured Property at paragraph 1.2.2: £9,100,000

Insured Property at paragraph 1.2.3: £411,125

**1.6 Indemnity**

All risks of physical loss of or damage to any part of the Insured Property from any cause not excluded.

**1.7 Period of Insurance**

1.7.1 From the Effective Date until the Phase 2 Completion Date and any further period of extension as may be agreed between the Trust and the Project Co.

1.7.2 Defects Liability Period specified in the Building Contract.

**1.8 Main Exclusions**

The Insurers shall not be liable for:

1.8.1 war;

1.8.2 nuclear risks;

1.8.3 wear and tear;

1.8.4 unexplained shortages;

1.8.5 consequential losses (except as provided for in paragraph 1.10);

1.8.6 sonic boom;

1.8.7 loss of or damage to contractors' equipment (but for the avoidance of doubt this exclusion shall not apply to materials and other things forming part of or intended to form part of the Works or any temporary works);

1.8.8 the costs necessary to replace, repair or rectify any defect in design, plan, specification, materials or workmanship, but (other than where such damage is suffered by any sub-contractor to the Building Contractor) should unintended damage result from such a defect, this exception shall be limited to the additional costs of improvements to the original design, plan or specification, provided always that Insurers shall not be liable for the first £250,000 of each and every event payable under this exception;

1.8.9 terrorism above £100,000.

**1.9 Maximum Deductibles**

£20,000 per event, other than defects cover.

**1.10 Main Extensions/Conditions**

- 1.10.1 Including strikes, riots, civil commotion and criminal damage.
- 1.10.2 Debris removal (limited to 15% of each and every loss).
- 1.10.3 Expediting expenses (up to 130% of normal costs).
- 1.10.4 Professional fees to normal scale.
- 1.10.5 Temporary repairs (limited to 10% of actual cost of repair).
- 1.10.6 Automatic reinstatement of Sum Insured (to 130%).
- 1.10.7 Plans or specifications of the Insured Property.
- 1.10.8 Seventy two hour clause.
- 1.10.9 Including inland transit and storage.
- 1.10.10 Guarantee maintenance.
- 1.10.11 Airfreight costs.
- 1.10.12 ABI Fire Code of Practice.

**2. ADVANCE LOSS OF PROFITS**

**2.1 The Insured**

The Project Co and the Funders.

**2.2 Period of Insurance**

From the Effective Date until the Phase 2 Completion Date.

**2.3 Indemnity**

2.3.1 If any of the Insured Property under paragraph 1 is lost, destroyed or damaged by any of the risks insured under paragraph 1, including loss or damage which would be indemnifiable but for the application of any deductible, which causes interruption to or interference with construction work, resulting in a delay to any then anticipated Completion Date, this insurance will indemnify the Insured in respect of loss of anticipated gross revenue; and

2.3.2 "Increased Cost of Working" - the additional expenditure necessarily and reasonably incurred for the purpose of avoiding or reducing delay which, without such expenditure, would have taken place but not exceeding the amount of loss of anticipated gross revenue thereby avoided, less any sums saved during the Indemnity Period in respect of such costs, as may cease or be reduced in consequence of the delay,

which occur during the Indemnity Period.

## 2.4 **Sum Insured**

2.4.1 £84,000,000 being the sum sufficient to cover the sums subject of the Indemnity for the Indemnity Period referred to in paragraph 2.5.1.

2.4.2 £6,500,000 being the sum sufficient to cover the sums subject of the Indemnity for the Indemnity Period referred to in paragraph 2.5.2.

## 2.5 **Indemnity Periods**

2.5.1 In respect of the Phase 1 Design and Construct Phase, from the then anticipated Phase 1 Completion Date until 48 months thereafter.

2.5.2 In respect of the Phase 2 Design and Construct Phase, from the then anticipated Phase 2 Completion Date until 48 months thereafter.

## 2.6 **Main Exclusions**

As for paragraph 1 (but not the exclusion set out in paragraph 1.8.5), plus the Insurers shall not be liable in respect of any loss arising directly or indirectly as a consequence of:-

2.6.1 any restrictions on construction or operation imposed by a public authority;

2.6.2 delay due to alterations, additional, improvements or rectification of defects or faults or elimination of any deficiencies carried out after the occurrence of damage;

2.6.3 failure by the Insured to commit funds to the repair or replacement of destroyed or damaged items, where such funds have been paid by the Insurers to the order of the Insured under a full or partial settlement of a claim under the insurance effected pursuant to paragraph 1;

2.6.4 fines or damages for breach of contract for late or non-completion of orders or for any penalties of whatever nature, unless otherwise agreed; and

2.6.5 damage to contractors' equipment.

## 2.7 **Maximum Time Excess**

28 days for each and every loss.

## 2.8 **Main Extensions**

Subject in each case to usual market limitations on the period covered (if applicable):

2.8.1 delay arising from loss or damage (to the extent the loss or damage would have been insured under paragraph 1 if it had affected the Insured Property under paragraph 1) to the premises of suppliers where materials/plant/equipment for incorporation into the Project is being manufactured in respect of loss or damage caused by fire, lightning, aircraft and explosion only.

2.8.2 delay caused or contributed to by physical loss or damage to property in the vicinity of the Site which shall prevent or hinder access to or use of the Project.

2.8.3 interruption caused by damage to the supply of water, gas, electricity or telecommunications system to the Hospital.

### **3. PUBLIC LIABILITY**

#### **3.1 The Insured**

3.1.1 The Project Co, the Building Contractor and the Facilities Manager;

3.1.2 the Trust; and

3.1.3 the Funders,

each for its respective rights and interests.

#### **3.2 Period of Insurance**

From the Effective Date until the Phase 2 Completion Date.

#### **3.3 Indemnity**

The liability of an Insured to pay damages, costs and expenses as a result of:

3.3.1 death, injury and disease of any person;

3.3.2 loss or damage to any property; or

3.3.3 obstruction loss of amenities, nuisance, trespass, stoppage of traffic, infringement of light, easement or quasi easement,

arising out of or in the course of or in connection with the construction, testing, maintenance or commissioning of the Project.

#### **3.4 Geographical Limits**

The Site and anywhere else in the United Kingdom in connection with the Project, including inland transit and offsite temporary storage, but anywhere in the world in respect of visits for the purpose of the Project.

#### **3.5 Limit of Indemnity**

£50,000,000 for any one occurrence or all occurrences of a series consequent upon or attributable to one source or original source.

#### **3.6 Maximum Deductible**

£10,000 of each and every occurrence in respect of loss or damage to property, otherwise nil.

**3.7 Main Extensions**

- 3.7.1 Cross Liabilities Clause - In the event of claims being made by one Insured hereunder for which another Insured is or may be liable, this paragraph shall cover such other Insured against whom a claim is made or may be made, in the same manner as if separate policies had been issued to each Insured and the insurers shall waive all rights of subrogation against each Insured.
- 3.7.2 For purposes of this paragraph, the Insured includes the respective officers, directors, agents, servants and employees of an Insured.

**3.8 Main Exclusions**

- 3.8.1 Death of or bodily injury to or illness or disease contracted by the employees of the Insured claiming indemnity arising out of or in the course of their employment.
- 3.8.2 Property belonging to or in the charge or under the control of the Insured.
- 3.8.3 Liability arising out of technical or professional advice given for a fee by the Insured or by any person acting on behalf of the Insured other than advice relating to the Project insofar as insured under paragraph 1.
- 3.8.4 Liability arising out of the use of mechanically propelled vehicles for which compulsory insurance or security is required by legislation, except whilst in use as a tool of trade.
- 3.8.5 The cost of making good loss or damage to property indemnified under the insurance referred to in paragraph 1.
- 3.8.6 Liability arising from pollution or contamination, unless caused by a sudden, identifiable, unintended and unexpected incident.
- 3.8.7 Liability arising from ownership, possession, use or control of any aircraft or watercraft.

**4. COMPULSORY INSURANCES**

To comply with all statutory requirements, including Employer's Liability and Motor.

**SCHEDULE 7****INSURANCES****PART 2****Operational Phase****1. MATERIAL DAMAGE ALL RISKS****1.1 The Insured**

The Project Co the Trust and the Funders, each for its or their respective rights and interests.

**1.2 The Insured Property**

The Hospital (including between Phase 1 Completion and Phase 2 Completion, any Beneficial Occupation Area for which a BOA Completion Certificate has been issued) and all property and interests of every description used for or in connection with the ownership, maintenance and operation of the Hospital, excluding Medical Equipment, property of patients and Trust staff and other property in the Hospital not provided by or belonging to Project Co and its sub-contractors.

**1.3 Geographical Limits**

Anywhere that comprises the Hospital and its environs and temporary removals elsewhere in the United Kingdom or at which the Insured has an interest anywhere in the United Kingdom.

**1.4 Sum Insured**

An amount equivalent to the total reinstatement value of the property, including allowance for professional fees and removal of debris costs.

**1.5 Indemnity**

All risks of physical loss of or damage to any part of the Insured Property from any cause (including theft, subsidence, landslip, heave and whether or not caused by the Insured or any other person whosoever) not excluded in the Policy.

**1.6 Main Exclusions**

1.6.1 War, nuclear risks.

1.6.2 Gradual deterioration.

1.6.3 Unexplained shortages.

1.6.4 Consequential financial losses (loss of revenue, loss of use, etc.).

1.6.5 Defects in design, materials or workmanship (other than subsequent damage resulting from an ensuing cause which is not otherwise excluded).

**1.7 Main Extensions**

- 1.7.1 Including damage to buildings by thieves and theft of building fixtures or fittings for which the Insured is responsible.
- 1.7.2 Including all fixed glass on the interior and exteriors of the Insured Property, including stained glass and sanitary fixtures and fittings for which the Insured are responsible regardless of whether the buildings are insured.
- 1.7.3 Automatic reinstatement of Sum Insured.
- 1.7.4 Replacement of sanitary and other equipment or property.
- 1.7.5 Insured events includes reinstatement, repair or replacement of any property of the Insured or for which they are responsible, necessarily incurred by the Insured with the consent of the Insurer, having been affected by the outbreak of any infectious or contagious disease, including legionella.
- 1.7.6 Including pollution and contamination to the Insured Property arising from an event which itself is not otherwise excluded.
- 1.7.7 Contract works including works and temporary works erected or in the course of erection including materials and other things for incorporation in the Works up to a sum insured of £1,000,000.
- 1.7.8 Terrorism limit £100,000.
- 1.7.9 Goods in transit.
- 1.7.10 Deterioration of stock.
- 1.7.11 Debris removal.
- 1.7.12 Professional fees.
- 1.7.13 Local Authorities clause.
- 1.7.14 Replacement of computer records.

**1.8 Maximum Deductibles**

£5,000 of each and every loss.

**2. BUSINESS INTERRUPTION**

**2.1 The Insured**

The Project Co and the Funders.

**2.2 Indemnity**

If any of the Insured Property under paragraph 1 is lost, destroyed or damaged by any of the risks insured under paragraph 1, including loss or damage which would be indemnifiable but for the application of any excess/deductibles, which causes interruption to or interference with the operations of the Hospital, this insurance will



indemnify the Insured in respect of loss of revenue, to include the cost of meeting the loss of gross profits.

**2.3 Sum Insured**

A sum sufficient to cover the sums the subject of the Indemnity for the Indemnity Period.

**2.4 Maximum Deductible**

28 days for each and every loss.

**2.5 Indemnity Period**

From the date of damage or determination until 54 months thereafter.

**2.6 Main Exclusions**

As for paragraph 1 (except for paragraph 1.6.4).

**2.7 Main Extensions**

2.7.1 Delay arising from loss or damage (to the extent the loss or damage would have been insured under paragraph 1 if it had affected the Insured Property under paragraph 1) to the premises of suppliers where materials/plant/equipment for incorporation into the Project is being manufactured in respect of loss or damage caused by fire, lightning, aircraft and explosion only.

2.7.2 Interruption caused or contributed to by physical loss or damage to property in the vicinity of the Hospital which shall prevent or hinder access or use.

2.7.3 Interruption caused by damage to third party premises where property relating to the Hospital is stored and/or worked on.

2.7.4 Interruption caused by damage to the supply of water, gas, electricity or telecommunications system to the Hospital.

2.7.5 Interruption caused by infections or disease causing all or part of the Hospital to be unusable for its purpose, including the cancellation of bookings for accommodation surgery or treatment at the Hospital in consequence of such outbreak or the closure of the whole or part of the Hospital by the order of or on the advice of any public authority.

2.7.6 Injury or illness sustained by any person arising from or traceable to foreign or injurious matter in food or drink provided in the Hospital.

**3. ADDITIONAL COST OF WORKING**

**3.1 The Insured**

The Trust

**3.2 Indemnity**

If any of the Insured Property under paragraph 1 is lost, destroyed or damaged by any of the risks insured under paragraph 1, including loss or damage which would be indemnifiable but for the application of any excess/deductibles, which causes interruption to or interference with the operations of the Hospital, this insurance will indemnify the Insured in the respect of additional costs of working.

**3.3 Sum Insured**

£2,000,000

**3.4 Maximum Deductible**

28 days for each and every loss.

**3.5 Indemnity Period**

From the date of damage or determination until 54 months thereafter.

**3.6 Main Exclusions**

As for paragraph 1.

**3.7 Main Extensions**

3.7.1 Delay arising from loss or damage (to the extent the loss or damage would have been insured under paragraph 1 if it had affected the Insured Property under paragraph 1) to the premises of suppliers where materials/plant/equipment for incorporation into the Project is being manufactured in respect of loss or damage caused by fire, lightning, aircraft and explosion only.

3.7.2 Interruption caused or contributed to the physical loss or damage to property in the vicinity of the Hospital which shall prevent or hinder access or use.

3.7.3 Interruption caused by damage to third party premises where property relating to the Hospital is stored and/or worked on.

3.7.4 Interruption caused by damage to the supply of water, gas, electricity or telecommunications system to the Hospital.

3.7.5 Interruption caused by infections or disease causing all or part of the Hospital to be unusable for its purpose, including the cancellation of bookings for accommodation surgery or treatment at the Hospital in consequence of such outbreak or the closure of the whole or part of the Hospital by the order of or on the advance of any public authority.

3.7.6 Injury or illness sustained by any person arising from or traceable to foreign or injurious matter in food or drink provided in the Hospital.

3.7.7 Interruption to clinical services/research and development and resultant loss of income.

**4. PUBLIC LIABILITY**

**4.1 The Insured**

4.1.1 The Project Co and the Facilities Manager;

4.1.2 the Trust; and

4.1.3 the Funders,

each for its respective rights and interests

**4.2 Indemnity**

4.2.1 The liability of an Insured to pay damages as a result of:

(A) death, injury or disease of any person;

(B) loss or damage to any property; or

(C) obstruction, loss of amenities, nuisance, trespass, stoppage of traffic, infringement of light, easement or quasi easement,

arising out of the ownership, maintenance and part operation of the Hospital and all activities of each Insured therein.

4.2.2 Costs and expenses also to be covered at up to 25% of the Limit of Indemnity, included in limit.

**4.3 Geographical Limits**

Anywhere in the United Kingdom and anywhere in the world in respect of visits to the Hospital, excluding any judgment, award or settlement made within countries which operate under the laws of the United States of America and/or Canada or to any order made anywhere in the world to enforce such judgment, award or settlement, either in whole or in part.

**4.4 Limit of Indemnity**

Not less than £100,000,000 for any one occurrence or all occurrences of a series consequent upon or attributable to one source or original source.

**4.5 Maximum Deductibles**

£5,000 of each and every occurrence in respect of loss of or damage to property, otherwise nil.

**4.6 Main Extensions**

4.6.1 Cross liabilities clause. In the event of claims being made by one Insured hereunder for which another Insured is or may be liable, this paragraph shall cover such other Insured against whom a claim is made or may be made, in the same manner as if separate policies had been issued to each Insured and the insurers shall waive all rights of subrogation against each Insured.

- 4.6.2 For the purpose of this paragraph, the Insured includes the respective officers, directors, agents, servants and employees of an Insured.
- 4.6.3 To include cover for the following or their updated equivalent - Consumer Protection Act 1987, Data Protection Act 1984, Health and Safety at Work etc. Act 1974, Food Safety Act 1990 - prosecution defence costs.
- 4.6.4 Defective Premises Act 1972.
- 4.6.5 Canteen and Welfare facilities.
- 4.6.6 Patient to Patient liability.
- 4.6.7 Sudden and identifiable, unintended and unexpected pollution incidents, subject to such extension being available in the English insurance market at reasonable cost.

**4.7 Main Exclusions**

- 4.7.1 Death of or bodily injury to or disease contracted by the employees of the Insured claiming indemnity arising out of or in the course of their employment.
- 4.7.2 Liability arising out of medical/clinical malpractice or negligence.
- 4.7.3 Property belonging to or in the charge of or under the control of the Insured.
- 4.7.4 Liability arising out of technical or professional advice given for a fee by the Insured or by any person acting on behalf of the Insured, other than advice relating to the operation of the Hospital insofar as insured under paragraph 1.
- 4.7.5 Liability arising out of the use of motor vehicles for which compulsory insurance or security is required by legislation.
- 4.7.6 The cost of making good loss of or damage to property indemnified under the insurance referred to in paragraph 1.
- 4.7.7 Liability arising from pollution or contamination unless caused by a sudden unintended and unexpected incident.
- 4.7.8 Liquidated damages or penalties under any agreement for delay or in connection with guarantees of performance or efficiency.

**SCHEDULE 7****INSURANCE****PART 3****Review Procedure****1. Project Co's Notice**

Where, under Clause 24, any insurance effected is required to be maintained following its expiry, no later than the date following 30 Working Days (or such other period as the Parties may agree) before the relevant expiry date, the Project Co shall deliver to the Trust a notice, in respect of the relevant insurance, setting out the Project Co's proposals as to:

- 1.1 the changes (if any) since the Effective Date or, if later, the previous renewal date, in the risks or liabilities to be insured;
- 1.2 the reinstatement value of all assets required to be insured on a reinstatement value basis, the sum insured or limit of indemnity (as the case may be);
- 1.3 the insurance arrangements in respect of all other risks required to be insured.
- 1.4 the amount of deductibles applicable; and
- 1.5 any change in insurers or brokers,

in each case, for the period of 12 months (or such other period as may be agreed between the Parties) following the relevant expiry date.

**2. Information**

- 2.1 Each notice delivered pursuant to paragraph 1 shall be accompanied by information detailing the reasons for any changes and showing in reasonable detail how any amounts have been calculated.
- 2.2 The Project Co shall provide the Trust with any other information relating to the matters set out in such notice as the Trust may reasonably require.

**3. Agreement and Determination**

- 3.1 The Trust shall, upon receipt of any notice under paragraph 1 and the information required under paragraph 2, review the same and, within 10 Working Days of such receipt, inform the Project Co as to whether or not it considers that the Project Co is in breach of any of its obligations contained in Clause 24.
- 3.2 Where any matter set out in the Project Co's notice is stated by the Trust to be in breach of Clause 24 and is not agreed between the Parties within 20 Working Days of the date of such notice, the Dispute shall be referred to the Disputes Resolution Procedure.

**SCHEDULE 7****INSURANCE****PART 4****Application of Proceeds**

Any monies paid into the Insurance Proceeds Reinstatement Account pursuant to Clause 24.14 ("**Insurance Proceeds**") shall be applied as follows:

**1. DESIGN AND CONSTRUCT PHASE**

Subject to paragraph 3, Insurance Proceeds received in respect of the construction all risks insurance shall be applied by the Project Co in reinstating the insured property to which the relevant Insurance Proceeds relate.

**2. OPERATIONAL PHASE**

Subject to paragraph 3, Insurance Proceeds received in respect of the material damage all risks insurance shall be applied by the Project Co in reinstating the insured property to which the relevant Insurance Proceeds relate.

**3. REINSTATEMENT CONDITIONS**

3.1 Without the consent of the Controlling Creditor (whose decision the Project Co shall procure is not unreasonably delayed), no reinstatement of all or part of the Works shall be effected unless the conditions set out in this paragraph 3 are satisfied.

3.2 The Works may be reinstated in exactly the same form they were in before the relevant damage or destruction occurred, provided that:

3.2.1 Project Co has complied with its obligations under Clause 24, in the Design and Construct Phase, with regard to construction all risks insurance and advance loss of profits insurance and, in the Operational Phase, with regard to material damage all risks insurance and business interruption insurance or, where it has not so complied, there are sufficient Insurance Proceeds when taken together with any committed new funds Project Co has raised for such purpose on terms and conditions approved by the Controlling Creditor to complete the reinstatement works and ensure that amounts payable to Senior Creditors under the Funding Agreements during the period up to and including completion of the reinstatement works and, if the loss or damage occurs during the Design and Construct Phase, any period by which Completion is delayed as a result of that loss or damage (the "**Reinstatement Period**") may be paid by the Project Co in accordance with the Funding Agreements.

3.2.2 where Project Co has complied with its obligations under Clause 24, in the Design and Construct Phase, with regard to construction all risks insurance and advance loss of profits insurance and, in the Operational Phase, with regard to material damage all risks insurance and business interruption insurance, if there is any shortfall in the amounts required to complete the reinstatement works and ensure that amounts payable to Senior Creditors under the Funding Agreements during Reinstatement Period may be paid by the Project Co in accordance with the Funding Agreements, such shortfall

shall be made good by the Trust (on terms acceptable to the Controlling Creditor).

3.2.3 within six months of the occurrence of the relevant damage or destruction, there are delivered to the Agent:

- (A) a construction plan acceptable to the relevant insurers detailing the cost of reinstatement, the time it will take to reinstate and the contractor undertaking the reinstatement works;
- (B) during the Operational Phase, a fixed price contract acceptable to the relevant insurers, providing for liquidated damages if the reinstatement works have not been achieved by the date (the "**Target Date**") specified in the fixed price contract for completion of the reinstatement works and payable at such rate as is sufficient when taken together with any insurance proceeds applicable to the relevant loss or damage derived from business interruption insurance and any Usage Fee paid to the Project Co, to ensure that amounts payable to the Senior Creditors under the Funding Agreements may be paid by the Project Co during the period between the Target Date and the last day of the Reinstatement Period in accordance with the Funding Agreements; and
- (C) resolutions of the Trust's board of directors, approving the matters referred to in paragraphs 3.2.3(A) and 3.2.3(B) and the making of any payments required by paragraph 3.2.2, together with, where necessary, written confirmation from the Department of Health and the Treasury of their support for the reinstatement works and use of the facilities at the Hospital and confirming that this is consistent with the strategy of the relevant Health Authority and Government for healthcare provision.

3.2.4 the plan, contract, approvals and confirmations referred to in paragraph 3.2.3 are each in form and substance reasonably acceptable to the Controlling Creditor, provided that, where the cost of the reinstatement works, when aggregated with the cost of reinstatement works in respect of all other loss and damage occurring in the same calendar year:

is less than £2,500,000 (adjusted on the first day of every calendar year to reflect any change in RPI arising on or after 1st April, 1995), the requirements of this paragraph 3.2.4 shall apply only in respect of the resolutions of the Trust's board of directors referred to in paragraph 3.2.3(C).

3.3 The Works may be reinstated in a form different to that which existed immediately before the relevant loss or damage occurred, provided that:

3.3.1 Project Co has complied with its obligations under Clause 24, in the Design and Construct Phase, with regard to construction all risks insurance and advance loss of profits insurance and, in the Operational Phase, with regard to material damage all risks insurance and business interruption insurance or, where it has not so complied, there are sufficient Insurance Proceeds when taken together with any committed new funds Project Co has raised for such purpose on terms and conditions approved by the Controlling Creditor to

complete the reinstatement works (including the Variations) and ensure that amounts payable to Senior Creditors under the Funding Agreements during the Reinstatement Period may be paid by the Project Co in accordance with the Funding Agreements.

- 3.3.2 where Project Co has complied with its obligations under Clause 24 , in the Design and Construct Phase, with regard to construction all risks insurance and advance loss of profits insurance and, in the Operational Phase, with regard to material damage all risks insurance and business interruption insurance if there is any shortfall in the amounts required to complete the reinstatement works (including the Variations) and ensure that amounts payable to Senior Lenders under the Funding Agreements during the Reinstatement Period (which shall, in this paragraph 3.3.2, paragraph 3.3.3 and paragraph 3.3.6(B), include the period to completion of the relevant Variation) may be paid by the Project Co in accordance with the Funding Agreements, whether such shortfall arises as a result of the Variation or otherwise, such shortfall shall be made good by the Trust (on terms acceptable to the Controlling Creditor).
- 3.3.3 where, notwithstanding that Project Co has not complied with its obligations under Clause 24 as described in paragraph 3.3.1, there would be sufficient Insurance Proceeds when taken together with any committed new funds Project Co has raised for such purpose on terms and conditions approved by the Controlling Creditor to complete the reinstatement works (including the Variations) and ensure that amounts payable to Senior Creditors under Funding Agreements during the Reinstatement Period may be paid by the Project Co in accordance with the Funding Agreements, were it not for any Variation requested by the Trust, any shortfall shall be made good by the Trust (on terms acceptable to the Controlling Creditor).
- 3.3.4 in respect of the reinstatement works (including the Variations):
- (A) the amount (the "**Incremental Cost**") by which the total cost of all the reinstatement works (including the cost of the Variations) exceeds the cost of the reinstatement works which would be incurred if there were no Variations (the "**Primary Reinstatement Cost**") is not more than 10% of the Primary Reinstatement Cost; and
  - (B) the aggregate of:
    - (1) that part of the Primary Reinstatement Cost which would be incurred if there were no Variations (the "**Omissions Cost**") in respect of the proposed Variations; and
    - (2) the Incremental Cost,

does not exceed £15,000,000 (adjusted on the first day of every Contract Year to reflect any change in RPI arising on or after 1st April, 1995); and
  - (C) the requirements in respect of Variations set out in Clause 16 as amended by paragraph 3.3.5 have been completed within six months of the occurrence of the loss or damage.



For the purposes of this paragraph 3.3.4, the cost of any delay (including for these purposes Project Co's loss of anticipated revenue), arising from a Variation shall be added to the Incremental Cost or, where there is no Incremental Cost, the Omissions Cost for the purpose of calculating the same.

3.3.5 in respect of any Variations, the provisions of Clause 16 shall apply, provided that:

(A) during the Design and Construct Phase, Clause 16.4.1(D) shall, for the purposes of this paragraph 3.3.5, be deemed to include the words "and any costs or Losses incurred as a result of delays caused by negotiating the terms of the relevant Variation (except to the extent that the same are accommodated within the advance loss of profits insurance)" at the end of the first sentence.

(B) during the Design and Construct Phase, Clause 16.4.2 shall, for the purposes of this paragraph 3.3.5, be deemed to read as follows:

"16.4.2 During the Design and Construct Phase, the Project Co shall only be entitled to refuse to effect any Variation requested by the Trust pursuant to any Trust's Notice of Variation where:

(A) any necessary consents listed in the relevant Project Co's Variation Response pursuant to Clause 16.4.1(I) will not be obtainable; or

(B) the Variation would, if implemented, materially adversely affect the health and safety of any person or give rise to a breach of any Law or any NHS Requirement; or

(C) the Variation would, if implemented, have a material adverse effect on any Minimum Design Life and/or on the timing or cost of renewals; or

(D) the Variation would, if implemented, have a material adverse effect on the design and/or specification of the works to be effected by the Building Contractor pursuant to the Building Contract; or

(E) the extension of time which will result from the Delay Event consequent upon the Variation pursuant to Clause 10.5.1, with reference to the periods referred to in the Project Co's Variation Response in accordance with Clause 16.4.1(A), is reasonably likely to exceed three months or, when taken with previous extensions of time for Variations pursuant to Clause 10.5.1 is reasonably likely to exceed such period; or

(F) the Design and Construct Phase Variation Construction Cost specified in the Project Co's Variation Response

pursuant to Clause 16.4.1(D) is reasonably likely to exceed 10% of the Anticipated Construction Cost as at the Amendment Execution Date;

(G) the Variation would give rise to a Service Variation which the Project Co is entitled to refuse pursuant to Clause 11.4.3 of the Facilities Management Agreement; or

(H) the Variation would, if implemented, make any insurance effected or to be effected by the Project Co in accordance with Clause 24.1 unavailable."

(C) during the Operational Phase, Clause 16.5.1(D) shall, for the purposes of this paragraph 3.3, be deemed to include a further provision as follows:

"(7) any costs or Losses incurred as a result of delays caused by negotiating the terms of the relevant Variation (except to the extent that the same are accommodated within the business interruption insurance)".

3.3.6 within six months of the occurrence of the relevant loss or damage, there are delivered to the Agent:

(A) a construction plan acceptable to the relevant insurers detailing the cost of reinstatement, the time it will take to reinstate and the contractor undertaking the reinstatement works;

(B) a fixed price contract acceptable to the relevant insurers, providing for liquidated damages if the reinstatement works have not been achieved by the Target Date and payable at such rate as is sufficient when taken together with any insurance proceeds applicable to the relevant loss or damage derived from business interruption insurance and any Usage Fee paid to the Project Co, to ensure that amounts payable to the Senior Creditors under the Funding Agreements may be paid by the Project Co during the period between the Target Date and the last day of the Reinstatement Period in accordance with the Funding Agreements; and

(C) resolutions of the Trust's board of directors, approving the matters referred to in paragraphs 3.3.6(A) and 3.3.6(B) and the making of any payments required by paragraphs 3.3.2 or 3.3.3, together with, where necessary, written confirmation from the Department of Health and the Treasury of their support for the reinstatement works and use of the facilities at the Hospital and confirming that this is consistent with the strategy of the relevant Health Authority and Government for healthcare provision; and

(D) evidence of the calculations referred to in paragraph 3.3.4.

3.3.7 the plan, contract, approvals, confirmations and evidence referred to in paragraph 3.3.6 are each in form and substance reasonably acceptable to the

Controlling Creditor, provided that, where the cost of the reinstatement works, when aggregated with the cost of reinstatement works in respect of all other loss and damage occurring in the same calendar year is less than £2,500,000 (adjusted on the first day of every calendar year to reflect any change in RPI arising on or after 1st April, 1995), the requirements of this paragraph 3.3.7 shall apply only in respect of the resolutions of the Trust's board of directors referred to in paragraph 3.3.6(C).

- 3.4 In relation to any reinstatement pursuant to paragraph 3.3, the Trust shall pay to the Project Co the costs of any delay (to the extent the same are not accommodated within the advance loss of profits insurance or the business interruption insurance) arising as a result of the Trust proposing any Variation which does not subsequently proceed, provided that there shall be no double counting with any costs included pursuant to paragraph 3.3.

#### **4. PRE-REINSTATEMENT TERMINATION**

- 4.1 Where the requirements of paragraphs 3.2 or 3.3 (as the case may be) are not satisfied within six months of the occurrence of the relevant loss or damage, subject to paragraph 6, unless the Controlling Creditor otherwise agrees, the Project Documents will be terminated and, subject to paragraph 4.2:

4.1.1 where the requirement which has not been satisfied is paragraph 3.2.1 or 3.3.1, the Trust will, subject to compliance by the Project Co with its obligations under Clauses 45.5.2 (A), 45.5.2 (B) and 45.5.2 (C), pay the Project Co compensation in accordance with the relevant Section of Part 4 of Schedule 14 where the Project Documents are terminated during the Design and Construct Phase and in accordance with Part 5 of Schedule 14, where the Project Documents are terminated on or after the Phase 2 Completion Date.

4.1.2 where the requirements of paragraphs 3.2.3(A) or 3.2.3(B) or paragraphs 3.3.6(A) or 3.3.6 (B) have not been satisfied or the requirements of paragraphs 3.2.4 or 3.3.7 have not been satisfied in respect of the matters referred to in paragraphs 3.2.3(A) and 3.2.3(B) or 3.3.6(A) and 3.3.6(B), as the case may be, the Trust will, subject to compliance by the Project Co with its obligations under Clauses 45.5.2 (A), 45.5.2 (B) and 45.5.2 (C), pay the Project Co compensation. If the Project Co has used reasonable skill, care and endeavours to satisfy the provisions of paragraphs 3.2.3(A) and 3.2.3(B) or 3.3.6(A) and 3.3.6(B), as the case may be, compensation shall be payable in accordance with Part 3 of Schedule 14. If the Project Co has not used reasonable skill, care and endeavours to satisfy such provisions, where the Project Documents are terminated during the Design and Construct Phase, compensation shall be payable in accordance with the relevant Section of Part 4 of Schedule 14 and, where the Project Documents are terminated on or after the Phase 2 Completion Date, in accordance with Part 5 of Schedule 14.

4.1.3 where the requirement which has not been satisfied is paragraph 3.2.2, 3.3.2 or 3.3.3, paragraph 3.3.6(D) or paragraph 3.2.4 or 3.3.7, the Trust will, subject to compliance by the Project Co with its obligations under Clauses 45.5.2 (A), 45.5.2 (B) and 45.5.2 (C), pay the Project Co compensation in accordance with Part 3 of Schedule 14.

- 4.2 Where the Trust, within six months of the occurrence of the relevant loss or damage, elects not to reinstate the Works, subject to paragraph 6, the Project Documents will be terminated and the Trust will, subject to compliance by the Project Co with its obligations under Clauses 45.5.2 (A), 45.5.2 (B) and 45.5.2 (C) pay the Project Co compensation in accordance with Part 6 of Schedule 14. Such obligation shall apply notwithstanding the occurrence of any Event of Default since the date of the relevant loss or damage unless the Project Documents have been terminated in accordance with their terms and the terms of the Beneficiaries' Direct Agreement, before the Trust elects not to reinstate the Works in accordance with this paragraph 4.2.

**5. COMPENSATION PAYMENT**

Where the Trust is under any obligation to pay any compensation pursuant to paragraph 4, any Insurance Proceeds shall be applied as soon as possible:

- 5.1 first, in discharging such obligation; and
- 5.2 secondly, in discharging any other amounts owed by Project Co to the Senior Creditors.

Following such application, the balance of any Insurance Proceeds shall be paid to the Trust.

**6. NO REINSTATEMENT**

Notwithstanding the provisions of paragraph 4, the Project Documents shall not be terminated and no compensation shall be payable where, within six months of the occurrence of the relevant loss or damage:

- 6.1 upon request served on the Security Trustee by the Trust, all the Insurance Proceeds shall have been paid to the Agent for application in discharging amounts payable to Senior Creditors under the Funding Agreements (including any amounts arising as a result of any delay caused by the Trust in considering any proposed Variation as a result of such loss or damage, before making such request); and
- 6.2 Where the requirements of paragraph 3.2.3(C) or 3.3.6 (C) have not been satisfied within six months of the occurrence of the relevant loss or damage, the Trust shall forthwith make a request in accordance with paragraph 6.1 in respect of the relevant Insurance proceeds, upon which:
  - 6.2.1 the provisions of paragraph 6.1 shall apply; and
  - 6.2.2 the Trust shall use all reasonable endeavours to deliver to the Project Co, in form and substance reasonably acceptable to the Controlling Creditor, evidence of such approvals as are then required for the continued use of the facilities at the Hospital and the support thereof by the Department of Health and HM Treasury and confirming that this is consistent with the strategy of the relevant Health Authority and Government for healthcare provision,

provided that, if the requirements of paragraph 6.2.2 are not satisfied within one month of the relevant request by the Trust, the Project Documents shall be terminated and paragraph 4.1.3 shall apply.

- 6.3 the Usage Fee has been adjusted:

- 6.3.1 during the Design and Construct Phase in accordance with the following:
- (A) the Project Co shall re-run the Financial Model and ascertain the effect of the relevant payment to the Senior Creditors on the Usage Fee by inputting the change in real (and, where relevant nominal) costs for all affected periods; and
  - (B) following the re-running of the Financial Model pursuant to paragraph 6.3.1(A), the Project Co shall notify the Trust of the adjustments to the Usage Fee necessary to ensure the Maintenance of Ratios following the payment.
- 6.3.2 during the Operational Phase to ensure that the Parties are left in no better and no worse position than before the relevant loss or damage; and

6.4 the Trust has delivered to the Project Co, in form and substance reasonably acceptable to the Controlling Creditor, resolutions of the Trust's board of directors, approving the continued use of the Hospital and the matters referred to in 6.1 and 6.2, together with written confirmation from the Department of Health and the Treasury of their support for the continued use of the facilities at the Hospital and confirming that this is consistent with the strategy of the relevant Health Authority and Government for healthcare provision.

## 7. COMPENSATION BASIS

Notwithstanding the provisions of Part 4 of Schedule 14:-

- 7.1 where the Project Documents are terminated before the Phase 2 Completion Date at a time when there has been loss or damage to the Works and such Works have not been reinstated and the Trust is obliged to pay compensation on the basis provided for:
- 7.1.1 in Section A of Part 4 of Schedule 14, **NV** and **Net Value** in paragraphs 2 and 4 of Section A of Part 4 of Schedule 14 shall be calculated as the net value of the Works constructed by the Project Co as at the date of but immediately before the occurrence of the relevant damage or destruction; and
  - 7.1.3 in Section B of Part 4 of Schedule 14, **NV** and **Net Value** in paragraphs 2.2 and 3.2 of Section B of Part 4 of Schedule 14 shall be calculated as the net value of the Phase 2 Works constructed by the Project Co as at the date of but immediately before the occurrence of the relevant damage or destruction;
- 7.2 where:-
- 7.2.1 the termination arises during the Design and Construct Phase pursuant to Clause 43.3;
  - 7.2.2 Insurance Proceeds have previously been received or are receivable in respect of loss or damage to the Works; and
  - 7.2.3 the Trust elects not to enter into a contract for completion of a hospital at the Site (as referred to in Clause 46.1.2) following termination of the Project Documents,

subject to compliance by the Project Co with its obligations under Clauses 45.5.2 (A), 45.5.2 (B) and 45.5.2 (C), the amount of compensation which the Trust shall be obliged to pay to Project Co pursuant to Clause 46 shall be the higher of:-

- (A) compensation calculated in accordance with Part 4 of Schedule 14 (as amended pursuant to paragraph 7.1); and
- (B) the Insurance Proceeds or, if less, the Outstanding Debt.

**8. TIMING OF COMPENSATION PAYMENTS**

Subject to paragraph 5, where the Project Documents terminate:-

- 8.1 all Insurance Proceeds shall be applied, as soon as practicable, by way of a single lump sum payment, towards discharging all obligations of the Trust to pay compensation pursuant to Clause 46 (or this Part 4 of Schedule 7, as the case may be) and any other sums then due and payable by the Trust under the Project Documents in accordance with Clause 46.3 but without prejudice to any obligation of the Trust to pay the balance of all such compensation and other sums if the Insurance Proceeds are insufficient to discharge such obligations in full. For the avoidance of doubt, the provisions of this paragraph 8.1 shall override any entitlement of the Trust to pay any compensation over any period of time; and
- 8.2 the balance of any Insurance Proceeds after application pursuant to paragraph 8.1 shall be paid to the Trust.

**9. INSURABLE INTERESTS**

In making any payment pursuant to paragraphs 5 or 7, Insurance Proceeds relating to Project Co's insurable interest shall be applied first.

## SCHEDULE 8

### FORCE MAJEURE, DELAY EVENTS AND RELIEF EVENTS

#### PART 1

#### Force Majeure

#### 1. Design and Construct Phase

During the Design and Construct Phase, Force Majeure shall be:

- 1.1 War, invasion, act of foreign enemy, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection, military or usurped power.
- 1.2 Confiscation, commandeering, nationalisation or requisition or loss or destruction of or damage to any property by or under the order of any government *de jure* or *de facto* or public, municipal or local authority.
- 1.3 Ionising radiations or contamination by radioactivity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel, radioactive toxic explosive or other hazardous properties of any explosive nuclear assembly or nuclear component thereof.
- 1.4 Pressure waves caused by aircraft or other aerial devices travelling at sonic or supersonic speeds.
- 1.5 Subject to paragraph 2, Terrorism.

#### 2. Terrorism

Terrorism shall only be a Force Majeure event pursuant to paragraph 1.5:

- 2.1 during the Design and Construct Phase, to the extent that the relevant loss or damage is not insured within the scope of the construction all risks insurance effected by the Project Co pursuant to Clause 24.1.1; and
- 2.2 during the Operational Phase, to the extent that the relevant loss or damage is not insured within the scope of the material damage all risks insurance effected by the Project Co pursuant to Clause 24.1.1.

#### 3. Operational Phase

During the Operational Phase, Force Majeure shall be:

- 3.1 Any event specified in paragraph 1.
- 3.2 Any event besides those specified in paragraph 1 whose addition has been agreed or determined pursuant to paragraph 4.1 (unless its removal has been agreed or determined pursuant to paragraph 4.2).

#### 4. Other Events

- 4.1 Not more than one month before the anticipated Phase 1 Completion Date and not more than one month before each anniversary of the Phase 1 Completion Date, the Parties shall, at the request of the Project Co where the Project Co has reasonable

cause to believe that any event besides those specified in paragraph 1 cannot or may not (as at such anniversary) reasonably be insured in the English insurance market at reasonable cost, liaise together in accordance with the Liaison Procedure to consider the question. If the question of whether or not such event can or (as at such anniversary) may reasonably be so insured is not agreed within 10 Working Days of the date of the Project Co's request, the matter shall be referred to the Disputes Resolution Procedure. If the Parties agree (or it is determined) that such event cannot or may not (as at such anniversary) reasonably be so insured, such event shall be added to the list of Force Majeure events in paragraph 3 (as contemplated at paragraph 3.2) with effect from the relevant anniversary.

- 4.2 Where, pursuant to paragraph 4.1, any event has been added to the list of Force Majeure events in paragraph 3, the Parties shall, at the request of the Trust where the Trust has reasonable cause to believe that such event can or may reasonably be insured in the English insurance market at reasonable cost, liaise together in accordance with the Liaison Procedure to consider the question. If the question of whether or not such event can or shortly may reasonably be so insured is not agreed within 10 Working Days of the date of the Trust's request, the matter shall be referred to the Disputes Resolution Procedure. If the Parties agree (or it is determined) that such event can or shortly may reasonably be so insured the relevant event shall be removed from the list of Force Majeure events in paragraph 3 (as contemplated in paragraph 3.2) 10 Working Days after such agreement or determination if such event is then so insurable or (if not), 10 Working Days after such event becomes so insurable.



**SCHEDULE 8**

**FORCE MAJEURE, DELAY EVENTS AND RELIEF EVENTS**

**PART 2**

**Delay Events**

Delay Events are:

1. Variation to Works requested by the Trust.
2. Breach by the Trust of its obligations under any Project Documents arising on or after the Effective Date.
3. Any change of Hospital Specific Law or the introduction of Hospital Specific Law taking effect after the Commencement Date.
4. Force Majeure.
5. Subject to Clause 11.3.5 of the Facilities Management Agreement, Service Variations.
6. Subject to Clause 13.3.4 of the Facilities Management Agreement, amendments to the Standing Instructions and Procedures.

**SCHEDULE 8**

**FORCE MAJEURE, DELAY EVENTS AND RELIEF EVENTS**

**PART 3**

**Relief Events**

**Relief Events are:**

1. (Design and Construct Phase only) change of Law (excluding any change in Hospital Specific Law) or NHS Requirements or the introduction of Law (excluding the introduction of any Hospital Specific Law) or NHS Requirements, in any such case taking effect after the Execution Date.
2. (Design and Construct Phase only) exceptionally adverse weather conditions.
3. Protester action.
4. Failure by any statutory undertaker, utility company, local authority or other like body to carry out works or provide services, provided the same does not arise out of a late instruction given by or other act or omission, negligence or wilful default of the Project Co.
5. Fire, lightning, storm, tempest, flood, bursting or overflowing of water tanks, apparatus or pipes, earthquakes, aircraft and other aerial devices or articles dropped therefrom, riot and civil commotion, provided the same does not arise by reason of the wilful default or recklessness of the Project Co. For the purposes of this paragraph 5, Clause 54.4 shall not apply.
6. Accidental loss or damage to the Works and/or Hospital or any roads servicing the same, provided that such event does not arise (directly or indirectly) as a result of any wilful act or default of the Project Co.

**SCHEDULE 9**

**PART 1**

**RECORDS**

	<u>Document</u>	<u>Reference</u>	<u>Retention Period</u>
<b>PROJECT AGREEMENT</b>			
<b>Design and Construct Phase</b>			
1.	<u>Design</u>		
1.1	Existing Design Documents	Schedule 5 Parts 1 and 2	15 years
1.2	Project Co's design information	Schedule 5 Part 3 para 2	15 years
1.3	Trust's Works Adviser's responses to Project Co's design information	Schedule 5 Part 3 paras 3.1 and 5	15 years
1.4	Project Co's re-submissions	Schedule 5 Part 3 para 5.1	15 years
1.5	Trust Works Adviser's comments	Schedule 5 Part 3 para 3.2	15 years
1.6	Design Data	Clause 51.1	Until termination of Agreement
1.7	Certificates of Approval of Design	Clause 11.4	15 years
1.8	Design Documents	Schedule 5 Part 3 para 4.1	Until termination of Agreement
2.	<u>Planning</u>		
2.1	Planning Application and any subsequent planning applications made in relation to a Variation	Clauses 4 and 16.7	Until termination of Agreement

2.2	Planning Approval and any subsequent planning approvals obtained in relation to a Variation	Clauses 4 and 16.7	Until termination of Agreement
2.3	Planning Agreements	Clause 4	Until termination of Agreement
2.4	Notices of unacceptable conditions or Planning Agreements	Clause 4.1.9	Until termination of Agreement
2.5	Project Co's notices of reduction in cost	Clause 4.4.6	Until termination of Agreement
2.6	Project Co's notice of adjustment to Usage Fee	Clauses 4.4.7 and 4.5.2	Until termination of Agreement
3.	<u>Financial Model</u>		
3.1	Copies of the Financial Model	Clause 5.3	Until termination of Agreement
4.	<u>Construction</u>		
4.1	Construction Programme and the detailed programme and any revisions thereto	Clause 10.1	15 years
4.2	Certificates and instructions issued under the Building Contract	Clause 13.1	15 years
4.3	Monthly progress reports in relation to the Works	Clause 13.1	15 years
4.4	Surveys and investigations performed in relation to the installation of utility services	Clause 14.6	15 years

4.5	Trust's increased monitoring notices	Clause 17.2	15 years
4.6	Project Co's pre-Completion inspection notices	Clause 17.6	15 years
4.7	Trust's pre-completion matters notices	Clause 17.7	15 years
4.8	Project Co's notice re: Usage Fee	Clause 17.8	12 years
4.9	Project Co's notices re: Works being complete within 12 months	Clause 17.9.1	12 years
4.10	Completion Certificate	Clause 17.10.1	15 years
4.11	Snagging Notices	Clause 17.10.2	15 years
4.12	Project Co's Snagging Matters proposals	Clause 17.10.3	15 years
4.13	Trust's Non-Completion Certificates	Clause 9.3	15 years
4.14	Completion Statement	Clause 22.1	15 years
4.15	CDM Regulations declaration	Clause 19.1.3	15 years
4.16	CDM Regulations Executive notices	Clause 19.1.3	15 years
4.17	Fire Certificates	Clause 19.2.1	15 years
4.18	Health and Safety File	Clause 19.1.5	Until termination of Agreement
4.19	Operational Manuals	Clause 20	Until termination of Agreement
4.20	Trust's instructions in relation to the discovery of fossils and/or antiquities and the action to be taken	Clause 23.3	15 years

4.21	Set of as built drawings	Clause 35.6	Until termination of Agreement
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5. Insurance

5.1	Insurance policies obtained in relation to the matters specified in Schedule 7 Part 1	Clause 24.2.1 and Schedule 7 Part 1	12 years
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6. Payment

6.1	Project Co's notice of Usage fee adjustment	Clause 29.12.2	12 years
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7. Quality Assurance

7.1	Design and Construct Quality Manuals	Clause 33.1.2	15 years
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7.2	Any changes or amendments to the Quality Manuals	Clause 33.2	15 years
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**Operational Phase**

8. Break Options

8.1	Trust's notice to Terminate Project Documents	Clause 3.5	Until termination of Agreement
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9. Monthly Payments

9.1	Project Co's Reports and associated VAT invoices	Clause 40.1.3	12 years
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9.2	Working papers relating to the Project Co's Reports	Clause 40.1.4	12 years
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9.3	Trust's Monthly Payments Reports and associated VAT invoices	Clause 40.1.5	12 years
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10. Insurance

10.1	Insurance policies obtained in relation to the matters specified in Schedule 7 Part 2	Clauses 24.2.2 and Schedule 7 Part 2	12 years
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11.	<u>Decant and Commissioning</u>		
11.1	Decant and Commissioning Programme	Clause 18.1.3	Until termination of Agreement
11.2	Draft Equipment Schedules	Clause 18.1.6	Until agreed as Equipment Schedule
11.3	Equipment Schedules	Clause 18.1.9	Until termination of Agreement
11.4	Room Data Sheets	Schedule 5 parts 1, 2 and 3	12 years
11.5	Project Co notice of Usage Fee adjustment	Clause 18.1.10	12 years
11.6	Project Co notice re: Works being complete within one year	Clause 18.1.10	12 years
11.7	Service Completion Certificates	Clause 17.10.9	12 years
12.	<u>Payment</u>		
12.1	Trust's notices regarding funding of increased costs	Clauses 29.11.9 and 29.11.10(B)	12 years
12.2	Project Co's notice of reduction in costs	Clause 29.11.12(B)	12 years
12.3	Project Co's notice of Usage Fee adjustments	Clause 29.12.2	12 years
13.	<u>Quality Manuals</u>		
13.1	Facilities Management Quality Manuals	Clause 33.1.3	12 years
13.2	Services Quality Manuals	Clause 33.1.3	12 years
13.3	Any changes or amendments to the Quality Manuals	Clause 33.2	12 years

14. Dilapidations

14.1	Schedules of dilapidations	Schedule 6 Part 4 para 1.3	12 years
14.2	Trust's notice of satisfaction relating to Project Co's remedy of Dilapidations	Schedule 6 Part 4 paras 1.4 and 1.6	12 years
14.3	Trust's Outstanding Dilapidations Notices	Schedule 6 Part 4 para 1.4	12 years

15. Unavailability

15.1	Unavailability Notice	Schedule 6 Part 4 para 2.4	12 years
15.2	Notice of Renewed Availability	Schedule 6 Part 4 para 2.5	12 years
15.3	Unavailability Deduction Notice	Schedule 6 Part 4 para 2.6	12 years
15.4	Unavailability Response	Schedule 6 Part 4 para 2.7	12 years

**Design and Construct Phase and Operational Phase**

16. Variations

16.1	Project Co's notice of intention to make Variation	Clause 16.1.9	15 years
16.2	Trust's notices of Variation	Clause 16.2	15 years
16.3	Project Co's notices of reasons for refusal	Clause 16.3	15 years
16.4	Project Co's Variation Responses	Clauses 16.3, 16.4 and 16.5	15 years
16.5	Trust's Variation Confirmations	Clause 16.6	15 years
16.6	Design Data relating to any Variation	Clause 16.7	15 years



16.7	Trust's cancellation of Variations	Clause 16.6	15 years
16.8	Project Co's notice relating to Usage Fee adjustment	Clauses 16.9.4 and 16.9.5(B)	12 years
16.9	Trust's notices relating to funding of Design and Construct Phase Variation Costs and Operational Phase Variation Costs	Clauses 16.9.4 and 16.9.11 and Schedule 6 part 2 para 2	12 years
	Project Co's notices of Variation Savings	Clause 16.10.1(B) and Schedule 6 part 3 para 2	15 years
16.10	Trust's method statement in relation to Third Party Suppliers	Clause 16.12.6(D)	15 years
17.	<u>Private Patients and Commercial Income</u>		
17.1	Project Co's yearly Report on Commercial Income and working papers relating thereto	Clauses 28.4.3 and 28.4.4	12 years
18.	<u>Insurance</u>		
18.1	Project Co's further Insurance Policies	Clause 24.2	12 years
18.2	Project Co's disclosures to insurers and Trust's disclosures to Project Co	Clause 24.5	12 years
18.3	Project Co's notification of insurance and risk manager	Clause 24.6	12 years
18.4	Insurers surveys	Clause 24.7	12 years
18.5	Insurance renewal certificates	Clause 24.11.2	12 years
18.6	Project Co's notification of claims	Clause 24.13.1	12 years

18.7	Project Co's notices under Review Procedure	Schedule 7 part 3 para 1	12 years
19.	<u>Change of Law</u>		
19.1	Project Co's Change of Law Adjustment Notices	Clause 29.2	12 years
19.2	Trust's Change of Law Adjustment Notices	Clause 29.4	12 years
19.3	Trust's response to the Project Co	Clause 29.8.1	12 years
19.4	Trust's Change of Law Adjustment Confirmation	Clause 29.8.2	12 years
19.5	Project Co's Change of Law Adjustment Confirmation	Clause 29.9.2	12 years
20.	<u>Advisers and Representatives</u>		
20.1	Notices and approvals relating to terminations or substitution of appointment of Trust's Works Adviser or Facilities Adviser	Clause 32.3.1	12 years
20.2	Project Co's notice of appointment of substitute Project Co's Representative	Clause 32.3.2	12 years
21.	<u>Disputes Resolution Procedure</u>		
21.1	Original notices of issues in dispute	Schedule 10 Appendix A para 1.1	12 years
21.2	Counter-notices relating to original notices	Schedule 10 Appendix A para 1.2	12 years
21.3	Reference notices to the Panel	Schedule 10 Appendix A para 1.3	12 years

21.4	Any further written submission to the Panel	Schedule 10 Appendix A para 3.1	12 years
21.5	Any written submission, exchanged statements of evidence, signed statements or sworn affidavits etc presented by the Parties in the course of a hearing by the Panel	Schedule 10 Appendix A para 4	12 years
21.6	Decisions of the Panel relating to any Disputes	Schedule 10 Appendix A para 6	12 years
22.	<u>Liaison Procedure</u>		
22.1	Monthly Reports of the Liaison Committee	Schedule 11 para 7	12 years
23.	<u>Intellectual Property</u>		
23.1	Licences to use any Intellectual Property	Clause 51.2.1(B)	Until termination of Agreement
23.2	Licences relating to use of computerised data by the Trust	Clause 51.3.1	Until termination of Agreement
23.3	Proposals for backing up and storage and changes thereto	Clause 51.3.2	Until termination of Agreement
24.	<u>Confidential Information</u>		
24.1	Confidentiality agreements	Clause 52.4.2	Until termination of Agreement
24.2	Consents to copying of Confidential Information	Clause 52.6.2	12 years
24.3	Project Co's record of Confidential Information	Clause 52.7	Until termination of Agreement
24.4	Consents to disclosure	Clause 52.8	12 years

24.5	Notices relating to compelled disclosures of Confidential Information	Clause 52.9	12 years
25. <u>Corrupt Gifts and Payments</u>			
25.1	Any agreements for the payment of commissions	Clause 53.1	Until termination of Agreement
26. <u>Performance by Project Co</u>			
26.1	Trust's notices to Project Co to remedy failure by the Project Co to perform its obligations under the Project Documents	Clause 36.1	12 years
27. <u>Trust's Undertakings</u>			
27.1	Financial objectives supplied to Trust by Secretary of State for Health	Clause 37.3.2	12 years
27.2	Trust's approved annual business plans	Clause 37.3.3	12 years
27.3	Any outline or full business cases produced by the Trust in relation to new capital investment in the Hospital	Clause 37.3.4	Until termination of Agreement
27.4	Certified copy of each purchaser contract	Clause 37.3.5	6 years following termination of relevant purchaser contract
27.5	Trust's six monthly summary financial returns and Trust's audited annual accounts and reports	Clause 37.3.6	12 years

27.6	Copies of quality control and risk management procedures	Clause 37.3.9	Until termination of Agreement
27.7	Notices of Secretary of State for Health's recommendations or requirements	Clause 37.3.11	12 years
27.8	List of information provided by Trust to Secretary of State for Health and any copies of the information	Clauses 37.3.12 and 37.3.13	12 years
28.	<u>Assignment</u>		
28.1	Trust's consent to Project Co's assignment of any Project Document	Clause 47.2	12 years
28.2	Project Co's consent to Trust's assignment of any Project Document	Clause 47.3	12 years
29.	<u>Force Majeure, other Delay Events and Compensation</u>		
29.1	Relief notices relating to events of Force Majeure	Clause 41.2	12 years or termination of Agreement if sooner
29.2	Project Co's applications for extensions of time by reason of Force Majeure	Clause 41.3.1	12 years
29.3	Project Co and Trust notices to terminate Project Documents by reason of Force Majeure	Clauses 41.5.2, 41.5.3 and 41.5.4	Until termination of the Agreement

29.4	Project Co notice specifying reasons for delay to Construction Programme, delay details and any further information provided relating thereto	Clauses 10.2, 10.3 and 10.4	15 years
29.5	Project Co notices specifying Delay Events and associated costs	Schedule 14 Part 1, paras 2.1 and 4.1	15 years
29.6	Trust's response to Project Co	Schedule 14 Part 1, paras 2.1 and 4.1	15 years
29.7	Project Co notice of Usage Fee adjustment	Schedule 14 Part 1, paras 2.7.2 and 4.4.2	15 years
29.8	Project Co's notices relating to Maintenance of Buildings and Engineering Services and unmitigated costs	Schedule 14 Part 2, para 1	12 years
29.9	Project Co's notices specifying Outstanding Debt, interest thereon and Project Co's nominal issued share capital	Schedule 14 part 3, para 2.1	12 years
29.10	Project Co's notices specifying Outstanding Debt, interest thereon and market value of Project Co's equity	Schedule 14 Part 6, para 3.1	12 years
30.	<u>Indemnities</u>		
30.1	Trust notice to Project Co of right to an indemnity	Clause 42.2.1	12 years
30.2	Project Co consents to the settlement by the Trust of any claim which is subject to an indemnity	Clause 42.2.3	12 years

30.3	Trust notice of intention to control a claim which is subject to an indemnity	Clause 42.2.4	12 years
30.4	Project Co notice to the Trust of right to an indemnity	Clause 42.4.1	12 years
30.5	Trust consents to the settlement by Project Co of any claim which is subject to an indemnity	Clause 42.4.4	12 years
30.6	Project Co notice of intention to control a claim which is subject to an indemnity	Clause 42.4.5	12 years
31.	<u>Default</u>		
31.1	Notifications re: Events of Default	Clause 43.2	12 years or termination of Agreement if sooner
31.2	Trust notice of termination upon occurrence of an Event of Default	Clause 43.3	Until termination of the Agreement
32.	<u>Termination</u>		
32.1	Project Co notice of termination upon occurrence of a Project Co Termination Event	Clause 44.2	Until termination of the Agreement
32.2	Trust notice requiring Project Co's removal of equipment from the Site following termination	Clause 45.5.3	Until termination of the Agreement
32.3	Trust notice of termination upon a breach by the Project Co of its undertaking relating to corrupt gifts or payments	Clause 53.4	Until termination of the Agreement

33. Financial Information

33.1	Audited financial statements of Project Co, Building Contractor and the Facilities Manager	Clause 34.7.1(A)	12 years
33.2	Half year unaudited financial statements of Project Co	Clause 34.7.1(B)	12 years
33.3	Project Co's notice of its inability to meet its statutory financial obligations	Clause 34.7.2	12 years

34. Usage Fee

34.1	Trust's Activity Levels Adjustment Reports	Schedule 6 Part 1 para 1.6.1	Until termination of the Agreement
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35. Other Documents

35.1	Any other document expressly referred to in any provision of the Agreement		12 years
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**CUSTODY AGREEMENT**

1. Termination

1.1	Custodian's termination notice	Clause 6.1	12 years
1.2	Trust and Project Co termination notice	Clause 6.2	12 years

2. Step-In

2.1	Notice of Trust and Agent re Agent or Lenders' Representative performing or discharging Project Co's obligations	Clause 8.1.3	Until termination of the Custody Agreement
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2.2 Notice of Trust and Security Trustee or Lenders' Representative terminating Lenders' Representative's obligations Clause 8.3 Until termination of the Custody Agreement

3. Assignment

3.1 Consents to assignment Clause 10.2 12 years

4. Other Documents

4.1 Any other documents expressly referred to in any provision of the Agreement 12 years

**FACILITIES MANAGEMENT AGREEMENT**

1. Service Level Specification

1.1	Finalised Service Level Specifications for Part 2 of the Schedules	Clause 7.1.3	12 years from the termination of the provision of the Service
1.2	Copy of any changed Service Level Specifications	Clause 7.2	12 years from the termination of the provision of the Service

2. Project Co Obligations

2.1	Schedule of Ramp-Up Matters	Clause 8.3	12 years
2.2	Project Co's general statement of health and safety policy and all other statements of health and safety policies and any amendments thereto	Clause 8.4	12 years
2.3	Project Co's Annual Programme	Clause 8.5	12 years

3. Service Variations

3.1	Notice of Service Variations	Clause 11.2	12 years
3.2	Project Co's Service Variation Report	Clause 11.3.1	12 years
3.3	Trust's Service Variation Confirmation	Clause 11.4.1	12 years
3.4	Project Co's notices of refusal to Service Variation	Clause 11.4.3	12 years

3.5	Trust's notice of refusal to Service Variation	Clause 11.4.4	12 years
3.6	Project Co's notices of change in Reimbursable Expenses	Clause 11.5.2(A)	12 years
3.7	Project Co's notices of Service Variation Cost Adjustment	Clause 11.5.2(B)	12 years
4.	<u>Additional Services</u>		
4.1	Trust's Notices of Additional Services	Clause 12.2	12 years
4.2	Trust's information, statistics and verification	Clause 12.3.3	12 years
4.3	Project Co's notice to decline to provide Additional Services	Clauses 12.3.4 and 12.4.4	12 years
4.4	Trust's notice to cancel request for Additional Services	Clause 12.4.2	12 years
4.5	Trust's method statement	Clause 12.5.4	12 years
5.	<u>Standing Instructions and Procedures</u>		
5.1	Trust's Notices of Standing Instructions Amendment	Clause 13.2	12 years
5.2	Project Co's Standing Instructions Amendment Report	Clause 13.3	12 years

5.3	Trust's Standing Instructions Amendment Confirmation	Clause 13.4.1	12 years
5.4	Trust's notice of withdrawal of Standing Instructions Amendment	Clause 13.4.1	12 years
5.5	Project Co's notice of change in Reimbursable Expenses	Clause 13.4.3(A)	12 years
5.6	Project Co's notice of Standing Instructions Amendment Cost Adjustment and Service Cap Standing Instructions Amendment Adjustment	Clause 13.4.3(B)	12 years
6.	<u>Change of Law</u>		
6.1	Project Co's Change of Law Adjustment Notice	Clause 14.2	12 years
6.2	Trust's Change of Law Adjustment Notice	Clause 14.4	12 years
6.3	Trust's Change of Law Adjustment Confirmation	Clause 14.8	12 years
6.4	Project Co's Change of Law Adjustment Confirmations	Clause 14.9	12 years

6.5	Project Co's notices of increases or reductions in Reimbursable Expenses, Service Fees and Service Cap	Clauses 14.10.3(A) and 14.10.3(B)	12 years
7.	<u>Employees</u>		
7.1	Details regarding Employees disclosed to Project Co	Clause 15.1.5	12 years
7.2	Project Co's notice regarding omissions from disclosed details	Clause 15.2	12 years
7.3	Project Co's details of measures in relation to Employees	Clause 15.6	12 years
7.4	Trust's notice of consent to employment of staff	Clause 15.9.2	12 years
7.5	Original medical certificates in respect of staff	Clause 15.9.3	12 years
7.6	Training records	Clause 15.10.3	12 years
7.7	Trust's Facilities Adviser's requests relating to disciplinary actions	Clause 15.11.1	12 years
7.8	Project Co's requests relating to disciplinary actions	Clause 15.11.2	12 years
7.9	List of Staff	Clause 15.13	12 years

8. Contract Managers

- |     |  |                           |          |
|-----|--|---------------------------|----------|
| 8.1 | Project Co's notices of identity of Project Co's Contract Manager and his deputy | Clauses 16.2 and 16.4.1   | 12 years |
| 8.2 | Trust's notices of identity of Trust's Duty Manager and his deputy               | Clauses 16.2.2 and 16.4.2 | 12 years |
| 8.3 | Project Co's Contract Managers' notices reporting difficulties                   | Clause 16.5               | 12 years |

9. Relief Events

- |     |   |                       |          |
|-----|---|-----------------------|----------|
| 9.1 | Project Co's initial notice of relief requests and further Relief Requests and any further information relating thereto | Clauses 19.1 and 19.2 | 12 years |
| 9.2 | Trust's Facilities Advisers Relief Notices  | Clause 19.3           | 12 years |

10. Market Testing

- |      |   |                |          |
|------|---|----------------|----------|
| 10.1 | Draft Market Testing Proposals  | Clause 20.3.1  | 12 years |
| 10.2 | Project Co's or Trust's requests to change the split of Service Fees  | Clause 20.11.1 | 12 years |
| 10.3 | Trust's notice requesting termination of Service Providers' contracts | Clause 20.13.1 | 12 years |

10.4	Project Co's notices of termination and replacement of Service Providers' contracts	Clause 20.13.2	12 years
11.	<u>Equipment and Materials</u>		
11.1	Project Co's evidence of compliance with standard specifications	Clause 21.2	12 years
12.	<u>Performance Standards</u>		
12.1	Trust's notices of Activity Output failures	Clause 22.2.2	12 years
12.2	Trust's Facilities Adviser's Report	Clause 22.4.1	12 years
12.3	Project Co's notices disputing Report	Clause 22.4.2	12 years
12.4	Trust's notices of increased monitoring	Clause 22.6	12 years
13.	<u>Termination</u>		
13.1	Trust's Service termination notices relating to Performance Standards	Clause 23.1.1	12 years
13.2	Trust's Service termination notices	Clause 23.2.1	12 years
13.3	Project Co's notice that Service Provider's contract is terminated	Clause 23.1.3	12 years

- 14. Facilities Provision Contract
- 14.1                      Project Co's                      Clause 24                      12 years  
                                  notices of monthly  
                                  review meeting
- 15. Other Documents
- 15.1                      Any other    12 years  
                                  documents  
                                  expressly referred  
                                  to in any provision  
                                  of the Agreement

**CONSTRUCTION COLLATERAL WARRANTY AGREEMENT**

- 1. Professional Indemnity Insurance
- 1.1                      Professional Indemnity                      Clause 5                      Until  
                                  Insurance policy    termination  
                                     of the  
                                     Project  
                                     Agreement
- 2. Accounts
- 2.1                      Audited accounts for the                      Clause 8.2                      Until  
                                  Building Contractor    termination  
                                     of the  
                                     Project  
                                     Agreement
- 3. Confidentiality
- 3.1                      Any Confidential                      Clause 13                      Until  
                                  Information    termination  
                                     of the  
                                     Project  
                                     Agreement
- 4. Other Documents
- 4.1                      Any other documents    Until  
                                  expressly referred to in    termination  
                                  any provision of the    of the  
                                  Agreement    Project  
                                     Agreement



**FACILITIES PROVISION HANDOVER AGREEMENT**

1. Confidentiality

1.1	Any Confidential Information	Clause 8	Until termination of the Project Agreement
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2. Other Documents

2.1	Any other documents expressly referred to in any provision of the Agreement		Until termination of the Project Agreement
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**BENEFICIARIES' DIRECT AGREEMENT**

1. Assignment

1.1	Consent of Security Trustee to assignment or disposal of any Project Document by the Trust	Clause 2.5	Until termination of the Project Agreement
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2. Termination

2.1	Trust Notice of Event of Default	Clause 3.1	Until termination of the Project Agreement
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2.2	Termination Notice	Clause 3.2	Until termination of the Project Agreement
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2.3	Acceleration Notice	Clause 3.3	Until termination of the Project Agreement
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3. Step-in and Step-out

3.1	Step-in Notices	Clause 4.1	Until termination of the Project Agreement
3.2	Trust's notice of amounts due and payable by the Project Co, any other material obligations or liabilities and the amount of Consequential Liabilities (and subsequent changes thereto)	Clauses 4.2.1 and 4.2.3	Until termination of the Project Agreement
3.3	Security Trustee's Interim Step-in Notice	Clause 4.2.4	Until termination of the Project Agreement
3.4	Step-in Schedule of Works and Services (and consequential amendments)	Clauses 4.2.5, 4.2.6, 4.3.1, 4.3.2 and 5.13	Until termination of the Project Agreement
3.5	Trust's consent to Step-in Undertaking by a Beneficiaries' Representative (other than Security Trustee)	Clause 4.2.8	Until termination of the Project Agreement
3.6	Step-in Undertaking	Clause 4.2.15	Until termination of the Project Agreement
3.7	Trust's notice of further Performance Obligations	Clause 4.3.1	Until termination of the Project Agreement

3.8	Trust's notice to terminate Step-in Period and Beneficiaries' Representative's notice to terminate Step-in Period	Clause 4.3.3	Until termination of the Project Agreement
3.9	Trust's notice of material breach	Clause 4.4.1(C)	Until termination of the Project Agreement
3.10	Beneficiaries' Representative's notice to terminate the Step-in Period	Clause 4.5	Until termination of the Project Agreement
4.	<u>Novation</u>		
4.1	Proposed Novation Notices and subsequent Proposed Novation Notices	Clauses 5.1 and 5.5.1	Until termination of the Project Agreement
4.2	Information relating to consent to Novation	Clause 5.2	Until termination of the Project Agreement
4.3	Interim Novation Notice	Clause 5.2.4	Until termination of the Project Agreement
4.4	Novation Schedule of Works and Services (and consequential amendments)	Clauses 5.2.5, 5.2.6 and 5.13	Until termination of the Project Agreement
4.5	Consents to Novation Notice	Clause 5.4	Until termination of the Project Agreement

4.6	Withdrawal of Proposed Novation Notice	Clause 5.9.1	Until termination of the Project Agreement
4.7	Direct Agreement	Clause 5.12	Until termination of the Project Agreement
5.	<u>Revocation of Notices</u>		
5.1	Revocation notices relating to Termination Notices, Enforcement Notices or Step-in Notices	Clause 7	Until termination of the Project Agreement
6.	<u>Assignment</u>		
6.1	Consents to assignment	Clause 8.2	Until termination of the Project Agreement
7.	<u>Confidentiality</u>		
7.1	Any confidentiality agreements	Clause 12.4	Until termination of the Project Agreement
7.2	Consents to copying of Confidential Information	Clause 12.6.2	Until termination of the Project Agreement
7.3	Record of Confidential Information provided	Clause 12.7	Until termination of the Project Agreement

7.4	Consents to disclosure of Confidential Information	Clause 12.8	Until termination of the Project Agreement
7.5	Notification regarding compelled disclosure of Confidential Information	Clause 12.9	Until termination of the Project Agreement
8.	<u>Other Documents</u>		
8.1	Any other documents expressly referred to in any provisions of the Agreement		Until termination of the Project Agreement

**SCHEDULE 9**

**PART 2**

**REPORTS**

<b>Report</b>	<b>Number of Copies</b>	<b>Reference</b>
1. <u>Design And Construction</u> Project Co's monthly Report relating to the design and construction of the Hospital	5	Clause 13.1 and Schedule 5 Part 3 para 2
2. <u>Monthly Payments Report</u> Monthly Payment Reports	5	Clause 40.1
3. <u>Monthly Reports of the Liaison Committee</u> Monthly Reports of the Liaison Committee	5	Schedule 11 para 7
4. <u>Health and Safety</u> Project Co's Fire Reports	5	Clause 19.2.5(D)
5. <u>Commercial Income</u> Project Co's yearly Report on Commercial Income	5	Clause 28.4.3
6. <u>Service Variations</u> Project Co's Service Variation Reports	5	Clause 11.3.1 of the Facilities Management Agreement
7. <u>Standing Instructions and Procedures</u> Project Co's Standing Instructions Amendment Reports	5	Clause 13.3 of the Facilities Management Agreement

**SCHEDULE 10****DISPUTES RESOLUTION PROCEDURE****Introduction**

1. Should any Dispute arise between the Parties as to any matter relating to the Project, any Project Document, the Works, the Operations or in relation to any Design Document or any matter arising thereunder, the Disputes Resolution Procedure set out below shall be adopted, provided that the Disputes Resolution Procedure shall not be adopted in the context of any Dispute regarding forfeiture of any Lease. The Parties shall refer any Dispute to the decision of the Panel of Experts acting as independent experts but not as arbitrators.
2. A decision of the Panel shall be final and binding upon the Parties unless challenged by either Party, within 56 days of any such decision being made, by the issue of proceedings in the High Court of England and Wales as provided by paragraph 12 of this Schedule.
3. Unless the Parties otherwise agree in writing:-
  - 3.1 any concession or waiver made by either Party in or in connection with the proceedings before the Panel by the representatives of each of the Parties or the Parties themselves, shall be without prejudice and shall not be raised by either Party in any subsequent legal proceedings, save with the consent of the other Party;
  - 3.2 no member of the Panel shall be called to give evidence in any subsequent litigation; and
  - 3.3 no member of the Panel shall be entitled to act as an adviser to the Parties in subsequent legal proceedings, whether as counsel, solicitor or independent expert.
4. Unless the Project Agreement has already been repudiated or terminated, the Project Co shall continue to proceed with the Operations with all due diligence and the Trust and the Project Co shall continue to comply with all its obligations under the Project Documents regardless of the nature of the Dispute and the Parties shall give effect forthwith to every decision of the Panel except and to the extent that the same shall have been revised by settlement agreement or by the High Court of England and Wales.
5. In this Schedule 10, the expression "**the Panel**" shall be construed to mean the Technical Panel, the Facilities Panel, the Financial Panel or the Clinical Services Panel, as appropriate in the context. The expression "**the Chairman**" shall, similarly, be construed to mean the Chairman of the Technical Panel, the Chairman of the Facilities Panel, the Chairman of the Financial Panel or the Chairman of the Clinical Services Panel (as the case may be).

### **Intentions**

- 6.1 It is the intention of the Parties to avoid Disputes as far as is possible and the Parties have entered and will enter into the Project Documents with that intention.
- 6.2 Any Dispute arising between the Parties shall be referred to a Panel as set out at paragraph 7 of this Schedule.

### **The Panel**

- 7.1 The Panel shall conduct the reference and make its decision in accordance with the Panel Rules set out at Appendix A to this Schedule.
- 7.2 The Panel shall have power to open up, review and revise any endorsement, certificate, opinion, finding, instruction, notice, statement of objection, requirement, determination or decision of any person given or made pursuant to any of the Project Documents.
- 8.1 If any member of the Panel shall become unable or unwilling to act either at all or on such occasions or for such periods as to render it necessary or expedient, in the opinion of the Chairman, for a replacement to be appointed, the Parties shall agree and appoint such replacement. In default of such agreement within 28 days of notification to the Parties by the Chairman of the need for a replacement, the Chairman shall recommend a candidate having ascertained his suitability and willingness to act. Such person shall be appointed to the Panel, unless either Party objects, in which case the Chairman shall recommend other candidates until approval to an appointment is obtained, whereupon the candidate so approved shall be appointed to the Panel. If the Parties are unable to agree upon any candidate, a person nominated by the appropriate nominating authority referred to in the relevant Part of Appendix B to this Schedule shall be appointed.
- 8.2 Where there is a Dispute which has been referred to the Panel then, notwithstanding paragraph 8.1, if any member of the Panel shall be or become unable or unwilling to act in relation to such Dispute, in the absence of agreement between the Parties as to the appointment of an ad hoc replacement, the remaining members of the Panel shall reach a decision and the Chairman shall have a casting vote in the event of a tie.
- 9. If an appointment is made pursuant to paragraph 8 and if the period between the date of appointment and the date that a decision ought to be made by the Panel comprising such replacement pursuant to Panel Rule 6.1 is less than 21 days, the Parties shall be deemed to have agreed that the time limit under Panel Rule 6.1 shall be extended by such number of days as may be necessary to give the replacement 21 days from the date of his appointment to consider such reference.
- 10. Without prejudice to Panel Rule 7.1, the Parties shall bear equally the costs of and incidental to the engagement of the members of the Technical Panel, the Facilities Panel, the Financial Panel and the Clinical Services Panel, save and except those charges and expenses described in Appendix A, paragraph 7.2.
- 11.1 The Panel shall be set up as soon as possible after the Effective Date and shall be maintained until such time as the Parties may agree that it should be stood down.
- 11.2 If a Dispute should arise after the relevant Panel has been stood down, the Parties shall reconstitute the relevant Panel including, so far as practicable, the members of the



relevant Panel at the time it was stood down. Where the Parties cannot agree the appointment of any or any further members of the relevant Panel, the requisite appointments shall be made by the nominating authority referred to in Parts 1, 2, 3 or 4 of Appendix B to this Schedule, as the case may be.

**High Court Litigation**

12. If the Panel shall fail to deliver a decision pursuant to Panel Rule 6.1 or should either Party wish to challenge a decision made by the Panel pursuant to Panel Rule 6.1, provided that High Court proceedings are issued within 56 days of the said failure or the decision, the Parties hereby agree to refer the Dispute to the jurisdiction of the High Court of England and Wales which shall have the same power as is vested in the Panel referred to in paragraph 7.2.

**SCHEDULE 10**  
**DISPUTES RESOLUTION PROCEDURE**  
**APPENDIX A**  
**The Panel Rules**

**1. Commencement**

- 1.1 A Party may commence a reference under these rules by serving an original notice of the issue in dispute upon the other Party. An original notice shall include:-
- 1.1.1 a concise summary of the nature and background of the Dispute and the issues arising;
  - 1.1.2 a statement of the relief claimed;
  - 1.1.3 a reference to any Reports in which the matter of the Dispute was raised;
  - 1.1.4 a statement of any matters which the Parties have already agreed in relation to the procedure for determination of the Dispute;
  - 1.1.5 copies of all documents which have an important and direct bearing on the issues and on which the claimant intends to rely (or a list of such documents if they are already in possession of the recipient of the notice); and
  - 1.1.6 a statement to that effect if the Party considers the Panel should appoint a legal assessor pursuant to Panel Rule 4.3.
- 1.2 The recipient or recipients of an original notice shall, if it or he intends to dispute such notice, issue a counter notice within three Working Days of receipt of an original notice. A counter notice shall include:-
- 1.2.1 a concise summary of that recipient Party's case, including details of any response to the claims raised in an original notice and of any counterclaim; and
  - 1.2.2 a statement of the relief claimed against the Party serving the original notice; and
  - 1.2.3 the like details and documents required by Panel Rules 1.1.3, 1.1.4, 1.1.5 and 1.1.6.
- 1.3 If the Parties do not resolve the issue or issues in dispute raised under an original notice within three Working Days of service of the relevant counter notice, immediately thereafter either or both shall refer the Dispute to the Panel by serving a reference notice upon the Chairman in accordance with the provisions of Panel Rule 9. A reference notice shall include:-
- 1.3.1 an original notice and all ancillary documents attached thereto;
  - 1.3.2 the counter notice or notices and all ancillary documents attached thereto (except for any documents already contained in the original notice); and

- 1.3.3 a statement as to why that Party considers that particular Panel to be appropriate to consider the Dispute.
- 1.4 Provided that the Chairman of the relevant Panel is satisfied that the Panel should consider the Dispute, the Panel shall be empowered to consider the Dispute.
- 1.5 In the event of disagreement between the Parties as to whether a Dispute or whether any particular issues in a Dispute should be referred to the Technical Panel, the Facilities Panel, the Financial Panel or the Clinical Services Panel or as to the sequence in which Disputes or issues in a Dispute should be decided, the Parties shall make representations to the Chairman of the Financial Panel who, after consultation with the Chairmen of the other Panels, shall thereupon decide the appropriate forum or sequence as the case may be and, if a Dispute has already been the subject of a reference, the date to be deemed as the date of reference of the Dispute for the purposes of Panel Rule 6.1.
- 1.6 The Chairmen of the relevant Panels shall be entitled to discuss between them which Panel shall be empowered to consider the Dispute. Any decision of the Chairmen in that regard shall be binding upon the Parties, except insofar as it is challenged by the issue of High Court proceedings pursuant to paragraph 12.
- 1.7 The Technical Panel, the Facilities Panel, the Financial Panel and the Clinical Services Panel shall each be bound by their decisions and by the decisions of the others so far as they may be material to a Dispute before them, save to the extent that the same shall have been revised by settlement, agreement or court decision pursuant to paragraph 12.

2. **Quorum**

- 2.1 Unless the Parties agree otherwise in writing and subject to paragraph 8.2, the quorum for all proceedings of:-
- 2.1.1 the Technical Panel shall be all of its members including the Chairman (which shall include any acting Chairman) present in person;
- 2.1.2 the Facilities Panel shall be all of its members including the Chairman (which shall include any acting Chairman) present in person;
- 2.1.3 the Financial Panel shall be all of its members including the Chairman (which shall include any acting Chairman) present in person;
- 2.1.4 the Clinical Services Panel shall be all of its members including the Chairman (which shall include any acting Chairman) present in person.

3. **Procedure**

- 3.1 Once a reference has been made to the Panel in accordance with Panel Rule 1.3, each Party may make one written submission to the Panel, copied to the other Party, within seven days of the reference. Any such submission shall include a list of those witnesses who would be available if requested by the Panel to attend any oral examination that may be called by the Panel. Subject to Panel Rule 4.5, no other written submissions to the Panel will be permitted. Subject to Panel Rules 3.3, 4.3 and 4.5, no oral submissions or representations by the Parties will be permitted. The Panel

shall consider all written submissions and representations made in accordance with these rules, which include video, photographic and computer generated evidence and any permitted oral submissions or representations in reaching its decision.

- 3.2 Subject always to Panel Rule 3.1, the Panel shall have the widest discretion permitted by law to determine its procedure (including the delegation of the power to make procedural rulings to its Chairman) and to ensure the just, expeditious and economical determination of the Dispute after such investigation as the Panel may think fit, provided that the Panel shall adopt all and any procedures agreed by the Parties to be appropriate for the determination of a Dispute.
- 3.3 Without prejudice to the generality of Panel Rule 3.2, the Chairman shall decide whether or not to convene a hearing in order to examine witnesses or otherwise take oral evidence from witnesses or proceed to determine the Dispute on a documents-only basis, subject to the right of each Party to make representations to the Chairman in relation to such matters.
- 3.4 The Chairman shall fix the date, time and place of any meetings, hearings, or inspections which the Panel deems appropriate and shall give the Parties and other members of the Panel reasonable notice thereof.
- 3.5 The Chairman may, in advance of any hearing, submit to the Parties a list of questions which it wishes their witnesses to treat with special attention.
- 3.6 All meetings, hearings or inspections shall be in private unless the Parties agree otherwise.
- 3.7 Each Party may appoint representatives to appear on its behalf at a hearing, subject to such proof of authority as the Panel may require.

#### 4. **Witnesses**

- 4.1 Before any hearing to examine witnesses or other oral examination of witnesses, the Chairman may require either Party to exchange statements of evidence to be given by the witnesses by a specified time in advance of the hearing.
- 4.2 The Panel may allow, refuse or limit the appearance of witnesses, whether witnesses of fact or expert witnesses, save where the Parties have jointly agreed that the Panel should hear the evidence of specified witnesses, in which case the Panel shall hear such evidence and pay due regard to it.
- 4.3 If a statement by a Party has been made pursuant to Panel Rule 1.1.6, the Panel shall appoint a legal assessor to provide legal advice, as appropriate, upon the matters in issue to the Panel. The Panel may commission other expert evidence to be prepared and adduced by a witness independent of the Parties. Unless otherwise agreed by the Parties, no more than two such other witnesses may be called.
- 4.4 Any witness who gives oral evidence at a hearing or other oral examination may only be questioned by the Panel.
- 4.5 The Panel may allow the evidence of a witness to be presented in written form either as a signed statement or by a duly sworn affidavit. Either Party may make representations that such a witness should attend for oral examination by the Panel at a

hearing or other oral examination. If the Panel so orders and the witness thereafter fails to attend, the Panel may place such weight on the written evidence as it thinks fit or exclude it altogether.

**5. Powers of the Panel**

5.1 Without prejudice to Panel Rule 1.3 and to any powers which may be given to the Panel elsewhere in these Panel Rules or in any Project Document, the Panel shall have power:

5.1.1 to examine any witness or conduct an inspection of any property or thing relevant to the Dispute in the absence of any or any other representative of the Parties or any other person;

5.1.2 at any time to permit either Party to amend any submissions, subject always to informing the other Party of the amendment and permitting comments upon the amendment;

5.1.3 to continue with the reference in default of appearance or of any act by either Party in like manner as a judge of the High Court might continue with proceedings in that Court where a Party fails to comply with an order of that Court or a requirement of Rules of Court (including, without limitation, power to strike out any claim, defence, counterclaim or other submission and to make any decision consequent upon any such striking out) if a Party fails within the time specified in these Panel Rules or in any order, to do any act required by these Panel Rules or to comply with such order;

5.1.4 to order a Party to produce to the other Party and to the Panel for inspection and to supply copies of, any documents which do not have legal privilege in that Party's possession, custody or power, which, in the event of dispute, the Panel determines to be relevant;

5.1.5 to order a Party to answer interrogatories on the application of the other Party;

5.1.6 to order the inspection, preservation, storage, interim custody, sale or other disposal of any property or thing relevant to the Dispute under the control of either Party;

5.1.7 to make orders authorising any sample to be taken or any observation to be made or experiment to be tried which may, in the Panel's discretion, be necessary or expedient for the purpose of obtaining full information or evidence; and

5.1.8 to require the Parties to provide a written statement of their respective cases in relation to particular issues, to provide a written answer thereto and to give reasons for any disagreement.

5.2 Nothing in these Panel Rules shall be taken as conferring power upon the Panel to order a Party or a representative of a Party to give evidence (whether in person or by way of documentary or similar evidence) or do anything else which could not be ordered if the proceedings were before the High Court of England and Wales.

**6. Decisions**

- 6.1 The Panel shall make its decision within 21 days of the date of reference of a Dispute in accordance with Panel Rule 1.3 or within such other period as the Parties may agree in writing.
- 6.2 The Panel shall make its decision in writing. Unless the Parties otherwise agree, reasons for the decision and any reasons for dissent shall be given. The decision shall be dated and shall be signed or otherwise acknowledged in writing by all members of the Panel.
- 6.3 If a Panel member refuses or fails to sign or acknowledge the decision, the signatures of the majority will be sufficient, provided that the reason for the omitted signature is stated.
- 6.4 The Panel may allow interest on any sum which is the subject of a decision at the Interest Rate plus two per cent. per annum.
- 6.5 The Panel may make separate final decisions on different issues at different times.
- 6.6 Subject to paragraph 12, decisions shall be final and binding on the Parties as from the date upon which they are made.

**7. Costs**

- 7.1 The Panel shall have power to make a decision in respect of liability for all or part of the costs directly attributable to the reference by way of the charges and expenses of the members of the Panel and costs of an administrative nature (such as the hire of rooms) if the Panel considers that anything has been done or that any omission has been made unreasonably or improperly by or on behalf of a Party and to determine or assess the amount of those costs.
- 7.2 The Panel shall not in any event have power to make a decision in respect of liability for the legal or other costs incurred by a Party in preparing and presenting its case to the Panel. Such costs shall be borne by the Party incurring them.

**8. Exclusion of Liability**

Neither the Chairman nor any member of the Panel shall be liable to any Party for any act or omission in connection with any reference save that the Chairman and any member of the Panel may be liable for the consequences of conscious and deliberate wrongdoing.

**9. Notices**

- 9.1 Unless otherwise ordered by the Panel or agreed between the Parties, all notices required by these Panel Rules shall be in writing and shall be served in accordance with Clause 48. References in these Panel Rules to receipt of documents shall be construed accordingly.
- 9.2 Notices shall be effective from time of receipt. Periods of time measured with reference to the giving, sending or serving of a document shall be measured with reference to the time that document is received under Clause 48.2.

- 9.3 In every case in which a notice is sent to the Chairman, a copy thereof shall be sent to all other members of the Panel and to the other Party.

**SCHEDULE 10**  
**DISPUTES RESOLUTION PROCEDURE**

**APPENDIX B**

**PART 1**

**Composition of the Technical Panel**

1. The Technical Panel for any Dispute shall consist of three members including the Chairman. Each member (other than the Chairman) shall be selected by the Chairman from a pool of potential members agreed between the Parties from time to time. The composition of the pool shall reflect the different technical aspects of the Project. In making his selection, the Chairman shall have regard to the nature of the particular Dispute.
2. The Parties shall endeavour in good faith and with due expedition to agree the identity of persons willing and suitable to act as the initial members of the Technical Panel and of one such person to act as its Chairman and of willing and suitable replacements whenever the need therefor arises.
3. If the Parties are unable to agree any or all of the initial members of the Technical Panel within 28 days of a request that the Technical Panel be set up and constituted, either Party may apply to the nominating authority identified below to appoint such person or persons. Such Party shall notify the nominating authority of the identity of those persons who have been considered by the Parties under paragraph 2 and who have been thought by either Party not to be suitable. In the absence of agreement to the contrary by the Parties, the nominating authority shall not nominate any person who shall have been so identified.
4. The nominating authority for the purpose of appointing members of the Technical Panel shall be the President for the time being of the Centre for Dispute Resolution or, in his absence, the next available senior officer for the time being of such institution, provided that the nominating authority shall not be an Associated Entity.
5. With a view to facilitating the nominating authority's task of identifying suitable candidates for appointment, either Party may forward to the nominating authority any relevant description which has been agreed by the Parties of the likely background and experience of a suitable appointee and/or of the likely issues which the appointee as a member of the Technical Panel would be required to decide. The nominating authority may have regard to such description but shall not be bound by its terms. Subject to any such description, the nominating authority may have regard to the Parties' present intention that the members of the Technical Panel should be senior members of the engineering profession or of a similar background.
6. The Chairman shall nominate another member of the Technical Panel temporarily to act in his stead on such occasions or for such periods when the Chairman may, for any reason, be unable to carry out his duties.
7. If the Chairman shall, for any reason, be unable to carry out his duties as Chairman other than temporarily, the Parties shall agree upon the identity of his replacement. In the absence of such agreement or in the absence of agreement between the Parties as



to the identity of the initial Chairman, the eldest member of the Technical Panel shall take the chair and the members of the Technical Panel shall, by means of a majority vote, choose one of their number to act as Chairman, the oldest member shall have a casting vote in the event of a tie.

**SCHEDULE 10****DISPUTES RESOLUTION PROCEDURE****APPENDIX B****PART 2****Composition of the Facilities Panel**

1. The Facilities Panel for any Dispute shall consist of three members including the Chairman. Each member (other than the Chairman) shall be selected by the Chairman from a pool of potential members agreed between the Parties from time to time. The composition of the pool shall reflect the different facilities aspects of the Project. In making his selection, the Chairman shall have regard to the nature of the particular Dispute.
2. The Parties shall endeavour in good faith and with due expedition to agree the identity of persons willing and suitable to act as the initial members of the Facilities Panel and of one such person to act as its Chairman and of willing and suitable replacements whenever the need therefor arises.
3. If the Parties are unable to agree any or all of the initial members of the Facilities Panel within 28 days of a request that the Facilities Panel be set up and constituted, either Party may apply to the nominating authority identified below to appoint such person or persons. Such Party shall notify the nominating authority of the identity of those persons who have been considered by the Parties under paragraph 2 and who have been thought by either Party not to be suitable. In the absence of agreement to the contrary by the Parties, the nominating authority shall not nominate any person who shall have been so identified.
4. The nominating authority for the purpose of appointing members of the Facilities Panel shall be the President for the time being of the British Institute of Facilities Management or, in his absence, the next available senior officer for the time being of such institution, provided that the nominating authority shall not be an Associated Entity.
5. With a view to facilitating the nominating authority's task of identifying suitable candidates for appointment, either Party may forward to the nominating authority any relevant description which has been agreed by the Parties of the likely background and experience of a suitable appointee and/or of the likely issues which the appointee as a member of the Facilities Panel would be required to decide. The nominating authority may have regard to such description but shall not be bound by its terms. Subject to any such description, the nominating authority may have regard to the Parties' present intention that the members of the Facilities Panel should be senior members of the engineering profession.
6. The Chairman shall nominate another member of the Facilities Panel temporarily to act in his stead on such occasions or for such periods when the Chairman may, for any reason, be unable to carry out his duties.
7. If the Chairman shall, for any reason, be unable to carry out his duties as Chairman other than temporarily the Parties shall agree upon the identity of his replacement. In

the absence of such agreement or in the absence of agreement between the Parties as to the identity of the initial Chairman, the eldest member of the Facilities Panel shall take the chair and the members of the Facilities shall, by means of a majority vote, choose one of their number to act as Chairman, the oldest member shall have a casting vote in the event of a tie.

**SCHEDULE 10**  
**DISPUTES RESOLUTION PROCEDURE**

**APPENDIX B**

**PART 3**

**Composition of the Financial Panel**

1. The Financial Panel shall consist of three members including the Chairman. Each member (other than the Chairman) shall be selected by the Chairman from a pool of potential members agreed between the Parties from time to time. The composition of the pool shall reflect the different financial aspects of the Project. In making his selection, the Chairman shall have regard to the nature of the particular Dispute.
2. The Parties shall endeavour in good faith and with due expedition to agree the identity of persons willing and suitable to act as the initial members of the Financial Panel and of one such person to act as its Chairman and of willing and suitable replacements whenever the need therefor arises.
3. If the Parties are unable to agree any or all of the initial members of the Financial Panel within 60 days of the Execution Date, either Party may apply to the nominating authority identified below to appoint such person or persons. Such Party shall notify the nominating authority of the identity of those persons who have been considered by the Parties under paragraph 2 and who have been thought by either Party not to be suitable. In the absence of agreement to the contrary by the Parties, the nominating authority shall not nominate any person who shall have been so identified.
4. The nominating authority for the purpose of appointing replacement members of the Financial Panel shall be the President for the time being of the Institute of Chartered Accountants or, in his absence, the next available senior officer for the time being of such institution, provided that the nominating authority shall not be an Associated Entity. The nominating authority shall not appoint fellow officers of the said Institute to act as members of the Financial Panel.
5. The nominating authority shall not appoint any person whom he considers has a conflict of interest with the Project or either Party. If the nominating authority nominates a person whom either Party considers has a conflict of interest, either of them can notify the nominating authority of any such conflict of interest, together with evidence thereof and the nominating authority can, having given due consideration to the evidence, if he considers no such conflict exists, appoint such person. For these purposes, any person who was a member of a competing consortium which tendered for the Project shall be deemed to have a conflict of interest, unless the nominating authority and the Parties agree to the contrary.
6. With a view to facilitating the nominating authority's task of identifying suitable candidates for appointment, either Party may forward to the nominating authority any relevant description which has been agreed by the Parties of the likely background and experience of a suitable appointee and/or of the likely issues which the appointee as a member of the Financial Panel would be required to decide. The nominating authority may have regard to such description but shall not be bound by its terms.

7. The Chairman shall nominate another member of the Financial Panel temporarily to act in his stead on such occasions or for such periods when the Chairman may for any reason be unable to carry out his duties.
8. If the Chairman shall, for any reason, be unable to carry out his duties as Chairman other than temporarily, the Parties shall agree upon the identity of his replacement. In the absence of such agreement or in the absence of agreement between the Parties as to the identity of the initial Chairman, the eldest member of the Financial Panel shall take the chair and the members of the Financial Panel shall, by means of a majority vote, choose one of their number to act as Chairman, the oldest member shall have a casting vote in the event of a tie.

**SCHEDULE 10**  
**DISPUTES RESOLUTION PROCEDURE**  
**APPENDIX B**  
**PART 4**

**Composition of the Clinical Services Panel**

1. The Clinical Services Panel shall consist of three members including the Chairman. Each member (other than the Chairman) shall be selected by the Chairman from a pool of potential members agreed between the Parties from time to time. The composition of the pool shall reflect the different clinical aspects of the Project. In making his selection, the Chairman shall have regard to the nature of the particular Dispute.
2. The Parties shall endeavour in good faith and with due expedition to agree the identity of persons willing and suitable to act as the initial members of the Clinical Services Panel and of one such person to act as its Chairman and of willing and suitable replacements whenever the need therefor arises.
3. If the Parties are unable to agree any or all of the initial members of the Clinical Services Panel within 28 days of a request that the Clinical Services Panel be set up and constituted, either Party may apply to the nominating authority identified below to appoint such person or persons. Such Party shall notify the nominating authority of the identity of those persons who have been considered by the Parties under paragraph 2 and who have been thought by either Party not to be suitable. In the absence of agreement to the contrary of both Parties, the nominating authority shall not nominate any person who shall have been so identified.
4. The nominating authority for the purpose of appointing members of the Clinical Services Panel shall be the President for the time being of the appropriate Royal College or, in his absence, the next available senior officer for the time being of such institution, provided that the nominating authority shall not be any officer or employee of the Trust and/or any past or present consultant at the Trust.
5. With a view to facilitating the nominating authority's task of identifying suitable candidates for appointment, either Party may forward to the nominating authority any relevant description which has been agreed by the Parties of the likely background and experience of a suitable appointee and/or of the likely issues which the appointee as a member of the Clinical Services Panel would be required to decide. The nominating authority may have regard to such description but shall not be bound by its terms. Subject to any such description, the nominating authority may have regard to the Parties' present intention that the members of the Clinical Services Panel should be senior members of the medical profession or of a similar background.
6. The Chairman shall nominate another member of the Clinical Services Panel temporarily to act in his stead on such occasions or for such periods when the Chairman may for any reason be unable to carry out his duties.
7. If the Chairman shall for any reason be unable to carry out his duties as Chairman other than temporarily, the Parties shall agree upon the identity of his replacement. In

the absence of such agreement or in the absence of agreement between the Parties as to the identity of the initial Chairman, the eldest member of the Clinical Services Panel shall take the chair and the members of the Clinical Services Panel shall, by means of a majority vote, choose one of their number to act as Chairman, the oldest member shall have a casting vote in the event of a tie.

**SCHEDULE 11****LIAISON PROCEDURE**

1. The purpose of the Liaison Procedure is to have in place a mechanism whereby any matters relating to the Project can be discussed between the Parties with the intention of ensuring the successful and efficient operation of the Project and avoiding Disputes. The Liaison Procedure is separate from the IT Liaison Procedure (as defined in the IT Agreement).
2. The Liaison Procedure shall apply to all aspects of the Operations.
3. A Liaison Committee shall be appointed consisting of at least six members comprising:-
  - 3.1 three members from the Trust;
  - 3.2 three members from the Project Co; and
  - 3.3 where a majority of the Liaison Committee so determines, additional members being properly qualified to participate in discussions relating to any particular matter.
4. Each Party will have the right to reasonable objection to the other Party's proposed members except that neither Party shall have the right to object where the proposed member is the chief executive of the other Party.
5. The Liaison Committee shall meet on a monthly basis or at such other frequency as the majority of its members may determine, to review progress of the Project. Thereafter, members of the Liaison Committee shall correspond with one another as often as necessary to ensure the successful and efficient operation of the Project and the avoidance of Disputes.
6. The Liaison Committee shall, during the first year following the Execution Date, be chaired by a member appointed by the Trust under paragraph 3.1. During the year following the first anniversary of the Execution Date, the Liaison Committee shall be chaired by a member appointed by the Project Co under paragraph 3.2. Thereafter, the Chairmanship of the Liaison Committee shall rotate between such members annually until the Termination Date.
7. The Liaison Committee shall produce a monthly Report which will set out in detail the matters that have been discussed between the members and identify areas of agreement and disagreement. One of the purposes of the Liaison Committee is to avoid Disputes and should any Dispute arise between the members of the Liaison Committee, that Dispute shall, in the first instance, be referred to the Trust's Adviser and the Project Co's Representative and they shall meet with the intention of resolving it.
8. The Trust's Adviser and the Project Co's Representative shall be entitled to call for an explanation from the Liaison Committee as to the nature and extent of the Dispute and may make suggestions as to methods of resolving the same. Should no agreement be received as to the Dispute then the matter will be referred to the Disputes Resolution Procedure.



9. Should the Trust's Adviser and the Project Co's Representative agree that the best interests of the Project would be served by the removal of one or more members of the Liaison Committee, they may so direct in writing and the Trust or the Project Co, as the case may be, will put forward to the Trust's Adviser and the Project Co's Representative the name(s) of alternative members of the Liaison Committee.
10. The relevant person shall, with the consent of the other Party, such consent not to be unreasonably withheld or delayed, become a member of the Liaison Committee as from the date of its next meeting .

**SCHEDULE 12**

**PROJECT CO OWNERSHIP**

<b>Member</b>	<b>Ordinary shares in Project Co</b>
Octagon Healthcare Holdings (Norwich) Limited (Registered No. 3367686)	Two £1 ordinary shares

**SCHEDULE 13**  
**PLANNING APPROVAL**

**Leading Counsel**

This is a list of Leading Counsel for the purposes of determining whether or not there are unreasonable conditions.

John Taylor Q.C.

Anthony Anderson Q.C.

Christopher Lockhart-Mummery Q.C.

Michael Barnes Q.C.

John Howell Q.C.

Lionel Reid Q.C.

Jeremy Sullivan Q.C.

Roy Vandermeer Q.C.

Leading Counsel shall be the first named of the above but if he is unavailable within the timescale required, such other of them as shall be agreed between the Parties acting reasonably.

**SCHEDULE 14**  
**COMPENSATION**

**PART 1**

**Delay Events**

The Trust shall pay compensation pursuant to Clause 10.7 in accordance with the following:-

1. **Variation or Service Variation or amendment to Standing Instructions and Procedures**
  - 1.1 Where it is agreed or determined in accordance with Clause 10.5.1 that a Delay Event has arisen by reason of any Variation requested by the Trust, the costs incurred by the Project Co as a result of such Delay Event will be included in the calculation of Design and Construct Phase Variation Costs pursuant to Clause 16. As a result, compensation for a Delay Event arising out of any Variation shall be included within the relevant payment made by the Trust under Clause 16.9.
  - 1.2 Where it is agreed or determined in accordance with Clause 10.5.1 that a Delay Event has arisen by reason of any Service Variation, the costs incurred by the Project Co as a result of such Delay Event will be included in the calculation of the Service Variation Cost Adjustment pursuant to Clause 11.3 of the Facilities Management Agreement. As a result, compensation for a Delay Event arising out of any Service Variation shall be included within the relevant payment made by the Trust under Clause 11.5 of the same.
  - 1.3 Where it is agreed or determined in accordance with Clause 10.5.1 that a Delay Event has arisen by reason of any amendment to the Standing Instructions and Procedures, the costs incurred by the Project Co as a result of such Delay Event will be included in the calculation of the Standing Instructions Amendment Cost Adjustment pursuant to Clause 13.3 of the Facilities Management Agreement. As a result, compensation for a Delay Event arising out of any amendment to the Standing Instructions and Procedures shall be included within the relevant payment made by the Trust under Clause 13.4 of the same.
2. **Breach by the Trust of its Obligations under Project Documents**
  - 2.1 Where it is agreed or determined in accordance with Clause 10.5.1 that a Delay Event has arisen by reason of any breach by the Trust of its obligations under any Project Documents, the Project Co shall be entitled to serve a notice on the Trust specifying the Delay Event and demonstrating in reasonable detail how the Delay Event has or will give rise to increased costs to the Project Co. Where the Project Co notifies the Trust that there will be an increased cost to the Project Co, the Trust shall issue a response to the Project Co requesting details of the amount of the increased cost by reference to all or any of the payment methods referred to in paragraph 2.4.
  - 2.2 Following the issue of any notice by the Project Co and any response by the Trust pursuant to paragraph 2.1, the Parties shall liaise in accordance with the Liaison Procedure to seek to agree the amount of the relevant increased costs by reference to the method of their payment by the Trust. Where any such matter is not agreed within 10 Working Days, the Dispute shall be referred to the Disputes Resolution Procedure.

- 2.3 Once the increased cost to the Project Co has been agreed or determined, the Trust shall pay the same to the Project Co by way of compensation hereunder.
- 2.4 Any increased cost to the Project Co shall be paid by the Trust:
- 2.4.1 through an adjustment to the Usage Fee made in accordance with paragraph 2.9 in respect of the whole amount; or
  - 2.4.2 by way of a lump sum payment made in one or more instalments in respect of any part of the relevant increased cost and calculated to leave the Project Co in no better and no worse position than before such part of the increased cost was incurred, on the basis of the tests in paragraph 2.9.2 (*mutatis mutandis*) and an adjustment to the Usage Fee made in accordance with paragraph 2.9 in respect of the remaining part; or
  - 2.4.3 by way of a lump sum payment made in one or more instalments in respect of the whole amount and calculated to leave the Project Co in no better and no worse position than before such part of the increased cost was incurred, on the basis of the tests in paragraph 2.9.2 (*mutatis mutandis*).

Where any increased cost is to be paid by way of lump sum (whether by way of instalments or not) the Trust shall at the request and direction of the Project Co pay all or such part of the lump sum as the Project Co shall specify to such third party as the Project Co shall direct.

- 2.5 Subject to Clause 30, the Trust shall be entitled to elect the method of payment pursuant to paragraph 2.4. Any such election shall be made by the Trust pursuant to the liaison under paragraph 2.2 and confirmed once the relevant increased cost has been agreed or determined in accordance with the same.
- 2.6 If the Trust elects to pay the whole of any increased cost pursuant to paragraph 2.4.1, the Usage Fee shall be adjusted in accordance with paragraph 2.9 to reflect the same. Such adjustment shall be calculated by the Project Co and notified to the Trust within five Working Days of the end of the Quarter in which the relevant notice from the Project Co was delivered.
- 2.7 If the Trust elects to pay the increased cost pursuant to paragraph 2.4.2:
- 2.7.1 the Parties shall agree the amount and timing of the relevant instalments in respect of the relevant part of the increased cost, which instalments, unless otherwise agreed, shall reflect the amount and timing of the relevant costs as they are incurred and the Trust shall pay the same in accordance with such agreement.
  - 2.7.2 the Usage Fee shall be adjusted in accordance with paragraph 2.9 to reflect the remaining part of the increased costs. Such adjustment shall be made by the Project Co and notified to the Trust within five Working Days of the end of the Quarter in which the relevant notice from the Project Co was delivered.
- 2.8 If the Trust elects to pay the whole of the increased cost pursuant to paragraph 2.4.3, the Parties shall agree the amount and timing of the relevant instalments, which instalments, unless otherwise agreed, shall reflect the amount and timing of the

relevant costs as they are incurred and the Trust shall pay the same to the Project Co in accordance with such agreement.

- 2.9 Adjustments to the Usage Fee pursuant to this paragraph 2 shall be made as follows:
- 2.9.1 the Project Co shall re-run the Financial Model and ascertain the impact of the relevant increased costs (or part of the increased costs) on the Usage Fee by inputting the change in real (and, where relevant, nominal) costs for all affected periods.
- 2.9.2 following the re-running of the Financial Model pursuant to paragraph 2.9.1, the Project Co shall notify the Trust of the proposed necessary adjustments to the Usage Fee to ensure the Maintenance of Ratios as a result of the relevant changes.
- 2.10 If the Trust elects to pay any increased cost through an adjustment to the Usage Fee pursuant to this paragraph 2 but is precluded from doing so by Clause 30.1, the Trust shall pay such amount (in the case of any amount which relates to financing costs, as and when they fall due) by way of a lump sum pursuant to paragraph 2.4.2 or 2.4.3, as the case may be.

**3. Change of Hospital Specific Law or the Introduction of Hospital Specific Law taking effect after the Execution Date**

Where it is agreed or determined in accordance with Clause 10.5.1 that a Delay Event has arisen by reason of any change of Hospital Specific Law or the introduction of Hospital Specific Law taking effect after the Execution Date or the Amendment Execution Date (as the case may be), the costs incurred by the Project Co as a result of such Delay Event will be included in the calculation of increased costs pursuant to Clause 29. As a result, compensation for a Delay Event arising out of any such change of Law shall be included within the relevant payment made by the Trust under Clause 29.11.

**4. Force Majeure**

- 4.1 Where it is agreed or determined in accordance with Clause 10.5.1 that a Delay Event has arisen by reason of the occurrence of an event of Force Majeure, the Project Co shall be entitled to serve a notice on the Trust specifying the Delay Event and demonstrating in reasonable detail how the Delay Event has or will give rise to increased costs to the Project Co. Where the Project Co notifies the Trust that there will be an increased cost to the Project Co, the Trust shall issue a response to the Project Co requesting details of the amount of the increased cost by reference to all or any of the payment methods referred to in paragraph 2.4.
- 4.2 Following the issue of any notice by the Project Co and any response by the Trust pursuant to paragraph 4.1, the Parties shall liaise in accordance with the Liaison Procedure to seek to agree the amount of the relevant increased costs by reference to the method of their payment by the Project Co. Where any such matter is not agreed within 10 Working Days, the Dispute shall be referred to the Disputes Resolution Procedure.
- 4.3 Once the increased cost to the Project Co has been agreed or determined, the Trust shall pay the same to the Project Co by way of compensation hereunder. Paragraphs

2.4 to 2.8 (inclusive) and paragraph 2.10 shall apply, mutatis mutandis, in respect of such payment.

4.4 Adjustments to the Usage Fee pursuant to this paragraph 4 shall be made as follows:

4.4.1 the Project Co shall re-run the Financial Model and ascertain the impact of the relevant increased costs (or part of the increased costs) on the Usage Fee by inputting the change in real (and, where relevant, nominal) costs for all affected periods.

4.4.2 following the re-running of the Financial Model pursuant to paragraph 4.4.1, the Project Co shall notify the Trust of the proposed necessary adjustments to the Usage Fee to ensure the Maintenance of Ratios as a result of the relevant change, provided that, if any amount remains outstanding under the Senior Bank Facilities Agreement, the Project Co's adjustment to the Usage Fee shall, upon request by the Trust, assume that each repayment profile of the Senior Creditors has been rescheduled on the basis that:

- (A) the amount of the relevant loan which is due to be repaid on the first repayment date for that loan as specified in the Financial Model as at the Amendment Effective Date shall be reduced by the percentage which the Rescheduling Period bears to six months; and
- (B) the remaining amount of the relevant loan outstanding (including the amount of the first repayment which has been rescheduled) shall be repaid over the remaining repayment dates in respect of that loan for the Senior Creditors in the Financial Model as at the Amendment Effective Date with the amount to be repaid on each such repayment date being recalculated on the same basis and using the same methodology (including as to interest) as was used in the Financial Model as at the Amendment Effective Date.

**SCHEDULE 14**  
**COMPENSATION**  
**PART 2**

**Force Majeure (Operational Phase): Non-Termination**

The Trust shall pay compensation pursuant to Clause 41.4 in accordance with the following:

**1. Usage Fee (Maintenance) and Service Fees**

- 1.1 Where pursuant to Clause 41.1 or to Clause 41.3.2(A), the Trust is relieved from its obligations to pay the Usage Fee other than as referred to in paragraph 2 or any Service Fee or withholds from the Usage Fee amounts of up to the Usage Fee (Maintenance) in respect of the Maintenance of Buildings and Engineering Services or the Service Fees in respect of any other Service, in any such case, for a period of not less than two months in respect of the relevant Force Majeure event, the Project Co will be entitled thereafter, from time to time, to serve a notice on the Trust specifying the Maintenance of Buildings and Engineering Services or any other relevant Service (as the case may be) and any unmitigated costs incurred by the Project Co in respect of the same after such two month period.
- 1.2 Following the issue of any notice pursuant to paragraph 1.1, the Parties shall liaise in accordance with the Liaison Procedure to seek to agree the amount of the relevant costs. Where any such amount is not agreed within 10 Working Days of the date of the relevant notice, the Dispute shall be referred to the Disputes Resolution Procedure.
- 1.3 Once the costs incurred by the Project Co have been agreed or determined, the Trust shall pay the same to the Project Co by way of compensation hereunder.
- 1.4 Any costs to the Project Co shall be paid:
  - 1.4.1 through an adjustment to the Usage Fee in respect of the whole amount; or
  - 1.4.2 by way of a lump sum payment made in one or more instalments in respect of part of the costs and calculated to leave the Project Co in no better worse position than before the costs were incurred and an adjustment to the Usage Fee calculated in like manner in respect of the remaining part; or
  - 1.4.3 by way of a lump sum payment made in one or more instalments in respect of the whole amount and calculated to leave the Project Co in no better and no worse position than before the costs were incurred.

Where any costs are to be paid by way of lump sum (whether by way of instalments or not) the Trust shall, at the request and direction of the Project Co, pay all or such part of the lump sum as the Project Co shall specify to such third party as the Project Co shall direct.

- 1.5 Subject to Clause 30, the Trust shall be entitled to elect the method of payment pursuant to paragraph 1.4. Any such election shall be made by the Trust pursuant to the liaison under paragraph 1.2 and confirmed once the relevant costs have been determined in accordance with the same.



- 1.6 If the Trust elects to pay the whole of any costs pursuant to paragraph 1.4.1, the Parties shall liaise together following provision of information by the Project Co in accordance with Clause 30.2.4. Following such liaison, the Trust shall notify the Project Co as to whether or not it still wishes to fund the relevant costs pursuant to paragraph 1.4.1. If it does, the Usage Fee shall be adjusted by an amount calculated to leave the Project Co in no better and no worse position than before the costs were incurred. Otherwise, the Trust shall pay the costs in accordance with paragraph 1.4.2 or paragraph 1.4.3.
- 1.7 If the Trust elects to pay the costs pursuant to paragraph 1.4.2:
- 1.7.1 the Parties shall agree the amount and timing of the relevant instalments in respect of the relevant part of the costs, which instalments shall, unless the Project Co is able to fund such costs in accordance with Clause 30.2, reflect the amount and timing of the relevant costs as they are incurred. The Trust shall pay the instalments in accordance with such agreement;
- 1.7.2 in relation to the remaining part, the Parties shall liaise together following provision of information by the Project Co in accordance with Clause 30.2.4. Following such liaison, the Trust shall notify the Project Co as to whether or not it still wishes the Project Co to fund the remaining part of the costs pursuant to paragraph 1.4.2. If it does, the Usage Fee shall be adjusted by an amount calculated to leave the Project Co in no better and no worse position than before the costs were incurred. Otherwise, the Trust shall pay the costs in accordance with paragraph 1.4.3.
- 1.8 If the Trust elects to pay the whole of any cost pursuant to 1.4.3, the Parties shall agree the amount and timing of the relevant instalments, which instalments shall, unless the Project Co is able to fund such costs in accordance with Clause 30.2, reflect the amount and timing of the relevant costs as they are incurred. The Trust shall pay the instalments in accordance with such agreement.

**2. Core Usage Fee**

- 2.1 Where, pursuant to Clause 41.1 or Clause 41.3.2(B), the Trust is relieved from its obligation to pay the Usage Fee (excluding any withholding in relation to the Usage Fee (Maintenance)) or deducts from the Usage Fee amounts of up to the Core Usage Fee and the Project Documents are not terminated under Clause 41.5 as a result of the effects of the occurrence of Force Majeure which gave rise to such deduction:
- 2.1.1 if the Works at the Site are not damaged, the Trust shall pay to the Project Co, by way of compensation, an amount equal to any Usage Fee (excluding any withholding in relation to the Usage Fee (Maintenance)) in respect of which the Trust was relieved from its obligations to pay and/or the amount of any deduction made pursuant to Clause 41.3.2(B), together with interest calculated at the non-default senior debt interest rate under the Funding Agreements.
- 2.1.2 if any part of the Works at the Site is damaged and, following liaison pursuant to Clause 41.3.3, the Parties have reached agreement as to what action is appropriate in all the circumstances, the Trust shall pay to the Project Co by way of compensation, an amount calculated to leave the Project Co in no

better and no worse position than it was before the occurrence of the Force Majeure event.

- 2.2 The Trust's obligations to make any payment under paragraph 2.1 shall arise on the date the occurrence of Force Majeure ceases to have a material effect on the performance of any Project Document, subject to that date being not less than two months after the date of occurrence of the relevant event of Force Majeure.

**SCHEDULE 14**  
**COMPENSATION**  
**PART 3**

**Force Majeure : Termination**

The Trust will pay compensation pursuant to Clause 46.1.1 in accordance with the following:

**1. AMOUNT**

- 1.1 Subject to paragraph 1.2, the amount of compensation payable by the Trust shall be the aggregate of:
  - 1.1.1 Outstanding Debt;
  - 1.1.2 interest, including capitalised interest but excluding default interest, arising on any part of the Outstanding Debt at the rate of interest applicable under the relevant Funding Agreement until payment of the compensation hereunder in its entirety;
  - 1.1.3 the fees of any facility agent and/or security trustee arising in respect of the Outstanding Debt, until payment of the compensation hereunder in its entirety; and
  - 1.1.4 in respect of the event of Force Majeure giving rise to termination pursuant to Clause 41.5, an amount calculated in accordance with paragraph 2.1.1 of Part 2 of this Schedule where, pursuant to Clause 41.1 or Clause 41.3.2(B), the Trust is relieved from its obligation to pay the Usage Fee (excluding any withholding in relation to the Usage Fee (Maintenance)) or deducts from the Usage Fee amounts of up to the Core Usage Fee before the Project Documents are terminated under Clause 41.5.
- 1.2 Where the Project Documents have been terminated pursuant to Clause 41.5 as a result of the occurrence of an event of Force Majeure under paragraph 1.2 of Part 1 of Schedule 8, the amount of compensation payable by the Trust shall be calculated in accordance with paragraphs 1 and 2 of Part 6 of this Schedule.
- 1.3 The amount of compensation payable pursuant to paragraphs 1.1 or 1.2 shall be reduced by the amount of any compensation received by the Project Co from any other person pursuant to the occurrence of an event of Force Majeure as referred to in paragraphs 1 and 3.1 of Part 1 of Schedule 8.

**2. PAYMENT**

- 2.1 Following termination of the Project Documents in their entirety pursuant to Clause 41.5, the Project Co shall, as soon as reasonably practicable and in any event within three months, notify the Trust:
  - 2.1.1 where the amount of compensation payable is calculated in accordance with paragraph 1.1 of the amounts specified in paragraphs 1.1.1 and 1.1.3, together with details of interest accrued as contemplated in paragraph 1.1.2 and the daily rate of its accrual.

2.1.2 where the amount of compensation is calculated in accordance with paragraph 1.2, the amounts referred to in paragraph 3.1 of Part 6 of this Schedule.

Any such notice shall show in reasonable detail the derivation of the relevant amounts.

2.2 Following the issue of any notice pursuant to paragraph 2.1, the Parties shall liaise in accordance with the Liaison Procedure to seek to agree the amounts specified. Where any such amount is not agreed within 20 Working Days, the Dispute shall be referred to the Disputes Resolution Procedure.

2.3 Once agreed or determined, the Trust shall forthwith pay the amount of compensation due under paragraph 1:

2.3.1 in a lump sum payment; or

2.3.2 at the Trust's election, by way of equal six monthly instalments over a period of up to two years (at the Trust's election).

**SCHEDULE 14**  
**COMPENSATION**  
**PART 4**

**Design and Construct Phase : Event of Default Termination**

**SECTION A**

The Trust will pay compensation pursuant to Clause 46.1.2 in accordance with the following:

**1. Payment**

The Trust shall, subject to paragraph 4, pay compensation to the Project Co in respect of every Compensation Month which arises during the Compensation Period.

**2. Amount**

The amount of the compensation payable in respect of any Compensation Month pursuant to paragraph 1 shall be calculated in accordance with the following formula:

$$CA = \frac{NV}{\left(\frac{1}{r} - \frac{1}{r(1+r)^t}\right)}$$

Where:

CA = the compensation amount payable during each relevant year, which amount shall be divided into 12 equal monthly instalments for the purposes of paragraph 1;

NV = the net value of the Works constructed by the Project Co as at the Termination Date (the "**Net Value**") calculated in accordance with paragraph 3;

r = the non-default senior debt funding rate in the Funding Agreements, expressed as a decimal;

t = the number of years from the Termination Date until the date on which the Trust would have been entitled to terminate the Project Documents in their entirety pursuant to Clause 3.5.1(A).

**3. Net Value**

The Net Value shall be calculated in accordance with the following formula:

$$NV = AWC - MP - CC$$

Where:

NV = the Net Value;

AWC = the aggregate of the Phase 1 Anticipated Works Cost and the Phase 2 Anticipated Works Cost;

- MP = the market price established by the Trust, for completion of the Works outstanding at the Termination Date in accordance with the Design Documents; and
- CC = the amount then paid by the Trust to the Project Co pursuant to Clause 2.6.

Where MP is greater than or equal to AWC, NV shall be zero.

4. **Expiry**

Compensation shall cease to be payable pursuant to paragraph 1 where, before the expiry of the Compensation Period, the aggregate amount of compensation paid by the Trust shall equal the Net Value.

5. **Market Price**

In establishing a market price for completion of the Works in accordance with the Design Documents, the Trust shall act in a bona fide manner and take reasonable steps to mitigate the quantum of such market price.

**SCHEDULE 14  
COMPENSATION**

**PART 4**

**Design and Construct Phase : Event of Default Termination**

**SECTION B**

The Trust will pay compensation pursuant to Clause 46.1.3 in accordance with the following:

**1. Payment**

The Trust shall, subject to paragraph 6, pay compensation to the Project Co in respect of every Compensation Month which arises during the Compensation Period.

**2. Amount**

The amount of the compensation payable in respect of any Compensation Month pursuant to paragraph 1 shall be the aggregate of Amount A and Amount B calculated in accordance with paragraphs 2.1 and 2.2.

**2.1 Amount A in respect of any Compensation Month shall be the lesser of:**

CUF<sub>1</sub> x 95%; and

CUF<sub>2</sub> - TC

Where:

CUF<sub>1</sub> = the Core Usage Fee which would have been payable in accordance with the Project Agreement, had the Project Agreement not been terminated and the Compensation Month been a Contract Month, provided that, the amount of the Core Usage Fee shall be adjusted for the purposes of this provision so that the effects of any change in RPI arising on or after the Phase 1 Completion Date are removed;

CUF<sub>2</sub> = the Core Usage Fee which would have been payable in accordance with the Project Agreement, had the Project Agreement not been terminated and the Compensation Month been a Contract Month;

TC = the amount of any increased costs to the Trust reasonably and properly arising as a result of the termination referred to in Clause 46.1.3 and accruing during such Compensation Month, including the amount by which the costs to the Trust of procuring the Services in respect of the Phase 1 Areas during such Compensation Month (including amounts payable by the Trust pursuant to the novation of any Funding Agreement to it in accordance with Clause 45.5.2(C)) exceeds the aggregate of:

2.1.1 the amount which would have been payable by the Trust to the Project Co in accordance with the Facilities Management Agreement, had the Facilities Management Agreement not been

terminated and the Compensation Month been a Contract Month; and

2.1.2 the amount which would have been comprised in the Usage Fee (Maintenance) had the Compensation Month been a Contract Month,

provided that the Trust shall:

- (A) use reasonable endeavours to procure the Services in a manner consistent with the Facilities Management Agreement; and
- (B) take all reasonable steps to mitigate the amount of such costs,

TC shall exclude any costs included within MP pursuant to paragraph 3.2 and the costs to the Trust of procuring the Services in respect of the Phase 2 Areas; and

2.2 Amount B in respect of any Compensation Month shall be calculated in accordance with the following formula:

$$B = \frac{NV}{\left(\frac{1}{r} - \frac{1}{r(1+r)^t}\right)}$$

Where:

- B = the compensation amount payable during each relevant year, which amount shall be divided into 12 equal monthly instalments for the purposes of this paragraph 2.2;
- NV = the net value of the Phase 2 Works constructed by the Project Co as at the Termination Date (the "**Net Value**") calculated in accordance with paragraph 3.2;
- r = the non-default senior debt funding rate in the Funding Agreements, expressed as a decimal;
- t = the number of years from the Termination Date until the date on which the Trust would have been entitled to terminate the Project Documents in their entirety pursuant to Clause 3.5.1(A).

### 3. Calculations

#### 3.1 Floor

For the purposes of calculating both CUF<sub>1</sub> and CUF<sub>2</sub>, it shall be assumed that the number of Bed Days and the number of Outpatient Units for the relevant Compensation Month was, in each case, the lowest number shown from time to time in Activity Band (-1) in paragraph 1.2.3 of Part 1 of Schedule 6.



3.2 **Net Value**

The Net Value shall be calculated in accordance with the following formula:

$$NV = AWC + I - MP - CC$$

Where:

NV = the Net Value (which may be less than zero);

I = an amount equal to interest paid or accrued on or before the Termination Date on senior debt under the Funding Agreements applied in funding the costs of construction of the Phase 2 Works on or before such date, except to the extent that the interest rate margin applicable thereto is higher than that which would apply if such interest had been paid when due and excluding any fee payable under the Funding Agreements in the nature of a default fee (for clarity, fees payable to advisers in respect of default shall not be a default fee) other than such sums arising as a direct or indirect result of the Trust's default;

AWC = the Phase 2 Anticipated Works Cost;

MP = the market price established by the Trust, for completion of the Phase 2 Works outstanding at the Termination Date in accordance with Design Documents; and

CC = the amount then paid by the Trust to the Project Co pursuant to Clause 2.6.

4. **Market Price**

In establishing a market price for completion of the Phase 2 Works in accordance with the Design Documents, the Trust shall act in a bona fide manner and take reasonable steps to mitigate the quantum of such market price.

5. **Funding Amount**

5.1 Following termination of the Project Documents in their entirety pursuant to Clause 43.3, the Project Co shall, as soon as reasonably practicable and in any event within three months notify the Trust of the amount (the "**Funding Amount**") equal to the amount of the Outstanding Debt, where necessary, adjusted so that the Funding Amount shall not exceed an amount calculated in accordance with the following formula:

$$A = (OP \times 120\%) + B$$

Where:

A = the relevant amount;

OP = the aggregate of:

- (1) the total amount of principal which it was anticipated in the Financial Model as at the Amendment Effective Date would be owed to Funders under the Funding Agreements at the date of calculation of the Funding Amount, provided that such total amount shall be adjusted to reflect any re-scheduling effected by the Senior Creditors, as a result of the Delay Events referred to in paragraphs 3 and 4 of Part 1 of Schedule 14; and
- (2) any further amounts of principal outstanding as a result of funds being advanced by Funders pursuant to Clause 30 in respect of amounts which the Trust is paying through the Usage Fee.

B = any amounts of Outstanding Debt advanced to any Beneficiaries' Representative or Proposed Substitute (excluding any amount already counted within OP).

5.2 For the purposes of this Section B, the definition of Outstanding Debt shall exclude any subordinated debt.

6. **Expiry**

Compensation shall cease to be payable pursuant to paragraph 1 where, before the expiry of the Compensation Period, the aggregate amount of compensation paid by the Trust shall equal the Funding Amount, together with interest accruing on the same under the Funding Agreements at the non-default senior debt funding rate applicable from time to time during the Compensation Period.

**SCHEDULE 14**  
**COMPENSATION**  
**PART 5**

**Operational Phase : Event of Default Termination**

The Trust will pay compensation pursuant to Clause 46.1.4 in accordance with the following:

**1. Payment**

The Trust shall, subject to paragraph 5, pay compensation to the Security Trustee in respect of every Compensation Month which arises during the Compensation Period.

**2. Amount**

2.1 Subject to paragraph 2.2, the amount of compensation payable in respect of any Compensation Month pursuant to paragraph 1 ("**Compensation Amount**") shall be the lesser of:

CUF x 95%; and

CUF – TC

Where:

CUF = the Core Usage Fee which would have been payable in accordance with the Project Agreement, had the Project Agreement not been terminated and the Compensation Month been a Contract Month;

TC = the amount of any increased costs to the Trust reasonably and properly arising as a result of the termination referred to in Clause 46.1.4 and accruing during such Compensation Month, including the amount by which the costs to the Trust of procuring the Services in respect of such Compensation Month (including amounts payable by the Trust pursuant to the novation of any agreement to it in accordance with Clause 45.5.2(C)) exceed the aggregate of:

- (1) the amount which would have been payable by the Trust to the Project Co in accordance with the Facilities Management Agreement (taking into account, without prejudice to the generality of the foregoing, any adjustments to the relevant Service Fee which would have been made pursuant to Clause 20 thereof), had the Facilities Management Agreement not been terminated and the Compensation Month been a Contract Month;
- (2) the amount which would have been comprised in the Usage Fee (Maintenance) had the Compensation Month been a Contract Month; and
- (3) the amount of other payments or adjustments to payments (if any) which would have been made by the Trust to the Project Co pursuant to the Project Documents had the Project Agreement not been terminated and which are not

accounted for under (1) and/or (2) above, relating to the costs of procuring the Services,

provided that the Trust shall:

- (A) use reasonable endeavours to procure the Services in a manner consistent with the Facilities Management Agreement; and
- (B) take all reasonable steps to mitigate the amount of such costs.

2.2 In the case of the first Compensation Month and the last Compensation Month, the Compensation Amount shall be calculated proportionately by reference to calendar days.

**3. Floor**

For the purposes of calculating CUF, it shall be assumed that the number of Bed Days and the number of Outpatient Units for the relevant Compensation Month was, in each case, the lowest number shown from time to time in Activity Band (-1) in paragraph 1.3.3 of Part 1 of Schedule 6.

**4. Funding Amount**

4.1 Within 10 Working Days following the last day of each Funding Period, the Project Co shall notify the Trust of:

- 4.1.1 the Funding Amount relating to that Funding Period;
- 4.1.2 the Net Proceeds of Enforcement relating to that Funding Period; and
- 4.1.3 the Deposit Interest relating to that Funding Period.

4.2 In relation to each Funding Period, if the aggregate amount of all Compensation Amounts paid by the Trust in respect of that Funding Period exceeds:

- 4.2.1 the Funding Amount relating to that Funding Period;

Less

- 4.2.2 the Net Proceeds of Enforcement and Deposit Interest relating to that Funding Period,

then, subject to paragraph 4.3, the amount of such excess (the "**Excess Payment**") shall be deducted from the Compensation Amount next due and payable by the Trust and, if the Excess Payment is greater than that Compensation Amount, from each subsequent Compensation Amount which falls due and payable by the Trust, until (and to the extent that) the aggregate of such deductions equals the Excess Payment.

4.3 Where on any Scheduled Payment Date, the Senior Creditors Release Date will or is reasonably likely to occur before the next Scheduled Payment Date, the Project Co will forthwith notify the Trust. During the relevant Funding Period, the Parties shall take reasonable steps to minimise the amount of any Excess Payment which may arise at the end of the Funding Period. Such steps shall include making adjustments to the Compensation Amounts payable during the Funding Period (if appropriate). After the expiry of the last Funding Period, any Excess Payment shall be deducted from any

Compensation Amount which remains payable in respect of that Funding Period. The balance of the Excess Payment (if any) shall be paid by the Project Co to the Trust within 20 Working Days of the expiry of the last Funding Period.

4.4 For the purposes of this paragraph 4, the following terms shall have the following meanings:

**"Account Bank"** has the meaning given in the Collateral Deed;

**"Accounts"** has the meaning given in the Collateral Deed;

**"Accounts Agreement"** has the meaning given in the Collateral Deed;

**"Amendment Effective Date"** has the meaning given in a supplemental agreement to this Agreement dated December, 2003;

**"Default Interest"** means the amount by which interest accruing on amounts due but unpaid under the Deemed Senior Funding Agreements has been increased by application of a default interest rate rather than a non-default interest rate (subject as provided in Clauses 1.2.20 and 1.2.21) and the amount of any fee payable under the Deemed Senior Funding Agreements in the nature of a default fee (excluding fees payable to advisers in respect of default) except, in each such case, for such sums arising as a direct or indirect result of the Trust's default;

**"Deposit Interest"** means, in relation to any Funding Period, the amount of any deposit interest received by the Security Trustee during that Funding Period on cash balances resulting from Compensation Amounts and/or Net Proceeds of Enforcement, which interest shall be deemed to accrue at rate not less than that agreed from time to time between the Account Bank and the Security Trustee in respect of the Accounts pursuant to clause 2 of the Accounts Agreement;

**"Excluded Amount"** means:

- (A) any Default Interest;
- (B) any sums received by the Project Co, the Issuer, any Beneficiaries' Representative or any Proposed Substitute (as the case may be) in respect of the Project and applied for purposes other than those specified in the Deemed Senior Funding Agreements;
- (C) any costs, expenses, liabilities and obligations owing to the Senior Creditors as a result of or in connection with any refinancing of or amendment, modification or variation to the terms of any Deemed Senior Funding Agreement since the Effective Date, except where the same was effected in accordance with Clause 6.3.2;
- (D) any amount which arises from a failure to apply any Compensation Amount, Net Proceeds of Enforcement or Deposit Interest in payment of amounts due under the Deemed Senior Funding Agreements, as such amounts fall due;
- (E) any Spens Amount or, if the Bonds are redeemed in accordance with Condition 5 (b), the amount by which (1) the Early Redemption Price in respect of the Bonds exceeds (2) the Outstanding Principal Amount of the

Bonds together with any payment of interest due but unpaid on or prior to the Determination Date (other than the Early Redemption Price itself); and

- (F) any amount owed by the Issuer where a corresponding amount is owed to the Issuer.

**"Funding Amount"** means, in relation to each Funding Period, the aggregate amount which was paid by or on behalf of Project Co, the Issuer, any Beneficiaries' Representative or any Proposed Substitute, under or pursuant to the Deemed Senior Funding Agreements during that Funding Period less (without double counting):

- (A) any amount paid by the Senior Creditors to the Project Co, the Issuer, any Beneficiaries' Representative or any Proposed Substitute, under or pursuant to the terms of any Deemed Senior Funding Agreements during the Funding Period; and
- (B) any amount paid in respect of any Excluded Amount.

**"Funding Period"** means, in relation to each Scheduled Payment Date, the period commencing on (and including) the day after that Scheduled Payment Date and ending on (and including) the next Scheduled Payment Date, provided that the first Funding Period shall commence on (and include) the Termination Date and end on (and include) the next Scheduled Payment Date and the last Funding Period shall commence on (and include) the day after the Scheduled Payment Date before the earlier of the last day of the Compensation Period and the Senior Creditors Release Date and end on (and include) the last day of the Compensation Period or the Senior Creditors Release Date (as the case may be).

**"Net Proceeds of Enforcement"** means, in relation to any Funding Period, the amount of any net proceeds of enforcement realised by the Security Trustee free of any third party claims during that Funding Period.

**"Scheduled Payment Date"** has the meaning given in Condition 3 of the Bonds.

## 5. Expiry

- 5.1 Compensation shall cease to be payable pursuant to paragraph 1 upon the Senior Creditors Release Date, if this occurs prior to expiry of the Compensation Period.
- 5.2 For the purposes of paragraph 4 and this paragraph 5, **"Senior Creditors Release Date"** means the date upon which all amounts due under the Deemed Senior Funding Agreements have been irrevocably and unconditionally repaid in full (including all interest, fees, costs, expenses and other sums payable in connection therewith) except for any Excluded Amount and (except in respect of any Excluded Amount) neither the Project Co nor the Issuer nor any Beneficiaries Representative nor any Proposed Substitute nor any Senior Creditor is under any further obligation or liability (actual or contingent) in respect of the Deemed Senior Funding Agreements.

## 6. Payment Procedure

- 6.1 Within 10 Working Days following the last day of each Compensation Month, the Project Co shall deliver to the Trust a report setting out the amount of CUF in respect of that Compensation Month.

- 6.2 Within 10 Working Days following the last day of each Compensation Month, the Trust shall deliver to the Project Co a report setting out the amount of TC (if any) accompanied by workpapers:
- 6.2.1 clearly setting out a breakdown of (and the derivation of) the relevant increased costs;
  - 6.2.2 demonstrating (to the extent not previously demonstrated pursuant to this paragraph 6.2) that those increased costs have arisen reasonably and properly as a result of the termination referred to in Clause 46.1.4.
- 6.3 The Trust shall pay to the Project Co the Compensation Amount in respect of any Compensation Month not later than the later of:
- 6.3.1 the last Working Day of the Compensation Month following that Compensation Month; and
  - 6.3.2 the 15<sup>th</sup> Working Day after the date of delivery of the report referred to in paragraph 6.1.
- 6.4 Either Party shall have the right to dispute, in good faith, any amount specified in the reports referred to in paragraphs 6.2 and/or 6.3 above. The Parties shall use reasonable endeavours to resolve the Dispute in question within 10 Working Days of the Dispute arising. If they fail so to resolve it, either Party may refer the matter to the Dispute Resolution Procedure.
- 6.5 Following final resolution of the Dispute, any amount agreed or adjudged to be due shall be due for payment and paid promptly on demand, together with interest thereon at the non-default interest rate applicable to the Bonds from the day after the date on which payment was due in accordance with paragraph 6.3 to (and including) the due date of payment. Clause 40.5 shall otherwise apply in relation to late payment of any sum due under this Part 5 of Schedule 14.

**7. Corrupt Gifts and Payments**

For the avoidance of doubt, the provisions of this Part 5 of Schedule 14 shall apply, *mutatis mutandis*, to termination of the Project Documents in their entirety in accordance with Clause 53.4, subject to the qualifications contained in Clause 46.1.6.

**SCHEDULE 14**  
**COMPENSATION**  
**PART 6**

**Project Co Termination Event Termination**

The Trust shall pay compensation pursuant to Clause 46.1.5 in accordance with the following:

**1. Amount**

The amount of compensation payable by the Trust shall be the aggregate of:

- 1.1 Outstanding Debt;
- 1.2 interest, including capitalised interest and default interest arising as a result of the Trust's default, arising on any part of the Outstanding Debt at the rate of interest applicable under the relevant Funding Agreement, until payment of the compensation hereunder in its entirety;
- 1.3 the fees of any facility agent and/or security trustee arising in respect of the Outstanding Debt, until payment of the compensation hereunder in its entirety; and
- 1.4 the market value of the Project Co's equity calculated in accordance with paragraph 2.

**2. Market Value**

- 2.1 The market value of Project Co's equity shall be an amount equal to the sum of the Class Amounts in respect of each Class, where:
  - 2.1.1 **"Class"** means any class of issued share capital of the Project Co;
  - 2.1.2 **"Class Amount"** means, in respect of any Class, an amount equal to the product of the Share Amount in respect of each Share of such Class multiplied by the number of Shares in such Class;
  - 2.1.3 **"Share"** means any share of the issued share capital of Project Co; and
  - 2.1.4 **"Share Amount"** means, in respect of any Share, the amount payable as determined in accordance with paragraph 2.2.
- 2.2 The Share Amount will be calculated as at the Working Day immediately preceding the date on which the Project Co Termination Event occurs. The calculation of the Share Amount will depend on whether the Share has been admitted to the Official List of the London Stock Exchange (a **"Listed Share"**) or has not been so admitted (an **"Unlisted Share"**).
- 2.3 The amount payable in respect of each Unlisted Share will be the fair market value of the Unlisted Share, less the residual value (if any) of the Unlisted Share. The fair market value of any Unlisted Share will be calculated on the basis:
  - 2.3.1 of fair market value as between a willing vendor and a willing purchaser,



- 2.3.2 that the willing purchaser would be given all the information of Project Co and its shareholders relating to the Project and its prospects; and
  - 2.3.3 that the Project Co Termination Event had not occurred and Project Co was a going concern.
- 2.4 The valuation of the Listed Shares will be determined as follows:
- 2.4.1 the amount payable in respect of each Listed Share will be the amount by which the average of the middle market quotations of the Listed Share on the London Stock Exchange, ascertained by reference to the London Stock Exchange's Daily Official List, on the last dealing day for each of the 12 months immediately preceding the last Working Day before the date on which the Project Co Termination Event occurs exceeds the average middle market quotation (if any) on each of the 60 Working Days immediately succeeding the date on which the Project Co Termination Event occurs; and
  - 2.4.2 in determining the amount payable in respect of any Listed Share, there will be a reasonable adjustment to the middle market quotations for the Listed Share to take account of any capitalisation of profits or reserves by the Project Co, any consolidation or sub-division in respect of any Shares or any rights issues or capital distribution made by the Project Co.

### 3. **Payment**

- 3.1 Following termination of the Project Documents in their entirety pursuant to Clause 44.2, the Project Co shall, as soon as reasonably practicable and in any event within three months, notify the Trust of the amounts specified in paragraphs 1.1 and 1.3, together with details of interest accrued as contemplated in paragraph 1.2 and the daily rate of its accrual. Such notice shall show in reasonable detail the derivation of the relevant amounts.
- 3.2 Following the issue of any notice pursuant to paragraph 3.1, the Parties shall liaise in accordance with the Liaison Procedure to seek to agree the amounts specified. Where any such amount is not agreed within 20 Working Days, the Dispute shall be referred to the Disputes Resolution Procedure.
- 3.3 Once agreed or determined, the Trust shall forthwith pay the amount of compensation due under paragraph 1:
  - 3.3.1 in a lump sum payment; or
  - 3.3.2 save where termination is as a result of an event referred to in Clause 44.1.3 or Clause 44.1.4, at the Trust's election, by way of equal instalments, payable during the period of up to one year from the date of the relevant termination notice.

**SCHEDULE 15**  
**FINANCIAL MODEL**  
**PART 1**  
**Financial Model**