

CONFORMED COPY

AGREEMENT

between

LOTHIAN HEALTH BOARD

and

IHS LOTHIAN LIMITED

RE-PROVISION OF RHSC AND DCN AT LITTLE FRANCE

12th and 13th FEBRUARY 2015

macROBERTS

TABLE OF CONTENTS

PART 1: GENERAL

- 1 DEFINITIONS AND INTERPRETATION
- 2 EXECUTION AND DELIVERY OF DOCUMENTS
- 3 COMMENCEMENT AND DURATION
- 4 PROJECT DOCUMENTS
- 5 THE PROJECT OPERATIONS
- 6 GENERAL OBLIGATIONS AND RESPONSIBILITIES OF PROJECT CO
- 7 BOARD'S DATA
- 8 REPRESENTATIVES
- 8A LITTLE FRANCE CAMPUS WORKING GROUP

PART 2: LAND ISSUES

- 9 NATURE OF LAND INTERESTS
- 10 THE SITE
- 11 CONSENTS & PLANNING APPROVAL

PART 3: DESIGN AND CONSTRUCTION

- 12 THE DESIGN CONSTRUCTION AND COMMISSIONING PROCESS
- 13 RIGHT OF ACCESS OF BOARD'S REPRESENTATIVE
- 13A BOARD'S RIGHT TO STOP PROJECT OPERATIONS DURING THE PROJECT TERM
- 14 PROGRAMME AND DATES FOR COMPLETION
- 15 INDEPENDENT TESTER
- 16 EQUIPMENT
- 17 PRE-COMPLETION COMMISSIONING AND COMPLETION
- 18 POST COMPLETION COMMISSIONING
- 19 FOSSILS AND ANTIQUITIES

PART 4: QUALITY ASSURANCE

- 20 QUALITY ASSURANCE

PART 5: INFORMATION TECHNOLOGY

- 21 INFORMATION TECHNOLOGY

PART 6: SERVICE

- 22 THE SERVICES
- 23 MAINTENANCE
- 23A LIFECYCLE REPLACEMENT
- 24 MONITORING OF PERFORMANCE
- 25 TUPE AND EMPLOYMENT MATTERS
- 26 PENSIONS
- 27 SITE SECURITY AND PERSONNEL ISSUES
- 28 STOCKS CONSUMABLES, MATERIALS AND EQUIPMENT

PART 7: DELAY EVENTS, RELIEF AND FORCE MAJEURE

- 29 DELAY EVENTS
- 30 RELIEF EVENTS
- 31 FORCE MAJEURE

PART 8: CHANGES IN LAW & CHANGES

- 32 CHANGES IN LAW
- 33 CHANGE PROTOCOL

PART 9: FINANCIAL

- 34 PAYMENT
- 35 VAT AND CONSTRUCTION INDUSTRY TAX DEDUCTION SCHEME
- 36 PAYMENT OF SURPLUSES AND COMPLIANCE WITH NPD REQUIREMENTS
- 37 FINANCIAL MODEL
- 38 RECORDS AND OPEN BOOK ACCOUNTING

PART 10: TERMINATION

- 39 BOARD EVENTS OF DEFAULT
- 40 PROJECT CO EVENT OF DEFAULT
- 41 TERMINATION RESULTING FROM FORCE MAJEURE
- 42 BOARD VOLUNTARY TERMINATION
- 43 EXPIRY
- 44 CORRUPT GIFTS AND PAYMENTS
- 45 BREACH OF THE NPD REQUIREMENTS
- 46 COMPENSATION ON TERMINATION
- 47 CONSEQUENCES OF TERMINATION
- 48 HANDBACK PROCEDURE

PART 11: INDEMNITIES, WARRANTIES & INSURANCE

- 49 INDEMNITIES
- 49A MALICIOUS DAMAGE
- 50 TAX ON INDEMNITY PAYMENTS
- 51 EXCUSING CAUSES
- 52 WARRANTIES
- 53 INSURANCE
- 54 EXCLUSIONS AND LIMITATIONS ON LIABILITY

PART 12: MISCELLANEOUS

- 55 INTELLECTUAL PROPERTY
- 56 DISPUTE RESOLUTION PROCEDURE
- 57 ASSIGNATION AND SUB-CONTRACTING
- 58 OWNERSHIP INFORMATION AND CHANGES IN CONTROL
- 59 MITIGATION
- 60 DATA PROTECTION
- 61 CONFIDENTIALITY
- 62 FREEDOM OF INFORMATION
- 63 INFORMATION AND AUDIT ACCESS
- 64 NOTICES
- 65 NO WAIVER
- 66 NO AGENCY
- 67 ENTIRE AGREEMENT
- 68 THIRD PARTY RIGHTS
- 69 SEVERABILITY
- 70 CONFLICTS OF AGREEMENTS
- 71 COSTS AND EXPENSES
- 72 FURTHER ASSURANCE
- 73 COMMUNITY BENEFITS
- 74 GOVERNING LAW AND JURISDICTION

SCHEDULES

- SCHEDULE PART 1 DEFINITIONS AND INTERPRETATION
- SCHEDULE PART 2 COMPLETION DOCUMENTS
- SCHEDULE PART 3 KEY WORKS PERSONNEL
- SCHEDULE PART 4 FUNDERS' DIRECT AGREEMENT
- SCHEDULE PART 5 LAND MATTERS
- SCHEDULE PART 6 CONSTRUCTION MATTERS

SCHEDULE PART 7 THE PROGRAMME
SCHEDULE PART 8 REVIEW PROCEDURE
SCHEDULE PART 9 COLLATERAL AGREEMENTS
SCHEDULE PART 10 OUTLINE COMMISSIONING PROGRAMME
SCHEDULE PART 11 EQUIPMENT
SCHEDULE PART 12 SERVICE REQUIREMENTS
SCHEDULE PART 13 INDEPENDENT TESTER CONTRACT
SCHEDULE PART 14 PAYMENT MECHANISM
SCHEDULE PART 15 INSURANCE REQUIREMENTS
SCHEDULE PART 16 CHANGE PROTOCOL
SCHEDULE PART 17 COMPENSATION ON TERMINATION
SCHEDULE PART 18 HANDBACK PROCEDURE
SCHEDULE PART 19 RECORD PROVISIONS
SCHEDULE PART 20 DISPUTE RESOLUTION PROCEDURE
SCHEDULE PART 21 PROJECT CO INFORMATION
SCHEDULE PART 22 CERTIFICATES
SCHEDULE PART 23 REFINANCING
SCHEDULE PART 24 EMPLOYMENT AND PENSIONS
SCHEDULE PART 25 INSURANCE PROCEEDS ACCOUNT AGREEMENT
SCHEDULE PART 26 COMMERCIALLY SENSITIVE INFORMATION
SCHEDULE PART 27 PLANS
SCHEDULE PART 28 BOARD POLICIES
SCHEDULE PART 29 PLANNING
SCHEDULE PART 30 BOARD ENABLING WORKS
SCHEDULE PART 31 CONSORT INTERFACE WITH CAMPUS SITE AND/OR CAMPUS
FACILITIES
SCHEDULE PART 32 COMMUNITY BENEFITS

ATTACHMENTS

ATTACHMENT 1 FINANCIAL MODEL

BETWEEN:

- (1) **LOTHIAN HEALTH BOARD**, a health board constituted in Scotland under the National Health Service (Constitution of Health Boards) (Scotland) Order 1974 (S.I. 1974/267) as amended by the National Health Service (Constitution of Health Boards) (Scotland) Amendment Order 2003 (S.S.I. 2003/217) pursuant to Section 2 of the National Health Service (Scotland) Act 1978 as amended by section 28 of the National Health Service and Community Care Act 1990 and having its principal address at Waverley Gate, 2-4 Waterloo Place, Edinburgh EH1 3EG (the "**Board**"); and
- (2) **IHS LOTHIAN LIMITED** (registered under number SC493676) whose registered office is Burness Paull LLP, 50 Lothian Road, Festival Square, Edinburgh, EH3 9WJ. ("**Project Co**").

WHEREAS:

- (A) The Board wishes to develop new facilities on the Site and Off-Site and to consolidate on the Site services currently provided at other locations in order to improve the quality and efficiency of services provided by the Board.
- (B) The Board wishes to procure the design, build, finance and maintenance of a project to re-provide services from the Royal Hospital for Sick Children, Child and Adolescent Mental Health Service and the Department of Clinical Neurosciences in a single building adjoining the Royal Infirmary of Edinburgh at Little France (the "**Project**").
- (C) In accordance with the Scottish Government's NPD initiative, the Board conducted a competitive dialogue to identify the most economically advantageous tender from persons interested in being appointed the Board's private sector partner and forming a NPD company to procure the Project.
- (D) The tender submitted by Project Co has been selected as the most economically advantageous tender.
- (E) This Agreement is entered into pursuant to a project applying principles similar to the principles of the private finance initiative and is excluded from the Housing Grants, Construction and Regeneration Act 1996 by virtue of the Construction Contracts (Scotland) Exclusion Order 1998 (S.I. 1998/686).

NOW IT IS HEREBY AGREED as follows:

PART 1: GENERAL

1. DEFINITIONS AND INTERPRETATION

Schedule Part 1 (*Definitions and Interpretation*) shall apply.

2. EXECUTION AND DELIVERY OF DOCUMENTS

- 2.1 On or prior to execution of this Agreement Project Co shall deliver to the Board the documents referred to in Section 1 (*Documents to be delivered by Project Co*) of Schedule Part 2 (*Completion Documents*) (unless the requirement to deliver any such document is waived by the Board by written notice to Project Co); and
- 2.2 the Board shall deliver to Project Co the documents referred to in Section 2 (*Documents to be delivered by the Board*) of Schedule Part 2 (*Completion Documents*) (unless the requirement to deliver any such document is waived by Project Co by written notice to the Board).

3. COMMENCEMENT AND DURATION

This Agreement, and the rights and obligations of the parties, shall commence on the date of execution of this Agreement and, without prejudice to Clause 47.6, shall terminate automatically on the expiry of the Project Term.

4. PROJECT DOCUMENTS

Ancillary Documents

4.1 Project Co shall perform its obligations under, and observe all of the provisions of, the Project Documents to which it is a party and shall not:

4.1.1 terminate or agree to the termination of all or part of any Ancillary Document;

4.1.2 make or agree to any material variation of any Ancillary Document;

4.1.3 in any material respect depart from its obligations (or waive or allow to lapse any rights it may have in a material respect), or procure that others in any material respect depart from their obligations (or waive or allow to lapse any rights they may have in a material respect), under any Ancillary Document; or

4.1.4 enter into (or permit the entry into by any other person of) any agreement replacing all or part of (or otherwise materially and adversely affecting the interpretation of) any Ancillary Document,

unless the proposed course of action (and any relevant documentation) has been submitted to the Board's Representative for review under Schedule Part 8 (*Review Procedure*) and either:

(a) there has been no objection in accordance with paragraph 3 of Schedule Part 8 (*Review Procedure*) within twenty (20) Business Days of receipt by the Board's Representative of the submission of the proposed course of action (and any relevant documentation), or such shorter period as may be agreed by the parties; or

(b) Project Co is acting in accordance with the comments of the Board as provided in paragraph 4.2 of Schedule Part 8 (*Review Procedure*);

and, in the circumstances specified in Clause 4.1.1, Project Co has complied with Clause 57 (*Assignment and Sub-contracting*).

Changes to Funding Agreements and Refinancing

4.2 Subject to Clauses 4.3, 4.4 and 4.5, Project Co shall be free, at any time, to enter into, terminate, amend, waive its rights and generally deal with its Funding Agreements on such terms and conditions as it sees fit without the prior written consent of the Board provided that (at the time such action is contemplated and

effected) the same will not materially and adversely affect the ability of Project Co to perform its obligations under the Project Documents or this Agreement.

- 4.3 No amendment, waiver or exercise of a right under any Funding Agreement or Ancillary Document shall have the effect of increasing the Board's liabilities on early termination of this Agreement unless:
 - 4.3.1 Project Co has obtained the prior written consent of the Board to such increased liability for the purposes of this Clause 4.3; or
 - 4.3.2 it is a Permitted Borrowing.
- 4.4 Project Co shall not, without the prior written consent of the Board for the purposes of this Clause 4.4, vary, amend or replace any Funding Agreement or enter into any new Funding Agreement, the effect of which is to:
 - 4.4.1 change the circumstances in, or conditions on, which Project Co is entitled or obliged to make payments into the Surplus Account; and/or
 - 4.4.2 change the circumstances in, or conditions on, which Project Co is entitled or obliged to make Surplus Payments.
- 4.5 Any amendment or variation of any Funding Agreements which constitutes a Refinancing shall be carried out in accordance with the provisions of Schedule Part 23 (*Refinancing*).
- 4.6 Without prejudice to Clause 4.2, Project Co shall liaise with the Board, and shall use all reasonable endeavours to provide the Board with a copy of the relevant agreement in settled draft form, not less than ten (10) Business Days before it enters into any Funding Agreement (other than the Initial Funding Agreements).

Delivery

- 4.7 Without prejudice to the provisions of this Clause 4 (*Project Documents*), if at any time an amendment is made to any Project Document, or Project Co enters into a new Project Document (or any agreement which affects the interpretation or application of any Project Document), Project Co shall deliver to the Board a conformed copy of each such amendment or agreement within ten (10) Business Days of the date of its execution or creation, certified as a true copy by an officer of Project Co.

Funding Default

- 4.8 Project Co shall promptly upon the occurrence of a Funding Default notify the Board of such Funding Default.
- 4.9 The Board may, in circumstances referred to in Clause 4.8 above (regardless of whether the Senior Funders have exercised any enforcement or similar rights under the Senior Funding Agreements), require Project Co to provide an Interim

Project Report and to attend, and use all reasonable endeavours to ensure that the Senior Funders attend, such meetings as the Board may convene to discuss such Interim Project Report and the circumstances giving rise to it.

4.10 Project Co shall promptly upon a failure by the Senior Funders to advance amounts due under the Senior Funding Agreements (or in circumstances that might reasonably be expected to lead to such a failure) notify the Board of such failure (or expected failure).

4.11 The Board may, in the circumstances referred to in Clause 4.10 above, require Project Co to attend, and use all reasonable endeavours to ensure that the Senior Funders attend, such meetings as the Board may convene to discuss the circumstances.

5. THE PROJECT OPERATIONS

Scope

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

General standards

5.2 Project Co shall at its own cost be solely responsible for procuring that the Project Operations are at all times performed:

5.2.1 in compliance with all Law and Consents (including without limitation the giving of notices and the obtaining of any such Consents) and so as not to prejudice the renewal of any such Consents;

5.2.2 in a manner that is not likely to be injurious to health or to cause damage to property;

5.2.3 in a manner consistent with the Quality Plans;

5.2.4 except to the extent expressly stated to the contrary in the Board's Construction Requirements or the Service Level Specification, in compliance with all applicable NHS Requirements;

5.2.5 in a manner consistent with the Board discharging its statutory duties and other functions undertaken by it as the same may be notified to Project Co from time to time;

5.2.6 in so far as not in conflict with an express obligation of Project Co under this Agreement, or where in relation to a matter there is no express obligation or standard imposed on Project Co under this Agreement, in accordance with Good Industry Practice; and

5.2.7 without prejudice to the foregoing generality, where any of the Project Operations are to be carried out on any part of the Retained Site and/or the Retained Estate in compliance with the reasonable requirements of the Board, which Project Co acknowledges may include the reasonable requirements of Consort and/or the University and/or other parties with an interest in the Retained Site and/or Retained Estate (such reasonable requirements shall be, for the avoidance of doubt, always to be communicated to Project Co by the Board) and PROVIDED ALWAYS that where, in the reasonable opinion of Project Co such requirements would give rise to it incurring material additional costs

FOISA
s33(1)(b)
EIR Reg
10(5)(e)

[REDACTED] Project Co shall require the Board to serve a Board Change Notice on Project Co in accordance with Clause 33 (*Change Protocol*) and Schedule Part 16 (*Change Protocol*) and Project Co shall not be obliged to comply with such requirements other than in accordance with the provisions of Schedule Part 16 (*Change Protocol*).

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

Board's Undertaking

5.3 The Board undertakes to Project Co that it shall:

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

provided that, to avoid doubt, nothing in this Clause 5.3 (*Board's Undertaking*) shall in any

way fetter the discretion of the Board in fulfilling its statutory functions.

Co-operation

- 5.4 Each party agrees to co operate, at its own expense, with the other party in the fulfilment of the purposes and intent of this Agreement. To avoid doubt, neither party shall be under any obligation to perform any of the other's obligations under this Agreement.
- 5.5 Without prejudice to the generality of Clause 5.4, the parties shall liaise with a view to ensuring that the requirements of The NHS and You and any other NHS requirement relating to customer service and satisfaction which may from time to time supplement or replace The NHS and You are met in respect of the operation of the Facilities.
- 5.6 Without prejudice to the binding contractual obligations set out in this Agreement, the Parties recognise and agree that the partnering ethos, principles and objectives described and set out in Section 4.30 (*Partnering and Collaborative Working*) of Project Co's Proposal and/or Section 1.3 (*Partnership*) of the Method Statements are aspirational and shall not and are not intended to give rise to legally binding rights and obligations between the Parties.

Board Works

- 5.7 Notwithstanding the terms of Schedule Part 5 (*Land Matters*), the Board shall carry out and complete each element of:-
- 5.7.1 Board Enabling Works in accordance with the requirements and timescales corresponding to that element as set out in Section 1 (*Board Enabling Works*) of Schedule Part 30 (*Board Works*).
- 5.7.2 the Board Neighbouring Works in accordance with the requirements and timescales corresponding to that element as set out in Section 2 (*Board Neighbouring Works*) of Schedule Part 30 (*Board Works*).

6. GENERAL OBLIGATIONS AND RESPONSIBILITIES OF PROJECT CO

Other business

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

Project Co Parties

- 6.2 Subject to the provision of Clause 30.1.7 (*Force Majeure*), Project Co shall not be relieved or excused of any responsibility, liability or obligation under this Agreement by the appointment of any Project Co Party. Project Co shall, as between itself and the Board, be responsible for the selection, pricing, performance, acts, defaults, omissions, breaches and negligence of all Project Co

Parties. All references in this Agreement to any act, default, omission, breach or negligence of Project Co shall be construed accordingly to include any such act, default, omission, breach or negligence of a Project Co Party.

Safety

- 6.3 Project Co shall, in carrying out the Project Operations, have full regard for the safety of all persons on the Site, the Retained Site and/or Off-Site (whether lawfully or not) and keep the Site and/or Off-Site, the Works and the Facilities in an orderly state, appropriate in accordance with Good Industry Practice, to avoid danger to such persons.

7. BOARD'S DATA

No liability

- 7.1 Save where expressly provided otherwise pursuant to Clauses 10.3 to 10.5, (*Responsibility for Contamination*), the Board shall not be liable to Project Co for and Project Co shall not seek to recover from the Board (or from any Board Party) any damages, losses, costs, liabilities or expenses which may arise (whether in contract, delict or otherwise) from the adoption, use or application of the Disclosed Data by, or on behalf of, Project Co, the Independent Tester or any Project Co Party.

No warranty

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

- 7.3 Project Co acknowledges and confirms that:

7.3.1 it has conducted its own analysis and review of the Disclosed Data and has, before the execution of this Agreement, satisfied itself as to the accuracy, completeness and fitness for purpose of any such Disclosed Data upon which it places reliance; and

7.3.2 save where expressly provided otherwise pursuant to Clauses 10.3 to 10.5 (*Responsibility for Contamination*), it shall not be entitled to and shall not (and shall procure that no Project Co Party shall) make any claim against the Board or any Board Party whether in contract, delict or otherwise including, without limitation, any claim in damages, for extensions of time or for additional payments under this Agreement on

the grounds:

- (a) of any misunderstanding or misapprehension in respect of the Disclosed Data; or
- (b) that incorrect or insufficient information relating to the Disclosed Data was given to it by any person, whether or not a Board Party,

nor shall Project Co be relieved from any obligation imposed on, or undertaken by it, under this Agreement on any such ground.

8. REPRESENTATIVES

Representatives of the Board

- FOISA
§ 32(1)(b)
- personal data
EIR Reg 11
- 8.1 The Board's Representative shall be [REDACTED] or such other person appointed pursuant to this Clause. The Board's Representative shall exercise the functions and powers of the Board in relation to the Project Operations which are identified in this Agreement as functions or powers to be carried out by the Board's Representative. The Board's Representative shall also exercise such other functions and powers of the Board under this Agreement as may be notified to Project Co from time to time.
 - 8.2 The Board's Representative shall be entitled at any time, by notice to Project Co, to authorise any other person to exercise the functions and powers of the Board delegated to him pursuant to this Clause, either generally or specifically. Any act of any such person shall, for the purposes of this Agreement, constitute an act of the Board's Representative and all references to the "Board's Representative" in this Agreement (apart from this Clause) shall be taken as references to such person so far as they concern matters within the scope of such person's authority.
 - 8.3 The Board may by notice to Project Co change the Board's Representative. The Board shall (as far as practicable) consult with Project Co prior to the appointment of any replacement for the Board's Representative, taking account of the need for liaison and continuity in respect of the Project. Such change shall have effect on the date specified in the written notice (which date shall, other than in the case of emergency, be such date as will not cause material inconvenience to Project Co in the execution of its obligations under this Agreement).
 - 8.4 During any period when no Board's Representative has been appointed (or when the Board's Representative is unable through illness, incapacity or any other reason whatsoever to carry out or exercise his functions under this Agreement) the Board shall carry out the functions which would otherwise be performed by the Board's Representative.
 - 8.5 No act or omission of the Board, the Board's Representative or any officer, employee or other person engaged by the Board shall, except as otherwise expressly provided in this Agreement:

8.5.1 in any way relieve or absolve Project Co from, modify, or act as a

waiver or personal bar of, any liability, responsibility, obligation or duty under this Agreement; or

8.5.2 in the absence of an express order or authorisation under Schedule Part 16 (*Change Protocol*), constitute or authorise a Change.

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

Representative of Project Co

8.7 Project Co's Representative shall be [REDACTED] or such other person appointed pursuant to Clause 8.8. Project Co's Representative shall have full authority to act on behalf of Project Co for all purposes of this Agreement. Except as previously notified in writing before such act by Project Co to the Board, the Board and the Board's Representative shall be entitled to treat any act of Project Co's Representative in connection with this Agreement as being expressly authorised by Project Co and the Board and the Board's Representative shall not be required to determine whether any express authority has in fact been given.

FOISA
S 32(1)(b)
personal data
EIR reg 11.

8.8 Project Co may by notice to the Board change Project Co's Representative. Where Project Co wishes to do so, it shall by written notice to the Board propose a substitute for approval, taking account of the need for liaison and continuity in respect of the Project. Such appointment shall be subject to the approval of the Board (not to be unreasonably withheld or delayed).

8.9 Project Co's Key Works Personnel are identified in Schedule Part 3 (*Key Works Personnel*). Project Co shall, as far as it is within Project Co's control, ensure that such persons retain their involvement in the Works and, in particular, will not, for the duration of the Works, require or request any of them to be involved in any other project on behalf of Project Co or any of the Shareholders or its or their Associated Companies if, in the reasonable opinion of the Board, this would adversely affect the Project.

Board Observer

8.10 Project Co shall, subject to Clauses 8.11 to 8.13, ensure that the Board Observer:

8.10.1 is invited to attend all Project Co board meetings;

8.10.2 receives at or around the time that they are received by Project Co's board members) the agendas and supporting papers that are circulated to the board members in advance of the board meetings or tabled at the board meetings including, without prejudice to the foregoing generality, six-monthly management accounts, budgets and management reports (including explanations of material variances against budget) and the statutory accounts in respect of each financial year;

- 8.10.3 is permitted by Project Co to attend and participate (but not vote at) all Project Co board meetings; and
 - 8.10.4 receives (at or around the same time as they are received by the board members) copies of the minutes of Project Co's board meetings and all other financial information relating to Project Co as any Director might reasonably require to keep himself properly informed about the activities of Project Co.
- 8.11 The Board Observer shall, unless otherwise determined by a board resolution in respect of any particular matter, be entitled to disclose any information received pursuant to Clause 8.10 subject to and in accordance with the provisions of Clause 61 (*Confidentiality*) and the Board shall procure that the individual appointed to fulfil such role executes suitable undertakings of confidentiality to comply with the terms of Clause 61 (*Confidentiality*).
- 8.12 Project Co, acting reasonably, shall be entitled to exclude the Board Observer from attending Project Co's board meetings and withhold the agendas and supporting papers referred to in Clause 8.10:
- 8.12.1 in the event that the Board Observer discloses information received pursuant to Clause 8.10 other than in accordance with Clause 8.11; or
 - 8.12.2 where and for so long as the conduct of the Board Observer is inappropriate.
- 8.13 Project Co shall be entitled to exclude the Board Observer from attending any part of a Project Co board meeting at which:
- 8.13.1 the exercise or purported exercise of contractual rights by Project Co against the Board or by the Board against Project Co; or
 - 8.13.2 any claims or potential claims by Project Co against the Board or by the Board against Project Co; or
 - 8.13.3 any matter of interpretation of this Agreement,
- is discussed and shall be entitled to withhold from the Board any supporting papers and information to the extent that they relate to the matters listed in Clauses 8.13.1 to 8.13.3.

8A LITTLE FRANCE CAMPUS WORKING GROUP

- 8A.1 The Board, Consort and the University have established a working group to discuss operational Campus Site and Campus Facilities issues (the "**Little France Campus Working Group**").
- 8A.2 The Little France Campus Working Group shall be attended by the Little France Working Group Parties who shall be obliged to attend any meeting of the Little France Working Group during the Project Term.

- 8A.3 The functions of the Little France Campus Working Group shall be:
- 8A.3.1 to provide means for the review of day to day aspects of the health and safety issues relating to the Campus Site and the Campus Facilities;
 - 8A.3.2 to provide a forum for strategic discussion relating to where improvements could be made to facilitate improved health and safety arrangements within the Campus Site and the Campus Facilities; and
 - 8A.3.3 to monitor and review the Programme to ensure that correct health and safety procedures are adhered to.
- 8A.4 Project Co shall submit to the Board's Representative four (4) Business Days prior to the date of each meeting (except where a meeting is called in an emergency in which case a report will be provided as soon as reasonable in the circumstances) a safety programme, which shall include safety measures to be undertaken by Project Co up to the date of such meeting.
- 8A.5 The role of the Little France Campus Working Group is to make recommendations to the Little France Campus Working Group Parties, which they may accept or reject at their complete discretion. Neither the Little France Campus Working Group itself, nor the Little France Campus Working Group Parties acting in that capacity shall have the authority to vary the provisions of this Agreement or to make any decision which is binding on all of the Little France Campus Working Group Parties. Neither the Board nor Project Co shall rely on any act or omission of the Little France Campus Working Group, nor any Little France Campus Working Group Parties acting in that capacity, so as to give rise to any waiver or personal bar in respect of any right, benefit of obligation of either party.
- 8A.6 Project Co shall appoint and remove its relevant representative of the Little France Campus Working Group and/or alternate by written notice delivered to the Board. If such representative and/or alternate is unavailable to attend then Project Co must issue a report to the Board four (4) Business Days before the relevant meeting of the Little France Campus Working Group setting out any significant health and safety and/or risk management issues within the Site and/or Facilities since the previous meeting, together with the safety programme referred to in Clause 8A.4.

Procedures and practices

- 8A.7 Subject to the provisions of this Agreement, the Little France Campus Working Parties may adopt such procedures and practices for the conduct of the activities of the Little France Campus Working Group as they consider appropriate from time to time and:
- 8A.7.1 may invite to any meeting of the Little France Campus Working Group such other persons as the Little France Campus Working Group Parties may agree; and
 - 8A.7.2 receive and review a report from any person agreed by its members.
- 8A.8 The Little France Campus Working Group shall meet at least once each month (unless otherwise agreed by its members) and from time to time as necessary.
- 8A.9 Not Used
- 8A.10 Meetings of the Little France Campus Working Group shall be convened by any Little France Working Group Party on not less than seven (7) Business Days notice (identifying the agenda items to be discussed at the meeting) provided that in emergencies a meeting may be called at any time on such notice as may be reasonable in the circumstances.

- 8A.11 Where the Little France Campus Working Group decides it is appropriate, meetings may also be held by telephone or another form of telecommunication, by which each participant can hear and speak to all other participants at the same time.
- 8A.12 Minutes of all recommendations (including those made by telephone or other form of telecommunication) and meetings of the Little France Campus Working Group shall be kept by the Board and copies circulated promptly to the Little France Campus Working Group Parties, normally within five (5) Business Days of the making of the recommendation or the holding of the meeting. A full set of minutes shall be open to inspection by any party at any time, upon request.

PART 2: LAND ISSUES

9. NATURE OF LAND INTERESTS

Access During Construction

- 9.1 From the Commencement Date until the Actual Completion Date or (if earlier) the Termination Date, the Board shall grant to Project Co and Project Co Parties, or procure that Project Co and the Project Co Parties are granted the Ancillary Rights set out in paragraphs 1 to 9 of Section 3 (*Ancillary Rights*) of Schedule Part 5 (*Land Matters*), in each case subject only to the Reserved Rights, the Title Conditions and the Board's rights under this Agreement and solely for the purposes of implementing the Works and carrying out Project Co's Pre-Completion Commissioning.

Access Following Construction

- 9.2 After the occurrence of the Actual Completion Date the Board shall grant to Project Co and Project Co Parties, or procure that Project Co and Project Co Parties are granted, the Ancillary Rights set out in paragraphs 1 and 10 of Section 3 (*Ancillary Rights*) of Schedule Part 5 (*Land Matters*) subject only to the Reserved Rights, the Title Conditions and the provisions of this Agreement and solely for the purposes of:

- 9.2.1 carrying out the Project Operations (other than those Project Operations for which Project Co is granted rights pursuant to Clause 9.1 (*Access During Construction*));
- 9.2.2 remedying Defects and carrying out Snagging Matters and exercising its rights under Clause 23.15 (*Board's Maintenance Obligations*); and
- 9.2.3 Not Used.

Such rights shall terminate on the Expiry Date or (if earlier) the Termination Date.

Extent of Rights

- 9.3 The rights referred to at Clauses 9.1 (*Access During Construction*) and 9.2 (*Access*

Following Construction) shall not operate or be deemed to operate as a lease of the Facilities, the Retained Estate Handback Infrastructure, the Site or Off-Site or any part of the Facilities, the Retained Estate Handback Infrastructure, the Site or Off-Site and Project Co shall not have or be entitled to exclusive possession (save to the extent expressly included within the Ancillary Rights) or any estate, right, title or interest in and to the Facilities, the Retained Estate Handback Infrastructure, the Site or Off-Site except as provided herein and shall occupy the Site as a licensee only.

9.4 The rights referred to at Clause 9.1 (*Access During Construction*) and Clause 9.2 (*Access Following Construction*) are personal to Project Co and the Project Co Parties.

9.5 Project Co shall procure that:

9.5.1 all Project Operations carried out at the Site or Off-Site by or on behalf of Project Co (whether before, during or after the completion of the Works) shall be carried out in a manner which does not breach any of the Title Conditions and/or the Reserved Rights; and

9.5.2 there shall be no action, or omission to act by Project Co or a Project Co Party, which shall give rise to a right for any person to obtain title to the Site and/or Off-Site or any part of it.

9.6 Notwithstanding the terms of Clauses 9.1 and 9.2 or any other rights granted under this Agreement, the Board shall (if it is the heritable proprietor of the Site or Off-Site), or (if it is not the heritable proprietor of the Site or Off-Site) shall procure that the heritable proprietor of the Site and/or Off-Site shall, enter into such wayleaves, deeds of servitude or other similar agreements with any third party that Project Co or any Project Co Party may require to be granted in favour of or by any third party, in order to exercise its rights or perform its obligations under this Agreement. The Board shall enter into (or, where appropriate, shall procure that the heritable proprietor of the Site and/or Off-Site shall enter into) any such wayleave, deed of servitude or other similar agreement, as soon as reasonably practicable after Project Co has provided to the Board all relevant information in connection therewith provided always that Project Co has obtained at its own cost the prior agreement of the third party in terms acceptable to the Board (acting reasonably). Project Co shall reimburse the Board for all costs and expenses reasonably and properly incurred by the Board (and/or the heritable proprietor of the Site and/or Off-Site) in connection with entering into such wayleaves, deeds of servitude or other similar agreements at the request of Project Co. Provided that the Board shall have no obligations in terms of this Clause 9.6 in relation to any land or interest in land which is procured by Project Co for the purpose of locating any electricity sub-station, or any ancillary apparatus or cabling to serve such sub-station if such land does not form part of (i) the Site or (ii) limb (a) or (b) of the definition of Off-Site.

10. THE SITE AND OFF-SITE

10.1 Subject to Clauses 10.3 and 10.4, the condition of the Site shall be the sole responsibility of Project Co and the condition of the Off-Site shall be the responsibility of Project Co when carrying out the Project Operations and to the extent that the condition of the Off-Site is affected by such Project Operations. Accordingly (without prejudice to any other obligation of Project Co under this Agreement), Project Co shall be deemed to have:

- 10.1.1 reviewed and taken cognisance of the Ground Physical and Geophysical Investigation and the Petrol Station Site Contamination Investigation and to have inspected and examined the Site and Off-Site and its surroundings and (where applicable) any existing structures or works on, over or under the Site and Off-Site;
 - 10.1.2 satisfied itself as to the nature of the Site Conditions and Off-Site Conditions, the ground and the subsoil, the form and nature of the Site and Off-Site, the load bearing and other relevant properties of the Site and Off-Site, the risk of injury or damage to property affecting the Site and Off-Site, the nature of the materials (whether natural or otherwise) to be excavated and the nature of the design, work and materials in each case, necessary for the execution of the Works;
 - 10.1.3 satisfied itself as to the extent and adequacy of the Site and Off-Site and of the rights of access to and from and through the Site and Off-Site granted hereunder and any accommodation it may require for the purposes of fulfilling its obligations under this Agreement (such as additional land or buildings outside the Site) without prejudice to Project Co's rights under this Agreement in respect of a breach by the Board of its obligations under Clause 9.1 and/or Clause 9.2;
 - 10.1.4 satisfied itself as to the reasonable precautions, times and methods of working necessary to prevent any nuisance or interference, whether public or private, being caused to any third parties including without limitation Consort, Consort Parties, the University and any University Parties; and
 - 10.1.5 satisfied itself as to the conditions, burdens, restrictions and reservations set out in the Title Conditions and the Reserved Rights.
- 10.2 Subject to Clause 10.3, to avoid doubt, Project Co accepts full responsibility for all matters referred to in Clause 10.1 and Project Co shall:
- 10.2.1 not be entitled to make any claim against the Board of any nature whatsoever save, if applicable, as expressly provided in Clause 29 (*Delay Events*), on any grounds including (without limitation) the fact that incorrect or insufficient information on any matter relating to the Site and Off-Site was given to it by any person, whether or not the Board or a Board Party;
 - 10.2.2 be responsible for, and hold the Board harmless from, (1) cleaning up and/or otherwise dealing with any Contamination at the Site and Off-Site and (2) that it shall at all times comply with its obligations under this Agreement including (without limitation) complying with, at its own cost, any applicable Laws and any Consents, orders, notices or directions of any regulatory body (whether made against the Board or Project Co).

Responsibility for Contamination

- 10.3 Notwithstanding the terms of Clause 10.2, and subject to Clause 10.5 below, save to the extent that Project Co has a valid legal claim for breach of duty of care and

or negligence against the provider of the Ground Physical and Geophysical Investigations and/or the Petrol Station Site Contamination Investigation in respect of its loss the Board shall be responsible for:

- 10.3.1 Relevant Petrol Station Site Contamination; and
- 10.3.2 any Contamination arising after the Commencement Date caused by the Board or a Board Party, whether directly or indirectly, at the Site or Off-Site.

If the Board is responsible for such Contamination under this Clause 10.3, the provisions of Clause 10.4 shall apply.

- 10.4 Where pursuant to Clause 10.3 the Board is responsible for any Contamination then the following provisions shall apply:
 - 10.4.1 during the Construction Phase any such matter shall be deemed to be a Compensation Event for the purposes of this Agreement;
 - 10.4.2 where such matter arises during the Operational Term it shall, for the avoidance of doubt, be deemed to be an Excusing Cause for the purposes of Clause 51 (*Excusing Cause*);
 - 10.4.3 where such matter arises during the Operational Term and any work or change to the Services is required or instructed to be done in consequence to it, it shall be deemed to be a Qualifying Change; and
 - 10.4.4 where any such matter is Contamination (whether during the Construction Phase and/or Operational Term) the Board shall further hold Project Co harmless from cleaning up and otherwise dealing with the Contamination and shall indemnify Project Co in respect of all Direct Losses incurred by Project Co resulting from such Contamination.
- 10.5 The Board shall be responsible for any loss suffered by Project Co in accordance with Clause 10.4 as a result of any Contamination under Clause 10.3 which exceeds the liability caps of the provider of the Ground Physical and Geophysical Investigations and/or the Petrol Station Site Contamination Investigation under their relevant contracts or which cannot be recovered by Project Co due to such provider being insolvent.

11. CONSENTS & PLANNING APPROVAL

- 11.1 Subject to Clause 11.3, Project Co shall be responsible for:
 - 11.1.1 obtaining all Consents which may be required for the performance of the Project Operations; and
 - 11.1.2 implementing each Consent within the period of its validity in accordance with its terms.

11.2 In the event that:

11.2.1 a Consent that has been granted is subsequently amended, repealed, revoked or otherwise ceases to be in full force and effect in accordance with its terms as a consequence of any action by a Relevant Authority;

11.2.2 affected persons are entitled to claim compensation for the adverse effects of such action under a statutory scheme of compensation; and

11.2.3 Project Co is not entitled in its own name to claim under that scheme but the Board is so entitled

the Board must use all reasonable endeavours, at the request and at the cost of Project Co, to claim or to include within its claim such sums as Project Co acting reasonably requests and shall pay to Project Co the part of any compensation that it receives under that scheme that relates to the sums claimed at the request of Project Co.

Board's Consents and Planning Obligations

11.3 Each party shall implement and satisfy each of the conditions and reserved matters of the Planning Approval in respect of which responsibility for the same has been allocated to it by the table set out in Part 1 (*Planning Condition Responsibilities*) of Schedule Part 29 (*Planning*).

PART 3: DESIGN AND CONSTRUCTION

12. THE DESIGN CONSTRUCTION AND COMMISSIONING PROCESS

Overall Responsibility

- 12.1 Project Co shall carry out the Works:
- 12.1.1 so as to procure satisfaction of the Board's Construction Requirements;
 - 12.1.2 in accordance with Project Co's Proposals; and
 - 12.1.3 in accordance with the terms of this Agreement.
- 12.2 To avoid doubt, the obligations in Clauses 12.1.1, 12.1.2 and 12.1.3 are independent obligations. In particular:
- 12.2.1 the fact that Project Co has complied with Project Co's Proposals shall not be a defence to an allegation that Project Co has not satisfied the Board's Construction Requirements; and
 - 12.2.2 the fact that Project Co has satisfied the Board's Construction Requirements shall not be a defence to an allegation that Project Co has failed to comply with Project Co's Proposals.

Design responsibility

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

Corporate Identity and Signage

- 12.4 The parties acknowledge that the Board may, from time to time during the Construction Phase, be required to procure the erection of hoarding, site boards, plaques and/or other signage in connection with the Project. Accordingly:
- 12.4.1 where requested by the Board (acting reasonably), Project Co shall procure the erection and maintenance of such hoarding, site boards, plaques and/or other signage as the Board may require; and
 - 12.4.2 the size, design, information disclosed, position and materials used in connection with such hoarding, site boards, plaques or other signage

shall be approved by the Board, such approval not to be unreasonably withheld; and

- 12.4.3 for the purposes of this Clause 12.4 (*Corporate Identity and Signage*), the Board shall be deemed to be acting reasonably where any proposals made by it and/or any approvals exercised by it conform with any relevant guidance issued to NHS Boards by the Scottish Government Health Directorate (or any successor Directorate) in relation to such matters whether by Executive Letter or otherwise.

Board design approval

- 12.5 The Board confirms that, as at the date of this Agreement, it has reviewed such of Project Co's Proposals as have been initialled by the Board and that, subject to any qualifications and/or comments notified by the Board to Project Co in writing and set out in Section 9 (*Board's Qualification/Comments in respect of Operational Functionality requirements*) of Schedule Part 6 (*Construction Matters*) such proposals satisfy the Board's requirements in respect of Operational Functionality, so far as can reasonably be determined given the level of detail of Design Data which has been disclosed to the Board.

- 12.6 Project Co shall develop and finalise the design and specification of the Works and the Board shall review the Reviewable Design Data in accordance with Schedule Part 8 (*Review Procedure*) and the provisions of this Clause 12.6:

- 12.6.1 Project Co shall submit the Reviewable Design Data and the design of any Changes developed in accordance with the procedure set out in Schedule Part 16 (*Change Protocol*) to the Board's Representative for review under Schedule Part 8 (*Review Procedure*). Project Co shall not commence or permit the commencement of construction of the part or parts of the Facilities and/or Retained Estate Handback Infrastructure to which such Reviewable Design Data relates until it has submitted the appropriate Reviewable Design Data and either it is confirmed by the Board's Representative that Project Co is entitled to proceed with construction in accordance with paragraph 3.3 of Schedule Part 8 (*Review Procedure*) or Project Co is:

- (a) disputing the status of such Reviewable Design Data pursuant to paragraph 1.3.1 or paragraph 4.3 of Schedule Part 8 (*Review Procedure*); and
- (b) proceeding at risk pursuant to paragraph 1.3.2 of Schedule Part 8 (*Review Procedure*).

- 12.6.2 with effect from the date at which any item of Reviewable Design Data is or becomes an Approved RDD Item in accordance with Schedule Part 8 (*Review Procedure*), such Approved RDD Item shall for the purposes of this Agreement be deemed to have satisfied the requirements of the Board in the manner and to the extent set out in, Table A in Appendix 1 of Schedule Part 8 (*Review Procedure*);

- 12.6.3 Project Co shall allow the Board's Representative, at any time, a reasonable opportunity to view any items of Design Data, which shall

be made available to the Board's Representative as soon as practicable following receipt of any written request from the Board's Representative; and

- 12.6.4 Project Co shall procure that the Contractor establishes and maintains a computerised design database which Project Co and the Board's Representative may access remotely by computer to view drawings comprised within the Design Data (including Reviewable Design Data) and electronically store and/or print copies of such Design Data. In the event of the Board's Representative being unable to access such design database, Project Co shall procure that it is made available for inspection by the Board's Representative, or any other person authorised by the Board's Representative.

Rectification of Project Co's Proposals

- 12.7 Without prejudice to Clause 12.1, if it should be found that Project Co's Proposals do not fulfil the Board's Construction Requirements, Project Co shall at its own expense, and in accordance with Clause 12.8 below, amend Project Co's Proposals and rectify the Works or any part affected. Such amendment and rectification shall have the effect that:
- 12.7.1 Project Co's Proposals shall satisfy the Board's Construction Requirements; and
- 12.7.2 following the amendment or rectification, the structural, mechanical and electrical performance of the Facilities and/or Retained Estate Handback Infrastructure will be of an equivalent standard of performance to that set out in Project Co's Proposals prior to their amendment or rectification (for the purpose of this comparison disregarding the fault which required the amendment or rectification to be made).
- 12.8 Where Clause 12.7 applies, Project Co shall submit its proposal for amending Project Co's Proposals and rectifying the Works (or any part affected) to the Board's Representative for review under Schedule Part 8 (*Review Procedure*) and shall not amend Project Co's Proposals or commence or allow the commencement of the rectification of the Works (or any part affected) until it is permitted to proceed in accordance with Schedule Part 8 (*Review Procedure*).

Construction Skills Certification Scheme

- 12.9 Project Co shall ensure that all persons engaged in carrying out the Works (or part thereof) on the Site and/or Off Site are accredited under the Construction Skills Certification Scheme or an equivalent scheme and where Project Co enters into a sub-contract for the purposes of carrying out the Works Project Co shall cause a term to be included in such sub-contract:
- 12.9.1 which requires the sub-contractor to ensure that such persons are accredited under the Construction Skills Certification Scheme or an equivalent scheme; and
- 12.9.2 in the same terms as that set out in this Clause 12.9 (including for the avoidance of doubt this Clause 12.9.2) subject only to modification to

refer to the correct designation of the equivalent party as Project Co and the sub-contractor as the case may be.

13. RIGHT OF ACCESS OF BOARD'S REPRESENTATIVE

Access to the Site and Off-Site

13.1 Without prejudice to Clause 9 (*Nature of Land Interests*), Schedule Part 31 (*Consort Interface with Campus Site and/or Campus Facilities*) and/or the Interface Proposals, Project Co shall procure that:

13.1.1 subject to complying with all relevant safety procedures, which shall include any relevant construction phase plans and health and safety plans for the construction of the Facilities and the Retained Estate Handback Infrastructure, the Contractor's Site Rules from time to time and any reasonable directions with regard to site safety that may be issued by or on behalf of the Contractor's Site Manager from time to time, the Board's Representative and any other parties authorised by the Board's Representative to accompany the Board's Representative shall have unrestricted access at all reasonable times during normal working hours to:

(a) view the Works at the Site and Off-Site on reasonable prior notice appropriate to the circumstances, provided that the notice procedures in this Clause 13.1.1(a) shall not apply to the right of access for the Board's Representative and his staff and visitors to the office and other facilities provided at the Site and Off-Site for his use; and

(b) subject to obtaining the consent of the relevant manufacturer or supplier (which Project Co agrees to use all reasonable endeavours to obtain), visit any site or workshop where materials, plant or equipment are being manufactured, prepared or stored for use in the Works for the purposes of general inspection and of attending any test or investigation being carried out in respect of the Works;

13.1.2 the Board's Representative shall have such rights of access to the Site and/or Off-Site in an emergency as he (acting reasonably) considers suitable in the circumstances; and

13.1.3 monthly progress meetings and site meetings are held and that the Board's Representative shall have the right to attend such monthly progress meetings and site meetings and to attend such other meetings as the Board's Representative may reasonably request.

Increased monitoring

13.2 If, following any viewing, visit or inspection made pursuant to Clause 13.1.1, it is discovered that there are defects in the Works or that Project Co has failed to comply with the Board's Construction Requirements or Project Co's Proposals, the Board's Representative may (without prejudice to any other right or remedy available to the Board) by notice to Project Co increase the level of monitoring of

Project Co until such time as Project Co shall have demonstrated to the satisfaction of the Board that it is capable of performing and will perform all its obligations to the Board under this Agreement. Project Co shall compensate the Board for any reasonable additional costs incurred as a result of such increased monitoring.

Right to Open Up

- 13.3 Subject to Clause 13.4, the Board's Representative shall have the right at any time prior to the Actual Completion Date to request Project Co to open up and inspect any part or parts of the Works where the Board's Representative reasonably believes that such part or parts of the Works is or are defective and Project Co shall comply with such request.
- 13.4 Prior to exercising his right pursuant to Clause 13.3 above, the Board's Representative shall notify Project Co of his intention to exercise such right, setting out detailed reasons.
- 13.5 If, following the exercise by the Board's Representative of his right pursuant to Clause 13.3, the inspection shows that the relevant part or parts of the Works are not defective then Clause 29.3.4 (*Delay Events*) shall apply.
- 13.6 If, following the exercise by the Board's Representative of his right pursuant to Clause 13.3, the inspection shows that the relevant part or parts of the Works is or are defective, Project Co shall rectify and make good such Defect(s) and any consequence of such rectification and/or making good Defect(s) shall be carried out by Project Co at no cost to the Board and Project Co shall not be entitled to any extension of time in relation to such rectification and making good of the Works.
- 13.7 If, following the exercise by the Board's Representative of his right pursuant to Clause 13.3, the Board's Representative is of the opinion that the inspection shows that the relevant part or parts of the Works is or are defective and Project Co does not agree with such opinion, the matter shall be determined in accordance with Schedule Part 20 (*Dispute Resolution Procedure*).
- 13.8 Without prejudice to the rights of the Board's Representative pursuant to this Clause 13 (*Right of Access of Board's Representative*) the parties acknowledge that the exercise of such rights shall not in any way affect the obligations of Project Co under this Agreement save as expressly set out in this Clause 13 (*Right of Access of Board's Representative*).

Safety during Construction

- 13.9 The provisions of Section 2 (*Safety During Construction*) of Schedule Part 6 (*Construction Matters*) shall apply to matters of safety.
- 13A BOARD'S RIGHT TO STOP PROJECT OPERATIONS DURING THE PROJECT TERM**
- 13A.1 The Board's Representative shall have the right at any time during the Project

Term to verbally or in writing instruct Project Co to stop the relevant part or parts of the Project Operations and to allow him to inspect the relevant part or parts of the Project Operations if:

13A.1.1 the Board's Representative reasonably believes a Stop Incident has occurred.

13A.1.2 the Board's Representative reasonably believes that the carrying out of the relevant part or parts of the Project Operations has or is likely to have a potentially adverse impact upon the Clinical Services at the Facilities and/or the clinical services at the RIE Facilities; or

13A.1.3 there is an occurrence of a Major Incident during the Construction Phase.

13A.2 In the event that Project Co receives an instruction from the Board's Representative to stop the relevant part or parts of the Project Operations pursuant to Clause 13A.1, then Project Co shall immediately stop the relevant part or parts of the Project Operations until such time as:

13A.2.1 in the case of Clause 13A.1.1, Project Co has confirmed to the Board its proposals for ensuring that the relevant breach is remedied and that Project Co is able to re-start the relevant part or parts of Project Operations in accordance with such proposals as soon possible, provided that the Board's Representative is satisfied (acting reasonably) with such proposals;

13A.2.2 in any case pursuant to Clause 13A.1, Project Co receives an instruction from the Board's Representative pursuant to Clause 13A.6 below to re-start the relevant part or parts of the Project Operations as soon as possible.

13A.3 If following the exercise by the Board's Representative of his right to stop the relevant part or parts of the Project Operations pursuant to:

13A.3.1 Clause 13A.1.1, it is agreed or determined under the Dispute Resolution Procedure that the breach which the Board's Representative considers has given rise to a Stop Incident has not occurred, then Clause 29.3.9 (*Delay Events*) shall apply;

13A.3.2 Clause 13A.1.2, then Clause 29.3.10 (*Delay Events*) shall apply;

13A.3.3 Clause 13A.1.3, then Clause 29.3.11 (*Delay Events*) shall apply.

13A.4 If following the exercise by the Board's Representative of his rights pursuant to Clause 13A.1.1, the inspection shows that one or more Stop Incident(s) have occurred, Project Co shall rectify and make good such Stop Incident(s) and any consequence of such rectification and/or making good such Stop Incident(s) shall be carried out by Project Co at no cost to the Board and Project Co shall not be entitled to any extension of time in relation to such rectification and making good of such Stop Incident(s).

- 13A.5 If following the exercise by the Board's Representative of his right pursuant to Clause 13A.1.1 the Board's Representative is of the opinion that the inspection shows that one or more Stop Incident(s) have occurred and Project Co does not agree with such opinion, the matter shall be determined in accordance with Schedule Part 20 (*Dispute Resolution Procedure*).
- 13A.6 Without prejudice to Clause 13A.7, following the exercise of the Board's Representative of his rights pursuant to Clause 13A.1, the Board's Representative shall have the right to instruct Project Co to re-start the relevant part or parts of the Project Operations.
- 13A.7 Without prejudice to the rights of the Board's Representative pursuant to this Clause 13A (*Board's right to stop Project Operations during the Project Term*) the parties acknowledge that the exercise of such rights shall not in any way affect the obligations of Project Co under this Agreement save as expressly set out in this Clause 13A (*Board's right to stop Project Operations during the Project Term*).
- 13A.8 The Board's Representative shall provide Project Co with written reasons for any verbal instruction (or for any written instruction where such written instruction did not contain written reasons) to stop the relevant part or parts of the Project Operations pursuant to Clause 13A.1 within three (3) Business Days of any such verbal instruction.
- 13A.9 Project Co shall maintain an up-to-date Stop Log Book for each instruction of the Board's Representative to stop the relevant part or parts of the Project Operations pursuant to Clause 13A.1, which shall set out:
- 13A.9.1 the date and time when the Board's Representative issued a verbal or written instruction to stop the relevant part or parts of the Project Operations pursuant to Clause 13A.1 and the date and time when the relevant part or parts of the Project Operations were re-started by Project Co pursuant to Clause 13A.2;
- 13A.9.2 the written reasons of the Board's Representative in respect of any instruction to stop the relevant part or parts of the Project Operations, together with the reasons of Project Co for re-starting the relevant part or parts of the Project Operations, with such Stop Log Book being updated by Project Co within three (3) Business Days of receipt of the Board's Representative's written reasons pursuant to Clause 13A.8;
- 13A.10 The Board's Representative shall be able to access the Stop Log Book upon written request to Project Co, and Project Co shall provide such access to the Board within three (3) Business Days of receipt of any such request.

14. PROGRAMME AND DATES FOR COMPLETION

Dates for Completion

- 14.1 Project Co shall complete the Works by the Completion Date. Without prejudice to Clause 40 (*Project Co Event of Default*), 42 (*Board Voluntary Termination*), 46 (*Compensation on Termination*) and 47 (*Consequences of Termination*) the Board shall not be entitled to claim liquidated or general damages in respect of any delay

which elapses between the Completion Date and the Actual Completion Date.

The Programme

- 14.2 Any Programme submitted in accordance with the provisions set out below shall be prepared in accordance with Good Industry Practice and shall be in sufficient detail so as to enable the Board's Representative to monitor the progress including all commissioning activities and likely future progress of the Works.
- 14.3 The initial Programme is set out at Schedule Part 7 (*The Programme*). Any change to the Programme shall only be made in accordance with this Clause 14 (*Programme and Dates for Completion*) and Schedule Part 8 (*Review Procedure*). Project Co shall promptly submit to the Board's Representative a copy of any version of the Programme varied in accordance with this Clause 14 (*Programme and dates for Completion*) and Schedule Part 8 (*Review Procedure*).
- 14.4 If it appears to the Board's Representative at any time that the actual progress of the Works has significantly fallen behind the Programme, then the Board's Representative shall be entitled to require Project Co to submit to the Board's Representative a report identifying the reasons for the delay and, unless the event causing the delay is still subsisting and it is not possible to predict with any certainty when the delay might come to an end, require Project Co (at the Board's option):
- 14.4.1 to produce and submit to the Board's Representative in accordance with Schedule Part 8 (*Review Procedure*) a revised Programme showing the manner and the periods in which the Works will be carried out to ensure completion; and/or
- 14.4.2 to produce and submit to the Board's Representative in accordance with Schedule Part 8 (*Review Procedure*) a revised Programme showing the steps which are to be taken to eliminate or reduce the delay.

Early completion

- 14.5 Notwithstanding that the Works may have been completed in accordance with this Agreement, the Actual Completion Date may only occur on a date on or after the Completion Date unless the Board, in its absolute discretion, agrees otherwise in writing.
- 14.6 Not Used.

15. INDEPENDENT TESTER

Appointment

- 15.1 The parties have on or prior to the date of this Agreement, in compliance with all Law relating to procurement which is applicable to either party, appointed a suitably qualified and experienced consultant to act as the Independent Tester for the

purposes of this Agreement upon the terms of the Independent Tester Contract.

Changes to terms of appointment

- 15.2 Neither the Board nor Project Co shall without the other's prior written approval (not to be unreasonably withheld or delayed):
- 15.2.1 terminate, repudiate or discharge the Independent Tester Contract or treat the same as having been terminated, repudiated or otherwise discharged;
 - 15.2.2 waive, settle, compromise or otherwise prejudice any rights or claims which the other may from time to time have against the Independent Tester; or
 - 15.2.3 vary the terms of the Independent Tester Contract or the service performed or to be performed by the Independent Tester.
- 15.3 The parties shall comply with and fulfil their respective duties and obligations arising under or in connection with the Independent Tester Contract.

Co-operation

- 15.4 The parties agree to co-operate with each other generally in relation to all matters within the scope of or in connection with the Independent Tester Contract. All instructions and representations issued or made by either of the parties to the Independent Tester shall be simultaneously copied to the other and both parties shall be entitled to attend all inspections undertaken by or meetings involving the Independent Tester.

Replacement

- 15.5 If the Independent Tester's appointment is terminated otherwise than for full performance, the parties shall liaise and co-operate with each other in order to appoint, in accordance with this Clause 15.5, a replacement consultant to act as the Independent Tester as soon as reasonably practicable. The identity of any such replacement shall be as agreed by the parties and the terms of his appointment shall, unless otherwise agreed, be as set out in the Independent Tester Contract.
- 15.6 If the parties fail to agree the identity and/or terms of a replacement Independent Tester in accordance with Clause 15.5 within ten (10) Business Days of the original Independent Tester's appointment being terminated then such disagreement shall be referred for resolution in accordance with Schedule Part 20 (*Dispute Resolution Procedure*).

16. EQUIPMENT

Project Co and the Board each shall comply with their respective obligations set out in

Schedule Part 11 (*Equipment*) in respect of Equipment.

17. PRE-COMPLETION COMMISSIONING AND COMPLETION

- 17.1 Not less than nine (9) months before the Completion Date, the Board shall provide Project Co with a draft of the Final Commissioning Programme as jointly developed by the Board and Project Co in accordance with the provisions of Clause 17.2 and 17.3. Project Co shall provide the Board with comments on the draft Final Commissioning Programme submitted to it within fifteen (15) Business Days. The parties shall, within fifteen (15) Business Days of receipt by the Board of Project Co's comments agree the terms of the Final Commissioning Programme provided that the Board may by prior notice to Project Co change the scope and time of the Board's Commissioning and reimburse Project Co its reasonable costs incurred as a result of such change in scope or time. If the parties are unable to agree the Final Commissioning Programme or the change in scope or time of the Board's Commissioning by three (3) months, the matter shall be referred for determination in accordance with Schedule Part 20 (*Dispute Resolution Procedure*).
- 17.2 The Final Commissioning Programme shall be in accordance with the Outline Commissioning Programme and shall impose no greater or more onerous obligations on the Board than those set out in the Outline Commissioning Programme (unless otherwise agreed by the Board in its absolute discretion). The Final Commissioning Programme shall then replace the Outline Commissioning Programme.
- 17.3 The Final Commissioning Programme shall describe the steps necessary, the party responsible for taking each of such steps and the timing and sequence of each of such steps to ensure:
- 17.3.1 that Project Co's Pre-Completion Commissioning and the Board's Commissioning will not delay the Actual Completion Date from occurring by the Completion Date; and
- 17.3.2 that Project Co's Post Completion Commissioning and the Board's Post Completion Commissioning are completed by the Commissioning End Date.
- 17.4 The parties shall procure that the steps that they are responsible for carrying out and completing pursuant to the Final Commissioning Programme include, in the case of Project Co's activities, the activities described at paragraph 4.5.17 (*Completion Requirements*) of the Board's Construction Requirements.
- 17.5 Project Co shall notify the Independent Tester and the Board's Representative of the date when Project Co (acting reasonably) considers that the Works will be complete in accordance with the Board's Construction Requirements, the Completion Criteria and this Agreement not less than three (3) months prior to such anticipated completion. Such notification shall trigger the activities of the Independent Tester under this Clause.
- 17.6 The parties each undertake to co-operate with the Independent Tester to ensure that the Independent Tester is familiar with all necessary aspects of the Project for the purposes of its role as described in this Clause.

Commissioning prior to Completion Date

17.7 Project Co shall:

17.7.1 undertake Project Co's Pre-Completion Commissioning in accordance with the Final Commissioning Programme; and

17.7.2 permit the Board to undertake the Board's Commissioning including permitting specialist contractors engaged by the Board to deliver and install equipment on such dates as agreed between the Board and Project Co, in accordance with the Final Commissioning Programme

and the Board shall undertake the Board's Commissioning in accordance with the Final Commissioning Programme and so as not to cause material damage to the Works.

17.8 Project Co shall give written notice to the Independent Tester and the Board of the commencement of Project Co's Pre-Completion Commissioning and shall ensure that the Independent Tester and the Board's Representative are invited to witness all of, and are provided with all information they may reasonably require in relation to, Project Co's Pre-Completion Commissioning and that the Independent Tester is invited to comment on Project Co's Pre-Completion Commissioning.

17.9 Project Co shall (or shall procure that the Contractor shall), give the Board access to the Facilities and the Retained Estate Handback Infrastructure at such times as may be set out in the Final Commissioning Programme to enable the Board to undertake the Board's Commissioning in accordance with the Final Commissioning Programme for the period prior to completion. When exercising such rights the Board shall comply with all relevant safety procedures, which shall include any relevant construction phase plans and health and safety plans for the construction of the Facilities and the Retained Estate Handback Infrastructure, the Contractor's Site Rules from time to time and any reasonable directions with regard to site safety that may be issued by or on behalf of the Contractor's Site Manager from time to time.

Pre-Completion inspection

17.10 Without prejudice to the notice periods in respect of the Works which are set out in Schedule Part 31 (*Consort Interface with Campus Site and/or Campus Facilities*) in respect of which notice of completion is to be given by Project Co, Project Co shall in addition give the Independent Tester and the Board's Representative not less than twenty (20) Business Days notice and not more than thirty (30) Business Days notice of the date upon which Project Co considers that the Works will be complete and the tests on completion required to be performed in accordance with the Final Commissioning Programme will be carried out. Following receipt of the notice specified in this Clause 17.10 (*Pre-Completion Inspection*) the Board's Representative and the Independent Tester shall be entitled to inspect the Works on the date or dates reasonably specified by Project Co in accordance with this Clause 17.10 (*Pre-Completion Inspection*), and to attend any of the tests on completion. Project Co shall, if so requested, accompany the Board's Representative and the Independent Tester on any such inspection.

Pre-Completion matters

- 17.11 The parties shall procure that the Independent Tester, within five (5) Business Days of any inspection made pursuant to Clause 17.10 (*Pre-Completion Inspection*), notifies Project Co and the Board of any outstanding matters (including, without limitation, the repetition of any of the tests on completion which are required to be carried out and passed in accordance with the Final Commissioning Programme) which are required to be attended to before the Works can be considered to be complete in accordance with the Board's Construction Requirements, Project Co's Proposals and the Completion Criteria. Project Co shall attend to such matters and shall, if necessary, give the Independent Tester further notices in accordance with Clause 17.10 (*Pre-Completion Inspection*) (but dealing only with matters raised in the notification under this Clause 17.11 (*Pre-Completion Matters*)) so that the procedures in Clause 17.10 (*Pre-Completion Inspection*) and this Clause 17.11 (*Pre-Completion Matters*) are repeated as often as may be necessary to ensure that all outstanding matters in relation to the Works are attended to.

Completion Certificate

- 17.12 Pursuant to the terms of the Independent Tester Contract, the parties shall procure that the Independent Tester, when he is satisfied that the Facilities and the Retained Estate Handback Infrastructure are complete in accordance with the Completion Criteria, issues a Certificate of Practical Completion to that effect to the Board and to Project Co.
- 17.13 Without prejudice to Clauses 17.14 and 17.17, the issue of the Certificate of Practical Completion shall, in the absence of manifest error, bad faith or fraud, be conclusive evidence (but only for the purpose of ascertaining the Payment Commencement Date), that the Facilities and the Retained Estate Handback Infrastructure were complete in accordance with the Completion Criteria on the date stated in the Certificate of Practical Completion.
- 17.14 The Independent Tester shall issue the Certificate of Practical Completion notwithstanding that there are Snagging Matters. Where there are Snagging Matters, the parties shall procure that the Independent Tester shall, within ten (10) Business Days of the date of issue of the Certificate of Practical Completion, issue a Snagging Notice which shall specify the Snagging Matters and an estimate of the cost of rectifying such Snagging Matters.
- 17.15 Following the issue of a Snagging Notice, Project Co shall, in consultation with the Board's Representative and in such manner as to cause as little disruption as reasonably practicable to the Board's Post Completion Commissioning and the Board's use of the Facilities and the Retained Estate Handback Infrastructure and the Retained Estate, rectify all Snagging Matters within ten (10) Business Days of the issue of the Snagging Notice.
- 17.16 If, within ten (10) Business Days of the issue of the Snagging Notice, Project Co has failed to rectify the Snagging Matters specified in the Snagging Notice the Board may by itself (or engage others to) carry out the works necessary to rectify the Snagging Matters, at the risk and cost of Project Co.
- 17.17 The issue of the Certificate of Practical Completion shall in no way affect the obligations of Project Co under this Agreement including in respect of any Defects.

As-built specification

- 17.18 Within ten (10) Business Days, after the issue of the Certificate of Practical Completion, Project Co shall provide to the Board three (3) hard copies and one (1) electronic copy of the as-built building specification, together with all drawings relating to the Works.

18. POST COMPLETION COMMISSIONING

Commissioning

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

Information

- 18.2 Project Co shall ensure that the Board's Representative is provided with all the information he may reasonably require in relation to Project Co's Post-Completion Commissioning and the Board shall ensure that Project Co is provided with all information Project Co may reasonably require in relation to the Board's Post Completion Commissioning.
- 18.3 If the Board's Representative, acting reasonably, makes any comment in relation to the carrying out of Project Co's Post-Completion Commissioning, such comments shall be taken into account by Project Co and if Project Co, acting reasonably, makes any comment in relation to the carrying out of the Board's Post Completion Commissioning, such comment shall be taken into account by the Board.
- 18.4 On the completion of Project Co's Post-Completion Commissioning and the Board's Post Completion Commissioning the Independent Tester shall issue the Commissioning Completion Certificate.

Operational Manuals

- 18.5 Project Co shall make available on the Site to the Board's Representative:
- 18.5.1 at least twenty four (24) weeks prior to the anticipated Actual Completion Date, one (1) electronic copy and three (3) hard copies of a draft operation and maintenance manual in sufficient detail to allow the Board to plan for the safe and efficient operation of the Facilities and the Retained Estate Handback Infrastructure;
- 18.5.2 on or before the Actual Completion Date one (1) electronic copy and three (3) hard copies of a final draft operation and maintenance manual in sufficient detail to allow the Board to operate and use the Facilities and the Retained Estate Handback Infrastructure safely and efficiently;

18.5.3 within ten (10) Business Days following the Actual Completion Date, the principal operation and maintenance manual;

in each case including all manufacturers' instructions relating to Equipment installed by or on behalf of Project Co.

18.6 Project Co shall provide to the Board such information after the Actual Completion Date as relates to any Snagging Matters or rectification of Defect as is reasonably necessary to allow for the updating of any of the items listed in Clause 18.5.

18.7 On termination of this Agreement (howsoever arising) prior to the provision by Project Co in accordance with Clause 18.5 of the items listed therein, Project Co shall within ten (10) Business Days of such termination provide in triplicate hard copies and a single electronic copy of any operating and maintenance manual not yet provided (completed as appropriate to the date of termination) to the Board.

19. FOSSILS AND ANTIQUITIES

Property

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

Discovery

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

19.2.1 immediately notify the Board's Representative of such discovery;

19.2.2 take all steps not to disturb the object and, if necessary, cease any Works in so far as the carrying out of such Works would endanger the object or prevent or impede its excavation; and

19.2.3 take all necessary steps to preserve the object in the same position and condition in which it was found.

Action

19.3 The Board shall procure that the Board's Representative promptly, and in any event within ten (10) Business Days of receipt of notice pursuant to Clause 19.2.1, issues an instruction to Project Co specifying what action the Board's Representative requires Project Co to take in relation to such discovery.

19.4 Project Co shall promptly and diligently comply with any instruction issued by the Board's Representative referred to in Clause 19.3 above (except and to the extent

that such instruction constitutes a Board Change pursuant to Clause 19.6 below in which case the provisions of Schedule Part 16 (*Change Protocol*) shall apply), at its own cost.

19.5 If directed by the Board's Representative, Project Co shall allow representatives of the Board to enter the Site and Off-Site for the purposes of removal or disposal of such discovery provided that such entry shall be subject to the Board complying with all relevant safety procedures, which shall include any relevant construction phase plans and health and safety plans for the construction of the Facilities and the Retained Estate Handback Infrastructure, the Contractor's Site Rules from time to time and any reasonable directions with regard to site safety that may be issued by or on behalf of the Contractor's Site Manager from time to time.

19.6 If, in relation to such discovery, the Board requires Project Co to carry out works (being any work of alteration, addition, demolition or extension or variation in the Works) which are not works which would be necessary for the purpose of compliance with Law or any Consents, it must issue a Board Change Notice in accordance with the provisions of Schedule Part 16 (*Change Protocol*).

19A CONSORT INTERFACE WITH CAMPUS SITE AND/OR CAMPUS FACILITIES

Project Co shall comply with the provisions of Schedule Part 31 (*Consort Interface with Campus Site and/or Campus Facilities*) and shall provide and thereafter adhere to all relevant Interface Proposals in relation to such Schedule.

PART 4: QUALITY ASSURANCE

20. QUALITY ASSURANCE

Quality Plans and Systems

- 20.1 Project Co shall procure that all aspects of the Project Operations are the subject of quality management systems in accordance with the provisions of this Clause 20 (*Quality Assurance*).
- 20.2 The quality management systems referred to in Clause 20.1 above shall be reflected in appropriate quality plans, the standard of which shall be consistent with BS EN ISO 9001 or 9002 (as the case may be) or any equivalent standard which is generally recognised as having replaced them (or either of them).
- 20.3 Without limitation to the generality of Clause 20.2, there shall be:
- 20.3.1 a Design Quality Plan;
 - 20.3.2 a Construction Quality Plan; and
 - 20.3.3 a Services Quality Plan for each Service,
- provided that the Design Quality Plan and the Construction Quality Plan may be incorporated into one document.
- 20.4 Project Co shall procure that the Project Operations are carried out in compliance with the Quality Plans. All Quality Plans shall be submitted to the Board's Representative in accordance with Schedule Part 8 (*Review Procedure*) and Project Co shall not be entitled to implement or procure the implementation of any Quality Plan unless Project Co is entitled to proceed with such implementation pursuant to Schedule Part 8 (*Review Procedure*).
- 20.5 Project Co shall implement the quality management systems referred to in Clause 20.1 and shall procure that:
- 20.5.1 the Contractor implements the Design Quality Plan;
 - 20.5.2 the Contractor implements the Construction Quality Plan;
 - 20.5.3 each Service Provider implements the relevant Services Quality Plan for each Service being provided by that Service Provider.
- 20.6 Where any aspect of the Project Operations is performed by more than one contractor or subcontractor, then the provisions of this Clause 20 (*Quality Assurance*) (in so far as relevant or appropriate to the activities to be performed by

such contractor or subcontractor) shall apply in respect of each of such contractors or subcontractors, and references in this Clause 20 (*Quality Assurance*) to the "Contractor" or the "Service Provider" shall be construed accordingly. To avoid doubt, this Clause shall not be construed as requiring subcontractors of the Contractor or the Service Provider to have their own quality plans but only to comply with the Design Quality Plan and the Construction Quality Plan or the relevant aspects of the Services Quality Plan (as the case may be).

- 20.7 Project Co shall from time to time submit to the Board's Representative in accordance with Schedule Part 8 (*Review Procedure*) any changes to any of the Quality Plans required for such Quality Plan to continue to comply with the requirements set out in Clause 20.2. The Board's Representative may raise comments on any such proposed change only on the grounds set out in paragraph 3 of Schedule Part 8 (*Review Procedure*).
- 20.8 If there is no objection under Schedule Part 8 (*Review Procedure*) to a change to any Quality Plan proposed pursuant to Clause 20.7, the Quality Plan shall be amended to incorporate such change.

Quality Manuals and Procedures

- 20.9 If any Quality Plan refers to, relies on or incorporates any quality manual or procedure, then such quality manual or procedure or the relevant parts of it shall be submitted to the Board's Representative at the time that the relevant Quality Plan or part of (or change to) a Quality Plan is submitted in accordance with Schedule Part 8 (*Review Procedure*), and the contents of such quality manual or procedure shall be taken into account in the consideration of the relevant Quality Plan or part of (or change to) a Quality Plan in accordance with Schedule Part 8 (*Review Procedure*).

Quality Management

- 20.10 Project Co shall maintain a quality management system which shall:
- 20.10.1 ensure the effective operation of the quality systems described in this Clause 20 (*Quality Assurance*);
 - 20.10.2 cause an audit of the quality systems at regular intervals and the findings of such audit will be reported to the Board's Representative;
 - 20.10.3 require review of all quality systems at intervals agreed with the Board's Representative to ensure their continued suitability and effectiveness;
 - 20.10.4 require liaison with the Board's Representative on all matters relating to quality management; and
 - 20.10.5 require production of reports and their delivery to Project Co.

Quality Monitoring

20.11 The Board's Representative may carry out audits of Project Co's quality management system (including all relevant Quality Plans and any quality manuals and procedures) to establish that Project Co is complying with Clauses 20.1 and 20.3. The Board's Representative may carry out such audits at approximate intervals of three (3) months and may carry out other periodic monitoring, spot checks and auditing of Project Co's quality management systems. Project Co shall procure that the Board's Representative shall have an equivalent right in respect of the Contractor's and the Service Provider's quality management systems. Project Co shall co operate, and shall procure that any Sub-Contractor co-operates, with the Board's Representative including providing him with all information and documentation which he reasonably requires in connection with his rights under this Clause.

PART 5: NOT USED

21. NOT USED

PART 6: SERVICES

22. THE SERVICES

General obligations

22.1 Throughout the Operational Term Project Co shall provide (or procure that the Service Provider provides) the Services in accordance with:

22.1.1 the Service Level Specification;

22.1.2 the Method Statements; and

22.1.3 the terms of this Agreement

22.2 To avoid doubt the obligations in Clauses 22.1.1, 22.1.2 and 22.1.3, are independent obligations and:

22.2.1 the fact that Project Co has complied with the Method Statements shall not be a defence to an allegation that Project Co has not satisfied the Service Level Specification; and

22.2.2 the fact that Project Co has complied with the Service Level Specification shall not be a defence to an allegation that Project Co has not satisfied the Method Statements,

provided that where there is any conflict between the Service Level Specification and the Method Statements the Board shall be entitled (in its sole discretion) to decide which shall take precedence and inform Project Co of its decision and Project Co shall, at its own cost, be obliged to implement the Board's decision.

Commencement of Services

22.3 Project Co shall procure that the provision of the Services commences on the Actual Completion Date.

Project Co Services Changes

22.4 Project Co may at any time submit to the Board's Representative in accordance with Schedule Part 8 (*Review Procedure*) proposals for amendments to or substitution for the Method Statements or any part of them. If there is no comment on such proposed amendment or substitution (on the grounds set out in paragraph 3 of Schedule Part 8 (*Review Procedure*)), then the Method Statements as so amended or substituted shall be the Method Statements for the purposes of this Agreement, subject to any further amendment or substitution to which there has been no comment in accordance with Schedule Part 8 (*Review Procedure*).

- 22.5 To avoid doubt, an amendment to or substitution for the Method Statements proposed pursuant to Clause 22.4 shall not be a Qualifying Change entitling Project Co to any payment (or other compensation) or to any relief from the performance of its obligations under this Agreement.

No disruption

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

23. MAINTENANCE

Programmed Maintenance Works

- 23.1 No later than three (3) months prior to the Completion Date Project Co shall submit to the Board's Representative in accordance with Schedule Part 8 (*Review Procedure*) a Schedule of Programmed Maintenance for the period from the Completion Date to the expiry of that Contract Year.
- 23.2 Not later than three (3) months prior to the commencement of each subsequent Contract Year Project Co shall submit to the Board's Representative in accordance with Schedule Part 8 (*Review Procedure*) a Schedule of Programmed Maintenance for the next succeeding Contract Year.
- 23.3 Each Schedule of Programmed Maintenance shall contain the following information (the "Programmed Maintenance Information"):
- 23.3.1 details of the proposed start and end dates for each period of Programmed Maintenance, the works to be carried out and the proposed hours of work; and
 - 23.3.2 details of any effect of the Programmed Maintenance on the delivery of any of the Services and/or the activities of the Board; and
 - 23.3.3 any other information which is required pursuant to Section 2 (*Operational Construction Issues*), Section 5 (*Access Strategy*), Section 6 (*Service Strip and Foul Service Strip*) and Section 7 (*Link Building*) of Part 1 and Part 2 of Schedule Part 31 (*Consort Interface with Campus Site and/or Campus Facilities*) and/or of Clause 9 (*Nature of Land Interests*).
- 23.4 Not later than twenty (20) Business Days prior to the commencement of any quarter (being a three month period commencing on 1 April, 1 July, 1 October or 1 January), Project Co may submit to the Board's Representative for approval in accordance with Schedule Part 8 (*Review Procedure*) a revision to the Schedule of Programmed Maintenance for the Contract Year in which the relevant quarter falls showing the effect of the proposed changes to the Programmed Maintenance Information. If the Board's Representative does not raise comments on such proposed revision in accordance with Schedule Part 8 (*Review Procedure*), the

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

- 23.5 Where the Board's Representative raises comments in respect of any Programmed Maintenance periods and/or hours of work shown in a Schedule of Programmed Maintenance in accordance with paragraph 3 of Schedule Part 8 (*Review Procedure*), he shall indicate whether, and if so when, the Programmed Maintenance can be re-scheduled and Project Co shall amend the relevant Schedule of Programmed Maintenance accordingly.

23A LIFECYCLE REPLACEMENT

Lifecycle Replacement

- 23A.1 No later than three (3) months prior to the Actual Completion Date, Project Co shall submit to the Board's Representative in accordance with Schedule Part 8 (*Review Procedure*) a Schedule of Lifecycle Replacement for the Facilities for the Project Term.

- 23A.2 Not later than three (3) months prior to each subsequent Contract Year, Project Co shall submit to the Board's Representative in accordance with Schedule Part 8 (*Review Procedure*) a Schedule of Lifecycle Replacement for the Facilities for the next succeeding Contract Year.

- 23A.3 Each Schedule of Lifecycle Replacement shall contain the following information:

23A.3.1 details of all items of Plant and Group 1 Equipment and any other asset for which Lifecycle Replacement is planned during the Project Term; and

23A.3.2 the Contract Year (or Years) when the Lifecycle Replacement is planned to take place.

- 23A.4 Each Schedule of Lifecycle Replacement shall contain the following additional information for the items scheduled for the following Contract Year:

23A.4.1 details of all items of Plant and Group 1 Equipment and any other asset for which Lifecycle Replacement is planned during the Contract Year;

23A.4.2 any changes in any Plant, Group 1 Equipment or any other assets which appear in the Schedule of Lifecycle Replacement since the previous annual revision of the Schedule of Lifecycle Replacement;

23A.4.3 evidence which demonstrates that Project Co has taken into account in the proposed Lifecycle Replacement the cost to the Board of occupation and operation of the Facilities, which may be affected by Project Co's proposals for Lifecycle Works, including without limitation, energy consumption and the Board's maintenance and cleaning obligations;

- 23A.4.4 details of Group 1 Equipment to be replaced and commentary on how this has been determined with particular reference to any changes to the Board Services which the Board has made Project Co aware of, which mean that a like for like replacement of Group 1 Equipment may not be appropriate or represent best value for money to the Board;
 - 23A.4.5 details of the proposed start and end dates for the Lifecycle Replacement, the works to be carried out and the proposed hours of work, and any other information which the Board may reasonably require; and
 - 23A.4.6 details of any effect of the Lifecycle Replacement on the delivery of any of the Services and/or the activities of the Board.
- 23A.5 Where Lifecycle Replacement provides an opportunity to improve whole life costs, such as through lower energy consumption, longer life, or lower replacement costs, Project Co shall provide the Board with the details and benefits of any alternative products or solutions.
- 23A.6 The Board's Representative may comment on each Schedule of Lifecycle Replacement submitted by Project Co in accordance with this Clause 23A in accordance with Schedule Part 8 (*Review Procedure*). Project Co shall consider the Board's Representative comments but, for the avoidance of doubt (and without prejudice to Project Co's obligations under this Agreement), Project Co shall not be obliged to amend the Schedule of Lifecycle Replacement to reflect any comments which the Board's Representative may make in accordance with the provisions of paragraph 3.11 of Schedule Part 8 (*Review Procedure*).

Programmed and Unprogrammed Maintenance

- 23.6 Project Co shall not carry out any Programmed Maintenance or Unprogrammed Maintenance Works or Lifecycle Replacement save:
- 23.6.1 in accordance with a Schedule of Programmed Maintenance or Schedule of Lifecycle Replacement to which subject to Clause 23A.6 (*Lifecycle Replacement*), no objection has been made under Schedule Part 8 (*Review Procedure*) or, where comment has been raised in respect of the Programmed Maintenance periods and/or time, the Schedule of Programmed Maintenance or Schedule of Lifecycle Replacement has been amended pursuant to the Service Level Specification;
 - 23.6.2 in accordance with the procedures set out in Clause 23.8; or
 - 23.6.3 in an emergency, in accordance with Clause 23.9.
- 23.7 Notwithstanding that there has been no objection to a Schedule of Programmed Maintenance or Schedule of Lifecycle Replacement, the Board's Representative may, at any time, require Project Co to accelerate or defer any Programmed Maintenance or Lifecycle Replacement by giving written notice to Project Co, (unless otherwise agreed) not less than twenty (20) Business Days prior to the scheduled date for carrying out such Programmed Maintenance or Lifecycle

Replacement, which notice shall set out the time and/or periods at or during which the Board requires the Programmed Maintenance or Lifecycle Replacement to be performed. Project Co shall notify the Board of the amount of any additional reasonable costs which it will incur as a direct consequence of such acceleration or deferment (the "**Estimated Increased Maintenance and Lifecycle Costs**") within five (5) Business Days of the receipt of the written notice advising of the requirement for an acceleration or deferment of the Programmed Maintenance or Schedule of Lifecycle Replacement. The Board shall, within a further period of five (5) Business Days following receipt by the Board of notification of the amount of the Estimated Increased Maintenance and Lifecycle Costs, at the Board's option, either confirm or withdraw its request to accelerate or defer the Schedule of Programmed Maintenance and Schedule of Lifecycle Replacement. If the Board does not respond within this five (5) Business Day period, the request shall be deemed to have been confirmed. The Board shall reimburse Project Co the direct and reasonable costs actually incurred by Project Co as a consequence of such acceleration or deferment up to, but not exceeding, the amount of the Estimated Increased Maintenance and Lifecycle Costs.

23.8 If, in circumstances other than an emergency, the need arises for Maintenance Works or Lifecycle Replacement (excluding any works of a *de minimis* nature in respect of which the parties have agreed this Clause 23.8 shall not apply and excluding works carried out for the purpose of Rectification, which shall take place in accordance with the provisions of Schedule Part 14 (*Payment Mechanism*)), which are not scheduled to be carried out as part of the Programmed Maintenance or Lifecycle Replacement ("**Unprogrammed Maintenance or Lifecycle Replacement Works**"), Project Co shall not carry out any Unprogrammed Maintenance or Lifecycle Replacement Work unless and until the Board's Representative has approved the proposed commencement date, the proposed hours of work and estimated duration of the requisite Unprogrammed Maintenance or Lifecycle Replacement Work in accordance with the provisions of paragraph 3.9 of Schedule Part 8 (*Review Procedure*). Nothing in this Clause 23.8 (including any approval of the Board pursuant to Schedule Part 8 (*Review Procedure*)) shall prevent the Board from making any deductions in calculating the Monthly Service Payments pursuant to the Payment Mechanism.

23.9 If, as a result of an emergency, the need arises for Unprogrammed Maintenance or Lifecycle Replacement Works, Project Co may carry out such Unprogrammed Maintenance or Lifecycle Replacement Works provided that Project Co shall notify the Board's Representative as soon as possible (and in any event within one (1) hour of the occurrence of the emergency) of the extent of the necessary Unprogrammed Maintenance or Lifecycle Replacement Works and the reasons for them. Project Co shall take all reasonable steps to minimise the duration of such Unprogrammed Maintenance or Lifecycle Replacement Works. Nothing in this Clause 23.9 shall prevent the Board from making any deductions in calculating the Monthly Service Payments pursuant to the Payment Mechanism.

23.10 Where Programmed Maintenance and/or Lifecycle Replacement scheduled to be carried out in accordance with the Schedule of Programmed Maintenance has been deferred by the Board's Representative under Clause 23.7, Project Co shall not be treated as having failed to perform the relevant Service on account of the condition of the Facilities or any part of them from the time the Programmed Maintenance and/or Lifecycle Replacement was scheduled to have been completed until the time the deferred Programmed Maintenance and/or Lifecycle Replacement was scheduled to have been completed, but not afterwards, provided always, to avoid doubt, that Project Co shall not be relieved from the consequences of any failure to maintain the Facilities in respect of any period prior to the period for performing the particular work according to the Schedule of Programmed Maintenance or the Schedule of Lifecycle Replacement.

5 Year Maintenance Plan

- 23.11 Project Co shall deliver to the Board's Representative not less than three (3) months prior to the Completion Date, and thereafter not less than three (3) months prior to the commencement of each Contract Year the latest version of the 5 Year Maintenance Plan.
- 23.12 The Board shall have a right to inspect the Facilities and the Maintenance Works to ensure that the Facilities are being maintained in accordance with the Service Level Specification and that the Facilities comply with the Board's Construction Requirements and Project Co's Proposals throughout the Project Term. The Board may appoint an independent third party for the purposes of carrying out any such inspection and shall make known the findings to Project Co and the Funders. The parties shall then meet to discuss any implications of such findings and any steps that are necessary to remedy any failure to comply with such obligations. Project Co shall (subject to Clause 33 (*Change Protocol*)) take into account such discussions in the next Schedule of Programmed Maintenance so that any failure to comply with such obligations shall be remedied.

Board's Maintenance Obligations

- 23.13 The Board's Maintenance Obligations are as follows:
- 23.13.1 not less frequently than once in every five (5) years from the Actual Completion Date, in a good and workmanlike manner to make good plaster and other interior wall and ceiling finishes and decoration in all such parts of the interior of the Functional Areas as were plastered, finished and/or decorated by Project Co as part of the Works or in implementing a Board Change;
- 23.13.2 Not Used;
- 23.13.3 Not Used;
- 23.13.4 as often as is necessary to maintain anything provided by the Board under a Derogated Low Value Change; and
- 23.13.5 to ensure that all portable electrical appliances that are connected to the electricity supply in the Facilities by the Board and Board Parties have been tested in accordance with Law and the "**Code of Practice for In-service Inspection and Testing of Electrical Equipment**" published from time to time by the Institution of Electrical Engineers.
- 23.14 Subject to Clause 23.21, the Board must carry out and perform the Board's Maintenance Obligations or procure that the Board's Maintenance Obligations are carried out and performed as often as required by Clause 23.13 and in accordance with Good Industry Practice. Without prejudice to the Board's rights under Clause 23.7, the Board's Maintenance Obligations must be scheduled by the Board so as not to interfere with Project Co carrying out Programmed Maintenance or Lifecycle Replacement in accordance with the Schedule of Programmed Maintenance or Schedule of Lifecycle Replacement and/or interfere with Project Co carrying out Unprogrammed Maintenance Work or Lifecycle Replacement in accordance with

Clause 23.8.

23.15 If the Board is in breach of Clause 23.14, Project Co may, while the breach is continuing, give a notice to the Board requiring it to carry out the relevant Board Maintenance Obligations. If the Board:

23.15.1 does not reply to Project Co in writing within ten (10) Business Days of the date of Project Co's notice with a programme for carrying out the relevant Board Maintenance Obligations within a period of time that is reasonable having regard to the nature of the breach, the reasonably foreseeable consequences of non-performance of the relevant Board Maintenance Obligations for the Services and Project Co's obligations under this Agreement; or

23.15.2 having provided such a programme, does not comply with it,

Project Co shall be entitled to perform the Board's Maintenance Obligations so far as necessary to prevent any reasonably foreseeable adverse effect on the Services and/or Project Co's obligations under this Agreement consequent upon the non-performance of the relevant Board Maintenance Obligations ("**Project Co-Remedial Services**").

23.16 Project Co shall not carry out any Project Co's Remedial Services unless and until the Board's Representative, pursuant to this Clause 23.16, has approved or is deemed to have approved or has specified the proposed commencement date, the proposed hours of work and the estimated duration of Project Co's Remedial Services (together the "**PRS Timetable**"). Project Co must give the Board not less than twenty (20) Business Days notice of its proposed PRS Timetable. If the Board's Representative considers that the proposed PRS Timetable is not consistent with the principles set out in Appendix 2 to Schedule Part 8 (*Review Procedure*), he may specify an alternative PRS Timetable that is consistent with those principles, which shall be as near to the PRS Timetable proposed by Project Co as reasonably practicable. If the Board's Representative fails either to approve Project Co's proposed PRS Timetable or to specify an alternative PRS Timetable within ten (10) Business Days of receipt of Project Co's proposed PRS Timetable, he shall be deemed to have approved it.

23.17 The Board must allow Project Co and relevant Project Co Parties access to the Site and the Facilities:

23.17.1 for the purpose of monitoring the carrying out of Board's Maintenance Obligations; and

23.17.2 in accordance with the approved PRS Timetable for the purpose of carrying out any of Project Co's Remedial Services.

23.18 If the Board does not allow access to the Site and/or the Facilities as required pursuant to Clause 23.17.2, or otherwise prevents or interferes with Project Co and any relevant Project Co Party performing the PRS Remedial Works, Project Co may propose a new PRS Timetable in respect of the relevant Project Co's Remedial Services and Clause 23.16 shall apply.

- 23.19 In carrying out and performing Project Co's Remedial Services, Project Co must comply with the standards applicable to the relevant Board's Maintenance Obligations and Good Industry Practice and must use reasonable endeavours to match colours and other finishes to those that currently exist in the relevant part or parts of the Facilities.
- 23.20 The Board must reimburse Project Co all reasonable costs that it incurs in carrying out and performing Project Co's Remedial Services in accordance with this Clause 23.
- 23.21 Notwithstanding the terms of Clauses 23.14 to 23.19 above, Project Co is responsible for:
- 23.21.1 making good any defects in plaster and other interior wall and ceiling finishes and decoration provided by Project Co as part of the Works or in implementing a Board Change, caused by defective design or workmanship in the carrying out of the Works or in implementing the Board Change; and
- 23.21.2 making good any defects in plaster and other interior wall and ceiling finishes and decoration provided by Project Co as part of the Works or in implementing a Board Change (whether or not these have subsequently been replaced or renewed by the Board) and things referred to in Clause 23.13.4 consequential on any Programmed Maintenance or Unprogrammed Maintenance or any act or omission of Project Co.
- 23.22 The Board and Project Co shall co-operate with each other to coordinate any activities that the Board proposes to undertake to implement any of the Board's Maintenance Obligations and Project Co's Programmed Maintenance and Project Co must include the Board's intentions with regard to performing the Board's Maintenance Obligations in the Schedule of Programmed Maintenance for each Contract Year.

Energy for Repairs

- 23.23 Subject to Clause 23.24, the Board is entitled to be reimbursed by Project Co for costs incurred by the Board for Utilities supplied to the Facilities during the Operational Term that are consumed in the process of Project Co or any Project Co Party carrying out operations to rectify an Availability Failure.
- 23.24 For the purpose of applying Clause 23.23 the cost of each Utility shall be considered separately and Clause 23.23 shall not apply if the costs concerned, in respect of the particular Availability Failure, do not exceed the daily average cost based on bills paid by the Board to the supplier of the relevant Utility to the Facilities over the most recent twelve (12) month period for which figures are available. If the particular Availability Failure occurs prior to first anniversary of the Actual Completion Date then the daily average cost based on bills paid by the Board to the supplier of the relevant Utility shall be calculated by reference to the period from the Actual Completion Date to the date of the Availability Failure.
- 23.25 Where the Board claims reimbursement of Utilities costs pursuant to Clause 23.23 it must reasonably estimate those costs using all available evidence and send

Project Co a statement showing its calculation of the amount claimed along with its supporting evidence. Unless Project Co disputes the statement within ten (10) Business Days of receipt, the Board will be entitled, pursuant to Clause 34.6 (*Set Off*), to set-off the amount claimed.

Energy for deviation from the Energy Strategy

23.26 Subject to Clause 23.27, the Board is entitled to be reimbursed by Project Co for costs and losses incurred by the Board in relation to Utilities supplied to the Facilities during the Operational Term that are consumed as a result of the occurrence of Performance Failure(s) in respect of [REDACTED] such additional costs to be calculated in accordance with Clause 23.29 below (the "Utility Cost Difference").

FOISA 33(1)(b)
EIR Reg 10(5)(e)

23.27 For the purpose of applying Clause 23.26 the Board shall not be entitled to reimbursement if the Utility Cost Difference is less than zero (0).

23.28 Where the Board claims reimbursement of Utilities costs and/or losses pursuant to Clause 23.26 it must calculate the Utility Cost Difference pursuant to Clause 23.29 and send Project Co a statement showing its calculation of the amount claimed along with its supporting evidence. Unless Project Co disputes the statement within ten (10) Business Days of receipt, the Board will be entitled, pursuant to Clause 34.6, to set-off the amount claimed.

23.29 The Board shall calculate the Utility Cost Difference using the following formula:

INFORMATION REDACTED.

FOISA 33(1)(b)
EIR Reg 10(5)(e)

INFORMATION REDACTED. prior clause / page.

24. MONITORING OF PERFORMANCE

Monitoring

- 24.1 In carrying out the Services, Project Co shall, and shall procure that all Project Co Parties and any other persons for whom it is responsible shall, comply with the provisions of Schedule Part 12 (*Service Requirements*).
- 24.2 Project Co shall be responsible for monitoring its performance of this Agreement during the Operational Term, in the manner and at the frequencies set out in Schedule Part 12 (*Service Requirements*). Project Co shall provide the Board's Representative with relevant particulars of any aspects of its performance which fail to meet the requirements of this Agreement (unless otherwise notified in writing by the Board). The Board may at all reasonable times observe, inspect and satisfy itself as to the adequacy of the monitoring procedures (including without limitation carrying out sample checks).

Grounds for Warning Notices

- 24.3 If at any time during the Operational Term (other than by reason of a Force Majeure Event, a Relief Event or an Emergency):
- 24.3.1 the total Deductions for any Contract Month amount to more than 0.207 per cent of the Annual Service Payment for the current Contract Year; or
- 24.3.2 the total Deductions in each of any three Contract Months in any six consecutive Contract Months amount to more than [REDACTED] of the Annual Service Payment for the current Contract Year,

FOISA 33(1)(b)
EIR Reg 10(5)(e)

the Board's Representative may serve a Warning Notice on Project Co, provided always that, to give Project Co time to take appropriate rectification measures, the Board's Representative shall not be entitled:

- (a) to serve more than one (1) Warning Notice in any Contract Month;
- (b) to serve a Warning Notice in any two (2) consecutive Contract Months to the extent that the same event has contributed to the Board's right to serve the Warning Notice, but provided that Project Co demonstrates to the Board that it has taken all reasonable steps to remedy the cause of that event.

Warning Notices Disputes

- 24.4 If Project Co disputes that the Board was or is entitled to serve a Warning Notice, Project Co may refer that dispute for determination under the Dispute Resolution Procedure for resolution. If, after the Board's Representative issues a Warning Notice, the parties subsequently agree, or it is determined under the Dispute Resolution Procedure that the Warning Notice was served without justification, that Warning Notice shall be recalled or shall be cancelled and deemed not to have been served.

Board's remedial rights

- 24.5 The provisions of Clauses 24.6 to 24.9 (inclusive) shall apply if the Board, acting reasonably, considers that it needs to take action in connection with the Services:

24.5.1 because of an immediate and serious threat to the health or safety of any user of the Facilities and/or the Retained Estate; or

24.5.2 to prevent or address material interruption in the provision of one or more of the Services; or

24.5.3 because of a risk of the ability of the Board to provide the relevant Board Services being prejudiced to a material degree.

- 24.6 If any of the circumstances set out in Clause 24.5 arise (without prejudice to its rights under Clause 40 (*Project Co Event of Default*) or any other express rights under this Agreement) and the Board wishes to take action (either by itself or by engaging others), the Board shall notify Project Co in writing of the following:

24.6.1 the action it wishes to take;

24.6.2 the reason for such action;

24.6.3 the date it wishes to commence such action;

24.6.4 the time period which it believes will be necessary for such action; and

24.6.5 to the extent practicable, the effect on Project Co and its obligation to provide the Services during the period such action is being taken.

- 24.7 Following service of such notice, the Board shall take such action as has been notified under Clause 24.6 and any consequential additional action as it reasonably believes is necessary (together, the "**Required Action**") and Project Co shall give all reasonable assistance to the Board while it is taking the Required Action. To the extent that the Board performs any of the obligations of Project Co hereunder or undertakes tasks that would otherwise be undertaken by Project Co pursuant to this Agreement, the Board shall perform such obligations or undertake such tasks to the same standard as would be required of Project Co under the terms of this Agreement.

24.8 If the Required Action is taken other than as a result of a breach by Project Co of its obligations under this Agreement, then for so long as and to the extent that the Required Action is taken, and this prevents Project Co from providing any part of the Services:

24.8.1 Project Co shall be relieved from its obligations to provide such part of the Services; and

24.8.2 in respect of this period in which the Board is taking the Required Action and provided that Project Co provides the Board with reasonable assistance (such assistance to be at the expense of the Board to the extent that additional costs are incurred), the Monthly Service Payments due from the Board to Project Co shall equal the amounts that Project Co would receive if it were satisfying all of its obligations and providing the Services affected by the Required Action in full over that period and the Board shall indemnify Project Co against all Direct Losses sustained by Project Co as a result of the Board taking the Required Action.

24.9 If the Required Action is taken as a result of a breach by Project Co of its obligations under this Agreement, then for so long as and to the extent that the Required Action is taken, and this prevents Project Co from providing any part of the Services:

24.9.1 Project Co shall be relieved of its obligations to provide such part of the Services; and

24.9.2 in respect of the period in which the Board is taking the Required Action, the Monthly Service Payments due from the Board to Project Co shall equal the amounts Project Co would receive if it were satisfying all of its obligations and providing the Services affected by the Required Action in full over that period, less an amount equal to all of the costs incurred by the Board in taking the Required Action (including, without limitation, an appropriate sum in respect of general staff costs and overheads).

Emergencies

24.10 If an Emergency arises during the Operational Term which cannot be dealt with by performance of the Services, the Board may instruct Project Co to procure that such additional or alternative services are undertaken by Project Co as and when required by the Board to ensure that the Emergency is dealt with and normal operation of the Facilities resumes as soon as is reasonably practicable.

24.11 The cost of any additional or alternative services provided by Project Co under Clause 24.10 shall be borne by the Board and paid in accordance with Clause 34 (*Payment*). The Board will not be entitled to levy Deductions in respect of any failure to provide the Services to the extent that such failure arises by reason of Project Co's compliance with Clause 24.10.

No Employee Transfer

- 25.1 The Board and Project Co agree that there are no individuals presently employed by the Board or any other sub-contractor of the Board whose contracts of employment will, by virtue of the transfer to Project Co of responsibility for provision of (or procuring the provision by Service Providers of) any of the Services in accordance with this Agreement and in accordance with the Transfer Regulations, have effect after the date or dates of such transfer as agreed by the parties (each a "Relevant Service Transfer Date") (or at any other time) as if originally made between those persons and the relevant Service Provider.
- 25.2 If it is subsequently agreed or determined that there are persons presently employed by the Board or any other sub-contractor of the Board whose contracts of employment do have effect after the Relevant Service Transfer Date as if originally made between those persons and the relevant Service Provider ("Transferring Staff") then:
- 25.2.1 the Board shall within ten (10) Business Days of the date on which it was so agreed or determined have the opportunity to offer or procure the offer of a position as an employee of the Board to some or all of the Transferring Staff;
- 25.2.2 Project Co shall procure that no person to whom the Board has offered a position in accordance with Clause 25.2.1 shall be dismissed by reason of redundancy until the period for acceptance of such offer has expired and the person in question has not accepted such offer; and
- 25.2.3 subject to Clauses 25.2.1 and 25.2.2 Project Co or any Service Provider shall be entitled to dismiss any or all of the Transferring Staff by reason of redundancy provided that Project Co shall and shall procure that any Service Provider shall carry out in the required manner any obligation to consult with the Transferring Staff or any of them, or their respective representatives, and shall use all reasonable endeavours to mitigate the amount of any costs payable in respect of the Transferring Staff or their dismissal.
- The Board shall indemnify Project Co against any costs referred to in Clause 25.2.3 reasonably incurred by Project Co (or by a relevant Service Provider and for which Project Co is responsible) and shall reimburse any costs reasonably and properly incurred by Project Co or the Service Provider in employing any Transferring Staff prior to the expiry of the period referred to in Clause 25.2.2 including any protective award claims that arise as a result of the Board's failure or omission in relation to consultation required under the Transfer Regulations.

Compliance with Legislation and Board Policies

- 25.3 Project Co shall comply and shall procure that each Service Provider and all persons employed or engaged by a Service Provider in connection with the provision of any Service shall comply at all times with the Law on health and safety at work and on anti-discrimination and equal opportunities.
- 25.4 Project Co shall procure that each Service Provider takes all reasonable steps to

procure that all persons including any employed or engaged by a Service Provider in connection with the provision of any Service shall, so far as applicable, comply with the Board Policies as regards health and safety at work (including the Board Policy regarding smoking) and with those relating to anti-discrimination and equal opportunities (including those relating to harassment). Project Co also shall take and shall procure that every Service Provider shall take all such steps as the Board may reasonably require, which shall include co-operation with action proposed or taken by the Board, to ensure that the Board complies with its duty under Section 3(1) Health and Safety at Work Act 1974 regarding the conduct of the undertaking of the Board.

Project Co Indemnities

25.5 Project Co shall indemnify and keep indemnified in full the Board and, at the Board's request, each and every service provider who has or shall provide any service equivalent to any of the Services against:

25.5.1 claims in respect of all emoluments and all other contractual or statutory payments unpaid by Project Co or a Service Provider to any person entitled to such payments from Project Co or a Service Provider who is or has been employed or engaged by Project Co or any Service Provider on or after the Relevant Service Transfer Date but prior to the date of expiry or termination of this Agreement, and all income tax and pension and national insurance contributions payable thereon; and

25.5.2 insofar as Clause 25.5.1 does not apply, all Direct Losses incurred by the Board as a result of any claim against the Board in respect of any liability to any person who is or has been employed or engaged (whether as a consequence of the Transfer Regulations or of the provisions of this Clause 25) by Project Co or any Service Provider in connection with the provision of any of the Services, where such claim arises as a result of any act or omission of Project Co or the Service Provider occurring after the Relevant Service Transfer Date and before the expiry or termination of this Agreement;

BUT the indemnities in Clauses 25.5.1 and 25.5.2 shall not apply to the extent that the claim arises from a wrongful act or omission of the Board or is in respect of sums for which the Board is liable pursuant to Clause 25.2.

25.6 Clause 49.3 (*Conduct of Claims*) of this Agreement shall apply where any claim is made in respect of the indemnities given by Project Co under Clause 49.1 (*Project Co Indemnities*).

Position on expiry or earlier termination of this Agreement

25.7 On the expiry or earlier termination of this Agreement, the Board and Project Co agree that it is their intention that the Transfer Regulations shall apply in respect of the provision thereafter of any service equivalent to a Service but the position shall be determined in accordance with the Law at the date of expiry or termination as the case may be and this Clause is without prejudice to such determination.

25.8 Project Co shall not and shall procure that no Service Provider shall make any material change to the terms and conditions of employment of any person employed in the provision of any Service, transfer any person employed in the provision of any Service to another part of its business, or materially increase or

decrease the number of such persons:

25.8.1 within the period of [REDACTED] immediately preceding the expiry of this Agreement, or

25.8.2 within the period [REDACTED] before the termination of this Agreement or, if shorter, during the period of notice of termination

without the Board's consent (which shall not be unreasonably withheld), except if such change is required by Law.

FOISA
530(c)
533(1)(b)
EIR Reg 10(5)(e)

25.9 If the Transfer Regulations do not apply on the expiry or earlier termination of this Agreement, the Board shall ensure that each new provider of a service equivalent to a Service on or after the expiry or earlier termination of this Agreement (including the Board) shall offer employment to the persons employed by Project Co or a Service Provider in the provision of the Service immediately before the expiry or earlier termination of this Agreement and shall indemnify Project Co or a Service Provider for Direct Losses any of them may suffer or incur as a result of its failure to do so, and for any costs, claims or liabilities for redundancy payments (whether statutory or contractual).

25.10 If an offer of employment is made in accordance with Clause 25.9 the employment shall be on the same terms and conditions as applied immediately before the expiry or earlier termination of this Agreement including full continuity of employment, except that the Board or other new service provider may at its absolute discretion not offer such terms and conditions if there has been any change to the terms and conditions of the persons concerned in breach of Clause 25.8.

26. NOT USED

27. SITE AND OFF-SITE SECURITY AND PERSONNEL ISSUES

Access

27.1 The Board shall have the right to refuse admittance to, or order the removal from, the Facilities and/or the Retained Estate of any person employed by (or acting on behalf of) Project Co, any Project Co Party or any sub-contractor whose presence, in the reasonable opinion of the Board, is likely to have a material adverse effect on the provision by the Board of the relevant Board Services at the Facilities and/or the Retained Estate or who is not a fit and proper person to be in the Facilities and/or the Retained Estate.

27.2 Action taken under Clause 27.1 shall forthwith be confirmed in writing by the Board to Project Co and, to avoid doubt, shall not relieve Project Co of any of its obligations under this Agreement.

27.3 If and when so directed in writing by the Board, Project Co shall within twenty (20) Business Days provide a list of the names and addresses of all persons it expects may require admission in connection with this Agreement, to any premises occupied by the Board, specifying the capacities in which those persons are concerned with this Agreement and giving such other particulars as the Board may

reasonably require.

- 27.4 The decision of the Board as to whether any person is to be refused admission shall be final and conclusive.

Board Policies

- 27.5 Project Co shall, and shall procure that all Project Co Parties shall, comply at all times with the Board Policies.
- 27.6 The Board shall notify Project Co of any proposed change to the Board Policies as soon as practicable (and, in any event, prior to such change taking effect) and consult with Project Co. Subject to Clause 27.7, such change shall take effect as a Change in accordance with Schedule Part 16 (*Change Protocol*).
- 27.7 The Board may, at its sole option, notify Project Co that Project Co shall not be obliged to comply with any change to any Board Policy and that Project Co should continue to comply with the relevant Board Policy prior to any change in which case such change shall not take effect as a Change in accordance with Schedule Part 16 (*Change Protocol*).

Resources and training

- 27.8 Project Co shall procure that:
- 27.8.1 there shall at all times be a sufficient number of staff (including all relevant grades of supervisory staff) engaged in the provision of the Services with the requisite level of skill and experience. To avoid doubt, this obligation shall include ensuring that there are sufficient staff to cover periods of holiday, sickness, other absence, and anticipated and actual peaks in demand for each of the Services; and
- 27.8.2 all staff receive such training and supervision as is necessary to ensure the proper performance of this Agreement and compliance with all health and safety rules, procedures and requirements.
- 27.9 Not Used.

Convictions and disciplinary action

- 27.10 Subject to Clause 27.10A, Project Co (to the extent permitted by Law) shall procure that all potential staff or persons performing any of the Project Operations who may reasonably be expected in the course of their employment or engagement to have access to children, the elderly and/or vulnerable adults:
- 27.10.1 are questioned concerning their Convictions; and
- 27.10.2 are required to complete a Protecting Vulnerable Groups Scheme

form.

- 27.10A The completion of a Protecting Vulnerable Groups Scheme form in accordance with Clause 27.10 shall not be applicable to any person engaged by Project Co or a Service Provider during the course of the Project Operations (who is not a member of Project Co's or Service Provider's staff nor ordinarily at the Facilities and/or the Retained Estate) provided that any such person is always accompanied within the Facilities and/or Retained Estate by a member of Project Co's or a Service Provider's staff who has satisfactorily completed a Protecting Vulnerable Groups Scheme form and who (if found to have any Convictions) has been employed or engaged in the Project Operations with the Board's prior written consent pursuant to Clause 27.11.
- 27.11 Project Co shall procure that no person who discloses any Convictions, or who is found to have any Convictions following the completion of a Protecting Vulnerable Groups Scheme form, in either case of which Project Co or a Service Provider is aware or ought to be aware is employed or engaged in the provision of the Project Operations without the Board's prior written consent (such consent not to be unreasonably withheld or delayed).
- 27.12 Project Co shall procure that the Board is kept advised at all times of any person employed or engaged by Project Co or any Service Provider in the provision of any of the Project Operations who, subsequent to his/her commencement of such employment or engagement, receives a Conviction of which Project Co or a Service Provider becomes aware or whose previous Convictions become known to Project Co or a Service Provider.
- 27.13 The Board's Representative (acting reasonably) may instruct Project Co to procure that appropriate disciplinary action is taken against any employee of Project Co or any Sub-Contractor (in accordance with the terms and conditions of employment of the employee concerned) who misconducts himself or is incompetent or negligent in his duties or whose presence or conduct on the Site and/or Off-Site or at work is otherwise considered by the Board's Representative (acting reasonably) to be undesirable. The Board shall co-operate with any such disciplinary proceedings and shall be advised in writing by Project Co of the outcome.
- 27.14 Project Co shall procure that there are set up and maintained, by it and by all Service Providers, personnel policies and procedures covering all relevant matters (including discipline, grievance, equal opportunities and health and safety). Project Co shall procure that the terms and the implementation of such policies and procedures comply with Law and Good Industry Practice and that they are published in written form and that copies of them (and any revisions and amendments to them) are forthwith issued to the Board.

Management

- 27.15 Project Co shall consult with the Board in relation to the selection procedure (which shall stipulate a professional qualification in respect of facilities management or equivalent qualification) for Project Co's Facility Manager and such person shall not be appointed (or replaced) without the prior written consent of the Board (such consent not to be unreasonably withheld or delayed).
- 27.16 Project Co shall provide, and shall procure that all Service Providers provide, to the Board upon request details of their respective management organisations.

Lists and Records

- 27.17 Project Co shall procure that the Board's Representative shall at all reasonable times have access to all material details in respect of all employees of Project Co or any Service Provider engaged in the provision of the Services including numbers and categories of staff employed to perform the Services and including in respect of each such employee:
- 27.17.1 details of qualifications; and
 - 27.17.2 details of training undertaken by the employee.

Health Requirements

- 27.18 Not Used.
- 27.19 Not Used.
- 27.20 Not Used.
- 27.21 The Board's Representative may (acting reasonably) refuse admittance to or order the removal from the Board's premises of any person employed or engaged in the provision of the Services whose presence poses or is reasonably believed to pose a risk to the health of Board staff, patients or visitors and such action, which shall forthwith be confirmed in writing by the Board, shall not relieve Project Co of any of its obligations under this Agreement.

28. STOCKS CONSUMABLES, MATERIALS AND EQUIPMENT

Standards

- 28.1 All goods, equipment, consumables and materials which are to be used in the provision of the Services shall be of satisfactory quality.
- 28.2 Project Co shall ensure that the goods, equipment, consumables and materials used by it or any Sub-Contractor in connection with the provision of any of the Services (each as a distinct and separate obligation) are:
- 28.2.1 maintained in a safe, serviceable and clean condition in accordance with Good Industry Practice;
 - 28.2.2 of the type specified in the Service Level Specification and/or the Method Statements (where appropriate); and
 - 28.2.3 in compliance with any relevant rules, regulations, codes of practice and/or British or European Standards,

and shall, as soon as practicable after receiving a request from the Board's Representative, supply to the Board's Representative evidence to demonstrate its compliance with this Clause 28.2.

- 28.3 Project Co shall procure that sufficient stocks of goods, consumables, equipment and materials are held in order to comply with its obligations under this Agreement.

Hazardous substances and materials

- 28.4 Project Co shall not install, keep or use in or on the Facilities any materials, equipment or apparatus the installation, keeping or use of which is likely to cause (or in fact causes):

28.4.1 material damage to the Facilities;

28.4.2 dust, noise or vibration constituting a nuisance to the owners and/or occupiers of any property adjoining or near to the Facilities; or

28.4.3 the generation, accumulation or migration of any hazardous substance in an unlawful manner whether within or outside the Facilities,

and shall use all reasonable endeavours to ensure (by directions to staff and otherwise) that all materials, equipment or apparatus in or on the Facilities is operated so as to minimise noise and vibration likely to cause annoyance or disturbance and the unlawful generation or migration of any hazardous substance.

- 28.5 Project Co shall not bring in or on to (or keep or maintain in or on) the Facilities, any hazardous materials or equipment without the prior written consent of the Board and unless Project Co has complied with all relevant Law.

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

28.6.1 procure that all hazardous materials and equipment used, by it or by a Sub-Contractor or used on behalf of any of them, or stored, by it or by a Sub-Contractor or stored on behalf of any of them, on the Site and/or Off-Site are kept in accordance with all relevant Law and Good Industry Practice, properly and securely labelled and stored, under appropriate supervision and used only by appropriately trained and competent staff; and

28.6.2 use all practicable and reasonable means to:

(a) prevent or counteract, to the satisfaction of the Board's Representative, the unlawful emission of any such hazardous substance;

(b) avoid the unlawful discharge into any conducting media serving the Facilities, of any hazardous substance;

- (c) prevent the unlawful generation, accumulation or migration of any hazardous substance at or from the Facilities; and
- (d) prevent any environmental claims arising or any circumstances arising likely to result in any environmental claims,

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

28.7 The Board shall:

28.7.1 procure that all hazardous materials and equipment used, by it or by any Board Party or used on behalf of any of them, or stored, by it or by any Board Party or stored on behalf of any of them, on the Site are kept in accordance with all relevant Law and Good Industry Practice, properly and securely labelled and stored, under appropriate supervision and used only by appropriately trained and competent staff; and

28.7.2 use all practicable and reasonable means to:

- (a) prevent or counteract the unlawful emission of any such hazardous substance;
- (b) avoid the unlawful discharge into any conducting media serving the Facilities of any hazardous substance;
- (c) prevent the unlawful generation, accumulation or migration of any hazardous substance at or from the Facilities; and
- (d) prevent any environmental claims arising or any circumstances arising likely to result in any environmental claims,

in so far as any such hazardous substance is, or should be, under the control of the Board.

28.8 The Board shall:

28.8.1 maintain a COSHH register for the Facilities, which shall be up-to-date at all times;

28.8.2 ensure that a copy of the COSHH register is kept at the Facilities; and

28.8.3 ensure that a further copy of the COSHH register is given to Project Co as often as it is changed.

28.9 Project Co shall:

- 28.9.1 provide or procure that the Service Provider provides all necessary information (in a form acceptable to the Board) in respect of items associated with the provision of the Services at the Facilities in order to allow the Board to comply with its obligations set out at Clause 28.8; and
 - 28.9.2 carry out or procure that the Service Provider carries out all relevant COSHH risk assessments, the training and the display and provision of risk assessments thereto at the Facilities in respect of the Services.
- 28.10 The Board shall have no liability for any information provided by Project Co and/or the Service Provider pursuant to Clause 28.9 and for the avoidance of doubt the Board shall not be responsible for carrying out any assessments, providing training and displaying information relative to COSHH in respect of the Services.

PART 7: DELAY EVENTS, RELIEF EVENTS AND FORCE MAJEURE

29. DELAY EVENTS

- 29.1 If, at any time, Project Co becomes aware that there will be (or is likely to be) a delay in completion of the Works, Project Co shall forthwith give notice to the Board's Representative to that effect specifying the relevant delay or impediment. In relation to any such delay or impediment if the Board's Representative is satisfied, or it is determined in accordance with Schedule Part 20 (*Dispute Resolution Procedure*), that such delay or impediment has arisen as a result of the occurrence of a Delay Event, then, subject to Clause 29.2, the Board's Representative shall allow Project Co an extension of time equal to the delay or impediment caused by such Delay Event (taking into account reasonably foreseeable consequences of the Delay Event) and shall revise the Completion Date accordingly but to avoid doubt, there shall be no extension to the Project Term as a result of any such delay or impediment.
- 29.2 If Project Co is (or claims to be) affected by a Delay Event:
- 29.2.1 it shall (and shall procure that the Project Co Parties shall) take and continue to take all reasonable steps to eliminate or mitigate the consequences of such an event upon the performance of its obligations under this Agreement and, where relevant, resume performance of its obligations affected by the Delay Event as soon as practicable; and
- 29.2.2 it shall neither be relieved from liability under this Agreement nor entitled to any extension of time for the purpose of Clause 29 (*Delay Events*) to the extent that it is delayed or impeded due to its failure (if any) to comply with its obligations under Clause 29.2.1 above.
- 29.3 For the purposes of this Agreement, a Delay Event means any of the following to the extent in each case that there will be (or is likely to be) a delay in completion of the Facilities and/or the Retained Estate Handback Infrastructure:
- 29.3.1 the occurrence of a Qualifying Change in relation to which it has been agreed or determined that the implementation of the Board Change would delay the completion of the Facilities and/or the Retained Estate Handback Infrastructure;
- 29.3.2 any breach by the Board and/or any Board Party of any of the Board's express obligations under this Agreement to the extent in each case that any such breach is not caused, or contributed to, by Project Co or any Project Co Party;
- 29.3.3 the execution of works on the Site not forming part of this Agreement by the Board or any contractors employed by the Board;
- 29.3.4 opening up of the Works pursuant to Clauses 13.3 to 13.7 (inclusive) where such Works are not subsequently found to be defective (unless it is agreed or determined in accordance with Schedule Part 20

(*Dispute Resolution Procedure*) that the opening up of the Works was reasonable in the light of other defects previously discovered by the Board);

- 29.3.5 Force Majeure;
 - 29.3.6 a Relief Event; or
 - 29.3.7 a Relevant Change in Law referred to in Clause 32.3.1 (*Discriminatory Change in Law*) and Clause 32.3.2 (*Specific Change in Law*);
 - 29.3.8 the occurrence or circumstances deemed to be a Compensation Event pursuant to Clause 10.4;
 - 29.3.9 an instruction by the Board's Representative to Project Co to stop the relevant part or parts of the Project Operations pursuant to Clause 13A.1.1 (*Board's right to stop Project Operations during the Project Term*) where it is subsequently agreed or determined in accordance with Schedule Part 20 (*Dispute Resolution Procedure*) that the breach which the Board considered had given rise to a Stop Incident(s) had not occurred);
 - 29.3.10 an instruction by the Board's Representative to Project Co to stop the relevant part or parts of the Project Operations pursuant to Clause 13A.1.2 (*Board's right to stop Project Operations during the Project Term*);
 - 29.3.11 an instruction by the Board's Representative to Project Co to stop the relevant part or parts of the Project Operations pursuant to Clause 13A.1.3 (*Board's right to stop Project Operations during the Project Term*); or
 - 29.3.12 subject to Project Co complying with the mitigation measures set out within Section 4.3 (*Construction Methodology*) of Project Co's Proposals, the exercise of any of the Reserved Rights set out in paragraphs 12 and/or 13 and/or 14 of Section 2 (*Reserved Rights*) of Schedule Part 5 (*Land Matters*).
- 29.4 Without prejudice to the generality of Clause 29 (*Delay Events*), Project Co shall give notice in writing to the Board's Representative as soon as it (or the Contractor) can reasonably foresee a Delay Event occurring or, if the same is not reasonably foreseeable, as soon as it (or the Contractor) shall become aware of a Delay Event. Project Co shall within ten (10) Business Days after such notification, give further written details to the Board's Representative which shall include:
- 29.4.1 a statement of which Delay Event the claim is based upon;
 - 29.4.2 details of the circumstances from which the Delay Event arises;
 - 29.4.3 details of the contemporary records which Project Co will maintain to

substantiate its claim for extra time;

- 29.4.4 details of the consequences (whether direct or indirect, financial or non-financial) which such Delay Event may have upon completion of the Facilities and the Retained Estate Handback Infrastructure; and
 - 29.4.5 details of any measures which Project Co proposes to adopt to mitigate the consequences of such Delay Event.
- 29.5 As soon as possible but in any event within (five (5) Business Days of Project Co (or the Contractor) receiving, or becoming aware of, any supplemental information which may further substantiate or support Project Co's claim then, provided that the Completion Date has not otherwise already been revised pursuant to Clause 29.7, Project Co shall submit further particulars based on such information to the Board's Representative.
- 29.6 The Board's Representative shall, after receipt of written details under Clause 29.4, or of further particulars under Clause 29.5, be entitled by notice in writing to require Project Co to provide such further supporting particulars as he may reasonably consider necessary. Project Co shall afford the Board's Representative reasonable facilities for investigating the validity of Project Co's claim including, without limitation, onsite inspection.
- 29.7 Subject to the provisions of this Clause, the Board's Representative shall revise the Completion Date in accordance with Clause 29.1 (*Delay Events*) as soon as reasonably practicable and in any event within ten (10) Business Days of the later of:
- 29.7.1 the date of receipt by the Board's Representative of Project Co's notice given in accordance with Clause 29.4 and the date of receipt of any further particulars (if such are required under Clause 29.6), whichever is the later; and
 - 29.7.2 the date of receipt by the Board's Representative of any supplemental information supplied by Project Co in accordance with Clause 29.5 and the date of receipt of any further particulars (if such are required under Clause 29.6), whichever is the later.

If Project Co has failed to comply with the requirements as to the giving of notice under Clause 29.4, or has failed to maintain records or afford facilities for inspection to the Board's Representative, then Project Co shall not be entitled to any extension of time (and the Completion Date shall not be revised) in respect of any period of delay by Project Co in giving notice or providing information under Clause 29.4 and/or to the extent that its failure to maintain records or afford facilities for inspection to the Board's Representative has prevented the Board's Representative from assessing the consequences of the Delay Event.

29.8 If:

- 29.8.1 the Board's Representative declines to fix a revised Completion Date;

or

29.8.2 Project Co considers that a different Completion Date should be fixed;
or

29.8.3 there is a disagreement as to whether a Delay Event has occurred,

then Project Co shall be entitled to refer the matter for determination in accordance with Schedule Part 20 (*Dispute Resolution Procedure*).

Compensation

29.9 If the Delay Event is a Compensation Event Project Co's sole right to compensation shall be as provided for in Clauses 29.11 to 29.13 inclusive. To avoid doubt, no other Delay Event shall entitle Project Co to receive any compensation save as otherwise expressly provided in:

29.9.1 Schedule Part 16 (*Change Protocol*) in the case of a Delay Event referred to in Clause 29.3.1 (subject always to the provisions of Clause 32 (*Changes in Law*)); or

29.9.2 Clause 32 (*Changes in Law*) in the case of a Delay Event referred to in Clause 29.3.7.

29.10 For the purposes of Clause 29.9, a Compensation Event means:

29.10.1 any Delay Event referred to in Clause 29.3.2, Clause 29.3.3 or Clauses 29.3.4, 29.3.9, 29.3.10, 29.3.11 and 29.3.12 for which, in each case, it has been agreed or determined pursuant to this Clause 29 (*Delay Events*) that Project Co is entitled to an extension of time;

29.10.2 in the period prior to the Actual Completion Date, in circumstances where there is no delay in completion of the Facilities and the Retained Estate Handback Infrastructure any breach by the Board and/or any Board Party of any of the Board's express obligations under this Agreement to the extent that such breach is not caused, or contributed to, by Project Co or any Project Co Party;

29.10.3 the occurrence or circumstances deemed to be a Compensation Event pursuant to Clause 10.4; or

29.10.4 subject to Project Co complying with the mitigation measures set out within Section 4.3 (*Construction Methodology*) of Project Co's Proposals, the exercise of any of the Reserved Rights set out in paragraphs 12 and/or 13 and/or 14 of Section 2 (*Reserved Rights*) of Schedule Part 5 (*Land Matters*).

29.11 Subject to Clause 29.12, if it is agreed, or determined, that there has been a Compensation Event, and Project Co has incurred loss (including loss of revenue)

and/or expense as a direct result of such Compensation Event, Project Co shall be entitled to such compensation as would place Project Co in no better or worse position than it would have been in had the relevant Compensation Event not occurred. Project Co shall promptly provide the Board's Representative with any additional information he may require in order to determine the amount of such compensation.

29.12 Project Co shall take all reasonable steps so as to minimise the loss and/or expense referred to in Clause 29.11 (and shall in the event that the Board is in breach of Clause 5.7 (*Board Works*) include the rearranging of programmed activities pursuant to the Programme but only to the extent that this causes Project Co minimal disruption and no critical delay to the Programme) in relation to any Compensation Event and any compensation payable shall:

29.12.1 exclude any amounts incurred or to be incurred as a result of any failure of Project Co (or any Project Co Party) to comply with this Clause 29.12; and

29.12.2 be reduced by any amount which Project Co has recovered or will recover under any insurance policy (or would have recovered if it had complied with the requirements of this Agreement or of any policy of insurance required under this Agreement) which amount, to avoid doubt, shall not include any excess or deductibles or any amount over the maximum amount insured applicable to any such insurance policy.

29.13 The amount of any compensation due to Project Co under Clause 29.11 shall be agreed between the parties or, failing agreement, determined pursuant to Schedule Part 20 (*Dispute Resolution Procedure*) and such compensation shall be payable:

29.13.1 in respect of compensation for a Compensation Event to the extent resulting in Capital Expenditure being incurred the Board shall compensate Project Co for the actual Capital Expenditure incurred by Project Co within twenty (20) Business Days of its receipt of a written demand accompanied by a valid VAT invoice for the same by Project Co supported by all relevant information; and

29.13.2 in all other cases in accordance with Section 6 (*Changing the Financial Model*) of Schedule Part 16 (*Change Protocol*) as if a Relevant Event had taken place.

30. RELIEF EVENTS

30.1 For the purposes of this Agreement, subject to Clause 30.4, Relief Events mean any of the following events:

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

30.1.2 failure by any statutory undertaker, utility company, local authority or

other like body to carry out works or provide services;

- 30.1.3 accidental loss or damage to the Works and/or Facilities or any roads servicing the same;
- 30.1.4 without prejudice to any obligation of Project Co to provide stand-by power facilities in accordance with the Board's Construction Requirements, the Service Level Specification, failure or shortage of power, fuel or transport;
- 30.1.5 blockade or embargo falling short of Force Majeure;
- 30.1.6 the discovery of fossils, antiquities and human remains requiring action in accordance with Clause 19 (*Fossils and Antiquities*); or
- 30.1.7 official or unofficial strike, lockout, go slow or other dispute in each case generally affecting the construction, building maintenance or facilities management industry (or a significant sector of that industry),

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

- 30.2 Subject to Clauses 30.3 and 30.4, no right of termination shall arise under this Agreement by reason of any failure by a party to perform any of its obligations under this Agreement to the extent that such failure to perform occurs because of the occurrence of a Relief Event (and, to avoid doubt, and without prejudice to Clause 30.9, unless expressly stated to the contrary in this Agreement, it is acknowledged that all other rights and obligations of the parties under this Agreement remain unaffected by the occurrence of a Relief Event).
- 30.3 Without prejudice to Project Co's rights under Clause 29 (*Delay Events*), Project Co shall only be relieved of its obligations under Clauses 12 (*The Design, Construction and Commissioning Process*), 13 (*Right of Access of Board's Representative*), 14 (*Programme and Dates for Completion*), 17 (*Pre-Completion Commissioning and Completion*) and 29 (*Delay Events*) by Delay Events in accordance with Clause 29 (*Delay Events*).

Mitigation

- 30.4 Where a party is (or claims to be) affected by a Relief Event:
 - 30.4.1 it shall take all reasonable steps to mitigate the consequences of such an event upon the performance of its obligations under this Agreement, resume performance of its obligations affected by the Relief Event as soon as practicable and use all reasonable endeavours to remedy its failure to perform; and
 - 30.4.2 it shall not be entitled to rely upon the relief afforded to it pursuant to

Clause 30.2 of this Agreement to the extent that it is not able to perform, or has not in fact performed, its obligations under this Agreement due to its failure (if any) to comply with its obligations under Clause 30.4.1 above.

- 30.5 The party claiming relief shall serve written notice on the other party within five (5) Business Days of it becoming aware of the relevant Relief Event. Such initial notice shall give sufficient details to identify the particular event claimed to be a Relief Event.
- 30.6 A subsequent written notice shall be served by the party claiming relief on the other party within a further five (5) Business Days of the notice referred to in Clause 30.5 which shall contain such relevant information relating to the failure to perform (or delay in performing) as is available, including (without limitation) the effect of the Relief Event on the ability of the party to perform, the action being taken in accordance with Clause 30.4, the date of the occurrence of the Relief Event and an estimate of the period of time required to overcome it (and/or its effects).
- 30.7 The party claiming relief shall notify the other as soon as the consequences of the Relief Event have ceased and of when performance of its affected obligations can be resumed.
- 30.8 If, following the issue of any notice referred to in Clause 30.6, the party claiming relief receives or becomes aware of any further information relating to the Relief Event (and/or any failure to perform), it shall submit such further information to the other party as soon as reasonably possible.
- 30.9 To avoid doubt, the occurrence of a Relief Event shall not entitle Project Co to any compensation.

31. FORCE MAJEURE

- 31.1 For the purposes of this Agreement, Force Majeure means any of the following events or circumstances:
 - 31.1.1 war, civil war, armed conflict or terrorism; or
 - 31.1.12 nuclear contamination unless in any case Project Co and/or any Project Co Party is the source or the cause of the contamination; or
 - 31.1.3 chemical or biological contamination of the Works and/or the Facilities and/or the Site from any of the events referred to in Clause 31.1.1 above; or
 - 31.1.4 pressure waves caused by devices travelling at supersonic speeds,which directly causes either party to be unable to comply with all or a material part of its obligations under this Agreement.

- 31.2 Subject to Clauses 31.3 and 31.4 the party claiming relief shall be relieved from liability under this Agreement to the extent that by reason of the Force Majeure it is not able to perform its obligations under this Agreement. For the avoidance of doubt (but without prejudice to Clause 41 (*Termination Resulting from Force Majeure*)) the Board shall not be entitled to terminate this Agreement for a Project Co Event of Default if such Project Co Event of Default arises from a Force Majeure Event.
- 31.3 Where a party is (or claims to be) affected by an event of Force Majeure:
- 31.3.1 it shall take all reasonable steps to mitigate the consequences of such an event upon the performance of its obligations under this Agreement, resume performance of its obligations affected by the event of Force Majeure as soon as practicable and use all reasonable endeavours to remedy its failure to perform; and
- 31.3.2 it shall not be relieved from liability under this Agreement to the extent that it is not able to perform, or has not in fact performed, its obligations under this Agreement due to its failure (if any) to comply with its obligations under Clause 31.3.1.
- 31.4 Without prejudice to Project Co's rights under Clause 29 (*Delay Events*), Project Co shall only be relieved from its obligations under Clauses 12 (*The Design, Construction and Commissioning Process*), 13 (*Right of Access of Board's Representative*), 14 (*Programme and Dates for Completion*) and 29 (*Delay Events*) by Delay Events in accordance with Clause 29 (*Delay Events*).
- 31.5 The party claiming relief shall serve written notice on the other party within five (5) Business Days of it becoming aware of the relevant event of Force Majeure. Such initial notice shall give sufficient details to identify the particular event claimed to be an event of Force Majeure.
- 31.6 A subsequent written notice shall be served by the party claiming relief on the other party within a further five (5) Business Days which shall contain such relevant information relating to the failure to perform (or delay in performing) as is available, including (without limitation) the effect of the event of Force Majeure on the ability of the party to perform, the action being taken in accordance with Clause 31.3, the date of the occurrence of the event of Force Majeure and an estimate of the period of time required to overcome it (and/or its effects).
- 31.7 The party claiming relief shall notify the other as soon as the consequences of the event of Force Majeure have ceased and of when performance of its affected obligations can be resumed.
- 31.8 If, following the issue of any notice referred to in Clause 31.6, the party claiming relief receives or becomes aware of any further information relating to the event of Force Majeure (and/or any failure to perform), it shall submit such further information to the other party as soon as reasonably possible.
- 31.9 Nothing in this Clause 31 shall affect the Board's entitlement to make Deductions in the period during which any event of Force Majeure is subsisting.

31.10 The parties shall endeavour to agree any modifications to this Agreement which may be equitable having regard to the nature of an event or events of Force Majeure. Schedule Part 20 (*Dispute Resolution Procedure*) shall not apply to a failure of the Board and Project Co to reach agreement pursuant to this Clause 31.10.

PART 8: CHANGES IN LAW & CHANGES

32. CHANGES IN LAW

General

32.1 Project Co shall take all steps necessary to ensure that the Project Operations are performed in accordance with the terms of this Agreement (including, without limitation, Clause 5.2.1 (*General Standards*)) following any Change in Law.

Relevant Changes in Law

32.2 Subject to Clause 32.4.3(e) and Clause 32.4.3(f) and on the occurrence of any Relevant Change in Law, the parties shall be entitled to seek adjustments to the Annual Service Payments to compensate for any increase or decrease (as the case may be) in the net cost to Project Co of performing the Project Operations. Such adjustments (if any) will be calculated in accordance with and subject to Clause 32.4.

32.3 Relevant Change in Law means any of the following:

32.3.1 the occurrence of any Discriminatory Change in Law having an impact on the cost of performance of the Project Operations;

32.3.2 the occurrence of any Specific Change in Law having an impact on the cost of performance of the Project Operations; or

32.3.3 the occurrence, after the relevant date, of any Change in Law which requires any work of alteration, addition, demolition or extension or variation in the quality or function of the Facilities which is not Maintenance Work, Lifecycle Replacement or other work which, in each case, Project Co would (had such Change in Law not taken effect) otherwise be required to undertake to comply with its obligations under this Agreement. For the purposes of this Clause 32.3.3, the relevant date shall be the later to occur of the Completion Date and the Actual Completion Date, save where the Actual Completion Date is delayed by a Compensation Event, a Delay Event referred to in Clause 29.3.1 or by a Delay Event referred to in Clause 29.3.7, in which case the relevant date shall be the later to occur of the Completion Date and the date on which the Works would have been completed in accordance with this Agreement had the relevant Compensation Event or Delay Event not occurred,

provided that:

(a) such Change in Law (or, in the case of a Specific Change in Law, change to a NHS Requirement, as the case may be) was not reasonably foreseeable at the date of this Agreement by an experienced contractor performing operations similar to the relevant the Project Operations, on the basis of draft bills published in Government green or white papers or other Government departmental

consultation papers, bills, draft statutory instruments or draft instruments or proposals published in the Official Journal of the European Union, in each case published:

- (i) prior to the date of this Agreement; and
 - (ii) in substantially the same form or having substantially the same effect as the Relevant Change in Law; and
- (b) a Change in Law relating to the application for, coming into effect, terms, implementation, repeal, revocation or otherwise of any Planning Permission shall not constitute a Relevant Change in Law.

32.4 On the occurrence of a Relevant Change in Law:

32.4.1 either party may give notice to the other of the occurrence of the Relevant Change in Law;

32.4.2 the parties shall meet within fifteen (15) Business Days of the notice referred to in Clause 32.4.1 to consult and seek to agree the effect of the Relevant Change in Law. If the parties, within ten (10) Business Days of this meeting, have not agreed the occurrence or the effect of the Relevant Change in Law, either party may refer the question of whether a Relevant Change in Law has occurred or the effect of any Relevant Change in Law for resolution in accordance with Schedule Part 20 (*Dispute Resolution Procedure*); and

32.4.3 within five (5) Business Days of the agreement or determination referred to in Clause 32.4.2 above, the Board's Representative shall issue a Board Change Notice and the relevant provisions of Schedule Part 16 (*Change Protocol*) shall apply except that:

- (a) Project Co may give notice to the Board's Representative that it objects to such a Board Change Notice only on the grounds that the implementation of the Change would not give effect to or comply with the Relevant Change in Law;
- (b) the Board shall (i) agree the implementation of the Low Value Change, or (ii) confirm the estimate for the Medium Value Change, or (iii) approve the High Value Change Stage 2 Submission, (as appropriate) in respect of the Change in accordance with the relevant provisions of Schedule Part 16 (*Change Protocol*);
- (c) the provisions of Clause 11 (*Consents and Planning Approval*) shall apply;
- (d) the Board shall not be entitled to withdraw any Board Change Notice or its agreement as to the implementation of

the Low Value Change, confirmation of an estimate for the Medium Value Change or approval of a High Value Change Stage 2 Submission (as appropriate), issued in accordance with this Clause 32.4;

(e) Project Co shall, without prejudice to its general obligation to comply with the terms of this Agreement:

(i) use all reasonable endeavours to mitigate the adverse effects of any Relevant Change in Law and take all reasonable steps to minimise any increase in costs arising from such Relevant Change in Law; and

(ii) use all reasonable endeavours to take advantage of any positive or beneficial effects of any Relevant Change in Law and take all reasonable steps to maximise any reduction in costs arising from such Relevant Change in Law; and

(f) any compensation payable, or reduction to the Annual Service Payments, shall be calculated in accordance with the relevant provisions of Schedule Part 16 (*Change Protocol*) provided that:

(i) the amount of any compensation payable; or

(ii) the amount by which the Annual Service Payment is to be reduced,

shall not take into account any amounts incurred or to be incurred as a result of Project Co's failure to comply with Clause 32.4.3(e) above.

General Change in Law

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

32.5.1 the parties shall meet within fifteen (15) Business Days to consult and seek to agree the effect of the Change in Law and any Change required as a consequence. If the parties, within ten (10) Business Days of this meeting, have not agreed the occurrence or the effect of the relevant Change in Law, either party may refer the question of whether a Change in Law has occurred or the effect of the Change in Law for resolution in accordance with Schedule Part 20 (*Dispute Resolution Procedure*); and

32.5.2 within twenty (20) Business Days of the agreement or determination referred to in Clause 32.5.1 above the Board's Representative shall, if

it is agreed or determined that a Change is required in order to comply with the Change in Law, issue a Board Change Notice and the relevant provisions of Schedule Part 16 (*Change Protocol*) shall apply except that:

- (a) Project Co may give notice to the Board's Representative that it objects to such a Board Change Notice only on the grounds that the implementation of the Change would not give effect to or comply with the Change in Law;
- (b) the Board shall (i) agree the implementation of the Low Value Change; or (ii) confirm the estimate for the Medium Value Change; or (iii) approve the High Value Change Stage 2 Submission, (as appropriate) in respect of the Change in accordance with the relevant provisions of Schedule Part 16 (*Change Protocol*);
- (c) the provisions of Clause 11 (*Consents and Planning Approval*) shall apply;
- (d) the Board shall not be entitled to withdraw any Board Change Notice or its (i) agreement as to the implementation of the Low Value Change; or (ii) confirmation of an estimate for the Medium Value Change; or (iii) approval of a High Value Change Stage 2 Submission (as appropriate), issued in accordance with this Clause 32.5 (*General Changes in Law*); and
- (e) Project Co shall not be entitled to any payment or other compensation or relief from any performance of its obligations under this Agreement in respect of such Change in Law or associated Change (or the consequences of either).

33. CHANGE PROTOCOL

The provisions of Schedule Part 16 (*Change Protocol*) shall have effect in respect of Changes except as otherwise expressly provided in this Agreement.

PART 9: FINANCIAL

34. PAYMENT

Service Payments

34.1 Project Co shall not be entitled to receive any Monthly Service Payments until the Payment Commencement Date. Subject to the provisions of this Agreement, the Board shall pay Project Co the Monthly Service Payments in respect of each Contract Month following the Payment Commencement Date in accordance with the provisions of Schedule Part 14 (*Payment Mechanism*).

Invoicing and payment arrangements

34.2 The provisions of this Clause 34.2 apply to the issue of invoices in respect of the Monthly Service Payment by Project Co under this Agreement:

34.2.1 On or before the first day of each Contract Month Project Co shall submit to the Board an invoice ("Monthly Invoice") aggregating the following:

- (a) the Monthly Service Payment for that Contract Month, calculated in accordance with Section 2 (*Calculation of Service Payments*) of Schedule Part 14 (*Payment Mechanism*);
- (b) adjustments to reflect previous over-payments and/or under-payments (each adjusted stated separately);
- (c) any other amounts due by one party to the other (and where owed by Project Co showing as a negative figure);
- (d) any VAT payable in respect of the above amounts;
- (e) Not Used;
- (f) as a negative figure, [REDACTED] ("Estimated Deductions"),

FOISA
s 33(1)(b)
EIR
Reg 10(5)(e)

and setting out the date of the invoice, the due date for payment of the invoice and the account to which payment is to be made together with supporting information that clearly sets out the derivation and calculation of amounts referred to in the Monthly Invoice.

34.2.2 Subject to Clauses 34.2.3 and 34.3 and the submission of the

supporting information referred to in Clause 34.2.1, where a Monthly Invoice shows a net amount owed by the Board to Project Co, the Board shall pay the amount of the Monthly Invoice within ten (10) Business Days of its submission and delivery of a valid VAT invoice in respect thereof. Where a Monthly Invoice shows a net amount owed by Project Co to the Board, Project Co shall pay that amount to the Board within ten (10) Business Days of the Monthly Invoice or, at the option of the Board, carry forward that amount to the next Monthly Invoice to reduce amounts which would otherwise be owed by the Board to Project Co.

- 34.2.3 Within ten (10) Business Days of the Expiry Date, Project Co shall provide to the Board a Performance Monitoring Report in respect of the final two Contract Months. If the Deductions incurred in the final two Contract Months exceed the Estimated Deductions, Project Co shall pay to the Board an amount equal to the excess within ten (10) Business Days of receipt of an invoice therefor. If the Estimated Deductions exceed the Deductions incurred in the final two Contract Months the Board shall pay to Project Co an amount equal to the excess within ten (10) Business Days of receipt of an invoice therefor.
- 34.2.4 On or before the tenth (10th) day of each Contract Month Project Co shall submit to the Board a Monthly Service Report in respect of the immediately preceding Contract Month. The Monthly Service Report shall set out, in respect of the immediately preceding Contract Month:
- (a) details of each and the aggregate amount of all Deductions incurred in relation to Performance Failures;
 - (b) details of each and the aggregate amount of all Deductions incurred in relation to Availability Failures;
 - (c) other information detailed in Schedule Part 12 (*Service Requirements*).
- 34.2.5 The parties shall endeavour to agree the contents of a Monthly Service Report within ten (10) Business Days of its submission in accordance with Clause 34.2.4, failing which either party may refer the matter to the Dispute Resolution Procedure.

Manner of payment

- 34.3 All invoices under this Agreement shall be raised in Pounds Sterling and the money of account and money of payment in respect of all payments, liabilities and claims (including any accrued rights) under this Agreement at any time shall remain denominated in Pounds Sterling. All payments under this Agreement shall be made in Pounds Sterling by electronic transfer of funds for value on the day in question to the bank account of the recipient (located in the United Kingdom) specified in the relevant invoice, quoting the invoice number against which payment is made.

Disputes

- 34.4 If the Board (acting in good faith) disputes all or any part of the Monthly Service Payments calculated in accordance with Clause 34.2 (*Invoicing and Payment Arrangements*), the undisputed amount of the Monthly Service Payment shall be paid by the Board in accordance with Clause 34.2 (*Invoicing and Payment Arrangements*) and the provisions of this Clause 34.4 shall apply. The parties shall use all reasonable endeavours to resolve the dispute in question within ten (10) Business Days of the dispute arising. If they fail so to resolve it, either party may refer the matter to the Dispute Resolution Procedure. Following resolution of the dispute, any amount agreed or determined to have been payable shall be paid forthwith by the Board to Project Co, together with interest on such amount calculated in accordance with Clause 34.5 (*Late Payments*).

Late Payments

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

Set-Off

- 34.6 Subject to Clause 46.12 (*Rights of Set-Off*), whenever any sum of money shall be agreed, or determined, as due and payable by Project Co to the Board, such sum may at the Board's discretion be deducted from or applied to reduce the amount of any sum then due, or which at any time afterwards may become due, to Project Co from the Board under this Agreement provided that the Board has given Project Co not less than five (5) Business Days' notice of its intention to deduct or apply such sum.
- 34.7 Whenever any sum of money shall be agreed, or determined, as due and payable by the Board to Project Co, such sum may at Project Co's discretion be deducted from or applied to reduce the amount of any sum then due, or which at any time afterwards may become due, from Project Co to the Board under this Agreement provided that Project Co has given the Board not less than five (5) Business Days' notice of its intention to deduct or apply such sum.

35. VAT AND CONSTRUCTION INDUSTRY TAX DEDUCTION SCHEME

VAT

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

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

- 35.4 The following further provisions shall apply in respect of the application for a ruling in accordance with Clause 35.3:
- 35.4.1 prior to submitting its request for such a ruling and any further communication to the Commissioners in connection with the obtaining of the ruling, the Second Party shall first obtain the agreement of the First Party to the contents of such request and any such further communication, such agreement not to be unreasonably withheld or delayed;
 - 35.4.2 the Second Party shall provide to the First Party copies of all communications received from the Commissioners in connection with the application for a ruling as soon as practicable after receipt; and
 - 35.4.3 the Second Party shall use all reasonable endeavours (including without limitation the provision of such additional information as the Commissioners may require) to obtain such a ruling as soon as reasonably practicable following the initial request.
- 35.5 If a ruling is required by the First Party under Clause 35.3, the First Party shall not be obliged to pay the VAT so claimed by the Second Party unless and until a ruling is received from the Commissioners which states that a sum of VAT (the "VAT Sum") is properly so chargeable or the Commissioners state that they are not prepared to give any ruling on the matter. In this case, then subject to Clauses 35.6 and 35.7 and provided that the First Party shall first have received a valid tax invoice which complies with the requirements of Part III VAT Regulations 1995 and which states the VAT Sum to be the amount of VAT chargeable to the First Party, the First Party shall pay the VAT Sum (and any interest or penalties attributable to the VAT Sum) to the Second Party.
- 35.6 If the First Party disagrees with any ruling obtained pursuant to Clause 35.3 by the Second Party from the Commissioners, then the Second Party (provided that it is indemnified to its reasonable satisfaction against all costs and expenses including interest and penalties which it may incur in relation thereto) shall take such action and give such information and assistance to the First Party as the First Party may require to challenge such ruling or otherwise to resist or avoid the imposition of VAT on the relevant supply.
- 35.7 The following further provisions shall apply if the First Party shall exercise its rights under Clause 35.6:
- 35.7.1 the action which the First Party shall be entitled to require the Second Party to take shall include (without limitation) contesting any assessment to VAT or other relevant determination of the Commissioners before any VAT tribunal or court of competent jurisdiction and appealing any judgement or decision of any such tribunal or court;

- 35.7.2 if the Second Party shall be required to pay to or deposit with the Commissioners a sum equal to the VAT assessed as a condition precedent to its pursuing any appeal, the First Party shall, at its election, either pay such sum to the Commissioners on behalf of the Second Party or on receipt of proof in a form reasonably satisfactory to the First Party that the Second Party has paid such sum to or deposited such sum with the Commissioners the First Party shall pay such sum to the Second Party;
- 35.7.3 save as specifically provided in Clause 35.5, the First Party shall not be obliged to pay to the Second Party any sum in respect of the VAT in dispute to the Second Party or in respect of VAT on any further supplies made by the Second Party to the First Party which are of the same type and raise the same issues as the supplies which are the subject of the relevant dispute unless and until the final outcome of the relevant dispute is that it is either determined or agreed that VAT is properly chargeable on the relevant supply or supplies; and
- 35.7.4 the Second Party shall account to the First Party for any costs awarded to the Second Party on any appeal, for any sum paid to or deposited with the Commissioners in accordance with Clause 35.7.2 which is repayable to the Second Party and for any interest to which the Second Party is entitled in respect of such sums.

Changes in recoverability of VAT

- 35.8 Subject to Clause 35.9, if, following a Change in Law, Project Co becomes unable to recover VAT attributable to supplies to be made to the Board by Project Co pursuant to this Agreement, the Board shall ensure that Project Co is left in no better and no worse position than it would have been had such Change in Law not occurred (including but not limited to making such amendments to this Agreement as Project Co and the Board shall agree acting reasonably), provided that Project Co shall use all reasonable endeavours to mitigate the adverse effects of any such Change in Law.
- 35.9 The provisions of Clause 35.8 shall apply only if (and to the extent that) the Change in Law was not reasonably foreseeable at the date of this Agreement by an experienced contractor performing operations similar to the relevant Works on the basis of draft bills published in Government green or white papers or other Government departmental consultation papers, bills, draft statutory instruments or draft instruments or proposals published in the Official Journal of the European Union, in each case published:
- 35.9.1 prior to the date of this Agreement; and
- 35.9.2 in substantially the same form as the Change in Law.

Construction Industry Tax Deduction Scheme

- 35.10 This Clause 35.10 (*Construction Industry Tax Deduction Scheme*) relates to the Construction Industry Tax Deduction Scheme:

- 35.10.1 In this Clause 35.10 (*Construction Industry Tax Deduction Scheme*) (but not otherwise):
- (a) "the Act" means the Finance Act 2004;
 - (b) "the Regulations" means the Income Tax (Construction Industry Scheme) Regulations 2005 (SI 2005/2045);
 - (c) "the Legislation" means Chapter 3 Part 3 of the Act and the Regulations, taken together;
 - (d) "Contractor" means a person who is a contractor for the purposes of Chapter 3 Part 3 of the Act; and
 - (e) "sub-contractor" means a person who is a sub-contractor for the purposes of Chapter 3 Part 3 of the Act.
- 35.10.2 Each of the Board and Project Co shall comply with the Legislation.
- 35.10.3 If any payment due from the Board to Project Co under this Agreement is a contract payment under section 60(1) of the Act, then the Board, as Contractor, shall (not later than fifteen (15) Business days before the first such payment is due to be made) verify, in accordance with paragraph 6 of the Regulations, whether the sub-contractor is registered for gross payment or for payment under deduction or is not registered under Chapter 3 Part 3 of the Act.
- 35.10.4 If any payment due from the Board to Project Co under this Agreement is a contract payment under section 60(1) of the Act, then:
- (a) if Project Co is registered for gross payment under section 63(2) of the Act, the Board shall make a payment to Project Co without any deduction;
 - (b) if Project Co is not registered for gross payments under section 63(2) of the Act, the Board shall make a payment to Project Co, subject to the deduction of the relevant percentage in accordance with section 61(1) of the Act, and thereupon Clause 35.10.6 below shall apply.
- 35.10.5 If any dispute arises between the Board and Project Co as to whether any payment due by the Board to Project Co under this Agreement is or is not a contract payment by virtue of the exemption in Regulation 23 of the Regulations, the parties will jointly apply to HM Revenue and Customs for a written ruling and until such ruling is received it shall be assumed that such payment is a contract payment and the provisions of Clause 35.10 (*Construction Industry Tax Deduction Scheme*) shall apply accordingly.
- 35.10.6 The Board shall be entitled to make a deduction at the rate specified in

section 61(1) of the Act or at such other rate as may be in force from time to time from the whole of any payment to Project Co (and not just that part of such payment which does not represent the direct cost to Project Co or any other person of materials used or to be used in carrying out the construction operations to which the relevant payment relates) unless prior to making such payment the Board shall have received written confirmation from HM Revenue and Customs (obtained by and at the expense of Project Co) in a form which is reasonably satisfactory to the Board directing the Board to make the deduction against only a specified amount or proportion of any such payment to Project Co.

35.10.7 Where any error or omission has occurred in calculating or making any payment under this Clause 35.10 (*Construction Industry Tax Deduction Scheme*) then:

(a) in the case of an over deduction, the Board shall correct that error by repayment of the sum over deducted to Project Co; and

(b) in the case of an under deduction, Project Co shall correct that error or omission by repayment of the sum under deducted to the Board.

35.10.8 The Board shall send promptly to H M Revenue & Customs any returns required by the Legislation, and shall provide to Project Co a payment statement (where appropriate) and/or such other information as may be required by the Legislation in relation to any contract payment.

35.10.9 If compliance with this Clause 35.10 involves the Board or Project Co in not complying with any other of the terms of this Agreement, then the provisions of this Clause shall prevail.

36. PAYMENT OF SURPLUSES AND COMPLIANCE WITH NPD REQUIREMENTS

Project Co shall:

36.1 subject to the provisos, obligations and restrictions contained in its Articles of Association, pay the Surplus available as at each Surplus Payment Date to the Board (as a rebate of the Monthly Service Payments for the Contract Year most recently ended prior to the relevant Surplus Date) or to such other party as the Board may in its absolute discretion direct, in either case within thirty (30) Business Days of the relevant Surplus Payment Date; and

36.2 comply with the NPD Requirements at all times throughout the Project Term.

37. FINANCIAL MODEL

37.1 Unless otherwise agreed between the parties, any amendments to the Financial Model shall reflect, be consistent with and be made only in accordance with the

provisions of this Agreement, and shall in all cases be subject to the prior written approval of the Board (such approval not to be unreasonably withheld or delayed). In the event that the parties fail to agree any proposed amendments to the Financial Model, the matter shall be referred for resolution in accordance with Schedule Part 20 (*Dispute Resolution Procedure*).

- 37.2 Following any amendment of the Financial Model in accordance with this Agreement, Project Co shall promptly deliver a copy of the revised Financial Model to the Board in the same form as the original form (or such other form as may be agreed by the parties from time to time).

38. RECORDS AND OPEN BOOK ACCOUNTING

Records and Reports

The provisions of Schedule Part 19 (*Record Provisions*) shall apply to the keeping of records and the making of reports.

PART 10: TERMINATION

39. BOARD EVENTS OF DEFAULT

- 39.1 For the purposes of this Agreement, Board Events of Default means any of the following events or circumstances:

- 39.1.1 the Board is in material breach of its obligations under Clause 9 (*Nature of Land Interests*) (other than as a consequence of a breach by Project Co of its obligations under this Agreement) and such breach materially adversely affects the ability of Project Co to perform its material obligations under this Agreement for a continuous period of not less than thirty (30) Business Days; or
- 39.1.2 the Board fails to pay any sum or sums due to Project Co under this Agreement (which sums are not in dispute) which, either singly or in aggregate, exceed(s) the amount of the Monthly Service Payment from time to time and such failure continues for thirty (30) Business Days from receipt by the Board of a notice of non payment from Project Co;
- 39.1.3 the Board is in breach of its obligations under Clause 57.4 (*Assignment*); or
- 39.1.4 an Adverse Law or a Proposal for an Adverse Law being made.
- 39.1.5 an expropriation, sequestration or requisition of a material part of the Assets and/or shares of Project Co or Hold Co by the Board or a Relevant Authority.

Project Co's options

- 39.2 On the occurrence of a Board Event of Default, or within a reasonable time after Project Co becomes aware of the same, and while the same is still subsisting, Project Co may, at its option:
- 39.2.1 in respect of execution of the Works, suspend performance by it of its obligations under this Agreement until such time as the Board shall have demonstrated to the reasonable satisfaction of Project Co that it is capable of performing, and will perform, its obligations under this Agreement; or
- 39.2.2 serve notice on the Board (or such other party as may be notified in advance in writing by the Board to Project Co) of the occurrence (and specifying details) of such Board Event of Default. If the relevant matter or circumstance has not been rectified or remedied by the Board (or otherwise) in respect of Clause 39.1.1, Clause 39.1.3 or Clause 39.1.5 within sixty (60) Business Days of such notice, and in respect of Clause 39.1.2 within thirty (30) Business Days of such notice, Project Co may serve a further notice on the Board (or its substitute notified in accordance with this Clause 39.2.2) terminating this Agreement with immediate effect.
- 39.3 Project Co shall not exercise or purport to exercise any right to terminate this Agreement (or accept any repudiation of this Agreement) except as expressly set out in this Agreement.

40. PROJECT CO EVENT OF DEFAULT

Project Co Event of Default

- 40.1 For the purposes of this Agreement, Project Co Event of Default means any of the following events or circumstances:

Insolvency

- 40.1.1 the occurrence of any of the following events in respect of Project Co, namely:
- (a) any arrangement or composition with or for the benefit of creditors (including any voluntary arrangement as defined in the Insolvency Act 1986) being entered into by or in relation to Project Co;
 - (b) a 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 ten (10) Business Days) upon, the whole or any material part of the assets of Project Co;
 - (c) Project Co ceasing to carry on business;

- (d) a petition being presented (and not being discharged within twenty (20) Business Days), or a resolution being passed or an order being made for the administration or the winding up, bankruptcy or dissolution of Project Co; or
- (e) if Project Co shall suffer any event analogous to the events set out in Clauses 40.1.1(a) to (d) in any jurisdiction in which it is incorporated or resident.

Long stop

40.1.2 Project Co failing to achieve the Actual Completion Date within a period of [REDACTED] after the Completion Date;

FOISA
s 33(1)(b)

Default

EIR
Reg 10(5)(e)

40.1.3

- (a) Project Co committing a material breach of its obligations under this Agreement which has a material and adverse effect on the delivery of the Board Services (other than as a consequence of a breach by the Board of its obligations under this Agreement);
- (b) Project Co wilfully breaches Schedule Part 23 (*Refinancing*);

40.1.4 Project Co abandoning this Agreement;

Health and safety

40.1.5 at any time after the Actual Completion Date Project Co committing a material breach of its obligations under this Agreement (other than as a consequence of a breach by the Board of its obligations under this Agreement) which results in the criminal investigation, prosecution and conviction of Project Co or any Project Co Party or the Board under the Health and Safety Regime (a "**H&S Conviction**") provided that an H&S Conviction of a Project Co Party or the Board shall not constitute a Project Co Event of Default if, within ninety (90) Business Days from the date of the H&S Conviction (whether or not the H&S Conviction is subject to an appeal or any further judicial process), the involvement in the Project Operations of each relevant Project Co Party (which in the case of an individual director, officer or employee shall be deemed to include the Project Co Party of which that person is a director, officer or employee) is terminated and a replacement is appointed by Project Co in accordance with Clause 57.5 (*Sub contracting*);

In determining whether to exercise any right of termination or right to require the termination of the engagement of a Project Co Party pursuant to this Clause 40.1.5, the Board shall:

- (a) act in a reasonable and proportionate manner having regard to such matters as the gravity of any offence and the identity of the person committing it; and
- (b) give all due consideration, where appropriate, to action other than termination of this Agreement;

Change in Control

40.1.6 the occurrence of any Change in Control which is prohibited by Clause 58 (*Ownership Information and Changes in Control*);

Assignment

40.1.7 Project Co failing to comply with the provisions of Clauses 57.2 or 57.5 (*Assignment*);

Deductions

40.1.8 in each of [redacted] Project Co has suffered Deductions [redacted] the Annual Service Payment for the current Contract Year; or

FOISA
§ 33(1)(b)
EIR
Reg 10(5)(e)

Warning Notices

40.1.9 Project Co is awarded a total of [redacted]

FOISA
§ 33(1)(b)

Payment

40.1.10 Project Co failing to pay any sum or sums due to the Board under this Agreement (which sums are not in dispute) which [redacted] and such failure continues for [redacted] from receipt by Project Co of a notice of non payment from the Board; or

EIR
Reg 10(5)(e)

FOISA
§ 33(1)(b)
§ 30(c)
EIR Reg 10(5)(e)

Insurance

40.1.11 a breach by Project Co of its obligation to take out and maintain the insurances required by Clauses 53.1 and 53.2 (*Project Co Insurances*).

Notification

40.2 Project Co shall notify the Board of the occurrence, and details, of any Project Co

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

Board's options

40.3 On the occurrence of a Project Co Event of Default, or within a reasonable time after the Board becomes aware of the same, and while the same is subsisting, the Board may:

40.3.1 in the case of the Project Co Events of Default referred to in Clauses 40.1.1 (*Insolvency*), 40.1.2 (*Long Stop*), 40.1.3(b) (*Default*), 40.1.5 (*Health and Safety*), 40.1.6 (*Change in Control*), 40.1.7 (*Assignment*), 40.1.8 (*Deductions*) 40.1.9 (*Warning Notices*) or 40.1.10 (*Payment*), terminate this Agreement in its entirety by notice in writing having immediate effect;

40.3.2 in the case of any Project Co Event of Default referred to in Clause 40.1.3(a) (*Default*) and 40.1.4 (*Default*), serve notice of default on Project Co requiring Project Co at Project Co's option either:

(a) to remedy the Project Co Event of Default referred to in such notice of default (if the same is continuing) within twenty (20) Business Days of such notice of default; or

(b) to put forward within twenty (20) Business Days of such notice of default a reasonable programme (set out, if appropriate, in stages) for remedying the Project Co Event of Default. The programme shall specify in reasonable detail the manner in, and the latest date by, which such Project Co Event of Default is proposed to be remedied (Project Co shall only have the option of putting forward a programme in accordance with this Clause 40.3.2(b) if it first notifies the Board within ten (10) Business Days of such notice of default that it proposes to do so); and

40.3.3 in the case of any Project Co Event of Default referred to in Clause 40.1.11 (*Insurance*) serve notice of default on Project Co requiring Project Co to remedy the Project Co Event of Default (if the same is continuing) within twenty (20) Business Days of such notice of default.

Remedy provisions

40.4 Where Project Co puts forward a programme in accordance with Clause 40.3.2(b), the Board shall have twenty (20) Business Days from receipt of the same within which to notify Project Co (acting reasonably) that it does not accept the programme, failing which the Board shall be deemed to have accepted the programme. Where the Board notifies Project Co that it does not accept the programme as being reasonable, the parties shall endeavour within the following five (5) Business Days to agree any necessary amendments to the programme put forward. In the absence of agreement within five (5) Business Days, the question of whether the programme (as the same may have been amended by agreement) will remedy the Project Co Event of Default in a reasonable manner and within a

reasonable time period (and, if not, what would be a reasonable programme) may be referred by either party for resolution in accordance with Schedule Part 20 (*Dispute Resolution Procedure*).

40.5 If:

40.5.1 the Project Co Event of Default notified in a notice of default served under Clause 40.3.2 or Clause 40.3.3 (as the case may be) is not remedied before the expiry of the period referred to in Clause 40.3.2(a) or Clause 40.3.3 (as appropriate); or

40.5.2 where Project Co puts forward a programme pursuant to Clause 40.3.2(b) which has been accepted by the Board or has been determined to be reasonable and Project Co fails to achieve any element of the programme or the end date for the programme (as the case may be); or

40.5.3 any programme put forward by Project Co pursuant to Clause 40.3.2(b) is rejected by the Board as not being reasonable, and the Dispute Resolution Procedure does not find against that rejection,

then the Board may terminate this Agreement in its entirety by written notice to Project Co with immediate effect. Provided that for the purposes of Clause 40.5.2 if Project Co's performance of the programme is adversely affected by the occurrence of Force Majeure, a Relief Event or an Excusing Cause then, subject to Project Co complying with the mitigation and other requirements in this Agreement concerning Force Majeure, a Relief Event or an Excusing Cause (as the case may be), the time for performance of the programme or any relevant element of it shall be deemed to be extended by a period equal to the delay caused by Force Majeure, the Relief Event or the Excusing Cause (as the case may be) which is agreed by the parties or determined in accordance with Schedule Part 20 (*Dispute Resolution Procedure*).

Board's costs

40.6 Project Co shall reimburse the Board for all reasonable costs incurred by the Board in exercising any of its rights pursuant to this Clause 40 (*Project Co Event of Default*) (including, without limitation, any relevant increased administrative expenses). The Board shall take reasonable steps to mitigate such costs.

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

41. TERMINATION RESULTING FROM FORCE MAJEURE

If, in the circumstances referred to in Clause 31 (*Force Majeure*), the parties have failed to reach agreement on any modification to this Agreement pursuant to Clause 31 (*Force Majeure*) within six (6) calendar months of the date on which the party affected serves notice

on the other party in accordance with Clause 31 (*Force Majeure*) either party may at any time afterwards terminate this Agreement by written notice to the other party having immediate effect provided always that the effects of the relevant event of Force Majeure continues to prevent either party from performing any material obligation under this Agreement.

42. BOARD VOLUNTARY TERMINATION

42.1 The Board shall be entitled to terminate this Agreement at any time on six (6) months' written notice to Project Co. In the event of notice being given by the Board in accordance with this Clause, the Board shall, at any time before the expiration of such notice, be entitled to direct Project Co, where the Works (or any part or parts of the Works) or any Service (or any elements of any Service) have not been commenced, to refrain from commencing any such Works or Services (or to procure the same).

43. EXPIRY

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

44. CORRUPT GIFTS AND PAYMENTS

Prohibition on corruption

44.1 The term "Prohibited Act" means:

44.1.1 offering, giving or agreeing to give to the Board or any other public body or to any person employed by or on behalf of the Board or any other public body any gift or consideration of any kind as an inducement or reward:

(a) for doing or not doing (or for having done or not having done) any act in relation to the obtaining or performance of this Agreement or any other agreement with the Board or any other public body; or

(b) for showing or not showing favour or disfavour to any person in relation to this Agreement or any other agreement with the Board or any other public body;

44.1.2 entering into this Agreement or any other agreement with the Board or any other public body in connection with which commission has been paid or has been agreed to be paid by Project Co or on its behalf, or to its knowledge, unless before the relevant agreement is entered into particulars of any such commission and of the terms and conditions of any such agreement for the payment of such commission have been disclosed in writing to the Board;

- 44.1.3 committing any offence:
- (a) under the Bribery Act 2010;
 - (b) under any Law creating offences in respect of fraudulent acts; or
 - (c) at common law, in respect of fraudulent acts in relation to this Agreement or any other agreement with the Board or any other public body; or
- 44.1.4 defrauding or attempting to defraud or conspiring to defraud the Board or any other public body.

Warranty

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

Remedies

- 44.3 If Project Co or any Project Co Party (or anyone employed by or acting on behalf of them) commits any Prohibited Act, then the Board shall be entitled to act in accordance with Clauses 44.3.1 to 44.3.6 below:
- 44.3.1 if a Prohibited Act is committed by Project Co or by an employee not acting independently of Project Co, then the Board may terminate this Agreement with immediate effect by giving written notice to Project Co;
 - 44.3.2 if the Prohibited Act is committed by an employee of Project Co acting independently of Project Co, then the Board may give written notice to Project Co of termination and this Agreement will terminate, unless within twenty (20) Business Days of receipt of such notice Project Co terminates the employee's employment and (if necessary) procures the performance of the relevant part of the Works and/or Services by another person;
 - 44.3.3 if the Prohibited Act is committed by a Contracting Associate or by an employee of that Contracting Associate not acting independently of that Contracting Associate then the Board may give written notice to Project Co of termination and this Agreement will terminate, unless within twenty (20) Business Days of receipt of such notice Project Co terminates the relevant Sub-Contract and procures the performance of the relevant part of the Works and/or Services by another person, where relevant, in accordance with Clause 57 (*Assignment and Sub-Contracting*);
 - 44.3.4 if the Prohibited Act is committed by an employee of a Contracting Associate acting independently of that Contracting Associate, then the Board may give notice to Project Co of termination and this Agreement

will terminate, unless within twenty (20) Business Days of receipt of such notice Project Co procures the termination of the employee's employment and (if necessary) procures the performance of the relevant part of the Works and/or Services by another person;

44.3.5 if the Prohibited Act is committed by any other person not specified in Clauses 44.3.1 to 44.3.4 above, then the Board may give notice to Project Co of termination and this Agreement will terminate unless within twenty (20) Business Days Project Co procures the termination of such person's employment and of the appointment of their employer (where the employer is not the Board and where such person is not employed by Project Co or the Contracting Associate) and (if necessary) procures the performance of the relevant part of the Works and/or Services by another person; and

44.3.6 any notice of termination under this Clause shall specify:

- (a) the nature of the Prohibited Act;
- (b) the identity of the party who the Board believes has committed the Prohibited Act; and
- (c) the date on which this Agreement will terminate in accordance with the applicable provisions of this Clause.

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

44.4.1 the amount or value of any such gift, consideration or commission; and

44.4.2 any other loss sustained in consequence of any breach of this Clause.

Permitted payments

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

Notification

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

Interim Management

44.7 Where Project Co is required to replace any Sub Contractor pursuant to this Clause, the provisions of Clause 57.9 shall apply and be construed accordingly.

45. BREACH OF THE NPD REQUIREMENTS

Breach by Project Co

- 45.1 If Project Co breaches Clause 36 (*Payment of Surpluses and Compliance with NPD Requirements*) then the Board may terminate this Agreement, at any time within eighteen (18) months of becoming aware of such breach, in accordance with Clause 45.2 (*Notice of Termination*) below. The Board shall inform Project Co of the occurrence of any such breach as soon as reasonably practicable after becoming aware of the breach, provided that failure by the Board to so inform Project Co shall not constitute a breach of this Agreement by the Board and shall not prejudice the exercise of its rights under Clause 45.2 (*Notice of Termination*).

Notice of Termination

- 45.2 If the Board wishes to terminate this Agreement under this Clause 45 (*Breach of the NPD Requirements*), it must first give Project Co notice stating:

45.2.1 that the Board is terminating this Agreement under this Clause 45 (*Breach of the NPD Requirements*); and

45.2.3 that this Agreement will terminate on the date falling thirty (30) Business Days after the date of receipt of the notice.

and this Agreement will terminate on the day falling 30 Business Days after Project Co receives the notice unless Project Co demonstrates to the satisfaction of the Board (acting reasonably) that such breach was caused by an administrative error of Project Co and Project Co rectifies such breach within ten (10) Business Days of receipt of such notice, in which the notice shall be deemed not to have been served.

46. COMPENSATION ON TERMINATION

- 46.1 If this Agreement is terminated pursuant to Clause 41 (*Termination Resulting from Force Majeure*), then the Board shall pay compensation to Project Co in accordance with Section 3 (*Consequence of Termination for Force Majeure*) of Schedule Part 17 (*Compensation on Termination*).

- 46.2 If this Agreement is terminated pursuant to Clause 40 (*Project Co Events of Default*) other than pursuant to Clause 40.1.3(b) (*Default*), then the Board shall pay compensation to Project Co in accordance with Section 2 (*Compensation on Project Co Default*) of Schedule Part 17 (*Compensation on Termination*).

- 46.3 If this Agreement is terminated pursuant to Clause 39 (*Board Events of Default*), then the Board shall pay compensation to Project Co in accordance with Section 1 (*Compensation on Termination for Board Default and Voluntary Termination*) of Schedule Part 17 (*Compensation on Termination*).

- 46.4 If this Agreement is terminated pursuant to Clause 42 (*Voluntary Termination*), then the Board shall pay compensation to Project Co in accordance with Section 1

(Compensation on Termination for Board Default and Voluntary Termination) of Schedule Part 17 (Compensation on Termination).

- 46.5 If this Agreement is terminated pursuant to Clause 40.1.3(b) *(Default)*, Clause 44.3 *(Remedies)* or Clause 45 *(Breach of the NPD Requirements)* then the Board shall pay compensation to Project Co in accordance with Section 4 *(Corrupt Gifts and Fraud or Breach of Refinancing or Breach of NPD Requirements)* of Schedule Part 17 *(Compensation on Termination)*.

Tax equalisation

- 46.6 Where a payment is to be made to Project Co pursuant to Clause 46.1 *(Compensation on Termination)*, Clause 46.3 *(Compensation on Termination)*, Clause 46.4 *(Compensation on Termination)* or Clause 46.5 *(Compensation on Termination)* (a "**Compensation Payment**") and Project Co has a Relevant Tax Liability in respect of such payment, then the amount of the Compensation Payment to be made by the Board to Project Co shall be increased so as to ensure that Project Co is in the same position (after account is taken of the Relevant Tax Liability) as it would have been in had it not been for such Relevant Tax Liability.

- 46.7 For the purposes of this Clause 46 *(Compensation on Termination)*:

46.7.1 "**Relief**" shall mean any relief, allowance or deduction in computing profits or tax or a credit against, or right to repayment of, tax granted by or pursuant to any legislation for tax purposes;

46.7.2 a "**Relief derived from the Project**" is a Relief which arises in connection with the Project and includes any Relief arising as a consequence of the distribution of any amount obtained in respect of the Project (other than a Compensation Payment) by Project Co (whether by way of interest, dividend or other distribution, repayment, reduction or redemption of capital or indebtedness or return of assets or otherwise); and

46.7.3 Project Co shall be regarded as having a "**Relevant Tax Liability**" in respect of a Compensation Payment to the extent that:

(a) it has a liability for tax in consequence of or in respect of a Compensation Payment ("**Actual Liability**"); or

(b) it would have had a liability for tax within paragraph (a) above but for the utilisation of a Relief other than a Relief derived from the Project ("**Deemed Liability**").

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

- 46.9 Project Co shall keep the Board fully informed of all negotiations with the HM Revenue and Customs in relation to any Relevant Tax Liability in respect of a Compensation Payment. Project Co shall not agree, accept or compromise any claim, issue or dispute relating to such Relevant Tax Liability without the prior written consent of the Board, which shall not be unreasonably withheld or delayed. The Board may, if it considers in good faith that such action is justified having regard to the likely costs and benefits, direct Project Co to resist, appeal, defend or otherwise dispute the Relevant Tax Liability in respect of the Compensation Payment, provided that the cost of any such dispute (including any interest or penalties incurred) shall be at the Board's expense. However, if Project Co obtains professional advice from an independent person with relevant expertise that any resistance, appeal, defence or other mode of dispute is not likely to result in any more beneficial position in relation to the Relevant Tax Liability, Project Co shall be entitled not to continue with such resistance, appeal, defence or other mode of dispute. Where any resistance, appeal, defence or other mode of dispute results in a more beneficial position in relation to the Relevant Tax Liability, an adjustment will be made to the amount payable under Clause 46.6 to reflect such outcome.
- 46.10 Any increase in the amount of a Compensation Payment which is payable under Clause 46.6 shall be paid on the later of five (5) Business Days after a demand therefore (together with evidence in sufficient detail for the Board to satisfy itself of the Relevant Tax Liability and its calculation) is made by Project Co and:
- 46.10.1 in the case of an Actual Liability, five (5) Business Days before the date on which the relevant tax must be paid to the tax Board in order to avoid incurring interest and penalties; and
- 46.10.2 in the case of a Deemed Liability, five (5) Business Days before the date on which tax which would not have been payable but for the utilisation of the relevant Relief must be paid in order to avoid incurring interest or penalties (whether by Project Co or otherwise) and, for the purposes of determining when the Relief would otherwise have been utilised, Reliefs shall be regarded as utilised in the order in which they arise.
- 46.11 The Board shall have the right to pay the amount payable under Clause 46.6 direct to HM Revenue and Customs in satisfaction of the relevant tax due by Project Co.

Rights of Set-Off

- 46.12 To avoid doubt, the Board's obligations to make any payment of compensation to Project Co pursuant to this Clause are subject to the Board's rights under Clause 34.6 (*Set – Off*), save that the Board agrees not to set-off any amount agreed or determined as due and payable by Project Co to the Board against any payment of termination compensation (whether payable as a lump sum or in instalments) under Clauses 46.1, 46.3, 46.4 or 46.5, except to the extent that such termination payment exceeds the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount (as the case may be) at that time.

Full and final settlement

- 46.13 Subject to the provisions of paragraph 2.1 of Section 5 (*General*) of Schedule Part 17 (*Compensation on Termination*):

- 46.13.1 any compensation paid pursuant to this Clause shall be in full and final settlement of any claim, demand and/or proceedings of Project Co in relation to any termination of this Agreement and/or any Project Document (and the circumstances leading to such termination) and Project Co shall be excluded from all other rights and remedies in respect of any such termination; and
- 46.13.2 the compensation payable (if any) pursuant to this Clause 46 (*Compensation on Termination*) above shall be the sole remedy of Project Co and Project Co shall not have any other right or remedy in respect of such termination.

47. CONSEQUENCES OF TERMINATION

Continued performance

- 47.1 Subject to any exercise by the Board of its rights to perform, or to procure a third party to perform, the obligations of Project Co, the parties shall continue to perform their obligations under this Agreement, notwithstanding the giving of any notice of default or notice of termination, until the Termination Date.

Transfer to Board of Assets, Contracts etc.

- 47.2 On the service of a notice of termination in accordance with this Agreement for any reason:
 - 47.2.1 if prior to the Actual Completion Date, in so far as any transfer shall be necessary fully and effectively to transfer property to the Board, Project Co shall transfer to, and there shall vest in, the Board, such part of the Works and/or the Facilities as shall have been constructed and such items of the Plant and Equipment as shall have been procured by Project Co if the Board so elects:
 - 47.2.2 all goods and all materials on or near to the Site and/or Off-Site not yet incorporated in the Works shall remain available to the Board for the purposes of completing the Works and if the cost of such goods and materials has not been reflected in the payment of any compensation pursuant to Schedule Part 17 (*Compensation on Termination*), subject to the payment by the Board (determined as between a willing vendor and willing purchaser with any disputes determined pursuant to Clause 56 (*Dispute Resolution Procedure*));
 - 47.2.3 the construction plant shall remain available to the Board for the purposes of completing the Works, subject to payment of the Contractor's reasonable charges;
 - 47.2.4 Project Co shall hand over to, and there shall vest in, the Board, free from any Encumbrances (other than any created on or by or against the Board):

- (a) the Facilities and Equipment (which in the case of the termination

of this Agreement in accordance with Clause 43 (*Expiry*) shall be in the state required in accordance with Schedule Part 18 (*Handback Procedure*); and

(b) the Retained Estate Handback Infrastructure (if relevant prior to the Actual Completion Date);

47.2.5 if the Board so elects, Project Co shall procure that any of the Construction Contract, the Service Contracts and/or the Independent Tester Contract shall be novated or assigned to the Board, provided that where termination occurs under Clause 39 (*Board Events of Default*) the consent of the Contractor, the Service Provider or the Independent Tester (as the case may be) shall be required;

47.2.6 Project Co shall, or shall procure that any Contracting Associate shall (as the case may be), offer to sell to the Board at a fair value (determined as between a willing vendor and willing purchaser, with any disputes as to such fair value being determined pursuant to Schedule Part 20 (*Dispute Resolution Procedure*), free from any Encumbrance all or any part of the stocks of material and other assets, road vehicles, spare parts and other moveable property owned by Project Co or any of its Contracting Associates and reasonably required by the Board in connection with the operation of the Facilities or the provision of the Services;

47.2.7 Project Co shall deliver to the Board (as far as not already delivered to the Board) three (3) hard copies and one (1) electronic copy of complete sets of:

(a) "as built drawings" showing all alterations made to the Facilities since the commencement of operation of the Facilities; and

(b) maintenance, operation and training manuals for the Facilities and the Retained Estate Handback Infrastructure;

47.2.8 Project Co shall use all reasonable endeavours to procure that the benefit of all manufacturer's warranties in respect of mechanical and electrical plant and equipment used or made available by Project Co under this Agreement and included in the Facilities and the Retained Estate Handback Infrastructure are assigned, or otherwise transferred, to the Board with full title guarantee; and

47.2.9 Project Co shall deliver to the Board in relation to the employees employed by Project Co and/or Service Providers the records referred to in Clause 38 (*Records and Open Book Accounting*) except where such documents are required by Law to be retained by Project Co or its Contracting Associates (in which case complete copies shall be delivered to the Board).

47.3 Project Co shall ensure that provision is made in all contracts of any description whatsoever to ensure that the Board will be in a position to exercise its rights, and Project Co will be in a position to comply with its obligations, under Clause 47.2.

Transitional arrangements

- 47.4 On the termination of this Agreement for any reason, for a reasonable period both before and after any such termination, Project Co shall have the following duties:
- 47.4.1 Project Co shall co-operate fully with the Board and any successor providing to the Board services in the nature of any of the Services or any part of the Services in order to achieve a smooth transfer of the manner in which the Board obtains services in the nature of the Services and to avoid or mitigate in so far as reasonably practicable any inconvenience or any risk to the health and safety of the employees of the Board and members of the public;
- 47.4.2 Project Co shall as soon as practicable remove from the Site and/or Off-Site, all property not acquired by the Board pursuant to Clause 47.2 (or not belonging to the Board or any Board Party) and if it has not done so within forty (40) Business Days after any notice from the Board requiring it to do so the Board may (without being responsible for any loss, damage, costs or expenses) remove and sell any such property and shall hold any proceeds less all costs incurred to the credit of Project Co;
- 47.4.3 Project Co shall forthwith deliver to the Board's Representative:
- (a) any security passwords, access codes and other keys to the Facilities and the Retained Estate Handback Infrastructure (if relevant prior to the Actual Completion Date) and the equipment; and
 - (b) without prejudice to Clause 55 (*Intellectual Property*), any copyright licences for any computer programmes (or licences to use the same) necessary for the operation of the Facilities and the Retained Estate Handback Infrastructure (if relevant prior to the Actual Completion Date) (but excluding computer programmes, which have been developed or acquired by a Service Provider for its own use and not solely for the purposes of provision of any of the Services at the Facilities or the assignment or transfer of which is otherwise restricted); and
- 47.4.5 Project Co shall as soon as practicable vacate the Site and Off-Site , and (without prejudice to Schedule Part 18 (*Handback Procedure*)) shall leave the Site and Off-Site and the Facilities and the Retained Estate Handback Infrastructure (if relevant prior to the Actual Completion Date), in a safe, clean and orderly condition.
- 47.5 If the Board wishes to conduct a competition prior to the Expiry Date with a view to entering into an agreement for the provision of services (which may or may not be the same as, or similar to, the Services or any of them) following the expiry of this Agreement, Project Co shall co-operate with the Board fully in such competition process including (without limitation) by:
- 47.5.1 providing any information which the Board may reasonably require to conduct such competition but, to avoid doubt, information which is

commercially sensitive to Project Co shall not be provided (and, for the purpose of this Clause 47.5.1 commercially sensitive shall mean information which would if disclosed to a competitor of Project Co give that competitor a competitive advantage over Project Co and thereby prejudice the business of Project Co but shall, to avoid doubt, exclude any information to be disclosed in terms of Clause 25 (*TUPE and Employment matters*)); and

- 47.5.2 assisting the Board by providing all (or any) participants in such competition process with access to the Site, Off-Site and the Facilities and the Retained Estate Handback Infrastructure (if relevant prior to the Actual Completion Date).

Continuing Obligations

- 47.6 Save as otherwise expressly provided in this Agreement or as already taken into account in the calculation of any termination sum or other payment of compensation on termination pursuant to this Agreement:

- 47.6.1 termination of this Agreement shall be without prejudice to any accrued rights and obligations under this Agreement as at the date of termination; and

- 47.6.2 termination of this Agreement shall not affect the continuing rights and obligations of Project Co and the Board under Clauses 10 (*The Site*), 25 (*TUPE and Employment Matters*), 31 (*Force Majeure*), 34 (*Payment*), 35 (*Taxation*), 36 (*Payment of Surpluses and compliance with NPD Requirements*), 37 (*Custody of Financial Model*), 38 (*Records and Reports*), 41 (*Termination Resulting from Force Majeure*), 42 (*Board Voluntary Termination*), 44 (*Corrupt Gifts and Payments*), 46 (*Compensation on Termination*), 47.2 (*Transfer of Board Assets, Contracts etc*), 47.4 and 47.5 (*Transitional Arrangements*), 49 (*Indemnities and Liability*), 53 (*Insurance*), 54 (*Exclusions and Limits on Liability*), 55 (*Intellectual Property*), 56 (*Dispute Resolution Procedure*), 59 (*Mitigation*), 61 (*Confidentiality*), 64 (*Notices*) and Clause 74 (*Governing Law and Jurisdiction*) or under any other provision of this Agreement which is expressed to survive termination or which is required to give effect to such termination or the consequences of such termination.

48. HANDBACK PROCEDURE

The provisions of Schedule Part 18 (*Handback Procedure*) shall apply to the handback of the Facilities to the Board on expiry of this Agreement.

PART 11: INDEMNITIES, WARRANTIES & INSURANCE

49. INDEMNITIES

Project Co indemnities to Board

49.1 Project Co shall indemnify and keep the Board indemnified at all times from and against all Direct Losses sustained by the Board

[REDACTED] in consequence of:

FOISA
s 33(1)(b)
EIR Reg
10(5)(e)

49.1.1 any claim for, or in respect of, the death and/or personal injury of any employee of, or person engaged by, Project Co or any Project Co Party notwithstanding any act or omission of the Board or any Board Party;

49.1.2 any claim for, or in respect of, the death and/or personal injury of any third party (other than a person referred to in Clause 49.2.1) arising out of, or in the course of, the Project Operations, save to the extent caused (or contributed to) by any Unreasonable Act by the Board or any Board Party, breach of any express provision of this Agreement by the Board or any Board Party or any deliberate or negligent act or omission of the Board or any Board Party;

49.1.3 any physical loss of or damage to Board Assets arising by reason of any act or omission of Project Co or any Project Co Party, save to the extent that such loss or damage arises out of the breach of any express provision of this Agreement by the Board or any Board Party or any deliberate or negligent act or omission of the Board or any Board Party;

49.1.4 any loss of or damage to property or assets of any third party arising by reason of any act or omission of Project Co or any Project Co Party, save to the extent that such loss or damage arises out of the breach of any express provision of this Agreement by the Board or any Board Party or any deliberate or negligent act or omission of the Board or any Board Party;

[REDACTED]

[REDACTED]

FOISA
s 33(1)(b)
EIR
Reg
10(5)(e)

by Project Co or any Project Co Party.

Board indemnities to Project Co

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

49.2.1 any claim for, or in respect of, the death and/or personal injury of any employee of, or person engaged by, the Board or any Board Party notwithstanding any act or omission of Project Co or any Project Co Party;

49.2.2 any claim for, or in respect of, the death and/or personal injury of any third party (other than a person referred to in Clause 49.1.1) arising by reason of any act or omission of the Board or any Board Party in the course of provision of the Board Services, any Unreasonable Act by the Board or any Board Party, breach of any express provision of this Agreement by the Board or any Board Party or any deliberate act or omission of the Board or any Board Party, save to the extent caused (or contributed to) by any act or omission of Project Co or any Project Co Party;

49.2.3 any physical damage to any part of the Facilities or any assets or other property of Project Co or any Project Co Party arising by reason of any breach of any express provision of this Agreement by the Board or any Board Party or any deliberate act or omission of the Board or any Board Party, save to the extent caused (or contributed to) by any act or omission of Project Co or any Project Co Party; and

49.2.4 any loss of or damage to property or assets of any third party arising by reason of any breach of any express provision of this Agreement by the Board or any Board Party or any deliberate act or omission of the Board or any Board Party, save to the extent caused (or contributed to) by any act or omission of Project Co or any Project Co Party;

provided that in the case of Clauses 49.2.3 and 49.2.4 there shall be excluded from the indemnity given by the Board any liability:

- (a) for the occurrence of risks against which and to the extent to which Project Co is obliged to insure under this Agreement (but for the avoidance of doubt, not such liability to the extent within any applicable excess or deductible or over the maximum amount insured or to be insured under such insurance); or
- (b) in respect of a matter which is a Compensation Event; or
- (c) in respect of malicious damage.

Conduct of claims

49.3 This Clause 49.3 (*Conduct of Claims*) shall apply to the conduct, by a party from whom an indemnity is sought under this Agreement, of claims made by a third person against a party having (or claiming to have) the benefit of the indemnity. The party having, or claiming to have, the benefit of the indemnity is referred to as the "Beneficiary" and the party giving the indemnity is referred to as the "Indemnifier". Accordingly:

49.3.1 if the Beneficiary receives any notice, demand, letter or other document concerning any claim for which it appears that the Beneficiary is, or may become, entitled to indemnification under this Agreement, the Beneficiary shall give notice in writing, to the Indemnifier as soon as reasonably practicable and in any event within twenty (20) Business Days of receipt of the same;

49.3.2 subject to Clauses 49.3.3, 49.3.4 and 49.3.5 below, on the giving of a notice by the Beneficiary pursuant to Clause 49.3.1 above, where it appears that the Beneficiary is or may be entitled to indemnification from the Indemnifier in respect of all (but not part only) of the liability arising out of the claim, the Indemnifier shall (subject to providing the Beneficiary with an indemnity to its reasonable satisfaction against all costs and expenses that it may incur by reason of such action) be entitled to dispute the claim in the name of the Beneficiary at the Indemnifier's own expense and take conduct of any defence, dispute, compromise, or appeal of the claim and of any incidental negotiations. The Beneficiary shall give the Indemnifier all reasonable co operation, access and assistance for the purposes of considering and resisting such claim;

49.3.3 with respect to any claim conducted by the Indemnifier pursuant to Clause 49.3.2 above:

(a) the Indemnifier shall keep the Beneficiary fully informed and consult with it about material elements of the conduct of the claim;

(b) the Indemnifier shall not bring the name of the Beneficiary into disrepute; and

(c) the Indemnifier shall not pay or settle such claims without the prior consent of the Beneficiary, such consent not to be unreasonably withheld or delayed;

49.3.4 the Beneficiary shall be free to pay or settle any claim on such terms as it thinks fit and without prejudice to its rights and remedies under this Agreement if:

(a) the Indemnifier is not entitled to take conduct of the claim in accordance with Clause 49.3.2 above; or

(b) the Indemnifier fails to notify the Beneficiary of its intention to take conduct of the relevant claim within twenty (20) Business Days of the notice from the Beneficiary under Clause 49.3.1 above or notifies the Beneficiary that it does not intend to take

conduct of the claim; or

- (c) the Indemnifier fails to comply in any material respect with the provisions of Clause 49.3.3 above;

49.3.5 the Beneficiary shall be free at any time to give notice to the Indemnifier that it is retaining or taking over (as the case may be) the conduct of any defence, dispute, compromise or appeal of any claim (or of any incidental negotiations) to which Clause 49.3.2 above applies. On receipt of such notice the Indemnifier shall promptly take all steps necessary to transfer the conduct of such claim to the Beneficiary, and shall provide to the Beneficiary all reasonable co-operation, access and assistance for the purposes of considering and resisting such claim. If the Beneficiary gives any notice pursuant to this Clause 49.3.5, then the Indemnifier shall be released from any liability under its indemnity under Clause 49.1 (*Project Co Indemnities to Board*) or Clause 49.2 (*Board Indemnities to Project Co*) (as the case may be) and, without prejudice to any accrued liabilities, any liability under its indemnity given pursuant to Clause 49.3.2 in respect of such claim;

49.3.6 if the Indemnifier pays to the Beneficiary an amount in respect of an indemnity and the Beneficiary subsequently recovers (whether by payment, discount, credit, saving, relief or other benefit or otherwise) a sum which is directly referable to the fact, matter, event or circumstances giving rise to the claim under the indemnity, the Beneficiary shall forthwith repay to the Indemnifier whichever is the lesser of:

- (a) an amount equal to the sum recovered (or the value of the saving or benefit obtained) less any out of pocket costs and expenses properly incurred by the Beneficiary in recovering the same; and
- (b) the amount paid to the Beneficiary by the Indemnifier in respect of the claim under the relevant indemnity,

49.3.7 provided that there shall be no obligation on the Beneficiary to pursue such recovery and that the Indemnifier is repaid only to the extent that the amount of such recovery aggregated with any sum recovered from the Indemnifier exceeds any loss sustained by the Beneficiary (including for this purpose indirect or consequential losses or claims for loss of profits which are excluded by this Agreement from being recovered from the Indemnifier); and

49.3.8 any person taking any of the steps contemplated by Clauses 49.3.1 to 49.3.5 shall comply with the requirements of any insurer who may have an obligation to provide an indemnity in respect of any liability arising under this Agreement.

Mitigation – indemnity claims

49.4 To avoid doubt the provisions of Clause 59 (*Mitigation*) apply to any indemnity

given under this Agreement and any such indemnity shall not apply to the extent that such part or parts of Direct Losses could have been reduced or avoided by the Beneficiary complying with the provisions of such Clause 59 (*Mitigation*).

49A MALICIOUS DAMAGE

49A.1 Remit of Clause

This Clause 49A specifies the respective obligations of the parties in relation to malicious damage to the Facilities during the Operational Term.

49A.2 Notification

49A.2.1 As soon as possible after a Service Event has been notified to the Helpdesk or after Project Co has itself or by a Service Provider become aware of a Service Event, if it considers that the Service Event was caused by malicious damage by a person other than a Project Co Party, Project Co must verbally inform the Helpdesk and the Board's Representative (a "**Malicious Damage Report**"). Where it is reasonably practicable for it to do so without prejudicing its ability to achieve Rectification of the Service Event within the Rectification Period and subject to any immediate steps that it requires to take to make the Facilities safe, it must allow the Board's Representative an opportunity to inspect the evidence it relies on to support its claim that malicious damage caused the Service Event concerned before carrying out Rectification and, where this is not reasonably practicable, Project Co must take reasonable steps to preserve or record in a suitable manner any such evidence and forthwith make that record available to the Board.

49A.2.2 Provided Project Co has complied with the requirements of Clause 49A.2.1, unless within twelve (12) hours of receipt of a Malicious Damage Report the Board's Representative notifies Project Co that he agrees that the Service Event referred to in the relevant Malicious Damage Report was caused by malicious damage by a person other than a Project Co Party, the Board's Representative will be deemed to have disagreed that the Service Event concerned was caused by malicious damage by a person other than a Project Co Party.

49A.3 Rectification of Malicious Damage

49A.3.1 In relation to any Service Event referred to in a Malicious Damage Report, Project Co shall always take such steps as are necessary in accordance with its obligations under this Agreement to make the Facilities safe.

49A.3.2 If the Board's Representative agrees in accordance with Clause 49A.2 that a Service Event was caused by malicious damage by a person other than a Project Co Party, except when Clause 49A.3.3 applies, Project Co shall not Rectify the Service Event beyond what is required by Clause 49A.3.1 unless instructed by the Board to do so as a Board Change under Schedule Part 16 (*Change Protocol*).

49A.3.3 If, in the reasonable opinion of Project Co, the Service Event referred to in a Malicious Damage Report, if not Rectified, will or is likely to result in the costs of performing the Services and in particular the costs of Maintenance Works and Lifecycle Replacement being materially increased, it may notify the Board's Representative to that effect and shall be entitled to proceed with Rectification in accordance with its obligations under this Agreement.

49A.3.4 If the Board's Representative does not agree accordance with Clause 49A.2 that the Service Event referred to in a Malicious Damage Report was caused by malicious damage by a person other than a Project Co Party, Project Co shall be entitled to proceed with Rectification in accordance with its obligations under this Agreement.

49A.4 **Costs of rectifying malicious damage**

Project Co will be entitled to include all reasonable costs incurred with any Service Provider or third party:

49A.4.1 to make the Facilities safe pursuant to Clause 49A.3.1 if it is agreed by the Board or subsequently determined under the Dispute Resolution Procedure that the Service Event was caused by malicious damage by a person other than a Project Co Party; or

49A.4.2 to carry out Rectification pursuant to Clause 49A.3.3; or

49A.4.3 to carry out Rectification pursuant to Clause 49A.3.4 if it is subsequently determined under the Dispute Resolution Procedure that the Service Event was caused by malicious damage by a person other than a Project Co Party,

in a Monthly Invoice in accordance with Clause 34.2.1(c). In deciding what a reasonable cost is, regard may be had to prices and rates in the Catalogue (as defined in Schedule Part 16 (*Change Protocol*)).

49A.5 **Project Co to Provide Information**

Project Co must provide the Board with such information as the Board reasonably requests for the purpose of making claims for losses due to malicious damage, under the Operational Insurances.

49A.6 **Disputes**

Any dispute under this Clause 49A shall be determined under the Dispute Resolution Procedure.

50. **TAX ON INDEMNITY PAYMENTS**

If any payment by one party under an indemnity in this Agreement is subject to income tax or

corporation tax (or any tax replacing them) in the hands of the recipient, the recipient may demand in writing to the party making the payment that the payment shall be increased by such amount as would ensure that, after taking into account any such tax payable in respect of such additional amount, the recipient receives and retains a net sum equal to the amount it would have otherwise received had the payment not been subject to such tax. In relation to any such additional amount payable to Project Co, Project Co and the Board shall have the same rights and obligations as would apply to a Relevant Tax Liability under Clause 46.7.3 (*Tax Equalisation*) and Clauses 46.6 to 46.11 (*Tax Equalisation*) (inclusive) shall apply mutatis mutandis to the payment of the additional amount. The party making the payment shall pay such additional amount within ten (10) Business Days of receipt of such demand.

51. EXCUSING CAUSES

51.1 If an Excusing Cause interferes adversely with, or causes or contributes to a failure of, the performance of the Project Operations by Project Co and/or causes or contributes to the occurrence of an Availability Failure and/or a Performance Failure and provided that the effect of such Excusing Cause is claimed within ten (10) Business Days of the date on which Project Co became aware (or ought reasonably to have become so aware) of the occurrence of the Excusing Cause, then (subject to Clauses 51.3 (*Insured Exposure*) and 51.4 (*Mitigation of Excusing Cause*)) to the extent such failure or interference or occurrence of an Availability Failure and/or a Performance Failure arises as a result of such Excusing Cause:

51.1.1 such failure by Project Co to perform or interference or occurrence, and any poor performance of, any affected Service shall not constitute a breach of the provisions of this Agreement by Project Co;

51.1.2 such failure by Project Co to perform or interference or occurrence shall be taken account of in measuring the performance of any affected Service in accordance with the Service Level Specification, which shall be operated as though the relevant Service had been performed free from such adverse interference; and

51.1.3 any such Availability Failure and/or Performance Failure shall be deemed not to have occurred,

so that Project Co shall be entitled to payment under this Agreement as if there had been no such interference with, or failure in the performance of, the Project Operations and no such occurrence of an Availability Failure and/or Performance Failure.

51.2 For the purpose of Clause 51 (*Excusing Causes*), an Excusing Cause means:

51.2.1 any breach of any express provision of this Agreement by the Board or any Board Party (unless, and to the extent, caused or contributed to by Project Co or any Project Co Party);

51.2.2 any deliberate act or omission of the Board or any Board Party or any failure by the Board or Board Party (having regard always to the interactive nature of the activities of the Board and of Project Co) to take reasonable steps to carry out its activities in a manner which minimises undue interference with Project Co's performance of the

Project Operations, save where (and to the extent):

- (a) caused or contributed to by Project Co or any Project Co Party;
 - (b) the Board or Board Party is acting in accordance with a recommendation or instruction of Project Co or any Project Co Party;
 - (c) any such act or omission giving rise to such failure was within the contemplation of the parties or was otherwise provided for in this Agreement;
 - (d) the consequences of any such deliberate act or omission or other acts or omissions giving rise to such failure would have been prevented by the proper performance of Project Co's obligations under this Agreement; or
 - (e) the same arises from an act of the Board or a Board Party compliant with the Contractor's Site Rules and other requirements of the Contractor as referred to in Clause 13.1 (*Access to Site*) or 17.9 (*Commissioning prior to Completion Date*); or
- 51.2.3 the outbreak or the effects of any outbreak of any Medical Contamination unless and to the extent that the effects of such outbreak are caused (or contributed to) by any failure of Project Co or any Project Co Party to comply with procedures (or Board instructions) relating to control of infection or to take all reasonable steps to mitigate the effect of such Medical Contamination;
- 51.2.4 the implementation of any action taken by the Board or any Board Party, or any suspension of Project Co's obligation to deliver any or any part of the Services or the compliance by Project Co with instructions given by the Board, in each case in the circumstances referred to in Clauses 24.6 to 24.9 (*Board's remedial rights*) (inclusive);
- 51.2.5 the carrying out of any Low Value Change in accordance with the terms of this Agreement during the period of time agreed between the Board and Project Co;
- 51.2.6 the carrying out of planned preventative maintenance in accordance with the Schedule of Programmed Maintenance and Schedule of Lifecycle Replacement;
- 51.2.7 the occurrence of a Service Event that the Board's Representative has agreed pursuant to Clause 49A.3.2 (*Malicious Damage*) or that it has been determined pursuant to the Dispute Resolution Procedure has been caused by malicious damage by a person other than a Project Co Party, but only until such time as either (i) the Board has instructed Project Co to Rectify the Service Event as a Board Change and the time period for implementation of such Board Change has expired or

(ii) Project Co has Rectified the Service Event pursuant to Clause 49A.3.3 (*Malicious Damage*);

51.2.8 the occurrence of a matter referred to in Clause 10.4 (*Responsibility for Contamination*) during the Operational Term; or

51.2.9 subject to Project Co complying with the mitigation measures set out within Section 4.3 (*Construction Methodology*) of the Project Co Proposals, the exercise of any of the Reserved Rights set out in paragraphs 13 and/or 14 of Section 2 (*Reserved Rights*) of Schedule Part 5 (*Land Matters*).

Insured exposure

51.3 Without prejudice to Clause 53 (*Insurance*), Project Co shall not be entitled to any payment which would not have been due under this Agreement but for Clause 51 (*Excusing Causes*) to the extent that Project Co is or should be able to recover under any policy of insurance required to be maintained by Project Co or any Project Co Party in accordance with this Agreement (whether or not such insurance has in fact been effected or, if effected, has been vitiated as a result of any act or omission of Project Co (or any Project Co Party), including but not limited to non-disclosure or under insurance) or has any other policy of insurance which Project Co has taken out and maintained.

Mitigation of Excusing Cause

51.4 Project Co shall take all reasonable steps to mitigate the consequences of an Excusing Cause on Project Co's ability to perform its obligations under this Agreement. To the extent that Project Co does not take such steps, Project Co shall not be entitled to, and shall not receive, the relief specified in Clause 51.2.2

51.5 To avoid doubt, Clause 51.2.2 shall not impose a general obligation on the Board to take (or to procure that any Board Party takes) such steps and shall apply (and be construed) solely for the purpose of establishing whether an Excusing Cause has occurred.

52. **NOT USED**

53. **INSURANCE**

Project Co Insurances

53.1 Project Co shall procure that the insurances, details of which are set out in Section 1 (*Policies to be taken out by Project Co and maintained during the Design and Construction Phase*) of Schedule Part 15 (*Insurance Requirements*), are taken out prior to the commencement of the Works and are maintained for the periods specified in Section 1 (*Policies to be taken out by Project Co and maintained during the Design and Construction Phase*) of Schedule Part 15 (*Insurance Requirements*).

- 53.2 Project Co shall procure that the insurances, details of which are set out in Section 2 (*Policies to be taken out by Project Co and maintained from the Actual Completion Date*) of Schedule Part 15 (*Insurance Requirements*), are taken out prior to the Actual Completion Date and are maintained for the periods specified in Section 2 (*Policies to be taken out by Project Co and maintained from the Actual Completion Date*) of Schedule Part 15 (*Insurance Requirements*).
- 53.3 Without prejudice to the other provisions of this Clause 53 (*Insurance*), Project Co shall, at all relevant times, at its own cost, effect and maintain in full force those insurances which it is required to effect by any applicable Law.
- 53.4 All Insurances referred to in Clauses 53.1 and 53.2 shall:
- 53.4.1 be maintained in the names of the parties specified in Schedule Part 15 (*Insurance Requirements*) and shall be composite policies of insurance (and not joint) unless stated otherwise in Schedule Part 15 (*Insurance Requirements*);
 - 53.4.2 be placed with insurers who are acceptable to the Board (such acceptance not to be unreasonably withheld or delayed);
 - 53.4.3 in so far as they relate to damage to assets (including the Facilities), cover the same for the full reinstatement value;
 - 53.4.4 comply with the relevant provisions of Section 1 (*Policies to be taken out by Project Co and maintained during the Design and Construction Phase*) and Section 2 (*Policies to be taken out by Project Co and maintained from the Actual Completion Date*) of Schedule Part 15 (*Insurance Requirements*).
 - 53.4.5 provide for thirty (30) days prior written notice of their cancellation, non-renewal or amendment to be given to the Board in accordance with Endorsement 1 in Section 3 (*Endorsement*) of Schedule Part 15 (*Insurance Requirements*);
 - 53.4.6 in respect of the Physical Damage Policies provide for payment of any proceeds received by Project Co to be applied in accordance with Clause 53.22 (*Reinstatement*);
 - 53.4.7 in the case of the Operational Insurances only, be taken out and maintained in accordance with Section 4 (*Insurance Arrangements*) of Schedule Part 15 (*Insurance Requirements*).
- 53.5 Project Co shall ensure that its brokers give the Board a letter of undertaking substantially in the form set out in Section 5 (*Broker's Letter of Undertaking*) of Schedule Part 15 (*Insurance Requirements*) at Financial Close and subsequently on the renewal of each of the Insurances.

Subrogation and Vitiatio

- 53.6 Project Co shall in respect of the insurances referred to in Clauses 53.1 and 53.2:
- 53.6.1 procure that all policies of insurance to be effected by it pursuant to this Clause shall contain a provision to the effect that the insurers have agreed to waive all rights of subrogation against the Board (and all Board Parties other than contractors and sub-contractors in accordance with Endorsement 2 in Schedule 3 (*Endorsements*) of Schedule Part 15 (*Insurance Requirements*); and
- 53.6.2 provide for non-vitiatio protection in respect of any claim made by the Board as co-insured in accordance with Endorsement 2 in Section 3 (*Endorsements*) of Schedule Part 15 (*Insurance Requirements*),
- provided that, to avoid doubt, this Clause 53.6 shall not by itself prevent Project Co from claiming against the Board (or any Board Party) under an express provision of this Agreement for any loss or damage not covered because of the level of deductibles under such insurance permitted by this Agreement or to the extent such loss or damage exceeds the maximum of such insurance required by this Agreement.
- 53.7 Neither party shall take any action or fail to take any reasonable action or (in so far as it is reasonably within its power) permit or allow others to take or fail to take any action (including failure to disclose any fact) as a result of which any of the Insurances may be rendered void, voidable, unenforceable or suspended or impaired in whole or in part or which may otherwise render any sum paid out under any relevant policy repayable in whole or in part.

Evidence of Project Co Insurance

- 53.8 Not less than twenty (20) Business Days prior to the amendment or expiry of any relevant insurance policy (other than the expiry of any of the Operational Insurances in respect of which Project Co must comply with the provisions of Section 4 of Schedule Part 15 (*Insurance Requirements*)), Project Co shall submit to the Board a request for approval from the Board of the insurer and the principal terms and conditions of such insurance policy (and any revision to such terms and conditions or change in identity of such insurer), such approval not to be unreasonably withheld or delayed.
- 53.9 Project Co shall provide to the Board:
- 53.9.1 copies on request of all insurance policies referred to in Clauses 53.1 to 53.3 (together with any other information reasonably requested by the Board relating to such insurance policies) and the Board shall be entitled to inspect them during ordinary business hours; and
- 53.9.2 evidence that the premiums payable under all insurance policies have been paid and that the Insurances are in full force and effect in accordance with the requirements of this Clause 53 (*Insurance*) and Schedule Part 15 (*Insurance Requirements*).

- 53.10 Renewal certificates or other such evidence of renewal in relation to the Insurances shall be obtained as and when necessary and copies (certified in a manner acceptable to the Board) shall be forwarded to the Board as soon as possible but in any event within twenty (20) Business Days of the renewal date.
- 53.11 If Project Co defaults in insuring or continuing to maintain the Insurances, the Board may insure against any risk in respect of which such default has occurred and recover any premiums from Project Co as a debt provided that if the default occurs during the Operational Term the amount recoverable from Project Co shall be the difference between the premiums had Project Co continued to maintain the Insurances and the premiums paid by the Board to take out and maintain the Insurances.

Acceptance and compliance

- 53.12 The supply to the Board of any draft insurance policy or certificate of insurance or other evidence of compliance with this Clause 53 (*Insurance*) shall not imply acceptance by the Board (or the Board's Representative) that:
- 53.12.1 the extent of insurance cover is sufficient and its terms are satisfactory; or
- 53.12.2 in respect of any risks not insured against, that the same were Uninsurable.
- 53.13 Neither failure to comply, nor full compliance, with the insurance provisions of this Agreement shall relieve Project Co of its liabilities and obligations under this Agreement.

Uninsurable Risks

53.14

- 53.14.1 If a risk usually covered by contractors' 'all risks' insurance, property damage insurance, third party liability insurance, delay in start up and business interruption insurance (but not loss of profits) or statutory insurances in each case required under this Agreement becomes Uninsurable then:
- (a) Project Co shall notify the Board of any risk becoming Uninsurable within five (5) Business Days of becoming aware of the same and in any event at least five (5) Business Days before expiry or cancellation of any existing insurance in respect of that risk; and
- (b) if both parties agree, or it is determined in accordance with the Dispute Resolution Procedure that the risk is Uninsurable and that:
- (i) the risk being Uninsurable is not caused by the

actions of Project Co or any sub-contractor of Project Co (of any tier); and

- (ii) Project Co has demonstrated to the Board that Project Co and a prudent board of directors of a company operating the same or substantially similar businesses in the United Kingdom to that operated by Project Co would in similar circumstances (in the absence of the type of relief envisaged by this Clause) be acting reasonably and in the best interests of the company if they resolved to cease to operate such businesses as a result of that risk becoming Uninsurable, taking into account inter alia (and without limitation) the likelihood of the Uninsurable risk occurring (if it has not already occurred), the financial consequences for such company if such Uninsurable risk did occur (or has occurred) and other mitigants against such consequences which may be available to such company,

the parties shall meet to discuss the means by which the risk should be managed or shared (including considering the issue of self-insurance by either party).

53.14.2 If the requirements of Clause 53.14.1 are satisfied, but the parties cannot agree as to how to manage or share the risk, then:

- (a) where such requirements are satisfied in respect of such third party liability insurance the Board shall (at the Board's option) either pay to Project Co an amount equal to the amount calculated in accordance with Section 3 (*Compensation on Termination for Force Majeure*) of Schedule Part 17 (*Compensation on Termination*) and this Agreement will terminate, or elect to allow this Agreement to continue and Clause 53.14.2(b) below shall thereafter apply in respect of such risk; and
- (b) where such requirements are satisfied in respect of contractors' 'all risks' insurance, property damage insurance, third party liability insurance (if the Board elects to allow this Agreement to continue in accordance with Clause 53.14.2(a)), delay in start up and business interruption insurance (but not loss of profits) or statutory insurances this Agreement shall continue and on the occurrence of the risk (but only for as long as such risk remains Uninsurable) the Board shall (at the Board's option) either pay to Project Co an amount equal to insurance proceeds that would have been payable had the relevant insurance continued to be available and this Agreement will continue, or an amount equal to the amount calculated in accordance with Section 3 (*Compensation on Termination for Force Majeure*) of Schedule Part 17 (*Compensation on Termination*) plus (in relation to third party liability insurance only) the amount of insurance proceeds that would have been payable whereupon this Agreement will terminate; and

- (c) where pursuant to Clauses 53.14.2(a) and/or 53.14.2(b) this Agreement continues then the Annual Service Payment shall be reduced in each year for which the relevant insurance is not maintained by an amount equal to the premium paid (or which would have been paid) by Project Co in respect of the relevant risk in the year prior to it becoming Uninsurable (index linked from the date that the risk becomes Uninsurable) save to the extent that such reduction is otherwise reflected in a reduction in the payments claimed by Project Co pursuant to paragraph 3.1 of Section 6 (*Pass Through Costs*) of Schedule Part 14 (*Payment Mechanism*). Where the risk is Uninsurable for part of a year only the reduction in the Annual Service Payment shall be pro rated to the number of months for which the risk is Uninsurable;

- (d) where pursuant to Clauses 53.14.2(a) and/or 53.14.2(b) this Agreement continues Project Co shall approach the insurance market at least every four (4) months to establish whether the risk remains Uninsurable. As soon as Project Co is aware (and the parties agree or it is determined pursuant to the Dispute Resolution Procedure) that the risk is no longer Uninsurable, Project Co shall take out and maintain or procure the taking out and maintenance of insurance (to be incepted as soon as is reasonably practicable) for such risk in accordance with this Agreement;

- (e) in respect of any period between the Board receiving notification in accordance with Clause 53.14.1(a) that a TPL Risk has become Uninsurable and the Board's notification to the Project Co in accordance with Clause 53.14.2(a) in respect of such risk then, provided it is ultimately agreed or determined that the requirements of Clause 53.14.1(b) are satisfied in respect of the Uninsurable TPL Risk and subject to Clause 53.14.2(f) below, Clause 53.14.2(b) shall apply in respect of occurrences of the Uninsurable TPL Risk during such period unless the parties otherwise agree how to manage the risk during this period; and

- (f) Clause 53.14.2(e) shall only apply provided Project Co does not unreasonably materially delay (a) agreement and/or determination in accordance with the Dispute Resolution Procedure as to whether the requirements of Clause 53.14.1(b) are satisfied in respect of the Uninsurable TPL Risk and/or (b) meeting with the Board to discuss the means by which the risk should be managed.

Where this Clause 53.14.2 applies and this Agreement continues, Project Co shall, subject to Clause 53.14.2(c), be relieved of its obligations to maintain insurance in respect of the relevant Uninsurable Risk.

53.14.3 If, pursuant to Clause 53.14.1(b), the Board elects to make payment of compensation to Project Co (such that this Agreement will terminate)(the "**Relevant Payment**"), Project Co shall have the option (exercisable in writing within twenty (20) Business Days of the date of such election by the Board (the "**Option Period**")) to pay to the Board on or before the end of the Option Period, an amount equal to the

insurance proceeds that would have been payable had the relevant risk not become Uninsurable, in which case this Agreement will continue (and the Relevant Payment will not be made by the Board), and Project Co's payment shall be applied for the same purpose and in the same manner as insurance proceeds would have been applied had the relevant risk not become Uninsurable.

53.14.4 During the Operational Term, the Board shall be entitled to notify Project Co that a risk has become Uninsurable under paragraph (b) of the definition of "Uninsurable". Following such notification Clauses 53.14.1(b) to 53.14.3 (except Clause 53.14.1(b)(ii)) shall apply as if Project Co has issued a notice under Clause 53.14.1(a).

53.15 Unavailability of terms

53.15.1 If, upon the renewal of any of the Insurances:

- (a) any Insurance Term is not available to Project Co in the worldwide insurance market with reputable insurers of good standing; and/or
- (b) the insurance premium payable for Insurance incorporating such Insurance Term is such that the Insurance Term is not generally being incorporated in insurance procured in the worldwide insurance market with reputable insurers of good standing by contractors in the United Kingdom,
- (c) other than, in each case by reason of one or more actions of Project Co and/or any sub-contractor of Project Co (of any tier) then Clause 53.15.2, shall apply.

53.15.2 If it is agreed or determined that Clause 53.15.1 applies then the Board shall waive Project Co's obligations in Clauses 53.1 to 53.3 (*Project Co Insurances*) and/or Schedule Part 15 (*Insurance Requirements*) in respect of that particular Insurance Term and Project Co shall not be considered in breach of its obligations regarding the maintenance of insurance pursuant to this Agreement as a result of the failure to maintain insurance incorporating such Insurance Term for so long as the relevant circumstances described in Clause 53.15.1 continue to apply to such Insurance Term.

53.15.3 To the extent that the parties agree (acting reasonably), or it is determined pursuant to the Dispute Resolution Procedure, that an alternative or replacement term and /or condition of insurance is available to Project Co in the worldwide insurance market with reputable insurers of good standing which if included in the relevant insurance policy would fully or partially address Project Co's inability to maintain or procure the maintenance of insurance with the relevant Insurance Term, at a cost which contractors in the UK are (at such time) generally prepared to pay, Project Co shall maintain or procure the maintenance of insurance including such alternative or replacement term and/or condition.

53.15.4 Project Co shall notify the Board as soon as reasonably practicable and in any event within five (5) days of becoming aware that Clause 53.15.1(a) and/or Clause 53.15.1(b) are likely to apply or (on expiry of the relevant insurance then in place) do apply in respect of an Insurance Term (irrespective of the reason for the same). During the Operational Term the Board shall be entitled to notify Project Co that Clause 53.15.1(b) is likely to apply or (on expiry of the relevant insurance then in place) does apply in respect of an Insurance Term (irrespective of the reason for the same). Project Co shall provide the Board with such information as the Board reasonably requests regarding the unavailability of the Insurance Term and the parties shall meet to discuss the means by which such unavailability should be managed as soon as is reasonably practicable.

53.15.5 In the event that Clause 53.15.1(a) and/or Clause 53.15.1(b) apply in respect of an Insurance Term, (irrespective of the reasons for the same) Project Co shall approach the insurance market at least every four months to establish whether Clause 53.15.1(a) and/or Clause 53.15.1(b) remain applicable to the Insurance Term. As soon as Project Co is aware that Clause 53.15.1(a) and/or Clause 53.15.1(b) has ceased to apply to the Insurance Term and the parties agree or it is determined pursuant to the Dispute Resolution Procedure, Project Co shall take out and maintain or procure the taking out and maintenance of insurance (to be incepted as soon as is reasonably practicable) incorporating such Insurance Term in accordance with this Agreement.

Risk Management

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

53.16.1 be responsible for dealing with all risk management matters on behalf of its appointing or designating party including (without limitation) ensuring compliance by that party with this Clause 53.16;

53.16.2 advise and report to that party on such matters; and

53.16.3 ensure that any report or survey conducted by any insurer of any relevant procedures in relation to the Project is disclosed to the parties.

53.17 Without prejudice to the provisions of Clause 53.16, the parties shall notify one another, and in Project Co's case the relevant insurer, of any circumstances which may give rise to a claim of a value [REDACTED]

[REDACTED] under the Insurances within five (5) Business Days of becoming aware of the same (or earlier, if so requested by the terms of the relevant insurance policy). If any insurer disputes any such claim, Project Co shall provide the Board with full details of any disputed claim and the parties shall liaise with one another to ensure that the relevant claim is preserved or pursued.

F051X
S 33(i)(b)
S 30(c)
KIR Regio(5)(e)

Application of Proceeds

- 53.18 All insurance proceeds received by Project Co under the insurances referred to in paragraph 1 (*Contractor's "All Risk" Insurance*) of Section 1 (*Insurance Requirements*) and paragraph 1 (*Property Damage Insurance*) of Section 2 (*Policies to be taken out by Project Co and Maintained from the Actual Completion Date*) of Schedule Part 15 (*Insurance Requirements*) shall be paid into the Insurance Proceeds Account and shall be applied in accordance with this Agreement and in accordance with the Insurance Proceeds Accounts Agreement.
- 53.19 Subject to the provisions of the Funders' Direct Agreement and Clause 53.22 (*Reinstatement*), Project Co shall apply any proceeds of any policies of Insurance:
- 53.19.1 in the case of third party legal liability or employers' liability insurance, in satisfaction of the claim, demand, proceeding or liability in respect of which such proceeds are payable; and
- 53.19.2 in the case of any other insurance other than delay in start up or business interruption insurance, so as to ensure the performance by Project Co of its obligations under this Agreement, including where necessary the reinstatement, restoration or replacement of the Facilities, assets, materials or goods affected by the event giving rise to the insurance claim and consequent payment of proceeds.
- 53.20 Where reinstatement monies are required to be released from the Insurance Proceeds Account Project Co shall obtain the Board's consent in accordance with the Insurance Proceeds Account Agreement. The Board shall give its consent (or confirm that it is withholding its consent) to the release of monies from the Insurance Proceeds Account within one (1) Business Day of a request from Project Co (provided that such consent must not be unreasonably withheld).
- 53.21 If the proceeds of any insurance claim are insufficient to cover the settlement of such claims, Project Co will make good any deficiency forthwith.

53.22 Reinstatement

53.22.1 All insurance proceeds received under any Physical Damage Policy shall be applied to repair, reinstate and replace each part or parts of the Facilities in respect of which the proceeds were received.

53.22.2 Where a claim is made or proceeds of insurance are received or are receivable under any Physical Damage Policy in respect of a single event (or a series of related events) (the ("**Relevant Incident**") in an amount [REDACTED]

- (a) Project Co shall deliver as soon as practicable and in any event within twenty eight (28) days after the making of the claim a plan prepared by Project Co for the carrying out of the works necessary (the "**Reinstatement Works**") to repair, reinstate or replace (the "**Reinstatement Plan**") the assets which are the subject of the relevant claim or claims in accordance with Clause 53.22.2(b) below. The Reinstatement Plan shall set out:

FOISA
 s 33(1)(b)
 s 30(c)
 FIR Reg 10(5)(e)

- (i) if not the Contractor, the identity of the person proposed to effect the Reinstatement Works, which shall be subject to the prior written approval of the Board; and
 - (ii) the proposed terms and timetable or, if not then established, the reasonably anticipated terms and timetable upon which the Reinstatement Works are to be effected (including the date that the Project will become fully operational), the final terms of which shall be subject to the prior written approval of the Board, which approval shall not be unreasonably delayed;
- (b) provided that the Board is satisfied that the Reinstatement Plan will enable Project Co to comply with Clause 53.22.2(b)(iv) below within a reasonable timescale:
- (i) the Reinstatement Plan will be adopted and carried out by Project Co;
 - (ii) Project Co shall enter into contractual arrangements to effect the Reinstatement Works with the person identified in the Reinstatement Plan approved by the Board;
 - (iii) prior to the earlier to occur of the Termination Date or the Expiry Date, any amounts standing to the credit of the Insurance Proceeds Account (the "Relevant Proceeds") (together with any interest accrued) may be withdrawn by Project Co from the Insurance Proceeds Account as required to enable it to make payments in accordance with the terms of the contractual arrangements referred to in Clause 53.22.2(b)(ii) above, and to meet any other reasonable costs and expenses of Project Co for the sole purposes of funding the Reinstatement Works and the parties shall operate the signatory requirements of the Insurance Proceeds Account in order to give effect to such payments. Following the earlier to occur of the Termination Date and the Expiry Date, the Board may withdraw amounts standing to the credit of the Insurance Proceeds Account for the purposes of funding any Reinstatement Works;
 - (iv) the Board agrees and undertakes that, subject to compliance by Project Co with its obligations under this Clause, and provided that Project Co procures that the Reinstatement Works are carried out and completed in accordance with the contractual arrangements referred to in Clause 53.22.2(b)(ii), it shall not exercise any right which it might otherwise have to terminate this Agreement by virtue of the event which gave rise to the claim for the Relevant Proceeds;

- (v) the Board undertakes to use reasonable endeavours to assist Project Co in the carrying out of the Reinstatement Plan; and
- (vi) after the Reinstatement Plan has been implemented to the reasonable satisfaction of the Board and in accordance with Clause 53.22.3 below the Board shall permit withdrawal by Project Co of any Relevant Proceeds then held in the Insurance Proceeds Account that have not been paid under Clause 53.22.2(b)(iii) above, in respect of the Relevant Incident, together with any interest accrued.
- (vii) subject to the provisions of Clause 49.1 (*Project Co Indemnities to Board*) Project Co shall be solely responsible for the payment of any deficiency.

53.22.3 Where insurance proceeds are to be used, in accordance with this Agreement, to repair, reinstate or replace any Facilities, Project Co shall carry out the work in accordance with the Board's Construction Requirements so that on completion of the work, the provisions of this Agreement are complied with.

53.22.4 If and to the extent that a breach by Project Co of its obligations under Clause 53.22.2(b) leads to a delay in the completion of the Reinstatement Works, any entitlement that Project Co has to relief under Clause 30 (*Relief Events*) shall be suspended.

54. EXCLUSIONS AND LIMITATIONS ON LIABILITY

Exclusions

54.1 The indemnities under this Agreement shall not apply and (without prejudice to the Board's rights under the Payment Mechanism and to the provisions of Schedule Part 17 (*Compensation on Termination*)) there shall be no right to claim damages for breach of this Agreement, in delict or on any other basis whatsoever to the extent that any loss claimed by either party is for loss of profits, loss of use, loss of production, loss of business or loss of business opportunity or is a claim for consequential loss or for indirect loss of any nature ("**Indirect Losses**") suffered or allegedly suffered by either party. The Board agrees that, notwithstanding the foregoing, any losses of Project Co arising under the Construction Contract and the Service Contracts as originally executed (or as amended in accordance with and subject to Clause 4.1 (*Ancillary Documents*)) which are not Indirect Losses shall not be excluded from such a claim solely by reason of this Clause 54.1.

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

No Double Recovery

- 54.3 Subject to:
- 54.3.1 any other express right of the Board pursuant to this Agreement; and
 - 54.3.2 the Board's right to claim, on or after termination of this Agreement, the amount of its reasonable costs, losses, damages and expenses suffered or incurred by it as a result of rectifying or mitigating the effects of any breach of this Agreement by Project Co save to the extent that the same has already been recovered by the Board pursuant to this Agreement or has been taken into account to reduce any compensation payable by the Board pursuant to Clause 46 (*Compensation on Termination*),
- the sole remedy of the Board in respect of a failure to provide the Services in accordance with this Agreement shall be the operation of the Payment Mechanism.
- 54.4 Subject to Clause 29 (*Board Events of Default*) and any other express right of Project Co pursuant to this Agreement, Project Co's sole remedy in respect of any breach of this Agreement which is a Compensation Event shall be pursuant to Clause 29 (*Delay Events*).
- 54.5 Nothing in Clause 54.3 shall prevent or restrict the right of the Board to seek interdict or a decree of specific implement or other discretionary remedies of the court.
- 54.6 Notwithstanding any other provision of this Agreement, neither party shall be entitled to recover compensation or make a claim under this Agreement or any other agreement in relation to the Project in respect of any loss that it has incurred (or any failure of the other party) to the extent that it has already been compensated in respect of that loss or failure pursuant to this Agreement or otherwise.
- 54.7 Neither party shall have the right to terminate this Agreement for breach of contract save as expressly set out in this Agreement.

PART 12: MISCELLANEOUS

55. INTELLECTUAL PROPERTY

Project Data

55.1 Project Co shall make available to the Board free of charge (and hereby irrevocably licences the Board to use) all Project Data that might reasonably be required by the Board and Project Co shall ensure that it can make the Project Data available to the Board on these terms, for the purposes of:

55.1.1 the Board carrying out the Board Services (and its operations relating to the performance of the Board Services), its duties under this Agreement and/or any statutory duties that the Board may have; and

55.1.2 following termination of this Agreement, the design or construction of the Facilities, the operation, maintenance or improvement of the Facilities and/or the carrying out of operations the same as, or similar to, the Project Operations,

(together the "Approved Purposes") and in this Clause "use" shall include the acts of copying, modifying, adapting and translating the material in question and/or incorporating them with other materials and the term "the right to use" shall be construed accordingly.

Intellectual Property Rights

55.2 Project Co:

55.2.1 hereby grants to the Board, free of charge, an irrevocable, non-exclusive and transferable (but only to any assignee or transferee of any rights or benefits under this Agreement or upon or at any time following termination of this Agreement) licence (carrying the right to grant sub-licences) to use the Intellectual Property Rights which are or become vested in Project Co; and

55.2.2 shall, where any Intellectual Property Rights are or become vested in a third party, use all reasonable endeavours to procure the grant of a like licence to that referred to in Clause 55.2.1 above to the Board,

in both cases, solely for the Approved Purposes.

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

Maintenance of data

- 55.3 To the extent that any of the data, materials and documents referred to in this Clause are generated by or maintained on a computer or similar system, Project Co shall use all reasonable endeavours to procure for the benefit of the Board, at no charge or at the lowest reasonable fee, the grant of a licence or sub-licence for any relevant software to enable the Board or its nominee to access and otherwise use (subject to the payment by the Board of the relevant fee, if any) such data for such purposes as the Board may at its sole discretion require. As an alternative, Project Co may provide such data, materials or documents in a format which may be read by software generally available in the market at the relevant time or in hard copy format.
- 55.4 Project Co shall ensure the back-up and storage in safe custody of the data, materials and documents referred to in Clause 55.3 in accordance with Good Industry Practice. Without prejudice to this obligation, Project Co shall submit to the Board's Representative for approval its proposals for the back-up and storage in safe custody of such data, materials and documents and the Board shall be entitled to object if the same is not in accordance with Good Industry Practice. Project Co shall comply, and shall cause all Project Co Parties to comply, with all procedures to which the Board's Representative has given its approval. Project Co may vary its procedures for such back-up and storage subject to submitting its proposals for change to the Board's Representative, who shall be entitled to object on the basis set out above.

Claims

- 55.5 Where a claim or proceeding is made or brought against the Board which arises out of the infringement of any rights in or to any Intellectual Property (other than any Disclosed Data) or because the use of any materials, Plant, machinery or equipment in connection with the Project Operations infringes any rights in or to any Intellectual Property of a third party then, unless such infringement has arisen out of the use of any Intellectual Property by or on behalf of the Board otherwise than in accordance with the terms of this Agreement, Project Co shall indemnify the Board at all times from and against all such claims and proceedings and the provisions of Clause 49.3 (*Conduct of Claims*) shall apply.

56. DISPUTE RESOLUTION PROCEDURE

Except where expressly provided otherwise in this Agreement, any dispute arising out of or in connection with this Agreement shall be resolved in accordance with the procedure set out in Schedule Part 20 (*Dispute Resolution Procedure*).

57. ASSIGNATION AND SUB-CONTRACTING

Assigation

- 57.1 This Agreement and any other agreement in connection with the Project to which both the Board and Project Co are a party shall be binding on, and shall enure to the benefit of, Project Co and the Board and their respective statutory successors and permitted transferees and assignees. In the case of the Board, its successors shall include any person to whom the Scottish Ministers, in exercising their statutory powers to transfer property, rights and liabilities of the Board upon the

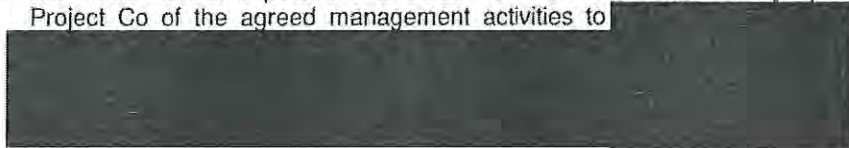
Board ceasing to exist, transfers the property, rights and obligations of the Board under this Agreement and such other agreements in connection with the Project to which the Board and Project Co are both a party.

57.2 Subject to Clause 57.3, Project Co shall not, without the prior written consent of the Board, assign, novate transfer, sub-contract or otherwise dispose of any interest in this Agreement, the Independent Tester Contract, the Construction Contract, the Service Contracts and any other contract entered into by Project Co for the purposes of performing its obligations under this Agreement.

57.3 To avoid doubt:

57.3.1 the provisions of Clause 57.2 do not apply to the grant of any security, in a form approved by the Board prior to its grant (such approval not to be unreasonably withheld or delayed) for any loan made to Project Co under the Initial Funding Agreements provided that any assignee shall enter into the Funders' Direct Agreement in relation to the exercise of its rights, if the Board so requires; and

57.3.2 the Board consents pursuant to Clause 57.2 to the subcontracting by Project Co of the agreed management activities to



FOISA
S 38(1)(b)
EIR
Regulation 11

57.4 The Board shall be entitled to assign, transfer or dispose of the whole of this Agreement and/or of any agreement entered into in connection with this Agreement to which the Board and Project Co are both party to:

57.4.1 the Scottish Ministers, another Health Board or any other person or body replacing any of the foregoing (or to whom the Scottish Ministers exercising their statutory rights would be entitled to transfer such benefits) covered by the National Health Service (Residual Liabilities) Act 1996; or

57.4.2 any other person or body with the prior written consent of Project Co (not to be unreasonably withheld or delayed);

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

Sub-contractors

57.5 Project Co shall, without prejudice to Clause 57.1, procure that none of the persons listed below shall sub-contract all (or substantially all) of their obligations under or in the agreement set out next to its name:

Person	Contract
--------	----------

Contractor Construction Contract

Service Provider Service Contract

without, in each case, the prior written consent of the Board (such consent not to be unreasonably withheld or delayed). To avoid doubt, (i) any failure to comply with Clause 57.7 shall be a reasonable ground for withholding consent and (ii) consent shall, without prejudice to the other provisions of Clause 57.5, not be required in respect of the appointment of any party currently approved by the Board as a suitable replacement and (iii) the Board consents to the agreed packages of work being sub-contracted to the Design Team and the Key Sub-contractors.

- 57.6 If the contract set out next to the name of any person referred to in Clause 57.5 shall at any time lapse, terminate or otherwise cease to be in full force and effect (whether by reason of expiry or otherwise), with the effect that such person shall cease to act in relation to the Project, Project Co shall forthwith appoint a replacement (subject to compliance with Clause 57.5).
- 57.7 Project Co shall procure that any replacement for any person referred to in Clause 57.5 or any Key Sub-Contractor shall enter into a contract upon the same or substantially similar terms as the person so replaced and shall also enter into a collateral agreement on the same or substantially the same terms as the Collateral Agreement entered into by the person so replaced.
- 57.8 Where Project Co enters into a contract with a sub-contractor for the purposes of carrying out the Project Operations or any part of the Project Operations under this Agreement, Project Co shall cause a term to be included in such contract:
- 57.8.1 which requires payment to be made to the sub-contractor within a specified period not exceeding thirty (30) days from receipt of a valid invoice as defined by the contract requirements and in the case of the provision of Services provides that, for the purpose of payment alone, where the Board has made payment to Project Co and the sub-contractor's invoice includes Project Operations in relation to which payment has been made by the Board then, to the extent that it relates to such Project Operations, the invoice shall be treated as valid and payment shall be made to the sub-contractor without deduction (but without prejudice to any right to deduct or set off validly arising under the terms of the contract with the sub-contractor); and
- 57.8.2 which notifies the sub-contractor that the contract forms part of a larger contract for the benefit of the Board and that should the sub-contractor have any difficulty in securing the timely payment of an invoice that matter may be referred by the sub-contractor to the Board's Representative; and
- 57.8.3 in the same terms as this Clause 57.8 (including for the avoidance of doubt this Clause 57.8.3) subject only to modification to refer to the correct designation of the equivalent party as the supplier and recipient of the relevant Project Operations as the case may be.

57.8A

Project Co shall procure that each Key Sub-Contractor:

- 57.8A.1 in the case of the Design Team, enters into an agreement in the applicable Agreed Form of the Collateral Agreement for the applicable Design Team member in favour of the Board;
- 57.8A.2 in the case of the work packages set out in limbs (a), (h) and (i) of the definition of 'Key Sub-Contractor' enters into the applicable Agreed Form of Key Sub-Contractor Collateral Agreement in favour of the Board;
- 57.8A.3 in the case of the work packages set out in limbs (b), (c), (d), (e), (f), (l), (j), (k) and (m) of the definition of 'Key Sub-Contractor' enters into an agreement substantially in the form of the Key Sub-Contractor Collateral Agreement set out in Section 3 of Schedule Part 9 (*Collateral Agreements*) in favour of the Board;
- 57.8A.4 in the case of the work package set out in limb (g) of the definition of "Key Sub-Contractor" provides a product warranty consistent with Good Industry Practice in favour of the Board or as approved by the Board acting reasonably naming the Board as a beneficiary of such product warranty;

and that each such document is duly executed by the parties thereto (other than by the Board, where the Board is a signatory) and is delivered to the Board:

- 57.8A.5 by the date of this Agreement in the case of both (1) the Design Team referred to in Clause 57.8A.1 and (2) the work packages referred to in Clause 57.8A.2; and
- 57.8A.6 within twenty (20) Business Days after the appointment of the relevant Key Sub-Contractor by the Contractor and in any event not later than the Completion Date, in the case of the works packages referred to in Clause 57.8A.3; and
- 57.8A.7 not later than the Completion Date in the case of the work package referred to in Clause 57.8A.4;

together with a certified true copy of the relevant sub-contract between the Contractor and each member of the Design Team and/or Key Sub-contractor (save for pricing information which may be redacted) and evidence that the professional indemnity insurance (or product liability insurance, in the case of the work package referred to in Clause 57.8A.4), to be maintained by the Key Sub-Contractor in terms of the relevant sub-contract and Collateral Agreement as applicable is in place.

Replacement of a non-performing Sub-Contractor

- 57.9 On the substitution or replacement of a Service Provider due to a breach or default under a Service Contract, Project Co may elect, subject to Clause 57.11 and provided that at the time of making such election no notice of termination has been served under this Agreement, that for the purposes of Clause 40.1.8 (*Deductions*) and Clause 40.1.9 (*Warning Notices*) only, all Deductions incurred and Warning Notices served prior to the date of such substitution or replacement shall be disregarded by virtue of Clause 57.10 below.
- 57.10 If Project Co makes an election pursuant to Clause 57.9 above then, with effect from the date of substitution or replacement of the Service Provider, all Deductions incurred and Warning Notices served prior to that date shall be disregarded for the purposes of Clause 40.1.8 (*Deductions*) and Clause 40.1.9 (*Warning Notices*). For

the avoidance of doubt, the Board shall retain the right to make Deductions in accordance with Schedule Part 14 (*Payment Mechanism*) in respect of the Availability Failures and/or Performance Failures to which the Deductions and/or Warning Notices are attributable.

- 57.11 Project Co shall be entitled to make an election pursuant to Clause 57.9 on a maximum of two occasions during the Project Term.

58. OWNERSHIP INFORMATION AND CHANGES IN CONTROL

- 58.1 Project Co represents and warrants to the Board that at the date of this Agreement the legal and beneficial ownership of Project Co is as set out in Schedule Part 21 (*Project Co Information*) and that, other than any Shareholder pre-emption rights, no arrangements are in place that have or may have or result in any sale, transfer or disposal of any legal, beneficial, equitable or other interest in any or all of the shares in Project Co.

- 58.2 Project Co shall inform the Board as soon as reasonably practicable (and in any event, within thirty (30) days) of any Change in Control occurring in respect of Project Co.

- 58.3 The Board may, [REDACTED] or any time when a Project Co Event of Default is outstanding, require Project Co to inform it, as soon as reasonably practicable and in any event within thirty (30) days of receipt of the Board's request for details, of any Change in Control in respect of Project Co.

FOISA
533(1)(b)
EIR
Regulation
10(5)(e)

- 58.4 Project Co's obligations under Clauses 58.1 and 58.2 above shall, except where a legal transfer of shares has occurred be limited to the extent of Project Co's awareness having made all reasonable enquiry.

- 58.5 Subject to Clause 58.6, prior to the expiry of a period of twelve (12) months commencing on the Actual Completion Date, no Change in Control in any or all of the shares in Project Co, Hold Co, Top Co and/or Mac Co shall be permitted without the prior written approval of the Board. Any Change in Control arising as a consequence of either:

- 58.5.1 the grant or enforcement of security in favour of the Senior Funders over or in relation to any of the shares of the Project Co, provided that any document conferring security over any shares has been approved by the Board (such approval not to be unreasonably withheld or delayed); or

- 58.5.2 any sale, transfer or disposal of any legal, beneficial or equitable interest in any shares or other interests by any Shareholder or an Associate of such Shareholder (the "Transferor") to another Associate of the Transferor (the "Transferee");

- 58.5.3 any change in legal or beneficial ownership of any shares or other interests that are listed on a recognised investment exchange (as defined in section 285 of the Financial Services and Markets Act 2000);

shall be disregarded for the purpose of this Clause 58.5 above.

Where Clause 58.5.2 applies and subsequent to any such transfer (the "Original Transfer") the Transferee ceases to be an Associate of the original Transferor, it shall be a breach of this Clause 58.5 if the shares or interests which were the subject of the Original Transfer are not within twenty (20) Business Days of the Transferee ceasing to be an Associate of the original Transferor, transferred to the original Transferor or any Associate of such Transferor, except where that Transferee is both (i) a unit trust, limited partnership or fund as set out in the definition of "Associated Company" and (ii) the relevant trustee, general partner, manager or co-manager has been terminated from its appointment for default or cause in accordance with the terms of that unit trust, limited partnership or fund or its contract of appointment.

- 58.6 No Change in Control (at any time) in any or all of the shares in Project Co (or any company (other than a public quoted company whose equity securities are listed on a recognised investment exchange, as defined in section 285 of the Financial Services and Markets Act 2000) holding shares in Hold Co, Project Co or in any company (or its shareholders) holding shares in such a company (or its shareholders)) shall be permitted without the prior written approval of the Board where the person acquiring control is a Restricted Person.

59. MITIGATION

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

60. DATA PROTECTION

Data Protection

- 60.1 For the purpose of the following Clauses, the term "personal data" shall have the meaning given to it in the Data Protection Act 1998.

- 60.2 Project Co undertakes to the Board that it shall comply with the obligations of a "data controller" under the provisions of the Seventh Data Protection Principle as set out in Schedule 1 of the Data Protection Act 1998. In addition, Project Co:

60.1.1 warrants that it has, or will have at all material times, (and it shall use best endeavours to procure that all Sub-Contractors (and their agents and sub contractors of any tier have or will have at all material times) the appropriate technical and organisational measures in place against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data held or processed by it and that it has taken, or will take at all material times, all reasonable steps to ensure the reliability of any of its staff which will have access to personal data processed as part of the Project Operations;

60.2.2 undertakes that it will act only on the instructions of the Board in relation to the processing of any personal data made available by or

on behalf of the Board as part of the Project Operations;

- 60.2.3 undertakes that it will only obtain, hold, process, use, store and disclose personal data as is necessary to perform its obligations under this Agreement and (without prejudice to Clause 5.2 (*General standards*)) that such data will be held, processed, used, stored and disclosed only in accordance with the Data Protection Act 1998 and any other applicable Law; and
- 60.2.4 undertakes to allow the Board access to any relevant premises on reasonable notice to inspect its procedures described at Clause 60.2.1 above.

61. CONFIDENTIALITY

61.1 The Board shall, subject to Clause 61.2 be entitled to make the documents and information listed in this Clause 61.1 freely available to the public (which may include, without limitation, publication on the Board's website):

- 61.1.1 this Agreement;
- 61.1.2 the Independent Tester Contract;
- 61.1.3 the Collateral Agreements;
- 61.1.4 the payment and performance report;
- 61.1.5 the Financial Model (as updated from time to time in accordance with this Agreement); and
- 61.1.6 Schedule of Lifecycle Replacement; and
- 61.1.7 Not Used,

and Project Co acknowledges and agrees that, subject to the exclusion of information referred to in Clause 61.2.2, the provision or publication of the documents and information listed in this Clause 61.1 shall not give rise to any liability under the terms of this Agreement or otherwise. The Board shall notify Project Co in writing not less than ten (10) Business Days prior to any intended provision or publication of information pursuant to this Clause 61.1.

61.2

- 61.2.1 The parties agree that the provisions of this Agreement, the Financial Model and each Ancillary Document shall, subject to Clause 61.2.2 below, not be treated as Confidential Information and may be disclosed without restriction and Project Co acknowledges that the Board shall, subject to Clause 61.2.2 below, be entitled to make this

Agreement, the Financial Model and each Ancillary Document available in the public domain.

- 61.2.2 Clause 61.2.1 above shall not apply to provisions of this Agreement, the Financial Model or an Ancillary Document designated as Commercially Sensitive Information and listed in Schedule Part 26 (*Commercially Sensitive Information*) to this Agreement which shall, subject to Clause 61.3 be kept confidential for the periods specified in that Schedule Part 26 (*Commercially Sensitive Information*).
- 61.2.3 The parties shall keep confidential all Confidential Information received by one party from the other party relating to this Agreement and Ancillary Documents or the Project and shall use all reasonable endeavours to prevent their employees and agents from making any disclosure to any person of any such Confidential Information.

Permitted Disclosure

61.3 Clauses 61.2.2 and 61.2.3 shall not apply to:

- 61.3.1 any disclosure of information that is reasonably required by any person engaged in the performance of their obligations under this Agreement for the performance of those obligations;
- 61.3.2 any matter which a party can demonstrate is already or becomes generally available and in the public domain otherwise than as a result of a breach of this Clause;
- 61.3.3 any disclosure to enable a determination to be made under Schedule Part 20 (*Dispute Resolution Procedure*) or in connection with a dispute between Project Co and any of its subcontractors;
- 61.3.4 any disclosure which is required pursuant to any Law or Parliamentary obligation placed upon the party making the disclosure or the rules of any stock exchange or governmental or regulatory authority having the force of law or, if not having the force of law, compliance with which is in accordance with the general practice of persons subject to the stock exchange or governmental or regulatory authority concerned;
- 61.3.5 any disclosure of information which is already lawfully in the possession of the receiving party, prior to its disclosure by the disclosing party;
- 61.3.6 any provision of information to the parties' own professional advisers or insurance advisers or to the Senior Funders or the Senior Funders' professional advisers or insurance advisers or, where it is proposed that a person should or may provide funds (whether directly or indirectly and whether by loan, equity participation or otherwise) to Project Co to enable it to carry out its obligations under this Agreement, or may wish to acquire shares in [REDACTED] in accordance with the provisions of this Agreement to that person or their respective professional advisers but

FOISA
s 33(1)(b)
EIR
Reg 10(f)(e)

only to the extent reasonably necessary to enable a decision to be taken on the proposal;

- 61.3.7 any disclosure by the Board of information relating to the design, construction, operation and maintenance of the Project and such other information as may be reasonably required for the purpose of conducting a due diligence exercise, to any proposed new contractor, its advisers and lenders, should the Board decide to retender this Agreement; or
- 61.3.8 any registration or recording of the Consents and property registration required;
- 61.3.9 any disclosure of information by the Board to any other department, office or agency of the Government or their respective advisers or to the Scottish Futures Trust or to any person engaged in providing services to the Board for any purpose related to or ancillary to this Agreement;
- 61.3.10 any disclosure for the purpose of:
- (a) the examination and certification of the Board's or Project Co's accounts;
 - (b) any examination pursuant to section 6(1) of the National Audit Act 1983 of the economy, efficiency and effectiveness with which the Board has used its resources;
 - (c) complying with a proper request from either party's insurance adviser, or insurer on placing or renewing any insurance policies; or
 - (d) (without prejudice to the generality of Clause 61.3.4) compliance with the FOI(S)A and/or the Environmental Information (Scotland) Regulations;
- 61.3.11 disclosure pursuant to Clause 61.1; or
- 61.3.12 disclosure to the extent required pursuant to Clause 63.2;

provided that, to avoid doubt, neither Clause 61.3.10(d) nor Clause 61.3.4 above shall permit disclosure of Confidential Information otherwise prohibited by Clause 61.2.3 where that information is exempt from disclosure under section 36 of the FOI(S)A.

- 61.4 Where disclosure is permitted under Clause 61.3, other than under Clauses 61.3.2, 61.3.4, 61.3.5, 61.3.8 and 61.3.10, the party providing the information shall procure that the recipient of the information shall be subject to the same obligation of confidentiality as that contained in this Agreement.

- 61.5 Project Co shall not make use of this Agreement or any information issued or provided by or on behalf of the Board in connection with this Agreement otherwise than for the purpose of this Agreement, except with the written consent of the Board.
- 61.6 Where Project Co, in carrying out its obligations under this Agreement, is provided with information relating to any Board Party, Project Co shall not disclose or make use of any such information otherwise than for the purpose for which it was provided, unless Project Co has obtained the prior written consent of that person and has obtained the prior written consent of the Board.
- 61.7 On or before the Expiry Date, Project Co shall ensure that all documents or computer records in its possession, custody or control, which contain information relating to any patient or Board Party including any documents in the possession, custody or control of a Sub-Contractor, are delivered up to the Board.
- 61.8 The parties acknowledge that Audit Scotland has the right to publish details of this Agreement (including Commercially Sensitive Information) in its relevant reports to Parliament.
- 61.9 The provisions of this Clause 61 (*Confidentiality*) are without prejudice to the application of the Official Secrets Acts 1911 to 1989.

Announcements

- 61.10 Unless otherwise required by any Law or any regulatory or governmental authority (but only to that extent), neither party shall make or permit or procure to be made any public announcement or disclosure (whether for publication in the press, the radio, television screen or any other medium) of any Confidential Information or in the case of Project Co of its (or any Project Co Party's) interest in the Project or, in any such case, any matters relating thereto, without the prior written consent of the other party (which shall not be unreasonably withheld or delayed).

62. FREEDOM OF INFORMATION

- 62.1 Project Co acknowledges that the Board is subject to the requirements of the FOI(S)A and the Environmental Information (Scotland) Regulations and shall assist and cooperate with the Board to facilitate the Board's compliance with its Information disclosure requirements pursuant to the same in the manner provided for in Clauses 62.2 to 62.8.
- 62.2 Where the Board receives a Request for Information in relation to Information that Project Co is holding on its behalf and which the Board does not hold itself the Board shall refer to Project Co such Request for Information as soon as practicable and in any event within five (5) Business Days of receiving such Request for Information and Project Co shall:
- 62.2.1 provide the Board with a copy of all such Information in the form that the Board requires as soon as practicable and in any event within five (5) Business Days (or such other period as the Board acting reasonably may specify) of the Board's request; and

62.2.2 provide all necessary assistance as reasonably requested by the Board in connection with any such Information, to enable the Board to respond to the Request for Information within the time for compliance set out in section 10 of the FOI(S)A or Regulation 5 of the Environmental Information (Scotland) Regulations.

62.3 Following notification under Clause 62.2, and up until such time as Project Co has provided the Board with all the Information specified in Clause 62.2.1, Project Co may make representations to the Board as to whether or not or on what basis Information requested should be disclosed, and whether further information should reasonably be provided in order to identify and locate the information requested, provided always that the Board shall be responsible for determining at its absolute discretion:

62.3.1 whether Information is exempt from disclosure under the FOI(S)A and the Environmental Information (Scotland) Regulations;

62.3.2 whether Information is to be disclosed in response to a Request for Information, and

in no event shall Project Co respond directly, or allow its Sub-Contractors to respond directly, to a Request for Information unless expressly authorised to do so by the Board.

62.4 Project Co shall ensure that all Information held on behalf of the Board is retained for disclosure for the remainder of the Project Term plus an additional seven (7) years, and shall permit the Board to inspect such Information as requested from time to time.

62.5 Project Co shall transfer to the Board any Request for Information received by Project Co as soon as practicable and in any event within two (2) Business Days of receiving it.

62.6 Project Co acknowledges that any lists provided by it listing or outlining Confidential Information are of indicative value only and that the Board may nevertheless be obliged to disclose Confidential Information in accordance with the requirements of FOI(S)A and the Environmental (Scotland) Regulations.

62.7 In the event of a request from the Board pursuant to Clause 62.2 Project Co shall as soon as practicable, and in any event within five (5) Business Days of receipt of such request, inform the Board of Project Co's estimated costs of complying with the request to the extent these would be recoverable, if incurred by the Board, under section 13(1) of the FOI(S)A and the Fees Regulations. Where such costs (either on their own or in conjunction with the Board's own such costs in respect of such Request for Information) will exceed the appropriate limit referred to in section 12(1) of the FOI(S)A and as set out in the Fees Regulations (the "Appropriate Limit") the Board shall inform Project Co in writing whether or not it still requires Project Co to comply with the request and where it does require Project Co to comply with the request the ten (10) Business Days period for compliance shall be extended by such number of additional days for compliance as the Board is entitled to under section 10 of the FOI(S)A. In such case, the Board shall notify Project Co of such additional days as soon as practicable after becoming aware of them and shall reimburse Project Co for such costs as Project Co incurs in complying with the request to the extent it is itself entitled to

reimbursement of such costs in accordance with its own FOI(S)A policy from time to time.

62.8 Project Co acknowledges that (notwithstanding the provisions of Clause 61 (*Confidentiality*)) the Board may, acting in accordance with the Scottish Ministers Code of Practice on the Discharge of Functions of Public Authorities under Part 6 of the Freedom of Information (Scotland) Act 2002 (the "**Code**"), and/or having full regard to any guidance or briefings issued by the Scottish Information Commissioner or the Scottish Ministers, be obliged under the FOI(S)A, or the Environmental Information (Scotland) Regulations to disclose Information concerning Project Co or the Project:

62.8.1 in certain circumstances without consulting with Project Co; or

62.8.2 following consultation with Project Co and having taken their views into account,

provided always that where Clause 62.8.1 above applies the Board shall, in accordance with the recommendations of the Code, draw this to the attention of Project Co prior to any disclosure.

62.9 In the event that the Project Co is or becomes subject to Environmental Information (Scotland) Regulations or FOI(S)A it shall comply with its obligations under Environmental Information (Scotland) Regulations and FOI(S)A. In doing so, it will use reasonable endeavours to consult the Board before disclosing Information about them or any agreement entered into between the Board and Project Co.

63. INFORMATION AND AUDIT ACCESS

63.1 Project Co shall provide to the Board's Representative all information, documents, records and the like in the possession of, or available to, Project Co (and to this end Project Co shall use all reasonable endeavours to procure that all such items in the possession of the Contractor or any Service Providers shall be available to it and Project Co has included, or shall include, relevant terms in all contracts with the Contractor or any Service Providers to this effect) as may be reasonably requested by the Board's Representative for any purpose in connection with this Agreement.

63.2 For the purpose of:

63.2.1 the examination and certification of the Board's accounts; or

63.2.2 any examination pursuant to section 23 of the Public Finance and Accountability (Scotland) Act 2000 of the economy, efficiency and effectiveness with which the Board has used its resources,

the Auditor General for Scotland may examine such documents as he may reasonably require which are owned, held or otherwise within the control of Project Co (and Project Co shall procure that any person acting on its behalf who has such documents and/or other information shall also provide access) and may require

Project Co to produce such oral or written explanations as he considers necessary.

- 63.3. Project Co shall provide and shall procure that its Sub-Contractors shall provide such information as the Board may reasonably require from time to time to enable it to meet its obligations to provide reports and returns pursuant to regulations, directions or guidance applicable to the Board including, without limitation, reports and returns regarding the physical condition of buildings occupied by the Board, health and safety, under the firecode, relating to environmental health and to comply with requirements for the provision of information relating to achievement of customer service targets.

64. NOTICES

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

If to Project Co Address:



If to the Board Address:



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

If to Project Co's Representative Address:



If to the Board's Representative Address:



(copied in each case to the Board)

- 64.3 Either party to this Agreement (and either Representative) may change its nominated address by prior notice to the other party.

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

FOISA
§ 32 (b)
RIA Reg 11

upon delivery.

65. NO WAIVER

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

Continued effect – no waiver

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

66. NO AGENCY

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

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

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

67. ENTIRE AGREEMENT

67.1 Except where expressly provided otherwise in this Agreement, this Agreement constitutes the entire agreement between the parties in connection with its subject matter and supersedes all prior representations, communications, negotiations and understandings concerning the subject matter of this Agreement.

67.2 Each of the parties acknowledges that:

67.2.1 it does not enter into this Agreement on the basis of and does not rely, and has not relied, upon any statement or representation (whether negligent or innocent) or warranty or other provision (in any case whether oral, written, express or implied) made or agreed to by any person (whether a party to this Agreement or not) except those expressly repeated or referred to in this Agreement and the only remedy or remedies available in respect of any misrepresentation or untrue statement made to it shall be any remedy available under this

Agreement; and

67.2.2 this Clause shall not apply to any statement, representation or warranty made fraudulently, or to any provision of this Agreement which was induced by fraud, for which the remedies available shall be all those available under the law governing this Agreement.

68. THIRD PARTY RIGHTS

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

69. SEVERABILITY

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

70. CONFLICTS OF AGREEMENTS

In the event of any conflict between this Agreement and the Project Documents, the provisions of this Agreement shall prevail.

71. 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.

72. FURTHER ASSURANCE

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

73. COMMUNITY BENEFITS

73.1 Project Co shall comply with the Board's Community Benefits Requirements in accordance with Project Co's Community Benefits Method Statements.

73.2 If, in relation to the Works, Project Co does not:

73.2.1 in respect of [REDACTED]

FOISA
s 33(1)(b)
FIR
Regulation
10(5)(e)

P 129
REDACTED

FOISA § 33(1)(b)
FIR Regulation 10(5)(e)

P 130
REDACTED

any sums due pursuant to Clause 73.4; and

73.6.2 in respect of such sums as are agreed as due pursuant to Clauses 73.2.1 to 73.2.4, within sixty (60) Business Days of the Actual Completion Date, and

if the parties are unable to agree the sums due by the date upon which they are due and payable pursuant to this Clause 73.6, either party may refer the matter to the Dispute Resolution Procedure.

74. GOVERNING LAW AND JURISDICTION

74.1 This Agreement shall be considered as a contract made in Scotland and shall be subject to the laws of Scotland.

74.2 Subject to the provisions of the Dispute Resolution Procedure, both parties agree that the courts of Scotland shall have exclusive jurisdiction to hear and settle any action, suit, proceeding or dispute in connection with this Agreement and irrevocably submit to the jurisdiction of those courts.

IN WITNESS WHEREOF these presents typewritten on this and the preceding 131 pages together with the Schedule in 32 Parts and the Attachment are executed by the parties hereto as follows:

SIGNED for and on behalf of
LOTHIAN HEALTH BOARD
At LONDON
on the 12TH day
of FEBRUARY 2015
by

..... Authorised Signatory

[Redacted] Full Name
before this witness

.....Witness

[Redacted] Full Name

[Redacted] Address

[Redacted]

SIGNED for and on behalf of
the said IHS LOTHIAN LIMITED acting
under a power of attorney

at LONDON

on 13TH FEBRUARY 2015

[Redacted]

Print Full Name [Redacted]

and

[Redacted]

Print Full Name [Redacted]

*FOISA s 38(1)(b)
EIR Regulation 11.*

This is the Schedule referred to in the foregoing Agreement between Lothian Health Board and IHS Lothian Limited in relation to the re-provision of the RHSC and DCN at Little France

SCHEDULE

SCHEDULE PART 1

DEFINITIONS AND INTERPRETATION

SECTION 1

In this Agreement unless the context otherwise requires:

[REDACTED] means that area forming [REDACTED]

FOISA 33(4)(b)
EIR
510(5)(e)

"5 Year Maintenance Plan"

means the plan, to be prepared by or on behalf of Project Co, for any works for the maintenance or repair of the Facilities, including the renewal or replacement of plant or equipment as necessary, during each rolling five (5) year period for the duration of the Project Term;

"Access Areas"

means the Orange Area and the Yellow Area;

"Access Roads"

means the access roads and footpaths shown coloured pink and yellow on Plan 8;

"Access Strategy"

means the agreed interface Proposal for access to the Access Areas, as set out in Appendix 4 of Schedule Part 31 [REDACTED] Interface with Campus Site and/or Campus Facilities) and/or any proposal for access to the Access Areas agreed or determined pursuant to paragraph 1 of Section 2 (Access Areas and Amended Supplemental Drainage Proposals) of Part 2 (Interface Proposals Procedure) of Schedule Part 31 (Consort Interface with Campus Site and/or Campus Facilities);

FOISA 33(4)(b)
EIR
Regulation 11

"Account Bank Agreement"

has the meaning given to it in the Common Terms Agreement;

"Actual Commissioning End Date"

means the date specified in the Commissioning Completion Certificate issued by the Independent Tester pursuant to Clause 18.4 (Information);

"Actual Completion Date"

means the later of:

- (a) the date stated in the Certificate of Practical Completion issued by the Independent Tester pursuant to Clause 17.12 (Completion Certificate); and
- (b) subject to Clause 14.5 (Early Completion), the Completion Date;

"Actual Liability"

has the meaning given in Clause 46.7.3;

"Additional Oversail Strategy"

has the meaning given in paragraph 1 of Section 1 (Oversail) of Part 2 (Interface Proposals

FOIA 533(i)(b)
EIR 10(5)(e)

"Additional Permitted Borrowing"

Procedure) of Schedule Part 31 (Schedule Part 31 [redacted] Interface with Campus Site and/or Campus Facilities);

means on any date, the amount equal to any amount of principal outstanding under the Senior Funding Agreements (as the same may from time to time be amended, whether or not with the approval of the Board) in excess of the amount of principal scheduled under the Senior Funding Agreements at Financial Close to be outstanding at that date,

but only to the extent that:

- (a) this amount is less than or equal to the Additional Permitted Borrowings Limit; and
- (b) in respect of any Additional Permitted Borrowing the Agent is not in material breach of its obligations under clause 9.4.3 of the Funders' Direct Agreement as it applies to such Additional Permitted Borrowing,

and provided further that any such excess amount of principal which is:

- (i) invested as part of any Qualifying Change; or
- (ii) outstanding from time to time as a result of any drawing under the Senior Funding Agreements as entered into at the date of this Agreement, disregarding any subsequent amendment; or
- (iii) outstanding from time to time as a result of any amendment to the Senior Funding Agreements in respect of which the Board has agreed that its liabilities on a termination may be increased pursuant to Clause 4.3 shall not be counted as Additional Permitted Borrowing;

"Additional Permitted Borrowings Limit"

means an amount equal to:

- (a) [redacted] of the Original Senior Commitment, for any Additional Permitted Borrowing subsisting in the period from the date of Financial Close to the date on which the amount outstanding under the Senior Funding Agreements is reduced to [redacted] of the Original Senior Commitment; and thereafter
- (b) the higher of:
 - (i) [redacted] of the Original Senior

FOIA 533(i)(b)
530(c)
EIR 10(5)(e)

FOIA 533(i)(b)
530(c)
EIR 10(5)(e)

Commitment; and

- (ii) the amount of any Additional Permitted Borrowing outstanding on the last day of the period referred to in paragraph (a);

"Adjudicator"

has the meaning given in paragraph 4.1 of Schedule Part 20 (*Dispute Resolution Procedure*);

"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:

- (a) remove, transfer to another party or otherwise have a material adverse effect upon the Board'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
- (b) 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;

provided that,

- (i) in the circumstances referred to in paragraph (a), where a Change in Law would have the effect of transferring the legal capacity or obligation of the Board in relation to such material obligations to a new entity (a "**Board Substitute**"), the relevant Law shall not be an Adverse Law if:

(aa) either:

- (i) 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 Board Substitute in full (as applied to the Board as at the date of this Agreement); or

(ii) the relevant Law has the same effect in relation to the Board Substitute as the Protective Legislation; and

(bb) the relevant Law does not otherwise have any adverse material effect on the legal capacity or obligation of the Board Substitute which affects (or could reasonably be expected to affect) the Board 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 Board under this Agreement;

"Agent"	has the meaning given in the Funders' Direct Agreement;
"Amended Service Proposal"	has the meaning given in paragraph 1.1 of Section 3 (Amended Service Proposal) of Part 2 (Interface Proposals Procedure) of Schedule Part 31 (Consort Interface with Campus Site and/or Campus Facilities);
"Amended Supplemental Drainage Proposal"	has the meaning given in paragraph 2.1 of Section 2 (<i>Access Areas and Amended Supplemental Drainage Proposal</i>) of Part 2 (<i>Interface Proposals Procedure</i>) of Schedule Part 31 (<i>Consort Interface with Campus Site and/or Campus Facilities</i>);
"Ancillary Documents"	means the Construction Contract, the Service Contracts and the Performance Guarantees, the appointments of the Design Team, the appointments of the Key Sub-contractors, Interface Agreement, the Management Services Agreement (only in relation to an increase in fees relating to Schedule 2 (<i>Fees</i>) of such agreement) all as the same may be amended or replaced from time to time;
"Ancillary Rights"	means such rights as set out in Section 3 (<i>Ancillary Rights</i>) of Schedule Part 5 (<i>Land Matters</i>);
"Annual Service Payment"	has the meaning given in Schedule Part 14 (<i>Payment Mechanism</i>);
"Appendix A"	means Schedule Part 31 (<i>Consort Interface with Campus Site and/or Campus Facilities</i>);
"Approved RDD Item"	means an item of Reviewable Design Data which has been returned or has been deemed to have

been returned endorsed either "Level A – no comment" or "Level B – proceed subject to amendment as noted" by the Board's Representative pursuant to the provisions of Clause 12 (*Design, Construction and Commissioning Process*) and Schedule Part 8 (*Review Procedure*) (provided that in the case of any item of Reviewable Design Data which has been returned or has been deemed to have been returned endorsed "Level B – proceed subject to amendment as noted" Project Co has taken account of the Board's Representative's comments), as such item of Reviewable Design Data may be varied or amended from time to time in accordance with Schedule Part 16 (*Change Protocol*);

"Articles of Association"

means Project Co's articles of association, and the term "Articles" shall be construed accordingly;

"As Built Energy Model"

means Project Co's Financial Close Energy Model updated to incorporate all as built construction, commissioning and testing information and any Board agreed design amendments, as agreed with the Board prior to the Commissioning End Date;

"As Built Facilities Energy Performance"

means the Energy Performance of the Facilities, as determined by Project Co's As Built Energy Model;

"Associated Companies"

means, in relation to any person:

- (a) a company which is a Subsidiary, a Holding Company or a company that is a Subsidiary of the ultimate Holding Company of that relevant company, and in the case of Project Co shall include Hold Co, Top Co and Mac Co and each of the Shareholders; or
- (b) any unit trust, limited partnership or fund in which that person or any Holding Company or Subsidiary of that person or any Subsidiary of such Holding Company of that person is a trustee, general partner, principal, manager, co-manager or adviser,

save that for the purposes of determining whether one entity is an Associated Company of another any transfer of shares by way of security or to a nominee of the transferor shall be disregarded, and the term "Associate" shall be interpreted accordingly;

"Availability Failure"

has the meaning given in Schedule Part 14 (*Payment Mechanism*);

"Base Date"

has the meaning given in paragraph 16 of Section 2 (*Interpretation*) of Schedule Part 1 (*Definitions and Interpretation*);

"Base Senior Debt Termination Amount"	has the meaning given in Section 6 (<i>Definitions</i>) of Schedule Part 17 (<i>Compensation on Termination</i>);
"Beneficiary"	has the meaning given in Clause 49.3 (<i>Conduct of Claims</i>);
"Board Assets"	means the Retained Estate, Retained Site and any other assets and equipment or other property used by, or on behalf of, the Board or any Board Party, other than the Facilities;
"Board Change"	has the meaning given in Schedule Part 16 (<i>Change Protocol</i>);
"Board Change Notice"	has the meaning given in Schedule Part 16 (<i>Change Protocol</i>);
"Board Events of Default"	has the meaning given in Clause 39.1 (<i>Board Events of Default</i>);
"Board Observer"	means, from time to time, the individual designated as such by the Board;
"Board Party"	<p>means any:</p> <ul style="list-style-type: none"> (a) of the Board's agents, contractors (including Consort and/or any Consort Party) and sub-contractors of any tier and its or their directors, officers and employees; and/or (b) University Party performing Clinical Services, <p>each at the Facilities, with the authority of the Board but excluding Project Co, any Project Co Party and statutory undertakers and utilities and "Board Parties" shall be construed accordingly;</p>
"Board Policies"	means, subject to Clause 27.7 (<i>Board Policies</i>), the policies of the Board set out in Schedule Part 28 (<i>Board Policies</i>) as amended from time to time;
"Board Services"	<p>means:</p> <ul style="list-style-type: none"> (a) the Clinical Services; (b) the Non-Clinical Services; (c) a catering service comprising a restaurant, grab and go kiosks, vending machines and trolley services, (d) retail premises for the sale of goods which are ordinarily sold in hospitals; (e) display of works of art for exhibition and/or sale within the Site;

	(f) any Volunteer Services;
	(f) the holding of an occasional fete, tombola and raffle for charitable fund raising purposes within the Site;
	(e) Teenager Cancer Trust Activities,
	and such other services as may be notified to Project Co by the Board from time to time which are not services to be carried out by Project Co under this Agreement;
"Board Specified Group 1 Equipment"	means the Group 1 Equipment to be specified by the Board as listed in Appendix 3 (<i>Board Specified Group 1 Equipment</i>) in Schedule Part 11 (<i>Equipment</i>);
"Board Specified Group 1 Equipment Specifications"	means the specifications for the Board Specified Group 1 Equipment as set out in Appendix 4 (<i>Board Specified Group 1 Equipment Specifications</i>) of Schedule Part 11 (<i>Equipment</i>);
"Board's Commissioning"	means the Board's pre-completion commissioning activities to be carried out by the Board in accordance with Clause 17 (<i>Pre-Completion Commissioning and Completion</i>);
"Board's Community Benefits Requirements"	means those requirements set out in Section 1 of Schedule Part 32 (<i>Community Benefits</i>);
"Board's Construction Requirements"	means the requirements of the Board set out or identified in Section 3 (<i>Board's Construction Requirements</i>) of Schedule Part 6 (<i>Construction Matters</i>) as amended from time to time in accordance with the terms of this Agreement;
"Board's Maintenance Obligations"	has the meaning given in Clause 23.13 (<i>Board's Maintenance Obligations</i>);
"Board's Post Completion Commissioning"	means the Board's post-completion commissioning activities to be carried out by the Board in accordance with Clause 18.1 (<i>Post Completion Commissioning</i>);
"Board's Representative"	means the person so appointed by the Board pursuant to Clause 8 (<i>Representatives</i>);
"Borrower Loan Note"	has the meaning given to it in the Common Terms Agreement;
"Bus Stop Infrastructure"	means the infrastructure resulting from the Bus Stop Works;
"Bus Stop Works"	means the design (including preparation of all Design Data), construction, testing and commissioning and completion of the bus stop works to be undertaken in accordance with paragraph 4.5.10(e)(i) of the Board's Construction Requirements;

"Business Day"	means a day other than a Saturday, Sunday or a bank holiday in Edinburgh;
"Campus Facilities"	means the Facilities and Retained Estate;
"Campus Parties"	<p>POISA 530(c) 530(d) EIR Reg 11</p> means the Board and/or Board Parties and/or [redacted] and/or [redacted] and/or the [redacted] and/or the [redacted] and each of their tenants or any party authorised by the same;
"Campus Site"	means the land shown outlined in red on Plan 7 including for the avoidance of doubt the Site and the University Site;
"Capital Expenditure"	means capital expenditure (as such term is interpreted in accordance with generally accepted accounting principles in the United Kingdom from time to time);
"Car Park E"	means the area of land the extent of which is shown delineated in a broken red line on Plan 3 and the location of which within the Campus Site is shown on Plan 5;
"CDM Regulations"	has the meaning given in Section 2 (<i>Safety During Construction</i>) of Schedule Part 6 (<i>Construction Matters</i>);
"Certificate of Practical Completion"	means a certificate in the relevant form set out in Schedule Part 22 (<i>Certificates</i>);
"Change"	has the meaning given in Schedule Part 16 (<i>Change Protocol</i>);
"Change in Control"	means: <ul style="list-style-type: none"> (a) any sale or other disposal of any legal, beneficial or equitable interest in any or all of the equity share capital of a corporation (including the control over the exercise of voting rights conferred on that equity share capital, control over the right to appoint or remove directors or the rights to dividends); and/or (b) any other arrangements that have or may have or which result in the same effect as paragraph (a) above;
"Change in Law"	means the coming into effect or repeal (without re-enactment or consolidation) in Scotland 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 Scotland in each case after the date of this Agreement;
"Clinical Clean"	has the meaning given to it in paragraph 4 (<i>Clinical Clean</i>) of Appendix B (<i>Completion Criteria</i>) of Schedule Part 10 (<i>Outline</i>);

	<i>Commissioning Programme</i>);
"Clinical Services"	means: (a) the management, responsibility, administration and carrying out of the clinical and medical services provided at the Facilities by or on behalf of the Board from time to time; (b) the provision of training and education required to deliver the services referred to in paragraph (a) above, and which are not services to be provided by Project Co to the Board under this Agreement;
"Collateral Agreements"	means the Contractor's Collateral Agreement, the Service Providers' Collateral Agreements and the Key Sub-Contractor Collateral Agreements;
"Commencement Date"	means the last day of execution of this Agreement;
"Commercially Sensitive Information"	means the sub set of Confidential Information listed in column 1 of Part 1 (<i>Commercially Sensitive Contractual Provisions</i>) and column 1 of Part 2 (<i>Commercially Sensitive Material</i>) of Schedule Part 26 (<i>Commercially Sensitive Information</i>) in each case for the period specified in column 2 of Parts 1 and 2 of Schedule Part 26 (<i>Commercially Sensitive Information</i>);
"Commissioners"	has the meaning given in Clause 35.3 (<i>VAT</i>);
"Commissioning Completion Certificate"	means a certificate in the relevant form set out in Schedule Part 22 (<i>Certificates</i>);
"Commissioning End Date"	means the date by which the parties' commissioning activities are programmed to be completed in accordance with the Final Commissioning Programme;
"Common Terms Agreement"	means the common terms agreement dated on or about the date of this Agreement between, amongst others, Project Co, the Senior Funders, the Senior-Subordinated On-Loan Lenders, the Intercreditor Agent and the Security Trustee;
"Compensation Event"	has the meaning given in Clause 29.10 (<i>Compensation</i>);
"Compensation Payment"	has the meaning given in Clause 46.10 (<i>Compensation on Termination</i>);
"Completion Criteria"	means the Completion Tests as defined in Appendix B of Schedule Part 10 (<i>Outline Commissioning Programme</i>);

"Completion Date"

FOISA
§ 33(1)(b)
EIR
Regulation 10(5)(e)

means [redacted] such revised date as may be specified by the Board's Representative pursuant to Clause 29 (*Delay Events*) or such other date as may be agreed by the parties;

"Completion Process"

has the meaning given to it in Schedule Part 10 (*Outline Commissioning Programme*);

"Confidential Information"

means:

- (a) information that ought to be considered as confidential (however it is conveyed or on whatever media it is stored) and may include information whose disclosure would, or would be likely to, prejudice the commercial interests of any person, trade secrets, Intellectual Property Rights and know-how of either party and all personal data and sensitive personal data within the meaning of the Data Protection Act 1988 and

- (b) Commercially Sensitive Information;

"Connection Area"

means the area of land shown shaded blue on Plan 2;

"Connection Proposal"

FOISA § 33(1)(b)
EIR 10(5)(e)

means the agreed Interface Proposal for connection information relating to the connection from the Facilities to the Link Building, as set out in Appendix 8 of Schedule Part 31 [redacted] *Interface with Campus Site and/or Campus Facilities*);

"Consents"

means all permissions, consents, approvals, certificates, permits, licences, statutory agreements and authorisations required by Law, and all necessary consents and agreements from any third parties (including, without limitation, any Planning Permission), needed to carry out the Project Operations in accordance with this Agreement;

[redacted]

FOISA
§ 33(1)(b)
§ 30(c)
EIR Reg 10(5)(e)

[redacted]

[redacted]

[redacted]

"Construction Access"

as defined in paragraph 1.1 of Section 1 (*Construction Access*) of Part 1 (*Interface*

	<i>Construction Issues and Interface Proposals</i>) of Schedule Part 31 (<i>Consort Interface with Campus Site and/or Campus Facilities</i>);
"Construction Access Proposal"	means the agreed Interface Proposal for construction access to the Site over the Yellow Area and/or Petrol Station Site, as set out in Appendix 1 of Schedule Part 31 (<i>Consort Interface with Campus Site and/or Campus Facilities</i>);
"Construction Contract"	means the design and build contract dated the same date as this Agreement between Project Co and the Contractor (which, as at the date of this Agreement, is in the Agreed Form) as amended or replaced from time to time in accordance with this Agreement;
"Construction Phase"	means the period from and including the date of execution of this Agreement to and including the Actual Completion Date;
"Construction Quality Plan"	means the document at Section 8 (<i>Quality Plans (Design and Construction)</i>) of Schedule Part 6 (<i>Construction Matters</i>);
"Construction Skills Certification Scheme"	means the scheme operated by Construction Skills Certification Scheme Limited (registered under number 03024675) to evidence the identity and skills and competence of persons employed on construction sites;
"Contamination"	means all or any pollutants or contaminants, including any chemical or industrial, radioactive, dangerous, toxic or hazardous substance, waste or residue (whether in solid, semi-solid or liquid form or a gas or vapour) and including without limitation genetically modified organisms;
"Contract Manager"	means the person so appointed by the Board and notified to Project Co from time to time;
"Contract Month"	means a calendar month provided that: <ul style="list-style-type: none"> (a) the first Contract Month shall be the period from and including the Payment Commencement Date to and including the last day of the calendar month in which the Payment Commencement Date falls; and (b) the last Contract Month shall be the period from and including the first day of the calendar month in which the Expiry Date or Termination Date (as the case may be) falls to and including the Expiry Date or the Termination Date (as the case may be);
"Contract Year"	means: <ul style="list-style-type: none"> (a) for the first Contract Year, the period from

the date of this Agreement to the subsequent 31 March; and


- (b) for all subsequent Contract Years, the period of twelve (12) calendar months commencing on each anniversary of 1 April,

provided that the final Contract Year shall be such period as commences on 1 April and ends on and includes the date of expiry or earlier termination of this Agreement (as the case may be);

"Contracting Associate"

means the Contractor, any Service Provider and any other entity which performs on behalf of Project Co any material function in connection with this Agreement or the Project Operations;

"Contractor"

means  engaged by Project Co to carry out the Works and any substitute design and/or building contractor engaged by Project Co as may be permitted by this Agreement;

FOISA
575 (10)

"Contractor's Collateral Agreement"

means a collateral agreement among the Board, Project Co and the Contractor in the form set out in Section 1 of Schedule Part 9 (*Collateral Agreements*);

"Contractor's Site Manager"

means the manager to be appointed by the Contractor for purposes of supervision of all day-to-day activities on the Site and/or Off-Site;

"Contractor's Site Rules"

means the Contractor's rules, applicable on the Site and/or Off-Site to the Board, Project Co, the Contractor and their respective sub-contractors and suppliers of every tier during the construction of the Facilities and the Retained Estate Handback Infrastructure;

"Convictions"

means, other than in relation to minor road traffic offences, any previous or pending prosecutions, convictions, cautions and binding-over orders (including any spent convictions as contemplated by section 1(1) of The Rehabilitation of Offenders Act 1974 by virtue of the exemptions specified in Part II of Schedule 1 of the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (SI 1975/1023) and the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Order 2003 Scottish SI 2003/231) or any replacement or amendment to those Orders);

"Cycle Path Infrastructure"

means the infrastructure resulting from the Cycle Path Works;

"Cycle Path Works"

means the design (including preparation of all Design Data), construction, testing and

commissioning and completion of the works to be undertaken on the cycle path and reconfigure the landscaped areas in accordance with inter alia paragraphs 3.8.4 and 4.5.10C of the Board's Construction Requirements;

"Deduction"

means a deduction to be made in calculating a Monthly Service Payment, calculated in accordance with Section 3 (*Deductions from Monthly Service Payments*) of Schedule Part 14 (*Payment Mechanism*);

"Deemed Liability"

has the meaning given in Clause 46.7.3 (*Compensation on Termination*);

"Default Interest"

means any increased margin that is payable to the Senior Funders or which accrues as a result of any payment due to the Senior Funders not being made on the date on which it is due;

"Default Interest Rate"

[Redacted]

FOISA
s 33(1)(b)
s 30(c)

"Defects"

means any defect or fault in the Works and/or the Facilities and/or the Retained Estate Handback Infrastructure (not being a Snagging Matter) which occurs due to a failure by Project Co to meet the Board's Construction Requirements and/or Project Co's Proposals or otherwise to comply with its obligations under this Agreement;

EIR
Reg 1c(5)(e)

"Delay Event"

has the meaning given in Clause 29.3 (*Delay Events*);

"Derogated Low Value Change"

has the meaning given in Schedule Part 16 (*Change Protocol*);

"Design Data"

means all drawings, reports, documents, plans, software, formulae, calculations and other data relating to the design, construction, testing and/or operation of the Facilities and/or the Retained Estate Handback Infrastructure;

"Design Quality Plan"

means the document at Section 8 (*Quality Plans (Design and Construction)*) of Schedule Part 6 (*Construction Matters*);

"Design Team"

means:

[Redacted]

FOISA s 33(1)(b)
EIR Reg 11

[Redacted]

POISA § 38 (1)(b).

WIR Reg. 11.

REDACTED

"Direct Losses"

means, subject to the provisions of Clause 54.1 (*Exclusions*), all damage, losses, liabilities, claims, actions, costs, expenses (including the cost of legal or professional services, legal costs being on an agent/client, client paying basis), proceedings, demands and charges whether arising under statute, contract or at common law

but, to avoid doubt, excluding:

(a) Indirect Losses

FOISA s 33(1)(b)
RIR 10(6)(e)

“Disclosed Data”

means any Design Data and any other written information, data and documents made available or issued to Project Co or any Project Co Party in connection with the Project by or on behalf of the Board (or any Board Party) whether on, before or after the execution of this Agreement;

“Discriminatory Change in Law”

means any Change in Law the effect of which is to discriminate directly against:

- (a) hospitals whose design, construction, financing and operation are procured under the private finance initiative in relation to other similar projects; or
- (b) companies undertaking projects procured by contracts under the private finance initiative in relation to other companies undertaking similar projects;
- (c) the Facilities or the Retained Estate Handback Works in relation to other similar facilities; or
- (d) Project Co in relation to other companies,

save:

- (i) where such Change in Law is in response to any act or omission on the part of Project Co which is illegal (other than an act or omission rendered illegal by virtue of the Change in Law itself);
- (ii) that such action shall not be deemed to be discriminatory solely on the basis that its effect on Project Co is greater than its effect on other companies; and
- (iii) that a change in taxes or the introduction of a tax affecting companies generally or a change in VAT shall be deemed not to be discriminatory in any circumstances (to avoid doubt, such changes being given effect in accordance with Clause 35 (*VAT and Construction Industry*)).

Tax Deduction Scheme);

"Dispute"	has the meaning given in paragraph 1 of Schedule Part 20 (<i>Dispute Resolution Procedure</i>);
"Dispute Resolution Procedure"	means the procedure set out in Schedule Part 20 (<i>Dispute Resolution Procedure</i>);
§ 32(1)(b) EIR Reg 10(5)(e) [redacted] Senior Finance Contract"	has the meaning given to it in the Common Terms Agreement;
[redacted] Senior Subordinated Finance Contract"	has the meaning given to it in the Common Terms Agreement;
[redacted] Senior Subordinated On-Loan Agreement"	has the meaning given to it in the Common Terms Agreement;
"EIB Senior Subordinated On-Loan Lender"	has the meaning given to that term in the Common Terms Agreement;
"Emergency"	means an event causing or, in the reasonable opinion of a party, threatening to cause death or injury to any individual, or serious disruption to the lives of a number of people or extensive damage to property, or contamination of the environment, in each case on a scale beyond the capacity of the emergency services or preventing the Services operating under normal circumstances and requiring the mobilisation and organisation of the emergency services;
"Encumbrance"	means any option, right of pre-emption, pledge, security, interest, lien, charge, mortgage, lease, licence, claim, condition, retention or other encumbrance or restriction whether imposed by agreement, by law or otherwise;
"Endorsed RDD Item"	has the meaning given in Part 1 (<i>Endorsed RDD Item – Level A or B but subject to re-submission to the Board through Schedule Part 8 (Review Procedure)</i>) of Section 5 (<i>Reviewable Region Data</i>) of Schedule Part 6 (<i>Construction Matters</i>);
"Energy Model"	means Project Co's approved software energy model used to inform compliance of Project Co's Proposals with the Energy Performance criteria;
"Energy Performance"	means the Board's requirements in relation to achieving a minimum performance for BREEAM credit ENE 01 and a minimum Energy Performance Certificate rating, as set out in the Board's Construction Requirements;
"Environmental Information (Scotland) Regulations"	means the Environmental Information (Scotland) Regulations 2004 together with any guidance and/or codes of practice issued by the Scottish Information Commissioner or relevant Government Department in relation to such regulations;

"Equipment"	means the Group 1 Equipment, the Group 2A Equipment, the Group 2B Equipment and/or the Group 3 Equipment;
"Equipment Responsibilities Matrix"	means the equipment responsibilities matrix set out in Appendix 2 of Schedule Part 11 (<i>Equipment</i>);
"Equipment Schedule"	means the equipment schedule set out in Appendix 1 to Schedule Part 11 (<i>Equipment</i>);
"Equity Documents"	has the meaning given to it in the Common Terms Agreement;
"Equity Funding Date"	means [redacted] or such earlier date for accelerated equity funding in accordance with the terms of the Finance Documents or Senior Subordinated Finance Documents, as such are defined in the Intercreditor Agreement;
FOISA 533(1)(b) EIR Reg 10(5)(e)	
"Estimated Deductions"	has the meaning given in Clause 34.2.1 (<i>Invoicing and Payment Arrangements</i>);
"Estimated Increased Maintenance Costs"	has the meaning given in Clause 23.7 (<i>Programmed and Unprogrammed Maintenance</i>);
"Excusing Cause"	has the meaning given in Clause 51.2 (<i>Excusing Causes</i>);
"Expiry Date"	means [redacted]
FOISA § 33(1)(b)	
"Facilities"	means the buildings and other facilities, together with all supporting infrastructure (including the Plant and the Group 1 Equipment), external hard-standings, specialist surfaces and other amenities located on the Site and Off-Site (excluding the Retained Estate Handback Infrastructure but including as a minimum all aspects detailed within Appendix B to Section 1 (<i>Service Level Specification</i>) of Schedule Part 12 (<i>Service Requirements</i>)), as required to enable Project Co to comply with its obligations under this Agreement, all as the same may be varied, amended or supplemented from time to time in accordance with this Agreement;
EIR Reg 10(5)(e)	
"Facility Manager"	means Project Co's duty manager who shall be present at the Facilities in accordance with the Service Level Specification;
"Fee Letter"	has the meaning given to it in the Common Terms Agreement;
"Fees Regulations"	means the Freedom of Information (Fees for Required Disclosure (Scotland)) Regulations 2004;
"Final Commissioning Programme"	means the programme jointly developed and agreed by the Board and Project Co in accordance with the provisions of Clause 17.1 (<i>Pre-completion Commissioning and</i>

	<i>Completion</i>);
"Financial Close"	means the date of this Agreement;
"Financial Close Energy Model"	means Project Co's Energy Model as agreed with the Board at Financial Close to inform compliance of Project Co's Proposals with the Board's Energy Performance requirements for the Facilities as detailed in Section 3 (<i>Board's Construction Requirements</i>) of Schedule Part 6 (<i>Construction Matters</i>);
"Financial Model"	means the computer spreadsheet model for the Project incorporating statements of Project Co's cashflows including all expenditure, revenues, financing and taxation of the Project Operations together with the profit and loss accounts and balance sheets for Project Co throughout the Project Term accompanied by details of all assumptions, calculations and methodology used in their compilation and any other documentation necessary or desirable to operate the model, as amended from time to time in accordance with the terms of Clause 37 (<i>Financial Model</i>), a copy of which is attached to this Agreement on disk as Attachment 1;
"Finishes"	means those finishes listed in the table set out in paragraph 1.2.3 of Schedule Part 8 (<i>Review Procedure</i>);
"Finishes Proposal Date"	means, in relation to a Finish, the relevant date identified in the table set out in paragraph 1.2.3 of Schedule Part 8 (<i>Review Procedure</i>);
"Finishes Selection Date"	means, in relation to a Finish, the relevant date identified in the table set out in paragraph 1.2.3 of Schedule Part 8 (<i>Review Procedure</i>);
"Fire Alarm System"	means the fire alarm system to be installed as part of the Works and thereafter maintained by Project Co as more fully described in paragraph 4.5.10(A) of the Board's Construction Requirements;
"First Party"	has the meaning given in Clause 35.3 (<i>VAT</i>);
"FOI(S)A"	means the Freedom of Information (Scotland) Act 2002 and any subordinate legislation (as defined in section 73 of the Freedom of Information (Scotland) Act 2002) made under the Freedom of Information (Scotland) Act 2002 from time to time together with any guidance and/or codes of practice issued by the Scottish Information Commissioner or relevant Government department in relation to such Act;
"Force Majeure"	has the meaning given in Clause 31 (<i>Force Majeure</i>);
"Foul Service Strip"	means the area shaded yellow and hatched black

"Foul Water Drainage"

on Plan 2A;

means the foul water drainage to be installed as part of the Works and thereafter maintained by Project Co, as more fully described in paragraphs 4.5.10 (*Construction Works Further Information*), 6.11 (*Drainage*) and 8.7.20 (*Drainage*) of Sub Section 1A of the Board's Construction Requirements;

"Functional Area"

means an area of the Facilities identified as such in Appendix 2 to Schedule Part 14 (*Payment Mechanism*);

"Funders"

FOISA s38(1)(b)
EIR Reg 11

means all or any of the persons who provide financing or funding in respect of the Project Operations under the Funding Agreements



and, where the context so permits, prospective financiers or funders;

"Funders' Direct Agreement"

means the agreement to be entered into between the Board, the Senior Funders and Project Co in the form set out in Schedule Part 4 (*Funders' Direct Agreement*);

"Funders' Contractor Direct Agreement"

has the meaning given to the term "Construction Contract Direct Agreement" in the Common Terms Agreement;

"Funders' Service Provider Direct Agreement"

has the meaning given to the term "Service Provider Direct Agreement" in the Common Terms Agreement;

"Funding Agreements"

means all or any of the agreements or instruments to be entered into by Project Co or any of its Associates relating to the financing of the Project Operations (including the Initial Funding Agreements and any agreements or instruments to be entered into by Project Co or any of its Associates relating to the rescheduling of their indebtedness or the refinancing of the Project Operations);

"Funding Default"

means a Default, as such term is defined in the Common Terms Agreement;

"Good Industry Practice"

means using standards, practices, methods and procedures conforming to the Law and exercising that degree of skill and care, diligence, prudence and foresight which would reasonably and ordinarily be expected from a skilled and experienced person engaged in a similar type of undertaking under the same or similar circumstances;

"Government"

means the government of the United Kingdom or the Scottish Ministers;

"Ground Physical and Geophysical" means the investigation procured by the Board

Investigation"	<p><i>DATES</i> dated [REDACTED] all</p>
	<p>the conditions of and surrounding the Site and of any extraneous materials in, on or under the Site (including its surface and subsoil) to enable the Facilities (other than those parts of the Facilities to be constructed Off-Site) to be designed and constructed and the Works to be carried out with due regard for those conditions and the seismic activity (if any) in the region of the Site;</p>
"Group 1 Equipment"	<p>means the equipment indicated as 1 in the "Group" column of the Appendix 1 (<i>Equipment Schedule</i>) of Schedule Part 11 (<i>Equipment</i>), including for the avoidance of doubt the Board Specified Group 1 Equipment and any Replacement Board Specified Group 1 Equipment;</p>
"Group 2A Equipment"	<p>means the equipment indicated as 2A in the "Group" column of the Appendix 1 (<i>Equipment Schedule</i>) of Schedule Part 11 (<i>Equipment</i>);</p>
"Group 2B Equipment"	<p>means the equipment indicated as 2B in the "Group" column of the Appendix 1 (<i>Equipment Schedule</i>) of Schedule Part 11 (<i>Equipment</i>);</p>
"Group 3 Equipment"	<p>means the equipment indicated as 3 in the "Group" column of the Appendix 1 (<i>Equipment Schedule</i>) of Schedule Part 11 (<i>Equipment</i>);</p>
"H&S Conviction"	<p>has the meaning given in Clause 40.1.5 (<i>Health and Safety</i>);</p>
"Handback Amount"	<p>has the meaning given in Schedule Part 18 (<i>Handback Procedure</i>);</p>
"Handback Bond"	<p>has the meaning given in Schedule Part 18 (<i>Handback Procedure</i>);</p>
"Handback Certificate"	<p>means the certificate of confirmation that the Facilities comply with the Handback Requirements in the relevant form set out in Schedule Part 18 (<i>Handback Procedure</i>);</p>
"Handback Programme"	<p>has the meaning given in Schedule Part 18 (<i>Handback Procedure</i>);</p>
"Handback Requirements"	<p>has the meaning given in Schedule Part 18 (<i>Handback Procedure</i>);</p>
"Handback Works"	<p>has the meaning given in Schedule Part 18 (<i>Handback Procedure</i>);</p>
"Handover Clean"	<p>has the meaning given in paragraph 3 (<i>Handover Clean</i>) of Appendix B (<i>Completion Criteria</i>) of Schedule Part 10 (<i>Outline Commissioning Programme</i>);</p>
"Hatched Orange Area"	<p>means the areas of land shown coloured orange and hatched in black on Plan 2, which form part</p>

	of the Orange Area;
"Health and Safety Regime"	means the Food Safety Act 1990 (and associated regulations), the Health & Safety at Work etc Act 1974 (and associated regulations), the Fire Precautions Act 1971, the Environmental Protection Act 1990 and the Water Industry (Scotland) Act 2002 and any similar or analogous health, safety or environmental legislation in force from time to time;
"Health Board"	means a health board established under section 2 of the National Health Service (Scotland) Act 1978 (or any successor body to any such body established with substantially the same powers or duties);
"High Value Change Stage 2 Submission"	has the meaning given in Schedule Part 16 (<i>Change Protocol</i>);
"Hold Co"	means IHS Lothian Holdings Limited (company number 09360660);
"HoldCo Loan Note"	has the meaning given to it in the Common Terms Agreement;
"Holding Company"	has the meaning given to it in section 1159 of the Companies Act 2006;
"Hospital Square"	means the areas shaded orange and hatched black on Plan 2, which form part of the Orange Area;
"Hospital Square Infrastructure"	means the infrastructure resulting from the Hospital Square Works;
"Hospital Square Works"	means the design (including preparation of all Design Data), construction, testing and commissioning and completion of the works to be undertaken in Hospital Square in accordance with inter alia paragraph 4 (<i>Site Specific Requirements</i>) of Sub-Section C of the Board's Construction Requirements;
"Hours for Programmed Maintenance"	has the meaning given in Appendix 2 of Schedule Part 8 (<i>Review Procedure</i>);
"Hours of Operation"	has the meaning given in Appendix 2 of Schedule Part 8 (<i>Review Procedure</i>);
"ICT"	means the information communications technology to be installed as part of the Works and thereafter maintained by Project Co, as more fully described in paragraph 9 (<i>Information and Communication Technology (ICT) Requirements</i>) of Sub-Section C of Board's Construction Requirements;
"Indemnifier"	has the meaning given in Clause 49.3 (<i>Conduct of Claims</i>);

"Indemnity Period"	has the meaning given to it in Schedule Part 15 (<i>Insurance Requirements</i>);
"Independent Tester"	means [REDACTED] such substitute independent tester as may be permitted pursuant to this Agreement;
FOISA s 38 (1)(b) EIR Reg 11	
"Independent Tester Contract"	means the contract dated the same date as this Agreement in the form set out in Schedule Part 13 (<i>Independent Tester Contract</i>) or any replacement thereof among Project Co, the Board and the Independent Tester;
"Indirect Losses"	has the meaning given in Clause 54.1 (<i>Exclusions and Limits on Liability</i>);
"Information"	has the meaning given under section 73 of the Freedom of Information (Scotland) Act 2002;
"Initial Drainage Proposal"	means the proposal in regard to works to install new Surface Water Drainage Works connections from the Site to the surface water drainage within the RIE Site detailed in Appendix E of the Board's Construction Requirements;
"Initial Funding Agreements"	means the Common Terms Agreement, the Intercreditor Agreement, the Institutional Investor Senior Facility Agreement, the [REDACTED] Senior Finance Contract, the Institutional Investor Senior Subordinated Facility Agreement, the [REDACTED] Senior Subordinated Finance Contract, the Topco Institutional Investor On-Loan Agreement, the Topco [REDACTED] On-Loan Agreement, the Institutional Investor Senior Subordinated On-Loan Agreement, the [REDACTED] Senior Subordinated On-Loan Agreement, the Account Bank Agreement, the Funders' Direct Agreement, the Funders' Contractor Direct Agreement, Funders' Service Provider Direct Agreement, each Fee Letter, each Security Document, the Equity Documents and each Senior Subordinated Security Document in the Agreed Form;
FOISA s 38 (1)(b) EIR Reg 11	
"Insurance Proceeds Account"	means the account [REDACTED] in the joint names of Project Co and the Board with the Account Bank (as defined in the Common Terms Agreement);
FOISA s 38 (1)(b) EIR Reg 11	
"Insurance Proceeds Account Agreement"	means the agreement in the form set out in Schedule Part 25 (<i>Insurance Proceeds Account Agreement</i>);
"Insurance Term"	means any term and/or condition required to be included in a policy of insurance by Clause 53 (<i>Insurance</i>) and/or Schedule Part 15 (<i>Insurance Requirements</i>) but excluding any risk;
"Insurances"	means, as the context requires, all or any of the insurances required to be maintained by Project

	Co pursuant to this Agreement;
"Intellectual Property"	means all registered or unregistered trademarks, service marks, patents, registered designs, utility models, applications for any of the foregoing, copyrights, unregistered designs, the sui generis rights of extraction relating to databases, trade secrets and other confidential information or know-how;
"Intellectual Property Rights"	means the Intellectual Property which (or the subject matter of which) is created, brought into existence, acquired, used or intended to be used by Project Co, any Project Co Party or by other third parties (for the use by or on behalf of or for the benefit of Project Co) for the purposes of the design or construction of the Facilities and the Retained Estate Handback Infrastructure, the operation, maintenance, improvement and/or testing of the Facilities and Retained Estate Handback Infrastructure or the conduct of any other Project Operation or otherwise for the purposes of this Agreement;
"Intercreditor Agent"	has the meaning given to it in the Common Terms Agreement;
"Interface Agreement"	means an interface agreement of even date between Project Co, the Contractor and the Service Provider;
"Interface Output Specification"	means the document detailing interfaces between the Facilities and the Link Building and/or the RIE Facilities set out in Appendix B of the Board's Construction Requirements;
"Interface Proposals"	means any of the Access Strategy, Connection Proposal, Construction Access Proposal, Oversail Strategy, Service Proposal, Supplemental Drainage Proposal, Traffic Management Strategy, and any strategy or proposal agreed or determined pursuant to the terms of Part 2 (<i>Interface Proposals Procedure</i>) of Schedule Part 31 (<i>Consort Interface with Campus Site and/or Campus Facilities</i>), which Interface Proposals form part of Project Co's Proposals and Method Statements;
"Intercreditor Agent"	has the meaning given to it in the Common Terms Agreement;
"Intercreditor Agreement"	has the meaning given to it in the Common Terms Agreement;
"Institutional Investor Senior Facility Agreement"	has the meaning given to it in the Common Terms Agreement;
"Institutional Investor Senior Lender"	has the meaning given to it in the Common Terms Agreement;
"Institutional Investor Senior Subordinated Facility Agreement"	has the meaning given to it in the Common Terms Agreement;

"Institutional Investor Senior Subordinated On-Loan Agreement"	has the meaning given to it in the Common Terms Agreement;
"Institutional Investor Senior Subordinated On-Loan Lender"	has the meaning given to it in the Common Terms Agreement;
"Interim Project Report"	means a report prepared by Project Co setting out all information which Project Co is required to provide to the Senior Funders in respect of a Funding Default;
"IT"	means information technology systems, hardware and software;
"Joint"	means the isolation/movement joint within the Connection Area between the Facilities and the Link Building, as more particularly referred to at paragraph 2.3 of the Interface Output Specification;
"Key Sub-Contractor"	<p>means the sub-contractors, including the Design Team, appointed to complete the following works packages:</p> <ul style="list-style-type: none"> (a) mechanical and electrical engineering and PTS; (b) connections design only in relation to primary steelwork and secondary steelwork; (c) roofing (excluding green and bituminous ballast/slab roofs) ; (d) cladding and windows (to the extent that design liability is not covered by the package set out in limb (e) of this definition); (e) curtain walling and windows(to the extent that design liability is not covered by the package set out in limb (d) of this definition); (f) structural glass (glazed balustrades); (g) helipad; (h) lifts; (i) piling; (j) SFS; (k) external canopies; (l) precast concrete (stairs, landings and edge beams only); and (m) catering facilities;
"Key Sub-Contractor Collateral Agreements"	<p>means:</p> <ul style="list-style-type: none"> (1) the Agreed Form Collateral Agreements between the members of the Design Team and the Board referred to in Clause 57.8A.1 of this

Agreement; and

(2) the Agreed Form Collateral Agreements among the Board the Contractor and the Key Sub-Contractors referred to in Clause 57.8A.2 of this Agreement; and

(3) the Collateral Agreements among the Board, the Contractor and the Key Sub-Contractors referred to in Clause 57.8A.3 of this Agreement substantially in the form set out in Section 3 of Schedule Part 9 (*Collateral Agreements*); and

(4) the product warranty to be provided to the Board in accordance with Clause 57.8A.4 of this Agreement.

"Law"

means:

- (a) any applicable statute or proclamation or any delegated or subordinate legislation;
- (b) any enforceable community right within the meaning of section 2(1) of the European Communities Act 1972;
- (c) any applicable guidance, direction or determination with which the Board and/or Project Co is bound to comply to the extent that the same are published and publicly available or the existence or contents of them have been notified to Project Co by the Board; and
- (d) any applicable judgement of a relevant court of law which is a binding precedent in Scotland,





in each case in force in Scotland;

"LIBOR"

means the rate per annum administered by ICE Benchmark Administration Limited (or any other person which takes over the administration of that rate) for six month sterling deposits in the London interbank market displayed (before any correction, recalculation or republication by the administrator) on pages LIBOR01 or LIBOR02 of the Thomson Reuters screen (or any appropriate replacement screen which displays that rate) and if, in either case, that rate is less than zero, LIBOR shall be deemed to be zero;

"Lifecycle Replacement"

means any works for the renewal or replacement of any Plant, Group 1 Equipment, or any other equipment or asset or part of the Facilities that are necessary to ensure that the Facilities are maintained in accordance with the Service Level

	Specification and Method Statements and that the Facilities comply with the Board's Construction Requirements and Project Co's Proposals throughout the Project Term;
"Link Building"	means the extension to the RIE Facilities constructed or to be constructed within the Connection Area by or on behalf of the Board pursuant to the Interface Output Specification;
"Little France Campus Working Group"	has the meaning given to it in Clause 8A.1 (<i>Little France Campus Working Group</i>);
"Little France Campus Working Group Parties"	means the Board, Consort, the University, Project Co and the relevant Sub-Contractor;
"Little France Steading"	means subjects extending to 0.242 hectares forming Little France Steading shown outlined in red on Plan 10;
"Low Value Change"	has the meaning given in Schedule Part 16 (<i>Change Protocol</i>);
 FOISA 538(1)(b) EIR Reg 11	
"Maintenance Works"	means any works for maintenance or repair of the Facilities that are necessary to ensure that the Facilities are maintained in accordance with Service Level Specification and Method Statements and that the Facilities comply with the Board's Construction Requirements and Project Co's Proposals (including, without limitation, the renewal or replacement of any Plant or equipment) throughout the Project Term but excluding for the avoidance of doubt Lifecycle Replacement;
"Major Incident"	means the widely accepted term used by the emergency services to describe any emergency that requires the implementation of special arrangements by one or more of the emergency services, the NHS, the Board or the local authority;
"Malicious Damage Report"	has the meaning given in Clause 49A.2.1;
 FOISA 538(1)(b) EIR Reg 11	
"Medical Contamination"	means a disease carrying agent which cleaning and prevention of infection or contamination techniques in use in accordance with Good Industry Practice and this Agreement cannot substantially prevent or cannot substantially remove with the result that: <ul style="list-style-type: none"> (a) it is unsafe to admit patients or 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;
"Medium Value Change"	has the meaning given in Schedule Part 16 (<i>Change Protocol</i>);
"Method Statements"	means the method of providing a Service as set out or identified in Section 2 (<i>Method Statements</i>) of Schedule Part 12 (<i>Service Requirements</i>) as amended from time to time in accordance with Clause 33 (<i>Change Protocol</i>) and Clause 22 (<i>The Services</i>);
"Monthly Service Payment"	has the meaning given in Schedule Part 14 (<i>Payment Mechanism</i>);
"Monthly Service Report"	means a monthly report to be prepared by Project Co and provided to the Board in accordance with the relevant provisions in Section 1 (<i>Service Level Specification</i>) of Schedule Part 12 (<i>Service Requirements</i>);
"Net Present Value"	has the meaning given in Schedule Part 23 (<i>Refinancing</i>);
"NHS"	means the National Health Service;
"NHS Requirement"	means: <ul style="list-style-type: none"> (a) in relation to the Works, Health Building Notes and Health Technical Memoranda and such other requirements as are designated as NHS Requirements in the Board's Construction Requirements; and (b) in relation to the Project Operations (other than the Works), Health Building Notes, Health Technical Memoranda, all Executive Letters, Health Service Guidelines, Health Circulars of the NHS and any similar official requests, requirements and guidance having similar status for the time being in force, but only to the extent the same are published and publicly available or the existence and contents of them have been notified to Project Co by the Board;
"Non-Clinical Services"	has the meaning set out in Sub-Section E (<i>Specific Non-Clinical Requirements</i>) of the Board's Construction Requirements;
"NPD"	means non-profit distributing model;
"NPD Requirements"	means all of the following requirements: <ul style="list-style-type: none"> (a) not to make a distribution of profit or surplus, or any transfer of assets to one or more shareholders whether by

means of any payment or transfer of assets, directly or indirectly, in cash or in any kind, whether by way of dividend, bonus or release of obligation or in any other way otherwise than:

- (i) for full consideration; or
 - (ii) to the Board pursuant to Clause 36 (*Payment of Surpluses and Compliance with NPD Requirements*) or Article 12 or 13 of the Articles of Association); or
 - (iii) Project Co's Share of a Project Co Change; or
 - (iv) Project Co's Share of a Refinancing Gain;
- (b) to comply with Clause 4.4 (*Changes to Funding Agreements and Refinancing*);

"Off-Site"

means:

- (a) the land made available to Project Co for the Works, the Off-Site Works and Services being:
 - (i) the Yellow Area, the Petrol Station Site, the Orange Area, the Connection Area and the Service Strip and
 - (ii) the Foul Service Strip; and
 - (iii) Not Used; and
- (b) those parts of the RIE Facilities made available to Project Co for the Off-Site Works and Services; and
- (c) the land procured by Project Co for the Substation Works.

"Off-Site Conditions"

means the condition of the Off-Site (including but not limited to) hydrological, hydrogeological, ecological, environmental, geotechnical and archaeological conditions;

"Off-Site Works"

means the RIE Works, Hospital Square Works, Cycle Path Works, Substation Works, Petrol Station Site Works and/or Surface Water Drainage Works;

"Operational Functionality"

means

- (a) the following matters as shown on the 1:500 scale development control plan and site plans;
 - (i) the point of access to and within the Site and the Facilities;
 - (ii) the relationship between one or more buildings that comprise the Facilities; and
 - (iii) the adjacencies between different hospital departments within the Facilities,

as indicated on the following drawings in Section 4 (*Project Co's Proposals*) of Schedule Part 6 (*Construction Matters*)

FOIA s33(1)(b)
EIR Reg 10(5)(e)



- (b) the following matters as shown on the 1:200 scale plans:
 - (i) the points of access to and within the Site and the Facilities;
 - (ii) the relationship between one or more buildings that comprise the Facilities;
 - (iii) the adjacencies between different hospital departments within the Facilities; and
 - (iv) the adjacencies between rooms within the hospital departments within the Facilities,

as indicated on the following drawings in Section 4 (*Project Co's Proposals*) of Schedule Part 6 (*Construction Matters*)



FOISA s 33 (1)(b).
EIR Reg 10 (5)(e)



- (c) the quantity, description and areas (in square metres) and minimum critical dimensions of those rooms and spaces as indicated on the following drawings in Section 4 (*Project Co's Proposals*) of Schedule Part 6 (*Construction Matters*)



- (d) the location and relationship of equipment, furniture, fittings and user terminals as shown on the 1:50 loaded room plans in respect of:
- (i) all bed and trolley positions;
 - (ii) internal room elevations;
 - (iii) actual ceiling layouts;
 - (iv) the Non-Clinical Services supplies, storage, distribution and waste management spaces; and
 - (v) the ICT requirements;
- (e) the location of and the inter-relationships between rooms within the departments within the Facilities, as indicated on the following drawings in Section 4 (*Project Co's Proposals*) of Schedule Part 6

FOIA s33(1)(b)
EIR Reg 10(5)(e)



but only insofar as each of the matters listed in (a) to (e) above relate to or affect Operational Use;

"Operational Insurances"

means the insurances required by Clause 53.2 and **"Operational Insurance"** means any one of such insurances;

"Operational Term"

means the period from the Actual Completion Date until the end of the Project Term;

"Operational Use"

means the use of a room or space to the extent that it is used by the Board or its employees, tenants, agents and/or contractors (but not to avoid doubt Project Co staff) for carrying out the Board Services;

"Option Period"

has the meaning given in Clause 53.14.3 (*Uninsurable Risks*);

"Orange Area"

means the area of land shaded orange on Plan 2 including for the avoidance of doubt the Hatched Orange Area;

"Original Senior Commitment"

means the amount committed under the Senior Funding Agreements as at Financial Close (as adjusted to take into account any Qualifying Change);

"Outline Commissioning Programme"

means the programme setting out the standards, specifications, procedures and other requirements for the carrying out and completion of the commissioning activities of the parties set out in outline in Appendix 3 (*Outline Commissioning Programme*) Schedule Part 10 (*Outline Commissioning Programme*);

"Oversail Strategy"

means the agreed Interface Proposal for oversailing parts of the Campus Site other than the Facilities, as set out in Appendix 3 of Schedule Part 31 (*Consort Interface with Campus Site and/or Campus Facilities*);

"Payment Commencement Date" means the Actual Completion Date;

"Payment Mechanism" means Schedule Part 14 (*Payment Mechanism*);

"Performance Failure" has the meaning given in Section 1 of Schedule Part 14 (*Payment Mechanism*);

"Performance Guarantees" means the guarantees to Project Co in respect of the Construction Contract, the Service Contracts which, as at the date of this Agreement are in the Agreed Form;

"Permit to Work System" means as at the Commencement Date the permit to work system in force at the Campus Site, as more fully described in the documentation set out in Appendix 11 (*Permit to Work Documentation*) of Schedule Part 31 (*Consort interfere with Campus Site and/or Campus Facilities*);

"Permitted Borrowing" means without double-counting, any:

- (a) advance to Project Co under the Senior Funding Agreements;
- (b) Additional Permitted Borrowing;
- (c) Not Used; and
- (d) interest and, in respect of the original Senior Funding Agreements only (as entered into at the date of this Agreement, prior to any subsequent amendment), other amounts accrued or payable under the terms of such original Senior Funding Agreements,

except where the amount referred to in paragraphs (a) to (d) above is or is being used to fund a payment of Default Interest on any Additional Permitted Borrowing;


"Petrol Station Site" means the area outlined in pink set out on Plan 2;

[REDACTED] means [REDACTED]

EIR 10/5/21

"Petrol Station Site Infrastructure" means the infrastructure resulting from the Petrol Station Site Works;

"Petrol Station Site Works"	means the design (including preparation of all Design Data), construction, remediation, demolition, testing and commissioning and completion of the works to be undertaken in relation to the Petrol Station Site in accordance with paragraph 4.6 (<i>Petrol Station Site Works</i>) of the Board's Construction Requirements;
"Physical Damage Policies"	means the policies of insurance referred to in paragraph 1 (<i>Contractors' 'All Risk' Insurance</i>) of Section 1 (<i>Policies to be Taken Out by Project Co and Maintained During the Design and Construction Phase</i>) and paragraph 1 (<i>Property Damage</i>) of Section 2 (<i>Policies to be Taken Out By Project Co and Maintained from the Actual Completion Date</i>) of Schedule Part 15 (<i>Insurance Requirements</i>);
"Plan 1"	means the plan marked "Plan 1 (<i>RHSC & DCN Site</i>)" annexed and executed as relative hereto and contained in Schedule Part 27 (<i>Plans</i>);
"Plan 2"	means the plan marked "Plan 2 (<i>Yellow Area, Orange Area, Connection Area, Service Strip, Substation Access Area and Petrol Station Site</i>)" annexed and executed as relative hereto and contained in Schedule Part 27 (<i>Plans</i>);
"Plan 2A"	means the plan marked "Plan 2A (<i>Foul Service Strip</i>)" annexed and executed as relative to this Agreement and contained in Schedule Part 27 (<i>Plans</i>);
"Plan 3"	means the plan marked "Plan 3 (<i>Car Park E</i>)" annexed and executed as relative to this Agreement and contained in Schedule Part 27 (<i>Plans</i>);
"Plan 5"	means the plan marked "Plan 5 (<i>Car Park Layout Plan</i>)" annexed and executed as relative hereto and contained in Schedule Part 27 (<i>Plans</i>);
"Plan 6"	means the plan marked "Plan 6 (<i>Roads Layout</i>)" annexed and executed as relative to this Agreement and contained in Schedule Part 27 (<i>Plans</i>);
"Plan 7"	means the indicative plan marked "Plan 7 (<i>Campus Site Plan</i>)" annexed and executed as relative to this Agreement and contained in Schedule Part 27 (<i>Plans</i>);
"Plan 8"	means the plan marked "Plan 8 (<i>Access Roads</i>)" annexed and executed as relative to this Agreement and contained in Schedule Part 27 (<i>Plans</i>);
"Plan 9"	means the plan marked "Plan 9 (<i>217 Old Dalkeith Road</i>)" annexed and executed as relative to this Agreement and contained in Schedule Part 27

	(Plans);
"Plan 10"	means the plan marked "Plan 10 (<i>Little France Steading</i>)" annexed and executed as relative to this Agreement and contained in Schedule Part 27 (Plans);
"Plan 11"	means the plan marked "Plan 11 (<i>Sewer</i>)" annexed and executed as relative to this Agreement and contained in Schedule Part 27 (Plans);
"Plan 12"	means the plan marked "Plan 12 (<i>Manhole</i>)" annexed and executed as relative to this Agreement and contained in Schedule Part 27 (Plans);
"Planning Approval"	<p>FOISA 525(1)(b)</p> 
"Planning Permission"	means any planning permission, approval of matters specified in conditions attached to any planning permission in principle listed building consent, conservation areas consent and/or other consent or approval reasonably required from time to time for construction and/or operation of the Facilities and the construction of the Retained Estate Handback Infrastructure (including without limitation for any Board Change and the Planning Approval);
"Plant"	means the infrastructure systems, building systems, fixed, and immovable equipment systems, installed as part of the Works or pursuant to a Board Change as replaced from time to time;
"Post Completion Commissioning"	means, as appropriate, Project Co's Post Completion Commissioning and/or the Board's Post Completion Commissioning;
"Pounds Sterling"	means the currency issued by the Bank of England from time to time;
"Programme"	means the programme set out in Schedule Part 7 (<i>The Programme</i>) as revised and issued by Project Co (or on its behalf) from time to time pursuant to Clause 14 (<i>Programme and Dates for Completion</i>);
"Programmed Maintenance"	means the maintenance work which Project Co is to carry out in accordance with Schedule of Programmed Maintenance;
"Programmed Maintenance Information"	has the meaning given in Clause 23.3 (<i>Programmed Maintenance Works</i>);
"Prohibited Act"	has the meaning given in Clause 44 (<i>Corrupt Gifts and Payments</i>);

"Project"	has the meaning given in Recital B;
"Project Co Event of Default"	has the meaning given in Clause 40 (<i>Project Co Events of Default</i>);
"Project Co Party"	means Project Co's agents and contractors (including without limitation the Contractor and the Service Providers) and its or their sub-contractors of any tier and its or their directors, officers, employees and workmen in relation to the Project and "Project Co Parties" shall be construed accordingly;
"Project Co's Community Benefits Method Statements"	means those method statements set out in Section 2 of Schedule Part 32 (<i>Community Benefits</i>);
"Project Co's Post-Completion Commissioning"	means Project Co's commissioning activities carried out in accordance with Clause 18.1 (<i>Commissioning</i>);
"Project Co's Pre-Completion Commissioning"	means Project Co's commissioning activities to be carried out in accordance with Clause 17 (<i>Pre Completion Commissioning and Completion</i>);
"Project Co's Proposals"	means the document at Section 4 (<i>Project Co Proposals</i>) of Schedule Part 6 (<i>Construction Matters</i>) as amended from time to time in accordance with Clause 33 (<i>Change Protocol</i>);
"Project Co's Remedial Services"	means any activities to be performed by or on behalf of Project Co pursuant to its rights under Clause 23.15 (<i>Board's Maintenance Obligation</i>);
"Project Co's Representative"	means the person appointed by Project Co pursuant to Clause 8 (<i>Representatives</i>);
"Project Data"	means: <ul style="list-style-type: none"> (a) all Design Data; (b) all drawings, reports, documents, plans, software, formulae, calculations and other data relating to the provision of the Services; and (c) any other materials, documents and or data acquired, brought into existence or used in relation to the Project Operations or this Agreement;
"Project Documents"	means the Ancillary Documents and the Funding Agreements;
"Project IRR"	<div style="background-color: black; width: 100px; height: 15px; display: inline-block;"></div> FOISA s33(1)(b) s30(c), EIR Reg 10 (s)(e)
"Project Operations"	means the carrying out of the Works, the carrying out of Project Co's Pre-Completion Commissioning and Project Co's Post-Completion Commissioning, the management

and provision of the Services and the performance of all other obligations of Project Co under this Agreement from time to time;

"Project Term"

means the period commencing at midnight on the date of this Agreement and ending on the earlier of the Expiry Date and the Termination Date;

"Proposal for an Adverse Law"

means a proposal for an Adverse Law as follows:

- (a) in the case of a bill, the bill being introduced by the Government or receiving the support of the Government at its second reading in the first House of Parliament into which it is introduced or the bill passing a second reading in the first House of Parliament into which it is introduced;
- (b) in the case of a bill passing through the Scottish Parliament, the bill being introduced by the Scottish Government or receiving the support of the Scottish Government at Stage 2 in the Scottish Parliament or the bill passing Stage 2 in the Scottish Parliament;
- (c) in the case of subordinate legislation, the proposed statutory instrument or order being laid before Parliament in draft;
- (d) in the case of a directive, regulation or decision of the European Union, its adoption; or
- (e) in the case of an administrative act as referred to in the definition of Adverse Law, any of the following prior or preparatory to the making of such an act;
- (f) the taking by the Board, the Government, a minister of the Crown, or a department, agency, regulator or other public body 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 a process before the making of such an administrative act can occur; or
- (g) any communication from the

Government, a minister of the Crown, or the department, agency, regulator or other public body or official responsible for making such administrative acts, to the effect that such an administrative act will be made;

"Protecting Vulnerable Groups Scheme"

means the Scottish Government's membership scheme which helps to ensure that people who have regular contact with children and protected adults through paid or unpaid work do not have a known history of harmful behaviour;

"PRS Timetable"

has the meaning given in Clause 23.16 (*Board's Maintenance Obligation*);

"PTS"

means the pneumatic tube system to be installed as part of the Works and thereafter maintained by Project Co, as more fully described in paragraph 8.7.23 (*Pneumatic Air Tube Transport System*) of the Board's Construction Requirements;

"Qualifying Change"

means (unless expressly stated otherwise):

- (a) a Low Value Change in respect of which the parties have agreed the method of implementation; or
- (b) a Medium Value Change in respect of which the Board has issued a confirmation notice pursuant to paragraph 7.1.1 of Section 3 (*Medium Value Changes*) of Schedule Part 16 (*Change Protocol*); or
- (c) a High Value Change which has received Stage 2 Approval pursuant to paragraph 8.2.1 of Section 4 (*High Value Changes*) of Schedule Part 16 (*Change Protocol*),

in each case provided that any necessary changes required to be made to any Project Document and/or Ancillary Document pursuant to Schedule Part 16 (*Change Protocol*) have been given effect to and become unconditional;

"Quality Plans"

means the Design Quality Plan and Construction Quality Plan, prepared in accordance with Section 8 (*Quality Plans (Design and Construction)*) of Schedule Part 6 (*Construction Matters*), and the Services Quality Plan, prepared in accordance with Section 3 (*Service Quality Plan*) of Schedule Part 12 (*Service Requirements*), as required to be implemented by Project Co in accordance with Clause 20 (*Quality*



	<i>Assurance</i>);
"Regulatory Authority"	means any competent authority having powers and duties in relation to the enforcement of any law rule regulation or obligation existing adopted made commenced introduced or otherwise brought into force prior to or after this transfer concerning the protection of human health the Environment or any Relevant Substances and for the avoidance of doubt the expression 'Regulatory Authority' shall not include any court of law, and "Regulatory Authorities" shall be construed accordingly;
"Range of Finishes"	has the meaning given in paragraph 1.2.3(a) of Schedule Part 8 (<i>Review Procedure</i>);
"Rectification"	has the meaning given in Schedule Part 14 (<i>Payment Mechanism</i>);
"Rectification Period"	has the meaning given in Schedule Part 14 (<i>Payment Mechanism</i>);
"Refinancing"	has the meaning given in Schedule Part 23 (<i>Refinancing</i>);
"Reinstatement Plan"	has the meaning given in Clause 53.22 (<i>Reinstatement</i>);
"Reinstatement Works"	has the meaning given in Clause 53.22.2 (<i>Reinstatement</i>);
"Relevant Authority"	means any court with the relevant jurisdiction and any local, national or supra-national agency, inspectorate, minister, ministry, official or public or statutory person of the government of the United Kingdom, or of the European Union, (or of the Scottish Government or the Scottish Parliament);
"Relevant Change in Law"	has the meaning given in Clause 32.3 (<i>Changes in Law</i>);
"Relevant Event"	has the meaning given in Schedule Part 16 (<i>Change Protocol</i>);
"Relevant Incident"	has the meaning given in Clause 53.22.2 (<i>Reinstatement</i>);
"Relevant Payment"	has the meaning given in Clause 53.14.3;
"Relevant Petrol Station Site Contamination"	means: <ul style="list-style-type: none"> (a) Contamination in, on, at, over or under the Petrol Station Site; and (b) Contamination that has migrated from the Petrol Station Site to the Site or Off-Site (excluding the Petrol Station Site) after the Commencement Date, <p style="margin-left: 40px;">save to the extent that:</p>

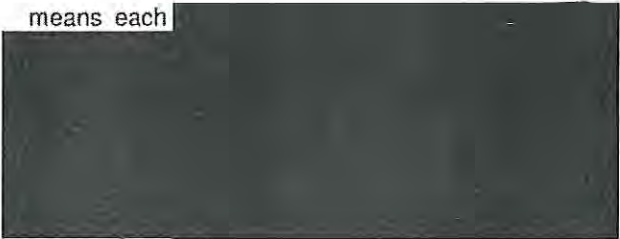
			(i)	the implementation of cleaning up and/or mitigation measures and/or otherwise dealing with such Contamination is within the scope of the Petrol Station Site Works to be carried out by Project Co; or
			(ii)	such Contamination (A) arises, (B) is aggravated or disturbed by, (C) increases in concentration, (D) necessitates the implementation of cleaning up and/or mitigation measures and/or (E) otherwise requires to be dealt with (in any of these cases) as a result of an act and/or omission of Project Co or any Project Co Party or any failure by Project Co to carry out the Project Operations in accordance with this Agreement;
"Relevant Proceeds"				has the meaning given in Clause 53.22.2 (<i>Reinstatement</i>);
"Relevant Service Transfer Date"				has the meaning given in Clause 25.1 (<i>No Employee Transfer</i>);
"Relevant Tax Liability"				has the meaning given in Clause 46.7.3 (<i>Compensation on Termination</i>);
"Relief"				has the meaning given in Clause 46.7.1,
"Relief Events"				has the meaning given in Clause 30 (<i>Relief Events</i>);
"Replacement Board Specified Equipment"	Group 1			means any item or items of Board Specified Group 1 Equipment which requires to be replaced by Project Co in accordance with its Schedule of Lifecycle Replacement;
"Replacement Board Specified Equipment Commissioning Tests"	Group 1			means any tests required to demonstrate that any replacement item of Board Specified Group 1 Equipment has been commissioned, such tests to be in accordance with Good Industry Practice and Law;
"Replacement Board Specified Equipment Specifications"	Group 1			means the specifications for any Replacement Board Specified Group 1 Equipment prepared by the Board pursuant to paragraph 1A.1 of Schedule Part 11 (<i>Equipment</i>);
"Replacement Board Specified Equipment Commissioning Tests"	Group 1			means any tests required to demonstrate that any replacement item of Board Specified Group 1 Equipment has been commissioned, such tests to be in accordance with Good Industry Practice and Law;
"Replacement Group 1 Equipment"				means any item or items of Group 1 Equipment which requires to be replaced by Project Co in accordance with its Schedule of Lifecycle

		Replacement;
"Replacement Group Commissioning Tests"	1 Equipment	means any tests required to demonstrate that any replacement item of Group 1 Equipment has been commissioned, such tests to be in accordance with Good Industry Practice and Law;
"Request for Information"		has the meaning set out in the FOI(S)A or the Environmental Information (Scotland) Regulations as relevant (where the meaning set out for the term "request" shall apply);
"Required Action"		has the meaning given in Clause 24.7 (<i>Board's Remedial Rights</i>);
"Reserved Rights"		means the matters referred to in Section 2 (<i>Reserved Rights</i>) of Schedule Part 5 (<i>Land Matters</i>);
"Restricted Person"		means either: <ul style="list-style-type: none"> (a) a person providing or proposing to provide healthcare services of a similar nature to those provided or contemplated by the Board at the time in question; or (b) any person who has a material interest in the production of tobacco products and/or alcoholic beverages;
"Retail Prices Index" or "RPI"		means the Retail Prices Index (All Items) as published by the Office for National Statistics from time to time (the " Index "), or, failing such publication or in the event of a fundamental change to the Index, such other index as the parties may agree, or such adjustments to the Index as the parties may agree (in each case with the intention of putting the parties in no better nor worse position than they would have been in had the Index not ceased to be published or the relevant fundamental change not been made) or, in the event that no such agreement is reached, as may be determined in accordance with the Dispute Resolution Procedure;
"Retained Estate"		means the RIE Facilities and the University Facilities and the Retained Estate Handback Infrastructure;
"Retained Estate Handback Infrastructure"		means the infrastructure to be handed back to the Board at or prior to the Actual Completion Date, comprising the Hospital Square Infrastructure, Cycle Path Infrastructure, Petrol Station Site Infrastructure, Surface Water Drainage Infrastructure (outwith the site) and Bus Stop Infrastructure;
"Retained Estate Handback Works"		means the Hospital Square Works, Cycle Path Works, Surface Water Drainage Works (outwith

		the site), Petrol Station Site Works and Bus Stop Works;
"Retained Estate Handback Works Completion Criteria"		has the meaning given to it in paragraph 6 (<i>Retained Estate Handback Infrastructure Completion Criteria</i>) of Appendix B (<i>Completion Criteria</i>) of Schedule Part 10 (<i>Outline Commissioning Programme</i>);
"Retained Site"		means the Campus Site under exception of the Site;
"Revenue"		means the projected Unavoidable Fixed Costs and Senior Debt Service Costs of Project Co;
"Reviewable Design Data"		means the Design Data listed at Section 5 (<i>Reviewable Design Data</i>) of Schedule Part 6 (<i>Construction Matters</i>);
"Revised Senior Debt Termination Amount"		has the meaning given in Section 6 (<i>Definitions</i>) of Schedule Part 17 (<i>Compensation on Termination</i>);
"RIE Facilities"		means the existing hospital, buildings and other facilities together with all supporting infrastructure and amenities located on the RIE Site as such hospital, buildings, facilities, infrastructure and amenities may be modified from time to time;
"RIE Infrastructure"		means the infrastructure resulting from the RIE Works;
"RIE Project"		means the financing, design, construction equipping and operation of, and the provision of certain services in connection with the RIE Facilities and the University Facilities;
"RIE Site"		means the Campus Site under exception of the Site and the University Site;
"RIE Works"		means the design (including preparation of all Design Data), construction, testing, commissioning and completion of the works to be undertaken at the RIE Site and/or the RIE Facilities in accordance with inter alia paragraph 4 (<i>Site Specific Requirements</i>) of Sub-Section C of the Board's Construction Requirements (as varied, amended or supplemented from time to time in accordance with this Agreement), namely the PTS, ICT, Foul Water Drainage, Joint and Fire Alarm System;
"Room Data Sheets"		has the meaning given in Section 6 (<i>Room Data Sheets</i>) of Schedule Part 6 (<i>Construction Matters</i>);
"Schedule of Condition"		shall have the meaning given to it in paragraph 2.1 (<i>Schedules of Condition</i>) of Part 3 (<i>General</i>

EIR Reg
10/5)E

	<i>Matters) of Schedule Part 31 (Consort interface with Campus Site and/or Campus Facilities); .</i>
"Schedule of Lifecycle Replacement"	means the programme of Lifecycle Replacement for the Project Term that complies with the requirements set out in Clause 23A (<i>Lifecycle Replacement</i>);
"Schedule of Programmed Maintenance"	means the programme referred to in Clause 23.1 (<i>Programmed Maintenance Works</i>) to be submitted to the Board's Representative by Project Co in accordance with Schedule Part 8 (<i>Review Procedure</i>);
"Scottish Futures Trust"	means  EIR Reg 11 &
"Second Party"	has the meaning given in Clause 35.3 (<i>VAT</i>);
"Secured Creditors"	has the meaning given to it in the Common Terms Agreement;
"Security Document"	has the meaning given to it in the Common Terms Agreement;
"Security Trustee"	means  EIR Reg 11.
"Senior Debt"	has the meaning given in Section 6 (<i>Definitions</i>) of Schedule Part 17 (<i>Compensation on Termination</i>);
"Senior Debt Service Costs"	means interest and debt service costs incurred in respect of the Senior Funding Agreements less: <ul style="list-style-type: none"> (a) sums which are in arrears; (b) all sums reserved by Project Co and which Project Co is entitled to use to make such payments, without breaching the Senior Funding Agreements;
"Senior Funders"	means the Senior Lenders, the Senior Subordinated Lenders and the Senior Subordinated On-Loan Lenders, as such terms are defined respectively in the Common Terms Agreement;
"Senior Funding Agreements"	means the Initial Funding Agreements (other than the Equity Documents) as at the date of this Agreement and as amended as permitted under Clause 4 (<i>Project Documents</i>);
"Senior-Subordinated On-Loan Lenders"	has the meaning given to in the Common Terms Agreement;
"Senior Subordinated Security Document"	has the meaning given to it in the Common

	Terms Agreement;
"Service Contracts"	means the contracts dated the same date as this Agreement between Project Co and each Service Provider (which as at the date of this Agreement are in the Agreed Form), by which Project Co will procure the performance of the Services (as amended or replaced from time to time in accordance with this Agreement);
"Service Event"	has the meaning given in Schedule Part 14 (<i>Payment Mechanism</i>);
"Service Level Specification"	means the requirements of the Board set out in Section 1 (<i>Service Level Specification</i>) of Schedule Part 12 (<i>Service Requirements</i>) as amended from time to time in accordance with Clause 33 (<i>Change Protocol</i>);
"Service Proposal"	means the agreed Interface Proposal in respect of the route, depth and size (having regard to the condition of existing service media in the Service Strip and Foul Service Strip) for laying and maintaining service media in the Service Strip and/or foul drainage in the Foul Service Strip as applicable, as set out in Appendix 7 of Schedule Part 31;
"Service Provider"	means each  EIR Reg 11. x
"Service Providers Collateral Agreements"	means the collateral agreements among the Board, Project Co and each Service Provider in the form set out in Section 2 of Schedule Part 9 (<i>Collateral Agreements</i>);
"Service Strip"	means the area shaded yellow and hatched black on Plan 2;
"Services"	means the services to be provided, managed and/or procured by Project Co for the Board in relation to the Facilities in accordance with Schedule Part 12 (<i>Service Requirements</i>) as subsequently amended or adjusted in accordance with this Agreement;
"Services Quality Plan"	means the document set out in Section 3 (<i>Services Quality Plan</i>) of Schedule Part 12 (<i>Service Requirements</i>);
"Sewer"	means the sewer, the expected route of which within the Site is shown red and to be located within the area of land shaded green on Plan 11;
"Shareholder(s)"	means any person(s) who from time to time, as permitted by this Agreement, holds share capital

in Project Co, Hold Co or Top Co which persons are, as at the date of this Agreement, listed as such in Schedule Part 21 (*Project Co Information*);

"Site"

means the land made available to Project Co for the Project delineated in a broken red line on "Plan 1";

"Shareholder Support Agreement"

has the meaning given to it in the Common Terms Agreement;

"Site Conditions"

means the condition of the Site including (but not limited to) climatic, hydrological, hydrogeological, ecological, environmental, geotechnical and archaeological conditions;



SME

FOISA 525(1)



(ii)

"Snagging Matters"

means minor items of outstanding work (including in relation to landscaping) which would not materially impair the Board's use and enjoyment of the Facilities and/or Retained Estate and/or the Retained Estate Handback Infrastructure or the carrying out by the Board of the Board Services or the performance of the Services by Project Co and/or the carrying out of any services pursuant to the RIE Project Agreement;

"Snagging Notice"

means the notice to be issued by the Independent Tester in accordance with Clause 17.14 (*Completion Certificate*);

"Social Enterprises"

means any registered charity as defined in either the Charities and Trustees Investment (Scotland) Act 2005 or the Charities Act 2011 (both as amended) and any community-interest-company, not-for profit organisation or other organisation whose constitution or founding document contains an express asset-lock under which proceeds and/or benefits from its activities must be applied to further an identified social cause;

"Specific Change in Law"

means:

- (a) any Change in Law which specifically refers to:
 - (i) the provision of works or services the same as or similar to the Works or the Services in premises similar to the Facilities; or

- (ii) the holding of shares in companies whose main business is providing works or services the same as or similar to the Works or the Services in premises similar to the Facilities; or

- (b) any change in a NHS Requirement (other than any NHS Requirement which merely gives effect to Law generally and does not principally affect or principally relate to the provision or operation of the Facilities or healthcare premises);

"Stop Incident"

FOISA s 33(1)(b)
EIR Reg 10(5)(e)

means a failure by Project Co to carry out the relevant part or parts of the Project Operations in accordance with:

- (a) Schedule Part 31 [redacted] *Interface with Campus Site and/or Campus Facilities*) and/or the Interface Proposals; and/or
- (b) any provision of this Agreement and such breach gives rise to an immediate and serious threat to the health and safety of any user of the Site, Off-Site, Retained Site and/or the Retained Estate (which for the avoidance of doubt shall include any adverse impact upon clinical services at the RIE Facilities) during the Construction Phase; and/or
- (c) paragraphs 4.4.3(b), 4.4.3(e), 4.5.1A, 4.5.12, 6.1.1, 6.1.2 and/or 7.6(j) of Sub-section C of the Board's Construction Requirements;

"Stop Log Book"

means a log book to be maintained by Project Co pursuant to Clause 13A.9 (*Board's Right to stop Project Operations during the Project Term*) in relation to the dates, timings and reasons for stopping and re-starting the relevant part or parts of the Project Operations;

"Sub-Contractor"

means any third party (including the Contractor and a Services Provider) who enters into any Sub-Contract;

"Sub-Contracts"

means the contracts entered into by or between Project Co, the Contractor and/or a Service Provider and other third parties in relation to any aspect of the Project Operations;

"Subordinated Debt"

has the meaning given in Section 6 (*Definitions*) of Schedule Part 17 (*Compensation on Termination*);

"Subordinated Debt Rate"

[redacted]

FOISA s 33(1)(b)
s 33(e)
EIR Reg 10(5)(e)

"Subordinated Funder"

means a person providing finance under a Subordinated Funding Agreement;

"Subordinated Funding Agreements"	means the Equity Documents and as at the date of this Agreement or as amended with the prior written agreement of the Board;
"Subsidiary"	has the meaning given to it in Section 1159 of the Companies Act 2006;
"Substation Works"	means the design (including preparation of all Design Data), construction, testing and commissioning and completion of the substation in accordance with inter alia paragraph 4.5.10(d) of sub-section C of the Board's Construction Requirements;
"Suitable Substitute Contractor"	has the meaning given in Section 6 (<i>Definitions</i>) of Schedule Part 17 (<i>Compensation on Termination</i>);
"Supplemental Drainage Proposal"	means the agreed Interface Proposal for Surface Water Drainage Works connections in the Orange Area, as set out in Appendix 5 of Schedule Part 31 (<i>Consort Interface with Campus Site and/or Campus Facilities</i>);
"Surface Water Drainage Infrastructure"	means the surface water infrastructure resulting from the Surface Water Drainage Works;
"Surface Water Drainage Works"	means the design (including preparation of all Design Data), construction, testing and commissioning and completion of the surface water drainage works connections to be undertaken in accordance with inter alia paragraphs 4.5.10 (<i>Construction Works Further Information</i>) of section C, 6.11 (<i>Drainage Works</i>) and 8.7.20 (<i>Drainage Works</i>) of Sub-Section C of the Board's Construction Requirements and the Initial Drainage Proposal and/or the Supplemental Drainage Proposal;
"Surplus"	means, on any given date, the amount (if any) standing to the credit of the Surplus Account;
"Surplus Account"	has the meaning given in the Common Terms Agreements;
"Surplus Payment"	means the payment of a Surplus or Surpluses by Project Co to the Board pursuant to Clause 36 (<i>Payment of Surpluses and Compliance with NPD Requirements</i>);
"Surplus Payment Date"	means the date falling five (5) Business Days after 31 March and 30 September in each year that follows the Commencement Date;
"Teenage Cancer Trust Activities"	means activities carried out at the Facilities and/or Site by the "Teenage Cancer Trust", a charitable organisation devoted to improving the lives of teenagers and young adults with cancer;
"Termination Date"	means the date on which termination of this Agreement takes effect in accordance with its

"The NHS and You"

terms;

means the document so entitled and issued by the Scottish Government Health Directorate in January 2009;

"Title Conditions"

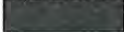
means title conditions set out in Section 1 of Schedule Part 5 (*Land Matters*);



"TPL Risk"

means a risk which is required to be insured under the third party liability insurance policy;

"Traffic Management Strategy" or "TMS"

means the agreed Interface Proposal in relation to the traffic management strategy for construction access over the Orange Area, as set out in Appendix 2 of Schedule Part 31  *Interface with Campus Site and/or Campus Facilities*;

"Transfer Regulations"

means the Transfer of Undertaking (Protection of Employment) Regulations 2006 (SI No. 246);

"Transferring Staff"

has the meaning given to it in Clause 25.2 (*No Employee Transfer*);

"Unavoidable Fixed Costs"

means the fixed costs incurred by Project Co which first fall due for payment by Project Co during the period of indemnity but excluding:

- (a) costs which could have reasonably been mitigated or avoided by Project Co;
- (b) payments to Project Co's Associated Companies;
- (c) payments which are not entirely at arm's length;
- (d) payments to holders of equity in Project Co, providers of Subordinated Debt and any other financing costs other than Senior Debt Service Costs;
- (e) indirect losses suffered or allegedly suffered by any person;
- (f) fines, penalties or damages for unlawful acts, breaches of contract or other legal obligations;

FOISA
s 33(1)(b)
KIR
Reg
10(5)(e)

v

v

- (g) payments Project Co can recover under contract or in respect of which Project Co has a remedy against another person in respect of the same liability;
- (h) payments to the extent that Project Co has available to it including:
 - (i) reserves which Project Co can draw upon without breaching the Senior Funding Agreements;
 - (ii) standby or contingent facilities or funds of Senior Debt or equity which Project Co is entitled to have available;
- (i) payments representing any profits of the Project (to the extent not already excluded in (e) above);

"Uninsurable"

means, in relation to a risk, either that:

- (a) insurance is not available to Project Co in respect of the Project in the worldwide insurance market with reputable insurers of good standing in respect of that risk; or
- (b) the insurance premium payable for insuring that risk is at such a level that the risk is not generally being insured against in the worldwide insurance market with reputable insurers of good standing by contractors in the United Kingdom;



*FOIA
S 33 (1)(b)
EIR 10(5)(e)*




"University Facilities"

means the existing university buildings and other facilities together with all supporting infrastructure and amenities located on the University Site, as each university buildings, facilities, infrastructure and amenities may be modified from time to time;



"University Site"

means the two areas of land shaded peach and

	outlined in blue on Plan 7;
"Unprogrammed Maintenance or Lifecycle Replacement Work"	has the meaning given in Clause 23.8 (<i>Programmed and Unprogrammed Maintenance</i>);
"Unreasonable Act"	means any act or omission which is contrary to any reasonable instruction, guidance or rules for the operation or management of the Facilities;
"Utilities"	has the meaning given in the Service Level Specification;
"VAT"	means value added tax at the rate prevailing at the time of the relevant supply charged in accordance with the provisions of the Value Added Tax Act 1994;
"VAT Sum"	has the meaning given in Clause 35 (<i>VAT and Construction Industry Tax Deduction Scheme</i>);
"Vitiating Act"	has the meaning given in Endorsement 2, Section 3 (<i>Endorsement</i>) of Schedule Part 15 (<i>Insurance Requirements</i>);
"Volunteer Services"	means any volunteer services and/or third sector bodies and/or retail bodies authorised by the Board to be the provider of volunteer services at the Facilities and/or Site from time to time, including for the avoidance of doubt
	
"Warning Notice"	means a notice validly served by the Board's Representative on Project Co under Clause 24.3 (<i>Warning Notices</i>), specifying that it is a Warning Notice and setting out the circumstances that have given rise to the issue thereof;
"Works"	means the design (including the preparation of all Design Data), construction, testing, commissioning and completion of the Facilities and the Retained Estate Handback Infrastructure (including any temporary works) and the installation, testing, commissioning and completion of Equipment to be performed by Project Co in accordance with this Agreement (as varied, amended or supplemented from time to time in accordance with this Agreement);
"Yellow Area"	means the area shaded Yellow on Plan 2.

F01SA530(c)

SECTION 2
INTERPRETATION

This Agreement shall be interpreted according to the following provisions, unless the context requires a different meaning:

- 1 The headings and marginal notes and references to them in this Agreement shall be deemed not to be part of this Agreement and shall not be taken into consideration in the interpretation of this Agreement.
- 2 Except where the context expressly requires otherwise, references to Clauses, Sub-clauses, paragraphs, sub-paragraphs and parts of the Schedule are references to Clauses, Sub-clauses, paragraphs, sub-paragraphs and parts of the Schedule to this Agreement and references to Sections, Appendices and Attachments (if any) are references to Sections, Appendices and Attachments to or contained in this Agreement.
- 3 The Schedule and Attachments (if any) to this Agreement are integral parts of this Agreement and a reference to this Agreement includes a reference to the Schedule and the Attachments (if any).
- 4 Words importing persons shall, where the context so requires or admits, include individuals, firms, partnerships, trusts, corporations, governments, governmental bodies, authorities, agencies, unincorporated bodies of persons or associations and any organisations having legal capacity.
- 5 Where the context so requires words importing the singular only also include the plural and vice versa and words importing the masculine shall be construed as including the feminine or the neuter or vice versa.
- 6 The language of this Agreement is English. All correspondence, notices, drawings, Design Data, test reports, certificates, specifications and information shall be in English. All operating and maintenance instructions, name plates, identification labels, instructions and notices to the public and staff and all other written, printed or electronically readable matter required in accordance with, or for purposes envisaged by, this Agreement shall be in English.
- 7 Save where stated to the contrary, references to any agreement or document include (subject to all relevant approvals and any other provisions of this Agreement concerning amendments to agreements or documents) a reference to that agreement or document as amended, supplemented, substituted, novated or assigned.
- 8 References to any Law are to be construed as references to that Law as from time to time amended or to any Law from time to time replacing, extending, consolidating or amending the same provided that the provisions of this paragraph shall be without prejudice to the operation of Clause 32 (*Changes in Law*) and Schedule Part 16 (*Change Protocol*) which shall operate in relation to a Change in Law on the basis set out in this Agreement.
- 9 Without prejudice to Clause 57.1 (*Assignment*), references to a public organisation (other than the Board) shall be deemed to include a reference to any successor to such public organisation or any organisation or entity which has taken over either or both the relevant functions and relevant responsibilities of such public organisation.

- 10 Without prejudice to Clause 57.1 (*Assignment*), references to other persons (other than the Board and Project Co) shall include their successors and assignees.
- 11 References to a deliberate act or omission of the Board or any Board Party shall be construed having regard to the interactive nature of the activities of the Board and of Project Co and the expression shall exclude acts or omissions which were within the contemplation of the parties or which were otherwise provided for in this Agreement.
- 12 The words in this Agreement shall bear their natural meaning. The parties have had the opportunity to take legal advice on this Agreement and no term shall, therefore, be construed contra proferentem.
- 13 Reference to "parties" means the parties to this Agreement and references to "a party" mean one of the parties to this Agreement.
- 14 In construing this Agreement, the rule known as the ejusdem generis rule shall not apply nor shall any similar rule or approach to the construction of this Agreement and accordingly general words introduced or followed by the word "other" or "including" or "in particular" shall not be given a restrictive meaning because they are followed or preceded (as the case may be) by particular examples intended to fall within the meaning of the general words.
- 15 All of Project Co's obligations, duties and responsibilities shall be construed as separate obligations, duties and responsibilities owed to the Board and to be performed at Project Co's own cost and expense.
- 16 Unless expressly stated otherwise, references to amounts or sums expressed to be "**(index linked)**" are references to amounts or sums expressed in prices relevant at the date of this Agreement (the "**Base Date**") which require to be adjusted whenever the provision containing the amount or sum is given effect in accordance with this Agreement to reflect the effects of inflation after that date. The adjustment shall be measured by changes in the relevant index published for that Contract Year as calculated in accordance with the following formula:
- $$\text{Amount or sum in Base Date prices} \times \frac{\text{RPI}_d}{\text{RPI}_0}$$
- Where RPI_d is the value of the Retail Prices Index published or determined with respect to the month of February most recently preceding the date when the provision in question is to be given effect and RPI_0 is the value of the Retail Prices Index at the Base Date
- 17 Reference to a document being in the Agreed Form is a reference to the form of the relevant document (or where appropriate, the form of relevant document on disc) agreed between the parties and for the purpose of identification initialled by each of them or on their behalf.
- 18 The operation of the Housing Grants, Construction and Regeneration Act 1996 upon any Project Document shall not affect the rights or obligations of the parties under this Agreement.
- 19 Words in parenthesis and italics appearing after a Clause reference or a reference to a Schedule Part are inserted for ease of reference only. If there is any discrepancy between the Clause reference and the words appearing in parenthesis and italics after the Clause

reference, the Clause reference shall prevail.

- 20 Where this Agreement states that an obligation shall be performed "no later than" or "within" or "by" a prescribed number of Business Days after a stipulated date or event, or "no later than" or "by" a stipulated date or event which is a prescribed number of Business Days after a stipulated date or event, the latest time for performance shall be 5pm on the last Business Day for performance of the obligations concerned.
- 21 Where this Agreement states that an obligation shall be performed "no later than" or "within" or "by" a prescribed number of Business Days before a stipulated date or event, or "no later than" or "by" a stipulated date or event which is a prescribed number of Business Days before a stipulated date or event, the latest time for performance shall be 5pm on the last Business Day for performance of the obligations concerned.

SCHEDULE PART 2
COMPLETION DOCUMENTS
SECTION 1

DOCUMENTS TO BE DELIVERED BY PROJECT CO

Unless an original document is specifically requested, a copy (certified by an officer of Project Co as being a true copy) of each of the following documents is to be delivered by Project Co to the Board in accordance with Clause 2.1 (*Execution and Delivery of Documents*) of this Agreement:

1. Not Used.
2. Not Used.
3. The Initial Funding Agreements and certification from Project Co that (1) the Initial Funding Agreements have become unconditional (other than any condition relating to the conditionality of this Agreement) and (2) that all conditions to the availability of funds to Project Co under the Initial Funding Agreements have been satisfied or waived, accompanied by evidence of the same.
4. The Construction Contract, the Services Contract, Performance Guarantees, Subordinated Funding Agreements, Interface Agreement, Management Services Agreement, executed by the parties to such agreements.
5. An original of the Funders' Direct Agreement, the Independent Tester Contract, the Insurance Proceeds Account Agreement, the Collateral Agreements (and in terms of the Key Sub-contractor Collateral Agreements shall be those agreements referred to in Clauses 57.8A.1 and 57.8A.2 of this Agreement) and the brokers letters of undertaking relating to the Insurances referred to in paragraph 11 below in the Agreed Form, executed by the parties to such agreements (other than the Board).

FOISA s33(1)(b)
6
EIR
10(5)(e)

6. Extracts from the minutes of the meeting of the board of directors (certified as true and accurate by the Secretary, Director or authorised signatory of the relevant company) of each of Project Co [REDACTED] the Contractor, the Service Provider and each of the guarantors under the parent company guarantees to Project Co in respect of the Construction Contract and the Service Contract, at which resolutions were passed approving the execution, delivery and performance of each relevant document to which such person is expressed to be a party and in each case authorising a named person or persons to execute and deliver each such document and any other documents to be delivered by it pursuant to it. For the avoidance of doubt, this requirement shall not extend to the Senior Funders.
7. A certificate of the Secretary, Director or authorised signatory of each of the companies referred to in paragraph 6 above setting out the names and specimen signatures of the person or persons named in the relevant certified extract.
8. Evidence of the share subscriptions contemplated under Article 11.1 of the Articles of Association of Project Co having been made.
9. Project Co's [REDACTED] Certificate of Incorporation and of any Certificate of Incorporation on Change of Name.

- 10 The Articles of Association of Project Co [REDACTED]
- 11 The insurance broker's letter of undertaking, evidence of the insurances required in accordance with Clause 53 (*Insurances*) having been taken out by Project Co and that the policies comply with the requirements of this Agreement, and an estimate by the insurance broker of the premiums for the Operational Insurances for the first year of the Operational Term.
- 12 Two computer disk copies of the Financial Model audited by [REDACTED]
- 13 Evidence that an election has been made for Project Co to act as "client" for the Project for the purposes of the CDM Regulations.
- 14 Evidence that the Insurance Proceeds Account has been opened.
- 15 The sub-contracts for Key Sub-Contractors executed by the parties to such agreements for the relevant sub-contract between the Contractor and each member of the Design Team and/or Key Sub-contractor required to provide a Collateral Agreement pursuant to Clauses 57.8A.1 and 57.8A.2 of this Agreement, and evidence that the professional indemnity insurance, to be maintained by the Key Sub-Contractor in terms of the relevant sub-contract and Collateral Agreement as applicable is in place.
- 16 Letter from [REDACTED]
- 17 An original duly executed copy of this Agreement.

FOISA s 33(1)(b)
Reg 10(5)(e)
EIR Reg 11

FOISA s 33(1)(b)
EIR Reg 11
FOISA Reg 10(5)(e)

SECTION 2

DOCUMENTS TO BE DELIVERED BY THE BOARD

The Board shall deliver to Project Co the following documents:

1. An original copy of the Funders' Direct Agreement, the Collateral Agreements referred to in Clauses 57.8A.1 and 57.8A.2 of this Agreement, the Independent Tester Contract, the Insurance Proceeds Account Agreement and this Agreement, duly executed by the Board.
2. A certified copy of the resolution of the Board approving:
 - 2.1 the execution, delivery and performance of the documents referred to in paragraph 1 above;
 - 2.2 the full business case for the Project; and
 - 2.3 in the case of the execution and delivery of the documents referred to in paragraph 1 above, authorising a named person or persons to execute and deliver each such document and any documents to be delivered by it pursuant thereto.
3. A certificate of the relevant officer of the Board setting out the names and specimen signatures of the person or persons named in the resolution of the Board referred to in paragraph 2 above.
4. Certified copies of the Board's:

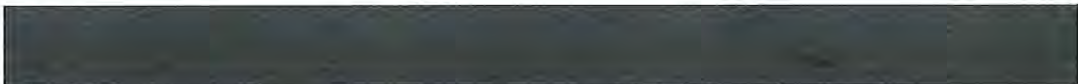


FOISA
s 25(1)

x

5. An original certificate of the Scottish Government issued pursuant to Section 1 of the National Health Service (Private Finance) Act 1997 as amended by the NHS Reform (Scotland) Act 2004, in relation to the documents referred to in paragraph 1 above
6. A certified copy of a letter confirming that the full business case of the Board has been approved on behalf of the Scottish Government, in respect of the Project.
7. A confirmation from the Director of Finance of the Board in respect of:
 - 7.1 approval of the documents to be signed by the Director of Finance of the Board as more fully described in the resolution of the Board referred to in paragraph 2 above; and
 - 7.2 no threatened, pending or actual litigation in respect of the procurement process for the Project.

8.



x



SCHEDULE PART 3

+ PART 4

+ PART 5,

REDACTED

FOISA § 38(1)(b)

EIR Reg 10(s)(e)

**SCHEDULE PART 6
CONSTRUCTION MATTERS**

SECTION 1

NOT USED

SECTION 2

SAFETY DURING CONSTRUCTION

1 In this Section 2 (*Safety During Construction*) of Schedule Part 6 (*Construction Matters*) and wherever used elsewhere in this Agreement:

1.1 "CDM Regulations" means the Construction (Design and Management) Regulations 2007 (and "CDM Regulation" shall be construed accordingly); and

1.2 "the client", "the CDM Co-ordinator" and "the Executive" shall have the same meanings as are ascribed to them in the CDM Regulations.

2 In so far as not already done, within five (5) Business Days of the date of execution of this Agreement, Project Co shall make and serve on the Board a declaration pursuant to and in the form (if any) required by CDM Regulation 8 that Project Co will act as the client in relation to the Works for all the purposes of the CDM Regulations. Notwithstanding the election made by Project Co in relation to CDM Regulation 8, the Board will comply with its remaining obligations as set out in CDM Regulation 8. During the Project Term, Project Co shall not, and shall not seek to, withdraw, terminate or in any manner derogate from its declaration that it will act as, and its acceptance of its responsibilities as, the client in relation to the Works for all the purposes of the CDM Regulations. The Board will endorse its consent, in writing, to such election on the said election and return it to Project Co within five (5) Business Days of receipt.

3 Project Co warrants that it has the competence, resources and capacity to, and shall, observe, perform and discharge or shall procure the observance, performance and discharge of:

3.1 all the obligations, requirements and duties of the client arising under the CDM Regulations in connection with the Works and, where necessary, the provision of the Services; and

3.2 all obligations incumbent on the client under any Code of Practice for the time being approved by the Health and Safety Commission pursuant to the Health and Safety at Work etc Act 1974 issued in connection with the CDM Regulations.

4 Project Co shall provide to the Board's Representative:

4.1 in a substantially complete form on the Actual Completion Date; and

4.2 in final form within five (5) Business Days of the Actual Completion Date,

one electronic copy (on computer disk, tape or other format) of each and every health and safety file and construction phase plan prepared by the CDM Co-ordinator pursuant to the CDM Regulations in relation to the Works and the Services and electronic or paper copies of every amendment or update made to such file during the Project Term.

SECTION 3

BOARD'S CONSTRUCTION REQUIREMENTS

The Board's Construction Requirements are the Board's Construction Requirements as set out on the disc in the Agreed Form identified and executed as the Section 3 (*Board's Construction Requirements*) of Schedule 6 (*Construction Matters*) of this Agreement, referred to in and forming part of this Agreement.

REDACTED.

FOISA § 33(1)(b).
EIR Reg 10(5)(e).

SECTION 4

PROJECT CO'S PROPOSALS

Project Co's Proposals are Project Co's Proposals as set out on the disc in the Agreed Form identified and executed as disc 1 (*Project Co Proposals*), disc 2 (

disc 3, disc 4, disc 5 and disc 6

for Section 4 (*Project Co's Proposals*) of Schedule Part 6 (*Construction Matters*) of this Agreement, referred to in and forming part of this Agreement.

REDACTED

FOISA 533(1)(b)
EIR 10(5)(B)

SECTION 5

REVIEWABLE DESIGN DATA

The Reviewable Design Data is the Reviewable Design Data as set out on the disc in the Agreed Form identified and executed as the Section 5 (*Reviewable Design Data*) of Schedule Part 6 (*Construction Matters*) of this Agreement, referred to in and forming part of this Agreement.

REDACTED . FOISA s33 (1)(b)
EIR Reg 10(5)(e) .

SECTION 6

ROOM DATA SHEETS

The Room Data Sheets are the Room Data Sheets as set out on the disc in the Agreed Form identified and executed as Appendix 1 (*RDS Pack*) and Appendix 2 (*Environmental Matrix*) of Section 6 (*Room Data Sheets*) of Schedule Part 6 (*Construction Matters*) of this Agreement, referred to in and forming part of this Agreement.

REDACTED

FOISA s 33 (1)(b)
EIR 10 (5)(3).

Appendix 1

RDS Pack

The RDS Pack is the RDS Pack as set out on the disc in the Agreed Form identified and executed as Appendix 1 (*RDS Pack*) and Appendix 2 (*Environmental Matrix*) of Section 6 (*Room Data Sheets*) of Schedule Part 6 (*Construction Matters*) of this Agreement referred to in and forming part of this Agreement.

REDACTED , FOISA 533 (1)(b)
EIR 10(5)(3) .

Appendix 2
Environmental Matrix

The Environmental Matrix is the Environmental Matrix as set out on the disc in the Agreed Form identified and executed as Appendix 1 (*RDS Pack*) and Appendix 2 (*Environmental Matrix*) of Section 6 (*Room Data Sheet*) of Schedule Part 6 (*Construction Matters*) of this Agreement, referred to in and forming part of this Agreement.

REDACTED.

FOISA s33(1)(b)
EIR 10(5)(3)

SECTION 7

THERMAL AND ENERGY EFFICIENCY TESTING PROCEDURE

REDACTED
to page 227

FOISA s 33(1)(b)
EIR 10/5)(3).

SECTION 8

QUALITY PLANS (DESIGN AND CONSTRUCTION)

The Quality Plans (*Design and Construction*) are the Quality Plans (*Design and Construction*) as set out in Section 4.20 (*Quality Plan*) of Section 4 (*Project Co's Proposals*) of Schedule Part 6 (*Construction Matters*).

REDACTED

FOISA s33(1)(b)
EIR 10(5)(3)

SECTION 9

AGREED FORM BOARD'S QUALIFICATIONS/COMMENTS IN RESPECT OF OPERATIONAL
FUNCTIONALITY REQUIREMENTS

REDACTED , FOISA 533(1)(b)
EIR 10(5)(3)
to page 230

SCHEDULE PART 7

THE PROGRAMME

The Programme is the Programme as set out on the disc in the Agreed Form identified and executed as the Schedule Part 7 (*The Programme*) of this Agreement, referred to in and forming part of this Agreement.

REDACTED

FOISA s 33(1)(b)
EIR 10(5)(3)

SCHEDULE PART 8

REVIEW PROCEDURE

1. REVIEW

1.1 The provisions of this Schedule Part 8 (*Review Procedure*) shall apply whenever any item, document or course of action is required to be reviewed, approved or otherwise processed in accordance with Schedule Part 8 (*Review Procedure*).

1.2 Subject to any express provision of this Agreement, the manner, form and timing of any submission to be made by Project Co to the Board's Representative for review under this Schedule Part 8 (*Review Procedure*) shall be a matter for Project Co to determine. Each submission under this Schedule Part 8 (*Review Procedure*) shall be accompanied by a copy of the proposed document to be reviewed (including, where applicable, any Reviewable Design Data) or a statement of the proposed course of action (the entire contents of a submission being referred to in this Schedule Part 8 (*Review Procedure*) as a "**Submitted Item**"). In relation to each Submitted Item, the following procedure shall apply:

1.2.1 as soon as possible and, if the Submitted Item comprises:

- (a) an Item of Reviewable Design Data;
- (b) a revised Programme submitted pursuant to Clause 14 (*Programme and Dates for Completion*); or
- (c) a document or proposed course of action submitted in the case of (an emergency),

within fifteen (15) Business Days of the date of receipt of a submission (or re-submission, as the case may be) of the Submitted Item to the Board's Representative (or such other period as the parties may agree), the Board's Representative shall return one copy of the relevant Submitted Item to Project Co endorsed "no comment" or (subject to and in accordance with paragraph 3 (*Grounds for Objection*)) "comments" as appropriate; and

1.2.2 subject to paragraph 1.4, if the Board's Representative fails to return a copy of any Submitted Item (including any re-submitted Submitted Item) duly endorsed in accordance with paragraph 1.2.1, within fifteen (15) Business Days (or within such other period as the parties may agree in writing) of the date of its submission to the Board's Representative, then the Board's Representative shall be deemed to have returned the Submitted Item to Project Co endorsed "no comment" (and, in the case of Reviewable Design Data, endorsed "Level A - no comment"); and

1.2.3 in relation to the aspects of each Finish identified in the table below:

- (a) Project Co shall submit to the Board a range or selection of finishes ("**Range of Finishes**") no later than the relevant Finishes Proposal Date;
- (b) the Board's Representative shall by the relevant Finishes Selection Date notify Project Co of its selection for the relevant Finish; and
- (c) if no selection of a Finish has been made by the Board's Representative and notified to Project Co in accordance with paragraph 1.2.3(b) by the relevant Finish Selection Date, Project Co shall be entitled to make a selection from the Range of Finishes submitted in accordance with paragraph 1.2.3(a). After the relevant Finish Selection Date, should the Board wish to vary any selection previously made by Project Co or by the Board, such variation shall be

effected as a Change in accordance with Schedule Part 16 (*Change Protocol*).

Table of Finishes

--	--	--	--	--	--

REDACTED

FOISA 533 (1)(b)
EIR 10(s)(3)

REDACTED

1.3 If the Board's Representative raises comments on any Submitted Item in accordance with paragraph 3 (*Grounds for Objection*) he shall state the ground upon which such comments are based and the evidence or other information necessary to substantiate that ground. To the extent that the Board's Representative comments on a Submitted Item other than on the basis set out in this Schedule Part 8 (*Review Procedure*), or fails to comply with the provisions of this paragraph, Project Co may, in its discretion, either:

1.3.1 request written clarification of the basis for such comments and, if clarification is not received within ten (10) Business Days of such request by Project Co, refer the matter for determination in accordance with Schedule Part 20 (*Dispute Resolution Procedure*); or

1.3.2 in the case of a Submitted Item comprising Reviewable Design Data only, at its own risk, and without prejudice to Clause 12 (*The Design, Construction and Commissioning Process*), proceed with further design or construction disregarding such comments pending the outcome of any reference to the Dispute Resolution Procedure that may be made by either party.

1.4 In the case of any Submitted Item of the type referred to in paragraph 3.10, a failure by the Board's Representative to endorse and return such Submitted Item within the period specified in paragraph 1.2.2 shall be deemed to constitute an objection by the Board's Representative to such Submitted Item. If the parties fail to agree the form and content of such Submitted Item, within ten (10) Business Days following the expiry of the period specified in paragraph 1.2.2, the matter shall be determined in accordance with Schedule Part 20 (*Dispute Resolution Procedure*).

2. FURTHER INFORMATION

Project Co shall submit any further or other information, data and documents that the Board's Representative reasonably requires in order to determine whether he has a basis for raising comments or making objections to any Submitted Item in accordance with this Schedule Part 8 (*Review Procedure*). If Project Co does not submit any such information, data and documents, the Board's Representative shall be entitled to:

2.1 comment on the Submitted Item on the basis of the information, data and documents which have been provided; or

2.2 object to the Submitted Item on the grounds that insufficient information, data and documents have been provided to enable the Board's Representative to determine whether he has a legitimate basis for commenting or objecting in accordance with this Schedule Part 8 (*Review Procedure*).

3. GROUNDS OF OBJECTION

The expression "raise comments" in this paragraph shall be construed to mean "raise comments or make objections" unless the contrary appears from the context. The Board's Representative may raise comments in relation to any Submitted Item on the grounds set out in paragraph 2 (*Further Information*) above or on the ground that the Submitted Item would (on the balance of probabilities) breach any Law but otherwise may raise comments in relation to a Submitted Item only as follows:

3.1 in relation to any Submitted Item if:

3.1.1 Project Co's ability to perform its obligations under this Agreement would (on the balance of probabilities) be adversely affected by the implementation of the Submitted Item; or

3.1.2 the implementation of the Submitted Item would (on the balance of probabilities) adversely affect any right of the Board under this Agreement or its ability to enforce any such right;

3.1.3 any aspect of a Submitted Item does not comply with or is not in accordance with or breaches Schedule Part 31 [REDACTED] *Interface with Campus Site and/or Campus Facilities*) and/or the Interface Proposals;

3.2 in relation to any Submitted Item submitted pursuant to Clause 4.1 (*Ancillary Documents*) if:

3.2.1 the Board's ability to perform its obligations under this Agreement would be adversely affected by the proposed course of action;

3.2.2 the Board's ability to provide the relevant Board Services or to carry out any

f0154
533(1)(b)
EIR 105(e)

- of its statutory functions would (on the balance of probabilities) be adversely affected by the proposed course of action;
- 3.2.3 the proposed course of action would be likely to result in an increase to the Board's liabilities or potential or contingent liabilities under this Agreement;
 - 3.2.4 the proposed course of action would adversely affect any right of the Board under this Agreement or its ability to enforce any such right; or
 - 3.2.5 Project Co's ability to perform its obligations under this Agreement would be materially adversely affected by the proposed course of action;
- 3.3 in relation to Reviewable Design Data submitted pursuant to Clause 12.6:
- 3.3.1 which does not comprise 1:50 scale Room Layout Drawings the Board's Representative may raise comments, subject to and in accordance with paragraph 4 (*Effect of Review*) on the ground that the Submitted Item is not in accordance with:
 - (a) the Board's Construction Requirements; and/or
 - (b) Project Co's Proposals;
 - 3.3.2 which comprises a 1:50 scale Room Layout Drawing in respect of which there is a corresponding generic 1:50 scale Room Layout Drawing for the relevant room type (which has previously been reviewed and commented upon by the Board's Representative in accordance with this Schedule Part 8 (*Review Procedure*)), the Board's Representative may raise comments, subject to and in accordance with paragraph 4 (*Effect of Review*), on the ground that the Submitted Item does not conform to the generic 1:50 scale Room Layout Drawing; and
 - 3.3.3 which comprises a 1:50 scale Room Layout Drawing in respect of which there is no corresponding generic 1:50 scale Room Layout Drawing for the relevant room type (which has previously been reviewed and commented upon by the Board's Representative in accordance with this Schedule Part 8 (*Review Procedure*)), the Board's Representative may raise comments, subject to and in accordance with paragraph 4 (*Effect of Review*), on the grounds that the Submitted Item:
 - (a) is not in accordance with the Board's Construction Requirements and/or Project Co's Proposals; or
 - (b) is inconsistent with the guidance contained in any current NHS Requirement which is applicable to a room of that function provided that such guidance has not been superseded by and is not inconsistent with any other provisions of the Board's Construction Requirements (including any existing Approved RDD Item);
 - 3.3.4 on the grounds that the Interface Proposals (other than those set out in Part 2 (*Interface Proposals Procedure*) of Schedule Part 31 (*Consort interfere with Campus Site and/or Campus Facilities*), and/or Reviewable Design Data as set out in Part 5 of Section 5 (*Reviewable Design Data*) is not in accordance with or breaches Schedule Part 31 [REDACTED] *Interface with Campus Site and/or Campus Facilities*) and/or the relevant Interface Proposals;
- 3.4 in relation to a proposal to amend Project Co's Proposals and rectify (part of) the Works submitted pursuant to Clause 12.8 (*Rectification of Project Co's Proposals*), on the grounds that, following the amendment and rectification proposed:
- 3.4.1 Project Co's Proposals would not satisfy the Board's Construction Requirements; and/or

POBt
533(1)(b)
10(5)(e)
EHL

- 3.4.2 the structural, mechanical and/or electrical performance of the Facilities and/or the Retained Estate Handback Infrastructure would not be of an equivalent standard of performance to that set out in Project Co's Proposals prior to their amendment or rectification (for the purpose of this comparison disregarding the fault which required the amendment or rectification to be made);
- 3.5 in relation to Finishes:
- 3.5.1 which have the effect of making a selection from the Range of Finishes (or any alternative range or selection of Finishes submitted by Project Co to the Board's Representative) pursuant to Clause 12.6.1 (*Board Design Approval*); or
- 3.5.2 where the Submitted Item does not comply with the relevant provisions of the Board's Construction Requirements and/or Project Co's Proposals;
- 3.6 in relation to the submission of any revised Programme pursuant to Clause 14 (*Programme and Dates for Completion*) on the ground that the revised Programme would not (on the balance of probabilities) enable the Works to be completed by the Completion Date and/or reflect any timescales set out in the Schedule Part 31 [REDACTED] (*Interface with Campus Site and/or Campus Facilities*) and/or the Interface Proposals;
- 3.7 in relation to the submission of any Quality Plan or part of a Quality Plan or any changes to any Quality Plan pursuant to Clause 20.4 (*Quality Plans and Systems*) or Clause 20.7 (*Quality Plans and Systems*) or any quality manual or procedure in accordance with Clause 20.9 (*Quality Manuals and Procedures*), on the grounds that such Quality Plans, or parts of or changes to such Quality Plans, quality manuals or procedures, or the quality management systems which they reflect, would not comply with:
- 3.7.1 in the case of the Design Quality Plan and the Construction Quality Plan referred to in Clause 20.8 (*Quality Plans and Systems*), the requirements referred to in Section 8 (*Quality Plans (Design and Construction)*) of Schedule Part 6 (*Construction Matters*); and
- 3.7.2 in the case of the Services Quality Plan referred to in Clause 20 (*Quality Assurance*), the requirements referred to in Section 3 (*Services Quality Plan*) of Schedule Part 12 (*Service Requirements*);
- 3.8 in relation to the submission of any proposed revision or substitution for the Method Statements and/or Interface Proposals (other than those set out in Part 2 (*Interface Proposals Procedure*) of Schedule Part 31 [REDACTED] (*Interfere with Campus Site and/or Campus Facilities*) or any part of any Method Statement (as the case may be) pursuant to Clause 22.4 (*Project Co Service Changes*), on the grounds that:
- 3.8.1 the proposed revision or substitution is not in accordance with Good Industry Practice;
- 3.8.2 the performance of the Services in accordance with the proposed revision or substitution would (on the balance of probabilities):
- (a) be materially different from the performance of the Services in accordance with the Method Statement prior to such proposed revision or substitution; or
- (b) be less likely to achieve compliance with the Service Level Specification and/or the relevant Interface Proposals; or
- (c) have an adverse effect on the provision by the Board of the relevant Board Services at, or on the safety of any users of, the Facilities; or

FOISA
s 33(1)(b)
E IR
10(e)(e)

- 3.8.3 the proposed revision or substitution would (on the balance of probabilities) result in an inferior standard of performance of the Services to the standard of performance in accordance with the Method Statement prior to such proposed revision or substitution; and
- 3.8.4 the Method Statement and/or Interface Proposals (other than those set out in Part 2 (*Interface Proposals Procedure*) of Schedule Part 31 [REDACTED] *interfere with Campus Site and/or Campus Facilities*) are not in accordance with or breach Schedules Part 31 (*Consort interfere with Campus Site and/or Campus Facilities*)
- 3.9 in relation to the submission of any Schedule of Programmed Maintenance pursuant to Clause 23.1 (*Programmed Maintenance Works*), the submission of any Schedule of Lifecycle Replacement pursuant to Clause 23A (*Lifecycle Replacement*), any revision to any Schedule of Programmed Maintenance pursuant to Clause 23.4 (*Programmed Maintenance Works*) or any submission of Unprogrammed Maintenance Works pursuant to Clause 23.8 (*Programmed and Unprogrammed Maintenance*), on the grounds that:
- 3.9.1 carrying out the Programmed Maintenance, Lifecycle Replacement or the Unprogrammed Maintenance Works in the period or at the times suggested would (on the balance of probabilities) interfere with the operations of the Board and/or any Board Party and such interference could be avoided or mitigated by Project Co rescheduling the Programmed Maintenance, Lifecycle Replacement or the Unprogrammed Maintenance Works; or
- 3.9.2 in relation to the Schedule of Programmed Maintenance or Schedule of Lifecycle Replacement, the proposed hours for carrying out the Programmed Maintenance or Schedule of Lifecycle Replacement are not consistent with the principles set out in Appendix 2, Table B to this Schedule Part 8 (*Review Procedure*); or
- 3.9.3 the proposed method of performance of the Programmed Maintenance, Lifecycle Replacement or the Unprogrammed Maintenance Works would not be in accordance with the Service Level Specification and/or the relevant Interface Proposals and/or Schedule Part 31 [REDACTED] *Interface with Campus Site and/or Campus Facilities*) and/or the restrictions and/or requirements of Clause 9 (*Nature of Land Interests*) including without limitation Schedule Part 5 (*Land Matters*); or
- 3.9.4 the safety of users of the Facilities and/or RIE Facilities would (on the balance of probabilities) be adversely affected; or
- 3.9.5 the period for carrying out the Programmed Maintenance, Lifecycle Replacement or the Unprogrammed Maintenance Works would (on the balance of probabilities) exceed the period reasonably required for the relevant works.
- 3.10 in relation to the submission of Project Co's proposals for the Handback Works, the Handback Programme and the Handback Amount pursuant to Schedule Part 18 (*Handback Procedure*), on the grounds that:
- 3.10.1 in the case of the Handback Works, Project Co's proposals will not (on the balance of probabilities) ensure that the Handback Requirements are achieved by the Expiry Date;
- 3.10.2 in the case of the Handback Programme, performance of the Handback Works in accordance with the programme is not (on the balance of probabilities) capable of achieving satisfaction of the Handback Requirements by the Expiry Date; and
- 3.10.3 in the case of the Handback Amount, it does not represent the cost of

carrying out the Handback Works according to the Handback Programme and the provisions of Schedule Part 18 (*Handback Procedure*);

- 3.11 in relation to the submission of any Schedule of Lifecycle Replacement on the grounds that, Project Co's Proposals do not address the issues set out in Clause 23A.3 and/or Clause 23A.4 (*Lifecycle Replacement*) or the Board's Representative wishes to make additional comments on the issues set out in Clauses 23A.3, 23A.4 and/or 23A.5 (*Lifecycle Replacement*).

4. EFFECT OF REVIEW

- 4.1 Any Submitted Item which is returned or deemed to have been returned by the Board's Representative endorsed "no comment" (and in the case of Reviewable Design Data, endorsed "Level A - no comment") shall be complied with or implemented (as the case may be) by Project Co.
- 4.2 In the case of any Submitted Item other than Reviewable Design Data, if the Board's Representative returns the Submitted Item to Project Co endorsed "comments", Project Co shall comply with such Submitted Item after amendment in accordance with the comments unless Project Co disputes that any such comment is on grounds permitted by this Agreement, in which case Project Co or the Board's Representative may refer the matter for determination in accordance with Schedule Part 20 (*Dispute Resolution Procedure*) and Project Co shall not act on the Submitted Item until such matter is so determined or otherwise agreed.
- 4.3 In the case of a Submitted Item comprising Reviewable Design Data, if the Board's Representative returns the Submitted Item endorsed other than "Level A - no comment", Project Co shall:
 - 4.3.1 where the Board's Representative has endorsed the Submitted Item "Level B - proceed subject to amendment as noted", either proceed to construct or proceed to the next level of design of the part of the Works to which the Submitted Item relates but take into account any amendments required by the Board's Representative in his comments;
 - 4.3.2 where the Board's Representative has endorsed the Submitted Item "Level C - subject to amendment as noted" not act upon the Submitted Item, amend the Submitted Item in accordance with the Board's Representative's comments and re-submit the same to the Board's Representative in accordance with paragraph 4.4; and
 - 4.3.3 where the Board's Representative has endorsed the Submitted Item "Level D - rejected" not act upon the Submitted Item, amend the Submitted Item and re-submit the Submitted Item to the Board's Representative in accordance with paragraph 4.4,

unless Project Co disputes that any such comment or proposed amendment is on grounds permitted by this Agreement, in which case Project Co or the Board's Representative may refer the matter for determination in accordance with Schedule Part 20 (*Dispute Resolution Procedure*) and Project Co shall not act on the Submitted Item until such matter is so determined or otherwise agreed except at its own risk in accordance with paragraph 1.3.2.

- 4.4 Within ten (10) Business Days of receiving the comments of the Board's Representative on any Submitted Item comprising Reviewable Design Data, Project Co shall (except in the case contemplated in paragraph 4.3.1) send a copy of the Submitted Item as amended to the Board's Representative pursuant to paragraph 4.3 and the provisions of paragraphs 1.2.1, 4.1 and 4.3 shall apply (changed according to context) to such re-submission.
- 4.5 The return or deemed return of any Submitted Item endorsed "no comment" (or in the case of Reviewable Design Data endorsed "Level A - no comment" or otherwise endorsed in accordance with paragraphs 4.3.1 or 4.3.2) shall mean that the relevant

Submitted Item may be used or implemented for the purposes for which it is intended but, save to the extent expressly stated in this Agreement including, without limitation, as specified in Appendix 1 Table A to this Schedule Part 8 (*Review Procedure*), such return or deemed return of any Submitted Item shall not otherwise relieve Project Co of its obligations under this Agreement nor is it an acknowledgement by the Board that Project Co has complied with such obligations.

- 4.6 Clause 23A.6 (*Lifecycle Replacement*) shall apply in respect of any comments made by the Board's Representative on the grounds set out in paragraphs 3.9 to 3.11 which Project Co shall not be bound to implement, notwithstanding any other provision in this Schedule Part 8 (*Review Procedure*).

5. DOCUMENTATION MANAGEMENT

- 5.1 Project Co shall issue two (2) copies of all Submitted Items to the Board and compile and maintain a register of the date and contents of the submission of all Submitted Items.
- 5.2 Project Co shall compile and maintain a register of the date of receipt and content of all Submitted Items that are returned or deemed to be returned by the Board's Representative.
- 5.3 Save to the extent set out in Appendix 1, Table A to this Schedule Part 8 (*Review Procedure*) or elsewhere in this Schedule Part 8 (*Review Procedure*), no review, comment or approval by the Board shall operate to exclude or limit Project Co's obligations or liabilities under this Agreement (or the Board's rights under this Agreement).

6. CHANGES

- 6.1 No approval or comment or any failure to give or make an approval or comment under this Schedule Part 8 shall constitute a Change save to the extent provided in this Schedule Part 8 (*Review Procedure*).
- 6.2 If, having received comments from the Board's Representative, Project Co considers that compliance with those comments would amount to a Change, Project Co shall, before complying with the comments, notify the Board of the same and, if it is agreed by the parties or determined pursuant to Schedule Part 20 (*Dispute Resolution Procedure*) that a Change would arise if the comments were complied with, the Board may, if it wishes, implement the Change and it shall be dealt with in accordance with Schedule Part 16 (*Change Protocol*). Any failure by Project Co to notify the Board that it considers compliance with any comments of the Board's Representative would amount to a Change shall constitute an irrevocable acceptance by Project Co that any compliance with the Board's comments shall be without cost to the Board and without any extension of time.
- 6.3 No alteration or modification to the design, quality and quantity of the Works arising from the development of detailed design or from the co-ordination of the design shall be construed or regarded as a Change.

APPENDIX 1

TABLE A

Approved (by category)	RDD	Item	Scale	Meaning of "Level A - no comment" and "Level B - proceed subject to amendment as noted" endorsement of Reviewable Design Data under Schedule Part 8 (Review Procedure) (including both the actual and deemed endorsement).
Room Data Sheets			n/a	A "Level A - no comment" endorsement or a "Level B - proceed subject to amendment as noted" endorsement of any room data sheet means that Project Co may proceed to construct in accordance with the Submitted Item and that the Board is satisfied that the design and other information in the relevant room data sheet satisfies Operational Functionality.
Drawings – Development Control Plan			1:1250	A "Level A - no comment" endorsement or a "Level B - proceed subject to amendment as noted" endorsement of any 1:1250 scale development control plan means that Project Co may proceed to construct in accordance with the Submitted Item and that the Board is satisfied that the design and other information contained in the relevant drawing satisfies Operational Functionality.
Drawings – Site Plan			1:500	A "Level A - no comment" endorsement or a "Level B - proceed subject to amendment as noted" endorsement of any 1:500 scale site plan means that Project Co may proceed to construct in accordance with the Submitted Item and that the Board is satisfied that the design and other information contained in the relevant drawing satisfies Operational Functionality.
Drawings – Floor Plans			1:200	A "Level A - no comment" endorsement or a "Level B - proceed subject to amendment as noted" endorsement of any 1:200 scale floor plan means that Project Co may proceed to construct in accordance with the Submitted Item and that the Board is satisfied that the design and other information contained in the relevant drawing satisfies the Operational Functionality.
Drawings – Room Layouts (including room elevations) & Reflected ceiling plans			1:50	A "Level A - no comment" endorsement or a "Level B - proceed subject to amendment as noted" endorsement of any 1:50 scale room layout and/or reflected ceiling drawing means that Project Co may proceed to construct in accordance with the Submitted Item and that the Board is satisfied (to the extent of the design and other information contained in the relevant drawing) that the design and other information in the relevant drawing satisfies Operational Functionality.

<p>Drawings –</p> <p>Departmental plans</p>	<p>1:50</p>	<p>A "Level A - no comment" endorsement or a "Level B – proceed subject to amendment as noted" endorsement of any 1:50 scale departmental plan means that Project Co may proceed to construct in accordance with the Submitted Item and that the Board is satisfied (to the extent of the design and other information contained in the relevant drawing) that the design and other information in the relevant drawing satisfies Operational Functionality.</p>

APPENDIX 2

HOURS FOR PROGRAMMED MAINTENANCE

- 1 Subject to paragraphs 3 to 5 below, Project Co shall carry out Programmed Maintenance and Lifecycle Replacement at the Facilities [REDACTED] ("Hours for Programmed Maintenance").
- 2 Project Co may, with the consent of the Board (which consent shall not be unreasonably withheld) carry out Maintenance Works outside the Hours for Programmed Maintenance and Lifecycle Replacement provided always that it shall take into account:
 - 2.1 the likely disturbance to the Board, Board Party and/or any Campus Party and users within the immediate area where the Maintenance Works and Lifecycle Replacement are to be undertaken;
 - 2.2 the likely disturbance to adjacent areas, the Board, Board Party and/or any Campus Party and users in those adjacent areas that may be affected by the Maintenance Works to be undertaken in the area(s) identified in (i) above; and
 - 2.3 compliance with the Law.
- 3 Subject to paragraph 4 and/or Schedule Part 31 (*Consort Interface with Campus Site and/or Campus Facilities*) and/or the Interface Proposals, Project Co shall have access to the Facilities during the hours of operation to the areas set out in and in accordance with Table B below ("Hours of Operation") to carry out Programmed Maintenance and Lifecycle Replacement.

TABLE B

REDACTED

FOIA
§ 33(1)(b)

ER
Reg 10(5)(e)



- 4 Where Project Co requires access to an area of the Facilities during the Hours of Operation, Project Co will consult with and obtain the consent of the Contract Manager concerning dates, times and periods during which Programmed Maintenance or Lifecycle Replacement is to be undertaken in those departments so as to minimise disruption to those departments.
- 5 The Board may request Project Co to carry out Programmed Maintenance or Lifecycle Replacement outside the Hours for Programmed Maintenance in the event that the carrying out of such Programmed Maintenance or Lifecycle Replacement during the Hours for Programmed Maintenance would adversely affect the use of the department or area.

SCHEDULE PART 9
COLLATERAL AGREEMENTS

REDACTED
to page 294

FOISA §38(1)(b).
EIR Reg 11.

SCHEDULE PART 10
OUTLINE COMMISSIONING PROGRAMME

REDACTED
to page 309

FOISA s38(1)(b)
EIR Reg. 11

SCHEDULE PART 11

EQUIPMENT

FOISA s38(1)(b)
EIR Reg. 11

REDACTED

to page 321

SCHEDULE PART 12
SERVICE REQUIREMENTS

SECTION 1
SERVICE LEVEL SPECIFICATION

The Service Level Specification is the Service Level Specification as set out on the disc in the Agreed Form identified and executed as the Section 1 (*Service Level Specification*) of Schedule Part 12 (*Service Requirements*) of this Agreement, referred to in and forming part of this Agreement.

REDACTED

FOISA s38(1)(b)
EIR Reg. 11

SECTION 2

METHOD STATEMENTS

The Method Statements are the Method Statements as set out on the disc in the Agreed Form identified and executed as the Section 2 (*Method Statements*) of Schedule Part 12 (*Service Requirements*) of this Agreement, referred to in and forming part of this Agreement.

REDACTED

FOISA s38(1)(b)
EIR Reg. 11

SECTION 3

SERVICES QUALITY PLAN

The Services Quality Plan is the Services Quality Plan as set out on the disc in the Agreed Form identified and executed as the Section 3 (*Services Quality Plan*) of Schedule Part 12 (*Service Requirements*) of this Agreement, referred to in and forming part of this Agreement.

REDACTED

FOISA s38(1)(b)
EIR Reg. 11

SECTION 4

ENERGY STRATEGY

The Energy Strategy is Energy Strategy as set out on the disc in the Agreed Form identified and executed as the Section 4 (*Energy Strategy*) of Schedule Part 12 (*Service Requirements*) of this Agreement, referred to in and forming part of this Agreement.

REDACTED

FOISA s38(1)(b)
EIR Reg. 11

SCHEDULE PART 13

INDEPENDENT TESTER CONTRACT

AGREEMENT

AMONG:

- (1) **LOTHIAN HEALTH BOARD**, a health board constituted in Scotland under the National Health Service (Constitution of Health Boards) (Scotland) Order 1974 (S.I. 1974/267) as amended by the National Health Service (Constitution of Health Boards) (Scotland) Amendment Order 2003 (S.S.I. 2003/217) pursuant to Section 2 of the National Health Service (Scotland) Act 1978 as amended by section 28 of the National Health Service and Community Care Act 1990 and having its principal address at Waverley Gate, 2-4 Waterloo Place, Edinburgh EH1 3EG (together with its successors, assignees and/or transferees is referred to as the "**Board**");
- (2) **IHS LOTHIAN LIMITED**, (registered under number SC493676 whose registered office is at Burness Paull LLP, 50 Lothian Road, Festival Square, Edinburgh, EH3 9WJ) ("**Project Co**");
- (3) [REDACTED] (the "**Independent Tester**");
- (4) [REDACTED] (the "**Security Trustee**");
- (5) [REDACTED] (the "**Intercreditor Agent**"); and
- (6) [REDACTED] (the "**Contractor**");

KIR Reg 11
FOISA 538 (b)

WHEREAS:

- (A) Project Co and the Board have entered into an agreement for the financing, design and construction of and the provision of certain services in connection with a project to re-provide services from the Royal Hospital for Sick Children, Child and Adolescent Mental Health Service and the Department of Clinical Neurosciences in a single building adjoining the Royal Infirmary of Edinburgh at Little France at the Site and Off-Site (the "**Project**") pursuant to the Government's private finance initiative (the "**Project Agreement**") under the terms of which they have jointly agreed to appoint an independent tester.
- (B) Project Co has entered into the Construction Contract with the Contractor for the development of the Project at the Site and Off-Site.
- (C) Project Co has entered into the Senior Funding Agreements with the Funders.
- (D) The Independent Tester is an independent adviser willing to provide services to Project Co and the Board and for the benefit of the Secured Creditors and the Funders.
- (E) Project Co and the Board have jointly agreed to engage the Independent Tester to carry out the duties and obligations ascribed to the Independent Tester in the Project Agreement upon the terms of this Agreement.

IT IS AGREED as follows:

1 INTERPRETATION

- 1.1 Unless the context otherwise requires, words and expressions defined in the Project Agreement have the same meanings in this Agreement as in the Project Agreement.

"**Completion Process**" means the process and procedures for carrying out the notification, testings, inspections and completion certification as set out in Schedule Part 10 (*Outline Commissioning Programme*) of the Project Agreement as may be applicable to the Works.

- 1.2 The headings in this Agreement do not affect its interpretation.

Unless the context otherwise requires, all references to Clauses and Appendices are references to clauses of and appendices to this Agreement.

2 APPOINTMENT

- 2.1 Project Co and the Board jointly appoint the Independent Tester to perform the services obligations and tasks which are ascribed to the Independent Tester under the Project Agreement and which are set out in Appendix 1 upon the terms and conditions set out below. The Contractor is a party to this Agreement solely to make the commitments on its part as expressly made in this Agreement and, for the avoidance of doubt, the Independent Tester shall have no liability to the Contractor.
- 2.2 The Independent Tester shall provide the services, obligation and tasks under Clause 2.1 above (the "**Services**") independently, fairly and impartially to and as between Project Co and the Board in relation to the Project Agreement at such times and at such locations as the parties shall agree from time to time. In performing the Services in accordance with the terms of this Agreement, the Independent Tester shall have regard to the interest of and shall perform the same for the benefit of and with a duty of care to the Funders, the Secured Creditors, the Security Trustee and the Intercreditor Agent. Whilst the Independent Tester shall take account of any representations made by Project Co and the Board and the Contractor (as appropriate) the Independent Tester shall not be bound to comply with any representations made by any of them in connection with any matter on which the Independent Tester is required to exercise his professional judgement.

3 VARIED SERVICES

- 3.1 The Independent Tester shall carry out and perform any additional and/or varied services required for the implementation of the Project reasonably required by the Board and Project Co which are not included in, or which are omitted from, the Services (the "**Varied Services**"), subject to prior agreement by the Board and Project Co to the costs thereof. The written agreement by the Board and Project Co pursuant to this Clause 3.1 shall state whether (and where applicable in what proportions) the Board and/or Project Co will be responsible for the payment of the fee agreed for the Varied Services. The Independent Tester acknowledges that the liability of Project Co and the Board to pay the Independent Tester for the Varied Services shall be several and not joint.
- 3.2 If the Independent Tester shall at any time be required to perform Varied Services, it shall give to the Board and Project Co a written estimate of the cost thereof (taking into account any reduction in work or other expense which might also occur as a result of the circumstances giving rise to the Varied Services).

- 3.3 Where a change to the Project occurs pursuant to the terms of the Project Agreement (whether by virtue of a Delay Event, Change, change to the Programme or otherwise) which may materially impact on the Services or otherwise on the Independent Tester, the Board and Project Co shall promptly notify the Independent Tester of such change. The Independent Tester shall within five (5) Business Days of receiving such notification, notify the Board and Project Co of the impact of such change, if any, on the Services, including whether such change gives rise to any Varied Services and the provisions of this Clause 3.3 shall apply accordingly.
- 3.4 The Independent Tester shall promptly and efficiently provide the Services and the Varied Services:
- 3.4.1 with the reasonable care, skill and diligence to be expected of a properly qualified and competent professional adviser who has held himself out as competent and experienced in rendering such services for projects of a similar size, nature, scope and complexity to the Project; and
- 3.4.2 in accordance with all applicable Law and NHS Requirements.
- 3.5 All instructions to the Independent Tester must be given signed and given jointly by the Board's Representative and Project Co's Representative or such other person appointed pursuant to Clause 8 (*Representatives*) of the Project Agreement and, for the avoidance of doubt, the Independent Tester shall not act in accordance with any instructions given to him by either the Board or Project Co (or any other person) not given in accordance with the provisions of this Clause 3.5.
- 3.6 The Independent Tester shall comply with all reasonable instructions given to it by Project Co and the Board pursuant to Clause 3.5 except and to the extent that the Independent Tester reasonably considers that any such instructions vary or might vary the Services or its authority or responsibilities under this Agreement or prejudices or might prejudice the exercise by the Independent Tester of its professional judgement in accordance with Clauses 2.2 and 3.4 above. The Independent Tester shall promptly confirm in writing to Project Co and the Board whether or not it shall comply with any such instruction setting out the grounds upon which the decision is made.
- 3.7 The Board, Project Co and the Contractor agree to co-operate with and provide reasonable assistance to the Independent Tester to familiarise the Independent Tester with all necessary aspects of the Project to enable the Independent Tester to carry out its obligations under this Agreement.
- 3.8 The Independent Tester shall be deemed to have full knowledge of the provisions of the Project Agreement, the Construction Contract, the Service Contracts, the Senior Funding Agreements and the Interface Agreement (as defined in the Construction Contract) such as relates to the Services and shall be deemed to be aware of and to have taken full account of all the undertakings and warranties, both expressed and implied, on the part of Project Co and the Board which are set out in the Project Agreement provided always that true and accurate copies have been delivered to the Independent Tester.
- 3.9 Subject to Clause 3.10, the Independent Tester shall use the following partners, directors or employees:





in connection with the performance of the Services and such persons' services shall be available when necessary and for so long as may be necessary to ensure the proper performance by the Independent Tester of the Services. Such persons shall have full authority to act on behalf of the Independent Tester for all purposes in connection with the Services.

- 3.10 The Independent Tester may by written notice to the Board and Project Co replace the staff identified in Clause 3.9 taking into account the need for liaison, continuity, level of qualification and availability of personnel in respect of the Project. Such replacement shall be subject to approval in writing by Project Co and the Board (not to be unreasonably withheld or delayed).

4 DURATION

- 4.1 The Services shall commence on the last date of execution of the Project Agreement
- 4.2 The parties hereby agree that this Agreement governs all of the Services (including the Varied Services, if any) provided by the Independent Tester in relation to the Project whether before or after the date hereof.

5 FEE

- 5.1 Project Co shall pay to the Independent Tester [REDACTED] the Services provided under this Agreement. The fee is exclusive of value added tax and inclusive of disbursements. The Independent Tester shall issue an invoice to Project Co on a monthly basis in accordance with Appendix 2 Section 1 (*Schedule of Drawdown of Fees*) (the "Application for Payment"). Five (5) days after the date on which the invoice is received by Project Co shall constitute the due date (the "Due Date"). The final date for payment by Project Co shall be thirty (30) days after receipt of the Independent Tester's invoice (the "Final Date"). If Varied Services are provided then they shall be paid for in accordance with the agreement between the Independent Tester and the Board and Project Co pursuant to Clause 3.1.
- 5.2 Not later than five (5) days after the Due Date ascertained in accordance with Clause 5.1, Project Co shall give written notice to the Independent Tester stating the amount which Project Co considers to be or have been due at the Due Date and the basis on which the amount is calculated (the "Payment Notice"). It is immaterial that the sum referred to in this notice may be zero. If Project Co fails to give a Payment Notice in accordance with this Clause 5.2 and the Independent Tester has given an Application for Payment in accordance with Clause 5.1, subject to any Pay Less Notice given under Clause 5.3, the sum to be paid to the Independent Tester shall be the sum specified in the Application for Payment.
- 5.3 Where Project Co intends to pay less than the sum stated as due pursuant to this

Agreement, Project Co shall, not later than two (2) days before the relevant Final Date, give a written notice to the Independent Tester (a "**Pay Less Notice**"). Such Pay Less Notice shall specify both the sum that Project Co considers to be due to the Independent Tester at the date the notice is given and the basis on which that sum is calculated. It is immaterial that the sum referred to in this Clause 5.3 may be zero. Where any Pay Less Notice is given, the payment to be made on or before the relevant Final Date shall be not less than the amount stated as due in such notice.

- 5.4 If Project Co fails to pay a sum, or any part of it, properly due to the Independent Tester under this Agreement by the relevant Final Date, Project Co shall, in addition to any unpaid amount that should properly have been paid, pay the Independent Tester simple interest on that amount from the Final Date until the actual date of payment at the Default Interest Rate.
- 5.5 If Project Co fails to pay any amount properly due pursuant to this Agreement by the relevant Final Date and the failure continues for twenty one (21) days after the Independent Tester has given notice to Project Co of its intention to suspend performance of all or any of the Services and the ground or grounds on which it is intended to suspend performance, the Independent Tester may suspend performance of any or all of its obligations until payment of the amount properly due is made in full. Any period of suspension of the Services in accordance with this Clause 5.5 shall be disregarded in computing any contractual time limit to complete work directly or indirectly affected by the exercise of the rights conferred by this Clause 5.5 or as the case may be, the time for completion of such work shall be extended by a period equal to the period of suspension.

Where the Independent Tester exercises its right of suspension under this Clause 5.5, it shall be entitled to a reasonable amount in respect of costs and expenses reasonably incurred by it as a result of the exercise of that right. Any such costs and expenses shall be included in the Independent Tester's next Application for Payment and the Independent Tester shall, with its application, submit such details of the costs and expenses as are reasonably necessary to enable the Independent Tester's entitlement to be ascertained.

- 5.6 Without prejudice to Clause 3.5, neither the Board nor Project Co shall issue instructions or do anything which does or is reasonably likely materially to increase the fees payable to the Independent Tester without the prior approval of the other (such approval not to be unreasonably withheld or delayed).
- 5.7 As soon as the Independent Tester becomes aware of the same and before acting on the same the Independent Tester shall inform the Board and Project Co of any instructions given to him pursuant to Clause 3.5 which will or could reasonably be expected to increase the fees payable to the Independent Tester under the terms of this Agreement. The Independent Tester shall if requested by either Project Co or the Board provide both the Board and Project Co with as detailed an estimate as is reasonably practicable of the increase to the fees payable to it if it carries out such instructions. The estimate of increased fees shall be based upon the rates contained in Appendix 2, Section 2 (*Schedule of Daily Rates*).

6 LIMITATIONS ON AUTHORITY

- 6.1 The Independent Tester shall not:

6.1.1 make or purport to make any alteration or addition to or omission from the

design of the Facilities and/or the Retained Estate Handback Infrastructure, (including, without limitation, the setting of performance standards) or issue any instruction or direction to any contractor or professional consultant employed or engaged in connection with the Project; or

6.1.2 (unless both Project Co and the Board consent in writing) consent or agree to any waiver or release of any obligation of Project Co or the Board under the Project Agreement or of any contractor or professional consultant employed or engaged in connection with the Project.

6.2 For the avoidance of doubt, the Independent Tester shall not express an opinion on and shall not interfere with or give any advice, opinion or make any representation in relation to any matters which are beyond its role and responsibilities under this Agreement.

7 TERMINATION

7.1 Project Co and the Board may by joint notice in writing (a "**Joint Notice**") immediately terminate this Agreement if the Independent Tester:

7.1.1 is in breach of any of the terms of this Agreement which, in the case of a breach capable of remedy, shall not have been remedied by the Independent Tester within twenty one (21) days of receipt by the Independent Tester of a Joint Notice specifying the breach and requiring its remedy;

7.1.2 is incompetent, guilty of gross misconduct and/or any material failure, negligence or delay in the provision of the Services and/or its other duties under this Agreement;

7.1.3 fails or refuses after written warning to provide the Services and/or its other duties under this Agreement reasonably and as properly required of him; or

7.1.4 is subject to an event analogous to any of the events set out in Clause 40.1.1 (*Insolvency*) of the Project Agreement.

7.2 If the Project Agreement is rescinded, terminated or repudiated for any reason and, notwithstanding that the validity of such rescission, termination or repudiation may be disputed, this Agreement may be terminated by Joint Notice and with immediate effect.

7.3 Following any termination of this Agreement, but subject to any set-off or deductions which Project Co or the Board may be entitled properly to make as a result of any breach of this Agreement by the Independent Tester, the Independent Tester shall be entitled to be paid in full and final settlement of any valid claim which the Independent Tester may have in consequence thereof, any fees due under Clause 5 (*Fee*) above in respect of the Services carried out in accordance with this Agreement prior to the date of termination.

7.4 Termination of this Agreement shall be without prejudice to any accrued rights and obligations under this Agreement as at the date of termination (including the right of

Project Co and the Board to recover damages from the Independent Tester).

- 7.5 If this Agreement is terminated in accordance with Clause 7.1, Project Co and the Board shall use reasonable endeavours to engage an alternative Independent Tester within thirty (30) days, subject to Law and public procurement rules. If within such period Project Co and the Board are unable to procure the appointment of an alternative Independent Tester on reasonable commercial terms, the Independent Tester shall pay to Project Co and/or the Board, as the case may be, any reasonable incremental loss, damage or extra costs suffered by each of them.
- 7.6 If Project Co fails to make a payment of any undisputed sum to the Independent Tester within twenty (20) Business Days of the expiry of any notice issued pursuant to Clause 5.5. in respect of such sum, the Independent Tester may issue a further written notice to the Board and Project Co specifying that the payment remains outstanding (the "Second Notice") and if payment is not made within fifteen (15) Business Days of receipt of the Second Notice the Independent Tester may issue a further written notice terminating this Agreement with immediate effect. Failure by Project Co to pay, following receipt of a Second Notice pursuant to this Clause 7.6, shall be the Independent Tester's sole ground for terminating this Agreement by reason of breach of this Agreement by the Board and/or Project Co.
- 7.7 Termination of this Agreement shall not affect the continuing rights and obligations of Project Co, the Board and the Independent Tester under Clauses 6 (*Limitations on Authority*), 8 (*Confidential Information and Copyright*), 9 (*Professional Indemnity Insurance*), 18 (*Dispute Resolution Procedure*) and this Clause 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.

8 CONFIDENTIAL INFORMATION AND COPYRIGHT

- 8.1 The Independent Tester shall treat as secret and confidential and shall not at any time for any reason disclose or permit to be disclosed to any person or otherwise make use of or permit to be made use of any unpublished information relating to Project Co's or the Board's or the Contractor's (if appropriate) technology or other know-how business plans or finances or any such information relating to a subsidiary, supplier, customer or client of Project Co or the Board or the Contractor (if appropriate) where the information was received during the period of this Agreement except as may be reasonably necessary in the performance of the Services. Upon termination of this Agreement for whatever reasons the Independent Tester shall offer to deliver up to Project Co or the Board (as appropriate) all working papers, computer disks and tapes or other material and copies provided to or prepared by him pursuant either to this Agreement or to any previous obligation owed to Project Co or the Board provided always that the Independent Tester shall be entitled to retain copies of all such items where such offer is accepted.
- 8.2 The obligation to maintain confidentiality does not apply to any information or material to the extent that the Independent Tester is compelled to disclose any such information or material by law or any regulatory or Government authority.
- 8.3 The copyright in all reports, and other documents produced by the Independent Tester in connection with the Project shall remain vested in the Independent Tester but the Independent Tester grants to Project Co and Board and their nominees with full title guarantee a non-exclusive irrevocable royalty free licence to copy and use such reports, and other documents and to reproduce the information contained in them for any purpose related to the Project including (but without limitation) the construction,

completion, maintenance, letting, promotion, advertisement, reinstatement, extension and repair of the Project. Such licence shall include a licence to grant sub-licences and to transfer the same to third parties.

- 8.4 The Independent Tester shall not be liable for use by any person of the documents, (including reports, details, plans, specifications, schedules, computer programs, software, consents and any other papers, works, reports and inventions produced by the Independent Tester) for any purpose other than that for which the same were prepared by or on behalf of the Independent Tester.

9 PROFESSIONAL INDEMNITY INSURANCE

- FolsA
s33(1)(b)
EIR
Reg 10(5)(e)
- 9.1 Without prejudice to its obligations under this Agreement, or otherwise at law, the Independent Tester shall maintain [REDACTED] respect of any neglect, error or omission on the Independent Tester's part in the performance of its obligations under this Agreement for the period commencing on the date of this Agreement and expiring twelve (12) years after:

9.1.1 the date of final certification of the Works; or

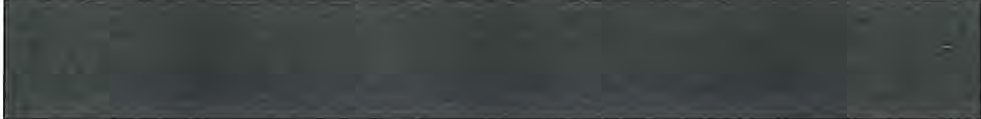
9.1.2 the termination of this Agreement,

whichever is the earlier, provided that such insurance is available in the market place at commercially reasonable rates.

- 9.2 The Independent Tester shall maintain such insurance with reputable insurers carrying on business in the United Kingdom.
- 9.3 Any increased or additional premium required by insurers by reason of the Independent Tester's own claims record or other acts, omissions, matters or things particular to the Independent Tester shall be deemed to be within commercially reasonable rates.
- 9.4 The Independent Tester shall as soon as reasonably practicable inform Project Co and the Board if such insurance ceases to be available at commercially reasonable rates in order that the Independent Tester and Project Co and the Board can discuss means of best protecting the respective positions of Project Co and the Board and the Independent Tester in respect of the Project in the absence of such insurance.
- 9.5 The Independent Tester shall fully co-operate with any measures reasonably required by Project Co and the Board including (without limitation) completing any proposals for insurance and associated documents, maintaining such insurance at rates above commercially reasonable rates if Project Co and the Board undertake in writing to reimburse the Independent Tester in respect of the net cost of such insurance to the Independent Tester above commercially reasonable rates.
- 9.6 The Independent Tester shall, prior to commencing the provision of the Services and as soon as reasonably practicable following renewal dates, produce for inspection by Project Co and the Board documentary evidence that such insurance is being properly maintained.

9.7 The above obligations in respect of professional indemnity insurance shall continue notwithstanding termination of this Agreement for any reason whatsoever, including (without limitation) breach by Project Co and the Board.

10 LIMITATION OF LIABILITY

10.1 

FOISA
s 33(1)(b)
E12
10(5)(c)

10.2 Not Used.

10.3 

11 SUB-CONTRACTOR LOSSES AND NO LOSS AVOIDANCE

11.1 Without prejudice to Clause 10 (*Limitation of Liability*) the Independent Tester hereby acknowledges and accepts (a) that a breach or failure on the part of the Independent Tester could have adverse financial consequences for the Sub-Contractors (or any of them) and (b) any losses, damages, costs and/or other liabilities suffered or incurred by the Sub-Contractors (or any of them) (as the case may be) arising from or in connection with any breach or failure on the part of the Independent Tester under this Agreement shall, for the purposes of this Agreement and notwithstanding the provisions of any Sub-Contract, be deemed to be losses, damages, costs and/or liabilities suffered or incurred by Project Co arising from or in connection with such breach or failure.

11.2 Where the Independent Tester would otherwise be liable to make a payment by way of compensation to Project Co including amounts which, in turn, comprise compensation to any Sub-Contractor which is payable by Project Co and/or which would be payable by way of compensation to any Sub-Contractor by Project Co the Independent Tester shall not be entitled to withhold, reduce or avoid any such payment to Project Co in reliance (in whole or in part) on the fact that payment of the amount which is or would be due from Project Co to the Sub-Contractor or the entitlement of the Sub-Contractor to receive payment of such amount (as a result of the circumstances giving rise to the Independent Tester's obligation to pay such compensation) is conditional on receipt by Project Co of such amount from the Independent Tester.

12 NOTICES

All notices or other communications required in connection with this Agreement shall be in writing and sent by hand, by first class pre-paid post or by facsimile transmission to the relevant address or facsimile number set out in the Project Agreement or in the case of the Independent Tester to its registered office for the attention of the company secretary or to such other address or facsimile number as a party to this Agreement may notify to another party to this Agreement in writing.

13 ASSIGNATION

- 13.1 The Independent Tester shall not assign or transfer any of its rights or obligations under this Agreement or sub-contract the whole or any part of the Services.
- 13.2 Neither Project Co nor the Board shall be entitled to assign or transfer any of their respective rights or obligations under this Agreement save that the parties hereby consent to any such assignment or transfer which is contemporaneous to the assignment or transfer of the Project Agreement and is made to the same assignee or transferee. In the event that the Project Agreement is novated to a third party, the term "Project Agreement" shall include any replacement contract arising from such novation.
- 13.3 The Independent Tester shall not be entitled to contend that any person to whom this Agreement is assigned in accordance with Clause 13.2 is precluded from recovering under this Agreement any loss incurred by such assignee resulting from any breach of this Agreement (whenever happening) by reason that such person is an assignee and not a named party under this Agreement.

14 CUMULATIVE RIGHTS AND ENFORCEMENT

- 14.1 Any rights and remedies provided for in this Agreement whether in favour of Project Co or the Board or the Independent Tester are cumulative and in addition to any further rights or remedies which may otherwise be available to the parties.
- 14.2 The duties and obligations of the Independent Tester arising under or in connection with this Agreement are owed to Project Co and the Board both jointly and severally and Project Co and the Board may accordingly enforce the provisions hereof and pursue their respective rights hereunder in their own name, whether separately or with each other.
- 14.3 Project Co and the Board covenant with each other that they shall not waive any rights, remedies or entitlements or take any other action under this Agreement which would or might reasonably be expected to adversely affect the rights, remedies or entitlements of the other without the other's prior written consent, such consent not to be unreasonably withheld or delayed.

15 WAIVER

The failure of any party at any one time to enforce any provision of this Agreement shall in no way affect its right thereafter to require complete performance by any other party, nor shall the waiver of any breach or any provision be taken or held to be a waiver of any subsequent breach of any provision or be a waiver of the provision itself.

16 SEVERABILITY

In the event that any term, condition or provision contained in this Agreement shall be held to be invalid, unlawful or unenforceable to any extent, such term, clause or provision shall, to that extent, be omitted from this Agreement and the rest of this Agreement shall stand, without affecting the remaining clauses.

17 VARIATION

A variation of this Agreement is valid only if it is in writing and signed by or on behalf of each party.

18 DISPUTE RESOLUTION PROCEDURE

18.1 All disputes shall be resolved in accordance with terms equivalent (mutatis mutandis) to the Dispute Resolution Procedure as set out in the Project Agreement.

18.2 Project Co, the Board and the Independent Tester shall co-operate to facilitate the proper, just, economical and expeditious resolution of any and all such disputes which arise under this Agreement.

19 GOVERNING LAW AND JURISDICTION

Subject to Clause 18 (*Dispute Resolution Procedure*) above, this Agreement shall be governed by and construed in accordance with the laws of Scotland, and (subject as aforesaid) the parties hereby submit to the non-exclusive jurisdiction of the courts of Scotland.

20 THIRD PARTY RIGHTS

Save as expressly set out herein, no provision of this Agreement is intended to or does confer upon any third party any benefit or right enforceable at the option of that third party against any party to this Agreement.

IN WITNESS WHEREOF these presents consisting of this and the eleven preceding pages and the following two Appendices are executed as follows:-

SIGNED for and on behalf of **LOTHIAN HEALTH BOARD**

at

on the _____ day

of _____ 2015

by

.....
Authorised Signatory

..... Full Name

Before this witness

.....Witness

..... Full Name

..... Address

.....

SIGNED for and on behalf of the said **IHS LOTHIAN LIMITED** acting under a power of attorney

at

on

by

.....
Print Full Name Attorney

and

.....
Print Full Name Attorney

SUBSCRIBED for and on behalf
of the said [REDACTED]

EIR Reg 11.

at

on

by

..... Member

..... Member

Address

.....
.....
.....

Signed by
[REDACTED]

EIR Reg 11

at

on

Acting by its duly

[Redacted]

.....
Sealing Officer

Before this witness

.....

.....
Witness

Address

.....

.....

*FOISA 5 32(1)(b)
EIR Reg 11.*

Signed by

[Redacted]

at

on

Acting by its duly
Authorised attorney

.....

.....

(Attorney)

Before this witness

.....

.....

(Witness)

Address

.....

.....

SUBSCRIBED for and on behalf of

[Redacted]

at

On the day of 2015 as follows:-

..... (Director/Authorised Signatory)

..... Full Name

Before this witness: -

Witness

Full name

Address

.....

.....

SUBSCRIBED for and on behalf of the
said

at

on

by

Print Full Name

before this witness

Director

Print Full Name

Address

Witness

APPENDIX 1

SCOPE OF SERVICES - INDEPENDENT TESTER CONTRACT

The Independent Tester shall perform the role of Independent Tester as referred to in Clauses 17 (*Pre-Completion Commissioning and Completion*), 18 (*Post Completion Commissioning*) and 19 (*Fossils and Antiquities*) (including complying with any time limits specified in such Clauses) and Schedule Part 6 (*Construction Matters*), Schedule Part 7 (*The Programme*), Schedule Part 8 (*Review Procedure*), Schedule Part 10 (*Outlining Commissioning Programme*), Schedule Part 11 (*Equipment*) and Schedule Part 17 (*Compensation on Termination*) of the Project Agreement, by providing the following scope of Services:

1 MONTHLY REPORT AND COMPLETION CERTIFICATION

The Independent Tester shall:

- 1.1 During the Works, attend monthly site progress meetings and provide the Board and Project Co with a monthly report on the activities carried out by the Independent Tester.
- 1.2 Undertake regular inspections during the Works, as necessary, in accordance with the Project Agreement. Report on the completion status of the Project, identifying any work that is not compliant with the Board's Construction Requirements, Project Co's Proposals, the Approved Reviewable Design Data (Approved RDD) and/or the Completion Criteria.
- 1.3 Provide details of any tests carried out by Project Co together with results obtained during that period.
- 1.4 Certify the Actual Completion Date and issue a Certificate of Practical Completion in accordance with the Project Agreement.
- 1.5 Within five (5) Business Days of issue of the Certificate of Practical Completion, issue a Snagging Notice specifying any Snagging Matters. Monitor and review rectification of such Snagging Matters in accordance with the Project Agreement.
- 1.6 Review the programme for the rectification of all Snagging Matters to be carried out and advise Project Co and the Board as appropriate.
- 1.7 And in order to enable the Independent Tester to discharge these primary functions which are to be performed independently, fairly and impartially to and as between Project Co and the Board and having regard to the interests of Funders, the Secured Creditors, the Security Trustee and the Intercreditor Agent, the Independent Tester shall discharge the further duties described below.
- 1.8 Monitor the Works against the required standards of construction quality and Reviewable Design Data.
- 1.9 Monitor the Works for compliance with the Board Construction Requirements and Project Co's Proposals and compliance with Law.

1.10 Provide details of Project Co's compliance with the Quality Plans.

2 GENERAL

The Independent Tester shall:

- 2.1 Familiarise itself with the Project Agreement (including the Design Data, the Design Quality Plan, the Construction Quality Plan, Schedule Part 11 (*Equipment*) of the Project Agreement and any Changes issued from time to time and any other relevant documentation or information referred to in the Project Agreement, relevant Service Level Specification and Method Statements) and the Construction Contract to the extent necessary to enable it to provide a report to the Board and Project Co on any contradictory requirements contained within the same and to be in a position to carry out the Services in accordance with the terms of the Project Agreement and this Agreement. Prior to the Commencement Date the Independent Tester shall prepare and issue to the Board and Project Co a project execution plan ("PEP") to include a detailed execution methodology for undertaking the Services including the following; (i) proposed team and duties for each team member; (ii) proposed programme for site visits detailing key inspections; (iii) monthly report template including standard format and items to be covered; and (iv) detailed project specific procedures for undertaking the Services.
- 2.2 Following notification by Project Co, pursuant to Clauses 17.8 (*Commissioning prior to Completion Date*) and 17.10 (*Pre-Completion Inspection*) of the Project Agreement, inspect and comment as required on the Works as required by the Completion Process.
- 2.3 Undertake monthly inspections in accordance with the Programme and Final Commissioning Programme.
- 2.4 Identify any delays in the Programme and/or Final Commissioning Programme, any non-compliance by Project Co and any other quality control matters.

3 DESIGN REVIEW

The Independent Tester shall:

- 3.1 Monitor and report upon the implementation of the Design Quality Plan for the construction, structural and engineering services design for the Project.
- 3.2 Monitor the detailed working drawings and specifications for a sample number and type of rooms which in his professional judgment is appropriate to be selected by the Independent Tester to verify that they comply with the Approved RDD as described in the Project Agreement. The Independent Tester has indicated that in normal circumstances twenty-five percent (25%) of rooms should be sampled. If in the professional judgment of the Independent Tester, because of the results of its sample or other circumstances a different sampling percentage is appropriate, he shall provide a detailed report in respect of that and, if so agreed (or determined as between Project Co and the Board by the Dispute Resolution Procedure) any change in the percentage sampling resulting in a change in fees will be borne by Project Co and the Board as they shall agree or as determined by the Dispute Resolution Procedure.

- 3.3 Review the detailed design information for any approved design or specification variations for compliance with the performance and quality standards of the Project Agreement, and quality standards as set out in the and the Contractor's Quality Plan.

4. PROCEDURE REVIEW

The Independent Tester shall:

- 4.1 Monitor the operation of the quality assurance procedures of the Contractor at monthly intervals during the execution of the Works.
- 4.2 The Independent Tester shall familiarise itself with the proposed procedures and programmes for the testing and commissioning of the Mechanical and Electrical engineering services prior to the Board's occupation.
- 4.3 Monitor the procedures for the identification, approval and recording of agreed Changes to the Works in accordance with the Project Agreement.
- 4.4 Review any samples or mock ups as required by Section 5 (*Reviewable Design Data*) of Schedule Part 6 (*Construction Matters*) and Schedule Part 8 (*Review Procedure*) and check that they have been approved in accordance with the Project Agreement.

5. CONSTRUCTION REVIEW

The Independent Tester shall:

- 5.1 Visit the Site and Off-Site and monitor the Works for their compliance with the Project Agreement, the Completion Criteria, the Board's Construction Requirements, Project Co's Proposals and the Approved RDD. The frequency and timing of the Independent Tester's visits are dependent on the progress of construction on Site and Off-Site. The Contractor shall agree a programme with the Independent Tester for the inspection of key construction processes and the completed Works and shall give the Independent Tester advance notice of these Works being carried out on Site and Off-Site. The Independent Tester shall identify any aspect of the Works which needs to be inspected before being covered over by subsequent activity so that he may satisfy himself that these have been constructed in accordance with the Contractor's Quality Plan without the need for opening up.
- 5.2 Randomly check that the Works are being undertaken in accordance with the Construction Quality Plan that has been agreed by the Board and Project Co.
- 5.3 Review the written Mechanical and Electrical engineering services testing and commissioning procedure. Undertake selective witnessing of the Mechanical and Electrical services testing and commissioning. The Independent Tester has indicated that these sampling proportions should amount to approximately fifty percent (50%). The Independent Tester shall review one hundred percent (100%) of all test results. If in the professional judgment of the Independent Tester, because of the results of witnessing (or because of other circumstances) a different sampling percentage is appropriate he shall provide a detailed report in respect of that and any change in the percentage sampling resulting in a change of fees will be borne by Project Co, the Board or the Contractor as they shall agree, failing such agreement, as determined by

the Dispute Resolution Procedure.

- 5.4 Inspect rectification works which have previously prevented the Independent Tester from certifying the Project as complete. Concurrent with the issue of the Certificate of Practical Completion, agree a list of Snagging Matters with the Board and Project Co together with its programme for implementation and issue a Snagging Notice in accordance with Clause 17.14 (*Completion Certificate*) of the Project Agreement.
- 5.5 Check the production of the relevant operating manuals, relevant approvals, test results, inspection records and as built drawings and monitor the timely handover of this documentation.

6 PARTICIPATION IN DISPUTE RESOLUTION

As and when required by the Board or Project Co, the Independent Tester shall participate in the Dispute Resolution Procedure of the Project Agreement (as such term is defined in the Project Agreement) to the extent that issues under the Project Agreement which have been referred to the said Dispute Resolution Procedure relate to the Independent Tester's other obligations and tasks as set out in this Appendix 1 and this Agreement.

APPENDIX 2 TO P 442

REDACTED FOISA s 33 (1)(b)
EIR Reg 10(5)(e).

SCHEDULE PART 17

COMPENSATION ON TERMINATION

SECTION 1

COMPENSATION ON TERMINATION FOR BOARD DEFAULT AND VOLUNTARY TERMINATION

1 Compensation on Termination for the Board Default and Voluntary Termination

1.1 If Project Co terminates this Agreement pursuant to Clause 39 (*Board Events of Default*) or the Board terminates this Agreement pursuant to Clause 42.1 the Board shall pay to Project Co the "Board Default Termination Sum" as set out in paragraph 1.2.

1.2 Subject to paragraphs 1.4 to 1.6 below the Board Default Termination Sum shall be an amount equal to the aggregate of:

1.2.1 the Base Senior Debt Termination Amount;

1.2.2 Redundancy Payments and Sub-Contractor Losses; and

1.2.3 the aggregate amount for which the share capital of Project Co and the amounts outstanding under the Subordinated Funding Agreements could have been sold on an open market basis based on the Relevant Assumptions;

LESS, to the extent it is a positive amount, the aggregate of without double counting in relation to the calculation of the Base Senior Debt Termination Amount or the amounts below:

1.2.4 the value of any right of Project Co to receive insurance proceeds (save where such insurance proceeds are held in the Insurance Proceeds Account and are to be applied in accordance with Clause 53.19 of this Agreement in reinstatement, restoration or replacement or, in the case of any third party legal liability or employer's liability, in satisfaction of the claim, demand, proceeding or liability) or sums due and payable from third parties (but only when received from third parties) but excluding any claims under any Sub-Contracts or claims against other third parties which have not been determined or have been determined but not yet paid provided that in such case Project Co shall assign any such rights and claims under the Sub-Contracts or claims against other third parties to the Board and give the Board reasonable assistance in prosecuting such claims;

1.2.5 to the extent realised before the Invoice Date the market value of any other assets and rights of Project Co (other than those transferred to the Board pursuant to this Agreement) less liabilities of Project Co properly incurred in carrying out its obligations under this Agreement as at the Termination Date provided that no account should be taken of any liabilities and obligations of Project Co arising out of:

(a) agreements or arrangements entered into by Project Co to the extent that such agreements or arrangements were not entered into in

connection with Project Co's obligations in relation to the Project; or

- (b) agreements or arrangements entered into by Project Co to the extent that such agreements or arrangements were not entered into in the ordinary course of business and on commercial arm's length terms; and

1.2.6 amounts which the Board is entitled to set off pursuant to Clause 46.12 of this Agreement.

- 1.3 To the extent that such assets and rights referred to in paragraph 1.2.5 above are not realised and applied by the Invoice Date, Project Co shall on payment of the Board Default Termination Sum assign such assets and rights to the Board.
- 1.4 If the aggregate of the amounts referred to in paragraphs 1.2.1 and 1.2.3 is less than the Revised Senior Debt Termination Amount, then the Board Default Termination Sum shall be increased so that it is equal to the aggregate of the Revised Senior Debt Termination Amount and the amount referred to in paragraph 1.2.2 LESS, without double counting in relation to the calculation of the Revised Senior Debt Termination Amount, the amounts referred to in paragraphs 1.2.4 to 1.2.6 above; provided always that (a) the amount referred to in paragraph 1.2.2 shall only be paid to the extent that Project Co has demonstrated to the reasonable satisfaction of the Board that the amount will not be applied (in whole or in part) in payment of any Distribution and (b) if, at the time of termination, there are any Additional Permitted Borrowings outstanding, no Sub-Contractor Losses shall be paid in respect of any Sub Contract in circumstances where there is an event of default under such Sub-Contract which would entitle Project Co to terminate such Sub-Contract.
- 1.5 If a Distribution is made whilst any Additional Permitted Borrowing is outstanding and Project Co has wilfully, or through gross negligence failed to comply with its obligations under clause 9.4.4(a) of the Funders' Direct Agreement then in addition to the deduction of the Distribution made pursuant to paragraph (v) of the definition of Revised Senior Debt Termination Amount, the Board shall be entitled to set off the value of that Distribution a second time against the Board Default Termination Sum, provided that the amount of the Board Default Termination Sum shall never be less than the Revised Senior Debt Termination Amount.
- 1.6 If Project Co has wilfully or through gross negligence failed to comply with its obligations under clause 9.4.4(b) of the Funders' Direct Agreement and there has been an overstatement of the cash balances by Project Co as at that date which has caused the Board to reasonably believe that it would be required to pay a lesser sum at the Termination Date than it actually is required to pay under the terms of this Section 1 (*Compensation on Termination for Board Default and Voluntary Termination*), then the Board Default Termination Sum shall be reduced by the amount of such overstatement (to the extent such overstatement is still applicable at the Termination Date), provided that the amount of the Board Default Termination Sum will never be less than the Revised Senior Debt Termination Amount.
- 1.7 The Board Default Termination Sum shall be payable in accordance with Section 5 (*General*) of this Schedule Part 17 (*Compensation on Termination*).

SECTION 2

COMPENSATION FOR PROJECT CO DEFAULT

- 1 If the Board terminates this Agreement pursuant to Clause 40 (*Project Co Events of Default*), with the exception of termination pursuant to Clause 40.1.3(b), the Board shall pay to Project Co such sum as is calculated according to this Section 2 (*Compensation for Project Co Default*) of this Schedule Part 17 (*Compensation on Termination*).

2 RETENDERING ELECTION

- 2.1 The Board shall be entitled to retender the provision of the Project Operations in accordance with paragraph 3 (*Retendering Procedure*) and the provisions of paragraph 3 (*Retendering Procedure*) shall apply if:

2.2.1 the Board notifies Project Co on or before the date falling twenty (20) Business Days after the Termination Date that it intends to retender; and

2.2.2 there is a Liquid Market; and either

(a) the Senior Funders have not exercised their rights to step-in under clause 5 (*Representative*) of the Funders' Direct Agreement; or

(b) Project Co or the Senior Funders have not procured the transfer of Project Co's rights and liabilities under this Agreement to a Suitable Substitute Contractor and have failed to use all reasonable efforts to do so

but otherwise the Board shall not be entitled to re-tender the provision of the Project Operations and paragraph 4 (*No Retendering Procedure*) shall apply.

3 RETENDERING PROCEDURE

- 3.1 The objective of the Tender Process shall be to enter into a New Agreement with a Compliant Tenderer.

- 3.2 The Board shall (subject to any legal requirements preventing it from doing so) use all reasonable endeavours to complete the Tender Process as soon as practicable.

- 3.3 The Board shall as soon as reasonably practicable notify Project Co of the Qualification Criteria and the other requirements and terms of the Tender Process, including the timing of the Tender Process, and shall act reasonably in setting such requirements and terms.

- 3.4 Project Co authorises the release of any information by the Board under the Tender Process which would otherwise be prevented under Clause 61 (*Confidentiality*) that is reasonably required as part of the Tender Process.

- 3.5 For all or any part of a month, falling within the period from the Termination Date to the

Compensation Date, the Board shall pay to Project Co:

- 3.5.1 the Post Termination Service Amount for each completed month, on or before the date falling ten (10) Business Days after the end of that month; and
- 3.5.2 the Post Termination Service Amount for the period from the end of the last completed month until the Compensation Date, on or before the date falling twenty (20) Business Days after the Compensation Date.
- 3.6 Project Co may, at its own cost, appoint a person to monitor the Tender Process for the purpose of monitoring and reporting to Project Co and the Senior Funders on the Board's compliance with the Tender Process.
- 3.7 The Tender Process Monitor shall enter into a confidentiality agreement with the Board in a form acceptable to the Board and shall be entitled to attend all meetings relating to the Tender Process, inspect copies of all the tender documentation and bids and make representations to the Board as to compliance with the Tender Process. The Board shall not be bound to consider or act upon such representations but acknowledges that such representations may be referred to by Project Co in the event that Project Co refers a dispute as to the Adjusted Highest Compliant Tender Price to the Dispute Resolution Procedure. The Tender Process Monitor will not disclose confidential information to Project Co or the Senior Funders or any other person (and shall provide an undertaking to the Board to such effect as a condition of his appointment) but shall be entitled to advise Project Co and the Senior Funders on whether it considers that the Board has acted in accordance with the Tender Process and correctly determined the Adjusted Highest Compliant Tender Price.
- 3.8 If any Post Termination Service Amount is less than zero then it may be carried forward and may be set off against any future positive Post Termination Service Amounts.
- 3.9 The Board shall require bidders to bid on the basis that they will receive the benefit of any outstanding claims under material damage insurance policies and the amount (if any) standing to the credit of the Insurance Proceeds Account on the date that the New Agreement is entered into.
- 3.10 As soon as practicable after tenders have been received, the Board shall (acting reasonably) review and assess the Compliant Tenders and shall notify Project Co of:
 - 3.10.1 the Highest Compliant Tender Price;
 - 3.10.2 the Tender Costs; and
 - 3.10.3 the Adjusted Highest Compliant Tender Price.
- 3.11 If Project Co refers a dispute relating to the Adjusted Highest Compliant Tender Price to dispute resolution in accordance with Clause 56 (*Dispute Resolution*), the Board shall irrespective of such dispute be entitled to enter into a New Agreement.

- 3.12 The Adjusted Highest Compliant Tender Price shall be paid in accordance with Section 5 (*General*) of this Schedule Part 17 (*Compensation on Termination*).
- 3.13 Subject to paragraphs 1.6 and 1.8 of Section 5 (*General*) of this Schedule Part 17 (*Compensation on Termination*), if the Board has not paid an amount equal to the Adjusted Highest Compliant Tender Price to Project Co on or before the date falling two years after the Termination Date then the following provisions of this paragraph 3 shall not apply to that termination and the provisions of paragraph 4 (*No Retendering Procedure*) shall apply instead.
- 3.14 The Board may elect at any time prior to the receipt of a Compliant Tender, to follow the no retendering procedure under paragraph 4 (*No Retendering Procedure*) by notifying Project Co that this election has been made.
- 3.15 In the event that the Adjusted Highest Compliant Tender Price exceeds the Maximum Termination Amount, the Adjusted Highest Compliant Tender Price shall be deemed to be an amount equal to the Maximum Termination Amount.

4 NO RETENDERING PROCEDURE

- 4.1 Subject to paragraph 4.2, if the provisions of this paragraph 4 (*No Retendering Procedure*) apply Project Co shall not be entitled to receive any Post Termination Service Amount.
- 4.2 If the Board elects to follow the no retendering procedure in accordance with this paragraph 4 (*No Retendering Procedure*) after it has elected to follow the procedure under paragraph 3 (*Retendering Procedure*), then the Board shall continue to pay to Project Co each Post Termination Service Amount until the Compensation Date, in accordance with paragraph 3 (*Retendering Procedure*).
- 4.3 In agreeing or determining the Estimated Fair Value of the Agreement the parties shall be obliged to follow the principles set out below:
- 4.3.1 all forecast amounts of revenues and costs should be calculated in nominal terms at current prices, recognising the adjustment for indexation in respect of forecast inflation between the date of calculation and the forecast payment date(s) as set out in this Agreement;
- 4.3.2 the total of all payments of the full Service Payments forecast to be made from the Termination Date to the Expiry Date shall be calculated and discounted at the Discount Rate;
- 4.3.3 the total of all costs reasonably forecast to be incurred by the Board as a result of termination shall be calculated and discounted at the Discount Rate and deducted from the payment calculated pursuant to paragraph 4.3.2 above, such costs to include (without double counting):
- (a) a reasonable risk assessment of any cost overruns that will arise, whether or not forecast in the relevant base case;

- (b) the costs of providing the Services reasonably forecast to be incurred by the Board from the Termination Date to the Expiry Date in providing the Project Operations to the standard required; and
- (c) any rectification costs required to deliver the Project Operations to the standard required (including any costs reasonably forecast to be incurred by the Board to complete the Works) and additional operating costs required to restore operating services standards less (to the extent that such sums are included in any calculation of rectification costs for the purposes of this paragraph) the aggregate of:
 - (i) any insurance proceeds received (or held in the Insurance Proceeds Account) or which will be received pursuant to policies maintained in accordance with Clause 53 (*Insurance*); and
 - (ii) amounts payable by the Board in respect of Capital Expenditure under this Agreement which have not been paid,

in each case such costs to be forecast at a level that will deliver the Services to the standards required by this Agreement;

4.3.4 the Net Present Value at the Termination Date of all future Surplus Payments forecast in the Financial Model shall be calculated and deducted from the payment calculation pursuant to paragraph 4.3.2 above but only to the extent that the payment calculation pursuant to paragraph 4.3.2 above less the sum of:

- (i) the costs calculation pursuant to paragraph 4.3.3 above; and
- (ii) the Net Present Value at the Termination Date of all future Surplus Payments forecast in the Financial Model,

exceeds the Revised Senior Debt Termination Amount.

4.4 If the parties cannot agree on the Estimated Fair Value of the Agreement on or before the date falling twenty (20) Business Days after the date on which the Board elected or was required pursuant to paragraph 2 (*Retendering Election*) or paragraph 3 (*Retendering Procedure*) to follow the no retendering procedure in accordance with this paragraph 4 (*No Retendering Procedure*), then the Adjusted Estimated Fair Value of the Agreement shall be determined in accordance with Clause 56 (*Dispute Resolution*).

4.5 The Adjusted Estimated Fair Value of the Agreement shall be paid in accordance with Section 5 (*General*) of this Schedule Part 17 (*Compensation on Termination*).

4.6 In the event that the Adjusted Estimated Fair Value of the Agreement exceeds the Maximum Termination Amount, the Adjusted Estimated Fair Value of the Agreement shall be deemed to be an amount equal to the Maximum Termination Amount.

SECTION 3

COMPENSATION ON TERMINATION FOR FORCE MAJEURE

1 CONSEQUENCES OF TERMINATION FOR FORCE MAJEURE

- 1.1 If Project Co or the Board terminates this Agreement pursuant to Clause 31.1 (*Force Majeure*) or Clause 53.14.2 (*Uninsurable Risks*) the Board shall pay to Project Co the "Force Majeure Termination Sum" as set out in paragraph 1.2.
- 1.2 Subject to paragraphs 1.4 to 1.6 below the Force Majeure Termination Sum shall be an amount equal to the aggregate of:
 - 1.2.1 the Base Senior Debt Termination Amount;
 - 1.2.2 Redundancy Payments and Sub-Contractor Losses (but excluding therefrom any claims for loss of profit);
 - 1.2.3 an amount equal to the Subordinated Debt less an amount equal to the aggregate of payments of interest paid on the Subordinated Debt provided that where such figure is a negative number it shall be instead fixed at zero; and

LESS, to the extent it is a positive amount, the aggregate of (without double counting) in relation to the calculation of the Base Senior Debt Termination Amount or the amounts below:

- 1.2.4 the value of any right of Project Co to receive insurance proceeds (save where such insurance proceeds are held in the Insurance Proceeds Account and are to be applied in accordance with Clause 53.19 (*Application of Proceeds*) of this Agreement in reinstatement, restoration or replacement, or in the case of third party legal liability or employer's liability, in satisfaction of the claim, demand, proceeding or liability) or sums due and payable from third parties (but only when received from third parties) but excluding any claims under any Sub-Contracts or claims against other third parties which have not been determined or have been determined but not yet paid provided that in such case Project Co shall assign any such rights and claims under the Sub-Contracts or claims against other third parties to the Board and give the Board reasonable assistance in prosecuting such claims;
- 1.2.5 to the extent realised before the Invoice Date, the market value of any other assets and rights of Project Co (other than those transferred to the Board pursuant to this Agreement) less liabilities of Project Co properly incurred in carrying out its obligations under this Agreement as at the Termination Date provided that no account should be taken of any liabilities and obligations of Project Co arising out of:
 - (a) agreements or arrangements entered into by Project Co to the extent that such agreements or arrangements were not entered into in connection with Project Co's obligations in relation to the Project; and
 - (b) agreements or arrangements entered into by Project Co to the extent

that such agreements or arrangements were not entered into in the ordinary course of business and on commercial arm's length terms; and

- 1.2.6 amounts which the Board is entitled to set off pursuant to Clause 46.12 (*Rights of Set-Off*) of this Agreement.
- 1.3 To the extent that such assets and rights referred to in paragraph 1.2.4 above are not realised and applied pursuant to that paragraph Project Co shall on payment of the Force Majeure Termination Sum assign such assets and rights to the Board.
- 1.4 If the aggregate of the amounts referred to in paragraphs 1.2.1 and 1.2.3 is less than the Revised Senior Debt Termination Amount, then the Force Majeure Termination Sum shall be increased so that it is equal to the aggregate of the Revised Senior Debt Termination Amount and the amount referred to in paragraph 1.2.2 LESS, without double counting in relation to the calculation of the Revised Senior Debt Termination Amount, the amounts referred to at paragraphs 1.2.4 to 1.2.6 above; provided always that (a) the amount referred to in paragraph 1.2.2 LESS the amounts referred to at paragraphs 1.2.4 to 1.2.6 above shall only be paid to the extent that Project Co has demonstrated to the reasonable satisfaction of the Board that the amount will not be paid (in whole or in part) in payment of any Distribution and (b) if, at the time of termination, there are any Additional Permitted Borrowings outstanding, no Sub-Contractor Losses shall be paid in respect of any Sub Contract in circumstances where there is an event of default under such Sub-Contract which would entitle Project Co to terminate such Sub-Contract.
- 1.5 If a Distribution is made whilst any Additional Permitted Borrowing is outstanding and Project Co has wilfully, or through gross negligence failed to comply with its obligations under clause 9.4.4(a) of the Funders' Direct Agreement then in addition to the deduction of the Distribution made pursuant to paragraph (v) of the definition of Revised Senior Debt Termination Amount, the Board shall be entitled to set off the value of that Distribution a second time against the Force Majeure Termination Sum, provided that the amount of the Force Majeure Termination Sum shall never be less than the Revised Senior Debt Termination Amount.
- 1.6 If Project Co has wilfully or through gross negligence failed to comply with its obligations under clause 9.4.4(b) of the Funders' Direct Agreement and there has been an overstatement of the cash balances by Project Co as at that date which has caused the Board to reasonably believe that it would be required to pay a lesser sum at the Termination Date than it actually is required to pay under the terms of this Section 3 (*Compensation on Termination for Force Majeure*), then the Force Majeure Termination Sum shall be reduced by the amount of such overstatement (to the extent such overstatement is still applicable at the Termination Date), provided that the amount of the Force Majeure Termination Sum will never be less than the Revised Senior Debt Termination Amount.
- 1.7 The Force Majeure Termination Sum shall be paid in accordance with Section 5 (*General*) of this Schedule Part 17 (*Compensation on Termination*).

SECTION 4

CORRUPT GIFTS AND FRAUD, BREACH OF REFINANCING OR BREACH OF NPD REQUIREMENTS

1 Consequences of Termination for Corrupt Gifts and Fraud, Breach of Refinancing or Breach of NPD Requirements

- 1.1 If the Board terminates this Agreement pursuant to Clause 40.1.3 (*Default*), Clause 44.3 (*Remedies*) or Clause 45 (*Breach of NPD Requirements*) the Board shall pay to Project Co an amount equal to the Revised Senior Debt Termination Amount;

LESS, to the extent it is a positive number, the aggregate of (without double counting):

- 1.1.1 the value of any right to receive insurance proceeds (save where such insurance proceeds are held in the Insurance Proceeds Account and are to be applied in accordance with Clause 53.19 (*Application of Proceeds*) of this Agreement in reinstatement, restoration or replacement or, in the case of third party legal liability or employer's liability, in satisfaction of the claim, demand, proceeding or liability) or sums due and payable from third parties (but only when received from third parties) but excluding any claims under any Sub-Contracts or claims against other third parties which have not been determined or which have been determined but not paid provided that in such case Project Co shall assign any such rights and claims under the Sub-Contracts or claims against other third parties to the Board and give the Board reasonable assistance in prosecuting such claims; and

- 1.1.2 to the extent realised before the Invoice Date, the market value of any other assets and rights of Project Co (other than those transferred to the Board pursuant to this Agreement) less liabilities of Project Co properly incurred in carrying out its obligations under this Agreement as at the Termination Date provided that no account should be taken of any liabilities and obligations of Project Co arising out of:

- (a) agreements or arrangements entered into by Project Co to the extent that such agreements or arrangements were not entered into in connection with Project Co's obligations in relation to the Project; and
- (b) agreements or arrangements entered into by Project Co to the extent that such agreements or arrangements were not entered into in the ordinary course of business and on commercial arm's length terms.

- 1.2 To the extent that such assets and rights referred to in paragraph 1.1.2 above are not realised and applied pursuant to that paragraph, Project Co shall, on payment of the sum referred to in paragraph 1.1 above, assign such assets and rights to the Board.

- 1.3 The sum referred to in paragraph 1.1 above shall be paid in accordance with Section 5 (*General*) of this Schedule Part 17 (*Compensation on Termination*).

SECTION 5

GENERAL

1 PAYMENT AND INTEREST

Following termination for Board Default, Force Majeure, Corrupt Gifts or Fraud, Breach of Refinancing or Breach of NPD Requirements

- 1.1 In respect of the termination payments to be made pursuant to any of Section 1 (*Compensation on Termination for Board Default and Voluntary Termination*), Section 3 (*Compensation on Termination for Force Majeure*), or Section 4 (*Corrupt Gifts and Fraud or Breach of Refinancing or Breach of NPD Requirements*) of this Schedule Part 17 (*Compensation on Termination*) as soon as practicable after, and in any event within twenty (20) Business Days of, the Termination Date, Project Co shall give to the Board an invoice for the relevant termination sum and sufficient supporting evidence, reasonably satisfactory to the Board, justifying the amount of the relevant termination sum including a breakdown of each of the individual elements of such sum, provided that where the amount of any SPENS Breakage Costs and/or EIB Prepayment Amount is not capable of final determination at the date of the invoice, a reasonable estimate shall be included and the Board shall be kept informed at reasonable intervals of any changes thereto and notified upon final determination of those amounts (and in any event no later than (where paragraph 1.2 below applies) two (2) Business Days prior to the date for payment pursuant to that paragraph, or (where paragraph 1.3 below applies) two (2) Business Days prior to the date for payment pursuant to that paragraph, of the last of the four (4) instalments there referred to), Where as a result of the timing of the final determination notice(s) in respect of the SPENS Breakage Costs, and/or EIB Prepayment Amount the amount paid by the Board is greater than or less than the correct amount due there shall be a balancing adjustment paid by Project Co or, as the case may be, the Board.
- 1.2 Subject to paragraph 1.3 below, the Board shall pay to Project Co:
- 1.2.1 the relevant termination amount within forty (40) Business Days of the Invoice Date; and
- 1.2.2 interest on the relevant termination amount (or any part of such amount that remains outstanding) from the Termination Date until the date of payment:
- (a) at the No Default Interest Rate for the period from (but excluding) the Termination Date to (and including) the date which is forty (40) Business Days after the Invoice Date; and
- (b) thereafter, at the Default Interest Rate.
- 1.3 The Board shall be entitled to pay the amount payable pursuant to Section 3 or Section 4 (as the case may be) of this Schedule Part 17 (*Compensation on Termination*) ("**Termination Sum**") in four (4) equal instalments by serving notice on Project Co within thirty (30) Business Days of the Invoice Date, in which case the provisions of paragraph 1.4 shall apply.
- 1.4 In the event that the Board elects to pay the Termination Sum in instalments pursuant

to paragraph 1.3 then:

- 1.4.1 the first such instalment (together with interest thereon calculated pursuant to paragraph 1.4.2 below) shall be due on the first Business Day occurring six (6) months after the date of the Board's notice served pursuant to paragraph 1.3 above and the remaining instalments (together with interest thereon calculated pursuant to paragraph 1.4.2 below) shall be due, respectively, on the first Business Day occurring twelve (12), eighteen (18) and twenty-four (24) months after the date of such notice; and
- 1.4.2 the Board shall pay interest on the Termination Sum (or any part of such sum that remains outstanding) from the Termination Date until the date of payment at the No Default Interest Rate.

If the Board fails to make a payment under paragraph 1.4.1 or 1.4.2 above in full within ten (10) Business Days of the due date for payment, or an Adverse Law or a Proposal for an Adverse Law is made then the outstanding amount of the Termination Sum shall be immediately due and payable and, thereafter, the Board shall pay interest on such sum at the Default Interest Rate.

Following Retendering

- 1.5 Subject to paragraphs 1.6 and 1.8, following a retendering exercise under Section 2 (*Compensation for Project Co Default*) of this Schedule Part 17 the Board shall pay to Project Co an amount equal to the Adjusted Highest Compliant Tender Price no later than the date falling twenty (20) Business Days after the later of:
 - 1.5.1 the date on which the Board receives the Market Value of the New Agreement from the New Project Co; and
 - 1.5.2 if Project Co has referred a dispute relating to the Adjusted Highest Compliant Tender Price to dispute resolution pursuant to paragraph 3.11 of Section 2 (*Compensation for Project Co Default*) of this Schedule Part 17, the date on which the dispute is finally determined in accordance with Clause 56 (*Dispute Resolution*),

provided that, to avoid doubt, if the dispute referred by Project Co to dispute resolution (pursuant to paragraph 1.5.2 above) concerns only a proportion of the Adjusted Highest Compliant Tender Price then the Board shall pay the undisputed proportion of such sum no later than 20 Business Days after the date referred to in paragraph 1.5.1 above (the "**Undisputed Payment Date**") and the Board shall pay interest to Project Co on any amount of the Adjusted Highest Compliant Tender Price which has been withheld, from the Undisputed Payment Date until the date on which payment is due under paragraph 1.5.2 above at the No Default Interest Rate.

- 1.6 If the Board has received all bids from bidders under the Tender Process and has received a Compliant Tender but decides not to complete the Tender Process, it shall notify Project Co of this decision and (if the Adjusted Highest Compliant Tender Price is a positive number) pay to Project Co an amount equal to the Adjusted Highest Compliant Tender Price within twenty (20) Business Days of such notification.
- 1.7 If the Board fails to pay the Adjusted Highest Compliant Tender Price (or any proportion thereof) by the date on which payment is due in accordance with paragraph 1.5 or paragraph 1.6 above, the Board shall pay to Project Co interest on such unpaid

amount, which shall accrue on such amount at the Default Interest Rate from (but not including) the date on which payment is due in accordance with paragraph 1.5 or paragraph 1.6 above until such amount is paid.

- 1.8 If the Adjusted Highest Compliant Tender Price is zero or a negative number then, on entering into the New Agreement with the New Project Co, the Board shall have no obligation to make any payment to Project Co and (if a negative number) an amount equal to the Adjusted Highest Compliant Tender Price shall be due and payable by Project Co to the Board on the date of the New Agreement or (where paragraph 1.6 applies) within twenty (20) Business Days of notification from the Board pursuant to that paragraph.

Following no retendering

- 1.9 If the Board follows the no retendering procedure set out in paragraph 4 of Section 2 (*Compensation for Project Co Default*) of this Schedule Part 17 (*Compensation on Termination*) then, subject to paragraph 1.10, the Board shall pay to Project Co an amount equal to the Adjusted Estimated Fair Value of the Agreement no later than twenty (20) Business Days after the Compensation Date and shall (unless the Board has paid Post Termination Service Amounts pursuant to paragraph 3.5 of Section 2 (*Compensation on Termination for Project Co Default*) of this Schedule Part 17 (*Compensation on Termination*)) pay interest on such amount calculated in accordance with paragraph 1.2.2 above.
- 1.10 To the extent that the Adjusted Estimated Fair Value of the Agreement is less than zero, then an amount equal to the Adjusted Estimated Fair Value of the Agreement shall be due and payable by Project Co to the Board on the Compensation Date.

2 Full and Final Settlement

- 2.1 Any and all sums irrevocably paid by the Board to Project Co under this Schedule Part 17 (*Compensation on Termination*) will be in full and final settlement of each party's rights and claims against the other for breaches and/or termination of this Agreement and any other Project Document whether under contract, delict, restitution or otherwise but without prejudice to:
 - 2.1.1 any antecedent liability of Project Co to the Board which the Board has been unable to set off pursuant to Clause 46.12 (*Rights of Set-Off*) of this Agreement;
 - 2.1.2 any antecedent liability of either party to the other that arose prior to the Termination Date (but not from the termination itself) to the extent such liability has not already been taken into account in determining or agreeing the Board Default Termination Sum, Adjusted Highest Compliant Tender Price, or Adjusted Estimated Fair Value of the Agreement, the Force Majeure Termination Sum or the sum due in accordance with Section 4 of this Schedule Part 17 (*Compensation on Termination*) as the case may be; and
 - 2.1.3 any liabilities arising in respect of any breach by either party of their obligations under Clause 47.6 (*Continuing Obligations*) of this Agreement which arises or continues after the Termination Date.

2.2 If either the Adjusted Highest Compliant Tender Price or (as the case may be) the Adjusted Estimated Fair Value of the Agreement is zero or a negative number the Board shall be released from all liability to Project Co for breaches and/or termination of this Agreement and any other Project Document whether under contract, delict, restitution or otherwise save for:

2.2.1 any antecedent liability of the Board which arose prior to the Termination Date (but not from the termination itself) to the extent such liability has not already been taken into account in determining the Adjusted Highest Compliant Tender Price or the Adjusted Estimated Fair Value of the Agreement (as the case may be); and

2.2.2 any liabilities arising in respect of any breach by either party of their obligations under Clause 47.6 (*Continuing Obligations*) of the Agreement which continues after the Termination Date.

3 Costs

The costs and/or expenses to be taken into account in the calculation of all termination sums due pursuant to this Schedule Part 17 (*Compensation on Termination*) shall only be such costs and/or expenses to the extent that they are reasonable and proper in quantum and shall have been or will be reasonably and properly incurred and shall only be counted once.

4 Undisputed Amounts

If the calculation of any termination amount is disputed then any undisputed element of that amount shall be paid in accordance with this Section 5 (*General*) of this Schedule Part 17 (*Compensation on Termination*) and the disputed element shall be dealt with in accordance with Schedule Part 20 (*Dispute Resolution Procedure*).

5 Outstanding Senior Debt Amount

5.1 The Board shall be entitled to rely on the certificate of the Intercreditor Agent as conclusive as to the amount of the Base Senior Debt Termination Amount or Revised Senior Debt Termination Amount (as the case may be) outstanding at any relevant time.

5.2 The receipt by the Intercreditor Agent of the Base Senior Debt Termination Amount or Revised Senior Debt Termination Amount or elements thereof (as appropriate) (as the case may be) (and where appropriate any accrued interest or breakage costs as certified in accordance with paragraph 5.1 above) shall discharge the Board's obligations to pay such sums to Project Co.

SECTION 6

DEFINITIONS

“Adjusted Estimated Fair Value of the Agreement” means, subject to paragraph 4.6 of Section 2 (*Compensation for Project Co Default*) of this Schedule Part 17 (*Compensation on Termination*), the Estimated Fair Value of the Agreement adjusted as follows:

- (a) where in respect of any month or part of a month from the Termination Date to the Compensation Date the Post Termination Service Amount is a negative number, the aggregate of all such negative Post Termination Service Amounts shall be set against and shall reduce the Estimated Fair Value of the Agreement (whether or not such amounts have been set-off by the Board pursuant to paragraph 3.8 of Section 2 (*Compensation for Project Co Default*) of this Schedule Part 17 (*Compensation on Termination*));

and the aggregate of the following amounts shall be deducted from the Estimated Fair Value of the Agreement:

- (b) the Post Termination Service Amounts actually paid by the Board to Project Co prior to the Compensation Date;
- (c) the Tender Costs; and
- (d) amounts that the Board is entitled to set off or deduct;

and the aggregate of the following amounts shall be added to the Estimated Fair Value of the Agreement:

- (e) all credit balances on any bank accounts held by or on behalf of Project Co on the date that the Estimated Fair Value of the Agreement is calculated; and
- (f) any insurance proceeds and other amounts owing to Project Co (and which Project Co is entitled to retain), to the extent not included in (e);

to the extent that:

- (i) (e) and (f) have not been directly taken into account in calculating the Estimated Fair Value of the Agreement; and
- (ii) the Board has received such amounts in accordance with this Agreement or such amounts are standing to the credit of the Insurance Proceeds Account;

“Adjusted Highest Compliant Tender Price”

means, subject to paragraph 3.15 of Section 2 (*Compensation for Project Co Default*) of this Schedule Part 17 (*Compensation on Termination*), the Highest Compliant Tender Price adjusted as follows:

- (a) where in respect of any month or part of a month from the Termination Date to the Compensation Date the Post Termination Service Amount is a negative number, the aggregate of all such negative Post Termination Service Amounts shall be set against and shall reduce such highest tender price (whether or not such amounts have been set-off by the Board pursuant to paragraph 3.8 of Section 2 (*Compensation for Project Co Default*) of this Schedule Part 17 (*Compensation on Termination*));

and the aggregate of the following amounts shall be deducted from the Highest Compliant Tender Price:

- (b) the Post Termination Service Amounts actually paid by the Board to Project Co prior to the Compensation Date;
- (c) the Tender Costs; and
- (d) amounts that the Board is entitled to set off or deduct under this Agreement,

and the aggregate of the following amounts shall be added to such highest tender price:

- (e) all credit balances on any bank accounts

held by or on behalf of Project Co on the date that the highest priced Compliant Tender is received; and

- (f) any insurance proceeds and other amounts owing to Project Co (and which Project Co is entitled to retain), to the extent not included in (e);

to the extent that:

- (i) (e) and (f) have not been directly taken into account in that Compliant Tender; and
- (ii) the Board has received such amounts in accordance with this Agreement;

"APB Distribution"

means, for the period during which the Additional Permitted Borrowing subsists, an amount equal to the aggregate of all Distributions made during that period up to an amount equal to the principal of the Additional Permitted Borrowing on the first day of that period;

"Base Senior Debt Termination Amount"

means, subject to Clause 4.3 (*Changes to Funding Agreements and Refinancing*):

- (a) all amounts outstanding at the Termination Date, including interest and Default Interest accrued as at that date, from Project Co to the Senior Funders in respect of Permitted Borrowings (other than in respect of Additional Permitted Borrowing); and
- (b) all amounts by way of breakage costs

FOISA s 33(1)(b)
EIR Reg 10(5)(a)

Breakage Costs are payable, any sum representing outstanding loan principal under the Institutional Investor Senior Facility Agreement and/or Institutional Investor Senior Subordinated Facility Agreement included in Permitted Borrowings in paragraph (a) above, payable by Project Co to the Senior Funders as a result of a prepayment in respect of Permitted Borrowings (other than in respect of Additional Permitted Borrowing) (or if any such prepayment

has not occurred by the Invoice Date, such amount as will become payable on the assumption that such prepayment will be made on (if paragraph 1.2 of Section 5 of this Schedule Part 17 applies) the date for payment by the Board pursuant to that paragraph, or (where paragraph 1.3 of Section 5 of this Schedule Part 17 applies) on the date for payment, pursuant to that paragraph, of the last of the four instalments there referred to) subject to Project Co and the Senior Funders mitigating all such costs to the extent reasonably possible;

- (c) less, to the extent it is a positive amount the aggregate of (without double counting in relation to the calculation of the Base Senior Debt Termination Amount or the amounts below)
 - i. any amounts claimable on or after the Termination Date in respect of Contingent Funding Liabilities;
 - ii. all other amounts received by the Senior Funders on or after the Termination Date and before the date on which any compensation is payable by the Board to Project Co as a result of enforcing any other rights they may have; and
 - iii. all credit balances on any bank accounts (but excluding the Insurance Proceeds Account and the Surplus Account) held by or on behalf of Project Co on the Termination Date;

“Compensation Date”

means either:

- (a) if paragraph 3 (*Retendering Procedure*) of Section 2 (*Compensation for Project Co Default*) of this Schedule Part 17 (*Compensation on Termination*) applies, the earlier of:
 - i. the date that the New Agreement is entered into; and
 - ii. the date on which the Board pays the Adjusted Highest Compliant Tender Price to Project Co; or
- (b) if paragraph 4 (*No Retendering Procedure*) of Section 2 (*Compensation for Project Co Default*) of this Schedule Part 17 (*Compensation on Termination*) applies, the date that the Adjusted Estimated Fair Value of the Agreement has been agreed or determined;

"Compliant Tender"

means a tender that meets all of the Qualification Criteria;

"Compliant Tenderer"

means a Suitable Substitute Contractor who submits a Compliant Tender;

"Deemed New Agreement"

means an agreement on the same terms and conditions as this Agreement, as at the Termination Date, but with the following amendments:

- (a) if this Agreement is terminated [REDACTED] shall be extended by a period to allow a New Project Co (had one been appointed) [REDACTED]
- (b) any accrued Deductions and/or Warning Notices shall, for the purposes of termination only, and without prejudice to the rights of the Board to make financial deductions, be cancelled; and
- (c) the term of such agreement shall be for a period equal to the term from the Termination Date to the Expiry Date;

FOISA s 33(1)(b)
RIR Reg 10(5)e

"Discount Rate"

means a discount rate expressed as $[(1 + \text{real base case project IRR} + \text{Gilt B} - \text{Gilt A}) * (1 + i) - 1]$

where:

[REDACTED]

"**T**" is the agreed assumed forecast rate of increase in RPI set out in the Agreement, for the remaining term of the Agreement;

"**Gilt A**" is the real yield to maturity on a benchmark government Gilt instrument of the same maturity as the average life of the outstanding Senior Debt as shown in the Financial Model at Financial Close; and

"**Gilt B**" is the real yield to maturity on a benchmark government Gilt instrument of the same maturity as the average life of the outstanding Senior Debt as shown in the

Financial Model as on the Termination Date;

"Distribution"

has the meaning given in Schedule Part 23 (Refinancing);



FOISA § 33(1)(b) -
EIR Reg 10(5)(e) -

"Estimated Fair Value of the Agreement"

means the amount determined in accordance with paragraph 4 (*No Retendering Procedure*) of Section 2 (*Compensation for Project Co Default*) of this Schedule Part 17 (*Compensation on Termination*) that a third party would pay to the Board as the market value of the Deemed New Agreement;

"Fair Value"

means the amount at which an asset or liability could be exchanged in an arm's length transaction between informed and willing parties, other than in a forced or liquidated sale;

"Highest Compliant Tender Price"

means the price offered by the Compliant Tenderer (if any) with the highest tender price and if no Compliant Tenders are received, means zero;

"Invoice Date"

means, in respect of the Board Default Termination Sum, the Force Majeure Termination Sum or the Corrupt Gifts Termination Sum (as appropriate), the date that is the later of:

- (a) the date on which the Board receives an invoice from Project Co for the relevant termination sum; and
- (b) the date on which the Board receives the supporting evidence required pursuant to paragraph 1.1 (*Payment and Interest*) of Section 5 (*General*) of this Schedule Part 17 (*Compensation on Termination*);

"Liquid Market"

means that there are sufficient willing parties (being at least two parties, each of whom is capable of being a Suitable Substitute Contractor) in the market for design, build, finance and maintain contracts or similar contracts for the provision of services (in each case the same as or similar to this Agreement) for the price that is likely to be achieved through a tender to be a reliable indicator of Fair Value provided always that any vehicle controlled and established by the Senior Funders specifically for the purposes of the Project and to which this Agreement may be novated shall be discounted

in assessing whether there are sufficient willing parties in the market for such purposes;

"Market Value Availability Deduction Amount" means for any month or part of a month, an amount equal to the availability deduction that was made to the Monthly Service Payment under paragraph 4 (*Deductions for Availability Failures*) of Section 3 (*Deductions from Monthly Service Payments*) of Schedule Part 14 (*Payment Mechanism*) in the month immediately preceding the Termination Date, less an amount equal to any availability deduction that was made for a Functional Area which was unavailable at the Termination Date but which has subsequently become available whether as a result of the Board incurring Rectification Costs or otherwise;

"Maximum Service Payment" means one twelfth of the Annual Service Payment ASP_n as defined in paragraph 2 (Annual Service Payment) of Section 2 (*Calculation of Service Payments*) of Schedule Part 14 (*Payment Mechanism*);

"Maximum Termination Amount" means either an amount equal to the aggregate of:

- (a) the Base Senior Debt Termination Amount; and
- (b) the principal amount of the Subordinated Debt outstanding; and
- (c) Redundancy Payments and Sub-Contractor Losses;

OR, if the aggregate of the amounts referred to in (a) and (b) above is less than the Revised Senior Debt Termination Amount then an amount equal to the aggregate of:

- (a) the Revised Senior Debt Termination Amount; and
- (b) Redundancy Payments;

"New Agreement" means an agreement on the same terms and conditions as this Agreement at the Termination Date, but with the following amendments:

- (a) if this Agreement is terminated prior to the Actual Completion Date, then the Longstop Date shall be extended by a period to allow a New Project Co to achieve the Actual Completion Date

prior to the Longstop Date;

- (b) any accrued Deductions and/or Warning Notices shall, for the purposes of termination only, and without prejudice to the rights of the Board to make financial deductions, be cancelled;
- (c) the term of such agreement shall be equal to the term from the Termination Date until the Expiry Date; and
- (d) any other amendments which do not adversely affect the Project Co;

"New Project Co"

means the person who has entered or who will enter into the New Agreement with the Board;

"No Default Interest Rate"

means in respect of a sum payable by Project Co for the benefit of:

FOISA 533(i)(b)
EIR Reg 10(5)(e)

(a) [REDACTED]

(b) [REDACTED]

[REDACTED]

[REDACTED]

provided that for the purposes of paragraph 1.5.2 of Section 5 of this Schedule Part 17, the No Default Interest Rate shall be the weighted average of the rates referred to in paragraphs (a) to (d) inclusive above.

"Post Termination Service Amount"

means for the purposes of paragraph 3 (*Retendering Process*) of Section 2 (*Compensation for Project Co Default*) of this Schedule Part 17 (*Compensation on Termination*), for the whole or any part of a month for the period from the Termination Date to the Compensation Date, an amount equal to the Maximum Service Payment (pro rata for part of a month) which would have been payable under this Agreement had this Agreement not been terminated, less an amount equal to the aggregate of (without double counting):

- (a) (where relevant) the amount by which the Post Termination Service Amounts

for the previous month was less than zero;

- (b) the Market Value Availability Deduction Amount for that month; and
- (c) the Rectification Costs incurred by the Board in that month;

“Qualification Criteria”

means the criteria that the Board requires tenderers to meet as part of the Tender Process, which (subject to compliance with procurement regulations) shall be:

- (a) the New Agreement terms;
- (b) tenderers should have the financial ability to pay the capital sum tendered for the New Agreement and the financial ability to deliver the Works and/or the Services (as appropriate) for the price tendered;
- (c) the tenderers may only bid on the basis of a single capital payment to be made on the date of the New Agreement;
- (d) the tenderer is experienced in providing the Services or similar services;
- (e) the technical solution proposed by the tenderers is capable of delivery and the tenderer is technically capable of delivery of the Services; and
- (f) any other tender criteria agreed by the Board and the Project Co;

“Rectification Costs”

means, for the purposes of any Termination Date that occurs after the Actual Completion Date, an amount equal to the reasonable and proper costs incurred by the Board in a particular month or part of a month in ensuring that the Services are available;

“Redundancy Payments”

means redundancy payments and other termination payments which are required under Law to be made to employees of Project Co reasonably and properly incurred by Project Co arising as a direct result of terminating this Agreement (provided that Project Co shall use all reasonable endeavours to mitigate its loss) and provided that in calculating such amount no account should be taken of any liabilities and

obligations of Project Co arising out of:

- (a) contracts of employment or other agreements or arrangements entered into by Project Co to the extent that such contracts of employment agreements or arrangements were not entered into in connection with the Project; and/or
- (b) contracts of employment or other agreements or arrangements entered into by Project Co to the extent that such contracts of employment agreements or arrangements were not entered into in the ordinary course of business and on commercial arm's length terms;

"Relevant Assumptions"

means the assumptions that the sale of Project Co is on the basis that there is no default by the Board, that the sale is on a going concern basis, that no restrictions exist on the transfer of share capital, that no Additional Permitted Borrowing has taken place and therefore that the effect of the Additional Permitted Borrowing on the calculation of such amount is disregarded but that otherwise the actual state of affairs of Project Co and the Project is taken into account;

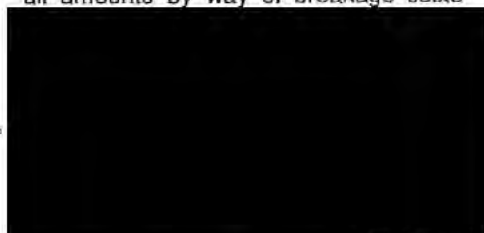
"Revised Senior Debt Termination Amount"

means, subject to Clause 4.3 (*Changes to Funding Agreements and Refinancing*):

- (a) all amounts outstanding at the Termination Date, including interest and (other than in respect of Additional Permitted Borrowing) Default Interest accrued as at that date, from Project Co to the Senior Funders in respect of Permitted Borrowing; and

- (b) all amounts by way of breakage costs

FOISA s 33(1)(b)
EIR Reg. 10(5)(2)



any sum representing outstanding loan principal under the Institutional Investor Senior Facility Agreement and/or Institutional Investor Senior Subordinated Facility Agreement included in Permitted Borrowings in paragraph (a) above, payable by Project Co to the Senior Funders as a result of a prepayment in respect of Permitted Borrowings (other

than in respect of Additional Permitted Borrowing) (or if any such prepayment has not occurred by the Invoice Date, such amount as will become payable on the assumption that such prepayment will be made on (if paragraph 1.2 of Section 5 of this Schedule 17 applies) the date for payment by the Board pursuant to that paragraph, or (where paragraph 1.3 of Section 5 of this Schedule Part 17 applies) on the date for payment, pursuant to that paragraph, of the last of the four instalments there referred to) subject to Project Co and the Senior Funders mitigating all such costs to the extent reasonably possible;(c) less, to the extent it is a positive amount, the aggregate of (without double counting in relation to the calculation of the Revised Senior Debt Termination Amount or the amounts below):

- i. all credit balances on any bank accounts (but excluding the Insurance Proceeds Account and the Surplus Account) held by or on behalf of Project Co on the Termination Date;
- ii. any amounts claimable on or after the Termination Date in respect of Contingent Funding Liabilities; iii. all other amounts received by the Senior Funders on or after the Termination Date and before the date on which any compensation is payable by the Board to Project Co as a result of enforcing any other rights they may have; and
- iv. all APB Distributions;

"Senior Debt"

means the financing provided by the Senior Funders under the Senior Funding Agreements;

"Senior Funding Agreements"

has the meaning given in Schedule Part 1 (*Definitions and Interpretation*);

"SPENS Breakage Costs"

means for the purposes of the Institutional Investor Senior Facility Agreement, the Spens Amount as defined therein and for the purposes of the Institutional Investor Senior Subordinated On-Loan Agreement, the Spens Amount as defined therein;

"Sub-Contractor Losses"

means:

- (a) the amount reasonably and properly payable by Project Co to the Contractor under the terms of the Construction

Contract as a direct result of the termination of this Agreement provided that such amount shall be reduced to the extent that Project Co fails to use all reasonable endeavours to mitigate such amount; and

- (b) the amount reasonably and properly payable by Project Co to the Service Providers under their respective contracts with Project Co (as the case may be) as a direct result of the termination of this Agreement provided that such amount shall be reduced to the extent that Project Co fails to use all reasonable endeavours to mitigate such amount;

provided that in both cases no account should be taken of any liabilities and obligation of Project Co to the Sub-Contractors arising out of:

- i. agreements or arrangements entered into by Project Co and/or the Sub-Contractors to the extent that such agreements or arrangements were not entered into in connection with those parties obligations in relation to the Project; and/or
- ii. agreements or arrangements entered into by Project Co and/or the Sub-Contractors to the extent that such agreements or arrangements were not entered into in the ordinary course of business and on commercial arm's length terms;

“Suitable Substitute Contractor”

has the meaning given in the Funders' Direct Agreement;

“Subordinated Debt”

means the debt contributed by the Subordinated Funders pursuant to the Subordinated Funding Agreements;

“Tender Costs”

means the reasonable and proper costs of the Board incurred in carrying out the Tender Process and/or in connection with any calculation of the Estimated Fair Value of the Agreement;

“Tender Process”

means the process by which the Board requests tenders from any parties interested in entering into a New Agreement, evaluates the responses from those interested parties and enters into a New Agreement with a new service provider, in accordance with paragraph 3 (*Retendering Process*) of Section 2 (*Compensation for Project Co Default*) of this Schedule Part 17

(Compensation on Termination);

“Tender Process Monitor”

means the person appointed under paragraph 3.6 of Section 2 (*Compensation for Project Co Default*) of this Schedule Part 17 (*Compensation on Termination*);

“Termination Sum”

has the meaning given in paragraph 1.3 of Section 5 (*General*) of this Schedule Part 17 (*Compensation on Termination*).

SCHEDULE PART 18
HANDBACK PROCEDURE

1 DEFINITIONS

In this Schedule Part 18 (*Handback Procedure*) and elsewhere in this Agreement (save where Schedule Part 1 (*Definitions and Interpretations*) provides to the contrary) the following words shall have the following meanings:

- "Handback Works" means the maintenance works (if any) required to be carried out in respect of the Facilities in order to procure that they will, on the Expiry Date, satisfy the Handback Requirements;
- "Handback Programme" means the programme for carrying out the Handback Works over the remainder of the Project Term describing the total works to be carried out and the method of carrying out such works during the overall period in which the Handback Works are to be executed;
- "Handback Amount" means the estimated cost of carrying out the Handback Works.

2 On the Expiry Date, each element of the Facilities shall be in a condition which is:

- 2.1 consistent with due performance by Project Co of the Service Level Specification and Method Statements; and
- 2.2 consistent with the Facilities and each of the elements of them having been designed and constructed in accordance with the applicable design life requirements set out in paragraph 5.1 of Section C of the Board's Construction Requirements,

together referred to as (the "Handback Requirements").

Not less than [REDACTED] prior to the Expiry Date, Project Co and the Board's Representative shall conduct a joint inspection of the Facilities.

4 Within fifteen (15) Business Days after the completion of the inspection, if it is found that any element of the Facilities is not in a condition consistent with the Handback Requirements, Project Co shall forthwith provide to the Board's Representative in accordance with Schedule Part 8 (*Review Procedure*):

4.1 Project Co's proposal as to the Handback Works;

FOIA 533(d)(b)
3
EIR Reg 106(e)
5

- 4.2 Project Co's proposal as to the Handback Programme; and
- 4.3 Project Co's estimate of the cost of the Handback Amount.
- 5 The Board's Representative may, within fifteen (15) Business Days after receipt of the details set out in paragraph 4 from Project Co, raise comments in accordance with paragraph 3 of Schedule Part 8 (*Review Procedure*) on Project Co's Proposals and estimate referred to in paragraph 1 above.
- 6 On agreement, or determination in accordance with Schedule Part 20 (*Dispute Resolution Procedure*), of the Handback Works, the Handback Programme and/or the Handback Amount (as the case may be), Project Co shall procure that the Handback Works are carried out in accordance with the Handback Programme so as to meet the Handback Requirements. Project Co shall carry out the Handback Works at its own cost notwithstanding that the actual cost of the Handback Works may be higher than the Handback Amount.
- 7 From the date of the agreement (or determination in accordance with Schedule Part 20 (*Dispute Resolution Procedure*)) of the matters identified in paragraph 6, the Board shall be entitled to withhold [REDACTED] of each subsequent Monthly Service Payment up to the amount of the Handback Amount (the "**Withheld Amount**") and the provisions of paragraph 11 shall apply. The Board shall pay such amounts into an interest bearing account in its own name (the "**Retention Fund**").
- 8 Project Co may elect by notice in writing to the Board within ten (10) Business Days of the agreement (or determination in accordance with Schedule Part 20 (*Dispute Resolution Procedure*)) of the matters identified in paragraph 6 to procure the provision of a bond (the "**Handback Bond**") in favour of the Board (and in a form acceptable to the Board (acting in its sole discretion)) for an amount equal to the Handback Amount and from a bank or insurance company authorised to carry out business in the United Kingdom, and upon delivery of the same to the Board, the provisions of paragraph 7 shall not apply.
- 9 Project Co shall carry out the Handback Works to the satisfaction of the Board's Representative in accordance with Good Industry Practice and in accordance with the Handback Programme so as to meet the Handback Requirements.
- 10 Notwithstanding:
- 10.1 the agreement of the Board's Representative to any Handback Works, the Handback Programme or the Handback Amount;
- 10.2 the participation of the Board's Representative in any inspection under this Schedule; and/or
- 10.3 the complete or partial carrying out of the Handback Works,

FOISA s33(1)(b)
 s 30(c)
 EIR regulation
 10 (5)(e)

Project Co shall not be relieved or absolved from any obligation to conduct any other inspection or to perform any other works in accordance with the Service Level Specification and Method Statement.

- 11 Where this paragraph 11 applies, if and to the extent that Project Co carries out any material part of the Handback Works in accordance with paragraph 6, Project Co may make a claim for payment for the work carried out. Any such claim shall be accompanied by a certificate by Project Co setting out the works performed and the value of such works. The Board shall be entitled to require any reasonable further evidence in respect of the valuation of the works. The Board shall make payment of the amount of a valid claim within fifteen (15) Business Days of the date of the claim and shall be entitled to withdraw that amount from the Retention Fund. If at any time the amount in the Retention Fund is insufficient to cover the costs claimed by Project Co, the Board shall pay the unpaid portion of such valid claim from any amounts which subsequently stand to the credit of the Retention Fund. In the event that the amount remaining in the Retention Fund on the Expiry Date is insufficient to cover Project Co's costs which have not been paid, Project Co shall bear the balance of such costs itself.
- 12 Not later than ninety (90) Business Days before the Expiry Date, Project Co and the Board's Representative shall conduct a joint inspection of the Facilities. Such inspection shall confirm whether or not the condition of the Facilities is in accordance with paragraph 1 above.
- 13 On, or within ten (10) Business Days after, the Expiry Date, the Board's Representative shall either:
- 13.1 issue to Project Co a Handback Certificate and return the Handback Bond or pay any balance standing to the credit of the Retention Fund (as appropriate), to Project Co; or
- 13.2 notify Project Co of its decision not to issue the Handback Certificate stating the reasons for such decision.
- 14 Any notice given by the Board's Representative in accordance with paragraph 13.2 shall set out each respect in which the Handback Works have not been completed or the Facilities do not comply with the Handback Requirements and shall state the Board's Representative's estimate of the cost of procuring that the Facilities comply in all respects with the Handback Requirements.
- 15 Project Co may, within fifteen (15) Business Days after receipt of the notice given in accordance with paragraph 13.2 by notice to the Board's Representative, object to any matter set out in the Board's Representative's notice. The notice from Project Co shall give details of the grounds of such objection and shall set out Project Co's proposals in respect of such matters.
- 16 If no agreement is reached between Project Co and the Board's Representative as to any matter referred to in Project Co's notice given in accordance with paragraph 15 within fifteen (15) Business Days of receipt of that notice by the Board's Representative, then either Project Co or the Board's Representative may refer the matter for determination in accordance with Schedule Part 20 (*Dispute Resolution Procedure*) as to:
- 16.1 whether the Facilities comply in all respects with the Handback Requirements; and
- 16.2 the estimated cost of procuring that the Facilities comply in all respects with the Handback Requirements, where the Facilities do not comply in all respects with the Handback Requirements.

- 17 If it is agreed or determined in accordance with Schedule Part 20 (*Dispute Resolution Procedure*) that the Facilities did not, at the Expiry Date, comply in all respects with the Handback Requirements, Project Co shall pay to the Board an amount equal to the estimated cost of completing such Handback Works (less, where applicable, any amounts standing to the credit of the Retention Fund at that time) or procuring that the Facilities comply in all respects with the Handback Requirements. Such payment shall be made not later than fifteen (15) Business Days after the estimated cost has been agreed or determined and, upon such payment being received by the Board, the Board's Representative shall issue the Handback Certificate and return (where applicable) the Handback Bond to Project Co.

SCHEDULE PART 19

RECORD PROVISIONS

SECTION 1

GENERAL REQUIREMENTS

- 1 Project Co shall retain and maintain all the records (including superseded records) referred to in Section 2 (*Records to be Kept*) of this Schedule Part 19 (*Record Provisions*) in accordance with this Section 1 (*General Requirements*) of this Schedule Part 19 (*Record Provisions*), the requirements of Good Industry Practice, in chronological order, in a form that is capable of audit and at its own expense. Project Co shall make such records available for inspection to the Board where it has reasonable cause for requiring such records, on giving reasonable notice shall provide such facilities as the Board may reasonably require for its representatives to visit any place where the records are held and examine the records maintained under this Schedule Part 19 (*Record Provisions*).
- 2 Wherever practical, original records shall be retained and maintained in hard copy form. True copies of the original records may be kept by Project Co where it is not practicable to retain original records.
- 3 Those records relating to the Project Operations (including the design, construction, development, enhancement and maintenance of the Facilities) shall be retained for the duration of the Agreement.
- 4 Financial and other records (including without limitation all information provided in support of any Change) shall be retained and maintained by Project Co for a period of at least six (6) years after the end of the Project Term in sufficient detail, in appropriate categories and generally in such a manner to enable Project Co to comply with its obligations under Clause 63.1 (*Information and Audit Access*) and where appropriate to enable the data in such records to be entered into the Financial Model so that the output from the Financial Model (on the basis of such data) can be directly compared with the actual financial cashflow and performance of Project Co.
- 5 Where Project Co wishes to dispose of any records maintained as provided in this Schedule Part 19 (*Record Provisions*) which are more than fifteen (15) years old, or in respect of which the required period for their retention has expired, then Project Co shall notify the Board and if, within forty (40) Business Days of such notice, the Board elects to receive certain of those records, then Project Co shall deliver up such records to the Board in the manner and at the location as the Board shall reasonably specify, and the costs of retaining those records in safe storage and delivering up the same shall be borne by Project Co.
- 6 Subject to paragraph 5, for a period of not more than six (6) years following the termination for whatever reason of this Agreement, Project Co shall retain in safe storage all such records as are referred to in Section 2 (*Records to be Kept*) of this Schedule Part 19 (*Record Provisions*) which were in existence at the date of termination of this Agreement. On the expiry of such period or at the earlier request of the Board (and the Parties acknowledge that such a request shall be deemed to have been issued by the Board upon the occurrence of any of the events set out in Clause 40.1.1 (*Insolvency*) whether prior to or following termination of this Agreement), Project Co shall deliver up all those records (or where those records are required by statute to remain with Project Co or a Contracting Associate of Project Co, copies thereof) to the Board in the manner and at the location as the Board shall reasonably specify. The Board shall make available to Project Co all the records Project Co delivers up pursuant to this paragraph subject to reasonable notice. The costs of retaining those records in safe storage and delivering up the same shall be borne:

- 6.1 by Project Co where the termination arises as a result of a Project Co Event of Default; and
- 6.2 by the Board where the termination arises for any other cause.
- 7 Without prejudice to the foregoing, Project Co shall provide the Board:
- 7.1 as soon as they may be available and in any event within sixty (60) Business Days after the end of the first six (6) months of each financial year of Project Co which falls during the Project Term, a copy, certified as a true copy by an officer of Project Co, of its unaudited interim accounts and, if appropriate, of consolidated unaudited interim accounts of Project Co, its Subsidiaries and Holding Company (if any) which would (if Project Co were listed on the London Stock Exchange whether or not it is) be required to be sent to shareholders as at the end of and for each such six (6) month period; and
- 7.2 as soon as they shall have been sent to its shareholders in order to be laid before an annual general meeting of Project Co but not later than one hundred and thirty (130) Business Days after the end of each accounting reference period of Project Co part or all of which falls in a Contract Year, a copy of Project Co's audited accounts and if appropriate, of the consolidated audited accounts of Project Co and, its Associated Companies (if any), in respect of that period, prepared in accordance with the Companies Act 1985 and generally accepted accounting principles and bases in Scotland, consistently applied together with copies of all related directors' and auditors' reports and all other notices/circulars to shareholders.
- 8 Project Co shall provide to the Board on 31 March, 30 June, 30 September and 31 December each year a document listing all information provided by it to the Senior Funders during the preceding three month period and, at the request of the Board, provide to the Board any information provided by it to the Senior Funders during the Project Term and any other information relating to the Project that the Board may reasonably require.
- 9 Any drawings required to be made or supplied pursuant to this Agreement shall be of a size appropriate to show the detail to be depicted clearly without magnifying aids and shall conform to British Standards 1192 or 308 or equivalent as appropriate. Where by prior agreement the Board has agreed to accept microfilm, microfiche or other storage media (which must include secure back up facilities), drawings and other documents shall be made or supplied in such form as has been agreed.
- 10 Upon termination or expiry of this Agreement, and in the event that the Board wishes to enter into another contract for the operation and management of the Project, Project Co shall (and shall ensure that the sub-contractors will) comply with all reasonable requests of the Board to provide information relating to Project Co's costs of operating and maintaining the Project.
- 11 Project Co shall use all reasonable endeavours to assist the Board in its preparation of any report and/or return required pursuant to regulations, directions or guidance applicable to the Board (in each case as amended, replaced or consolidated from time to time) or as required by external agencies including without limitation, reports and returns regarding the physical condition of the Facilities, health and safety, under the Fire (Scotland) Regulations 2005 and the Fire Safety (Scotland) Regulations 2006, relating to environmental health and to comply with The NHS and You or any document replacing it or required by the Scottish Government Health Directorates, the Scottish Government or the Scottish Futures Trust from time to time.

SECTION 2

RECORDS TO BE KEPT

- 1 This Agreement, its Schedule and the Project Documents and the Funding Agreements including all amendments to such agreements.

- 2 Project Co shall at all times maintain a full record of particulars of the costs of performing the Project Operations, including those relating to the design, construction, maintenance, operation and finance of the Facilities and the design, construction and finance of the Retained Estate Handback Infrastructure. This shall require Project Co to keep (and where appropriate to procure that the sub-contractors shall keep) books of account in accordance with best accountancy practice with respect to the Agreement showing in detail:
 - 2.1 administrative overheads;
 - 2.2 payments to Sub-Contractors and to sub-contractors;
 - 2.3 capital and revenue expenditure;
 - 2.4 such other items as the Board may reasonably require to conduct cost audits for verification of cost expenditure or estimated expenditure, for the purpose of Clause 29.11 (*Compensation*), Schedule Part 16 (*Change Protocol*) and Clause 32 (*Changes in Law*).

and Project Co shall have (and procure that the sub-contractors shall have) the books of account evidencing the items listed in paragraphs 2.1 to 2.4 available for inspection by the Board (and any expert) upon reasonable notice, and shall present a report of these to the Board as and when requested.

- 3 All other documents, software or other information expressly referred to in this Agreement.

- 4 Records relating to the appointment and supersession of the Board's Representative and Project Co's Representative.

- 5 Project Data.

- 6 Documents, drawings, design data or submissions raised in accordance with Schedule Part 8 (*Review Procedure*).

- 7 Documents relating to planning applications, consents, refusals and appeals.

- 8 Records relating to any specialist or statutory inspections of the Facilities and the Retained Estate Handback Infrastructure, including any roadways.

- 9 Notices, reports, results and certificates relating to completion of the Works and completion of the commissioning activities.

- 10 All operation and maintenance manuals and a full record of all maintenance procedures carried out during the Project Term.
- 11 Documents relating to events of Force Majeure, Delay Events and Relief Events and the consequences of the same.
- 12 All formal notices, reports or submissions made to or received from the Board's Representative in connection with the provision of Services, the Monitoring of Performance or the availability of the Facilities.
- 13 All certificates, licences, registrations or warranties related to the provision of Services.
- 14 Documents in support of claims for Services Payments.
- 15 Documents submitted in accordance with Schedule Part 16 (*Change Protocol*) and all documents provided in support.
- 16 Documents related to referrals to the Dispute Resolution Procedure.
- 17 Documents related to change in ownership or any interest in any or all of the shares in Project Co, Hold Co and/or Top Co.
- 18 Documents relating to the rescheduling of the indebtedness of Project Co or refinancing of the Project.
- 19 Tax invoices and records related to Value Added Tax.
- 20 Financial records, including audited and unaudited accounts of Top Co, Hold Co and Project Co and related reports
- 21 Records required by Law (including in relation to Health and Safety matters and health and safety files prepared pursuant to CDM Regulations) and all Consents.
- 22 Documents relating to insurance and insurance claims.
- 23 All other records, notices or certificates required to be produced and/or maintained by Project Co pursuant to this Agreement or any Project Document.
- 24 Records of all persons employed by Project Co or its sub-contractors and who are wholly or mainly engaged in the delivery of Services.

SCHEDULE PART 20

DISPUTE RESOLUTION PROCEDURE

- 1 The procedure set out in this Schedule Part 20 (*Dispute Resolution Procedure*) shall apply to any dispute, claim or difference arising out of or relating to this Agreement ("**Dispute**") except where it has been excluded from this procedure by an express term of this Agreement.
- 2 This Dispute Resolution Procedure shall not impose any pre-condition on either party or otherwise prevent or delay either party from commencing proceedings in any court of competent jurisdiction in relation to any Dispute in which that party requires either:
 - 2.1 an order (whether interlocutory or final) restraining the other party from doing any act or compelling the other party to do any act; or
 - 2.2 a decree for a liquidated sum to which there is no stateable defence.

3 MEDIATION

- 3.1 If the parties have been unable to resolve the Dispute within twenty (20) Business Days of the Dispute arising, they may (if both parties so agree) refer the Dispute to mediation on such conditions as may be agreed between the parties. Any mediation shall be completed within thirty (30) Business Days of such referral and any agreement arising therefrom shall be recorded in writing and signed by the parties and shall be binding and final to the extent set out in such agreement unless otherwise agreed.
- 3.2 For the avoidance of doubt, mediation shall not be a precondition to the commencement of Adjudication or court proceedings.

4 ADJUDICATION

- 4.1 Either party may at any time (notwithstanding that other dispute resolution procedures are running concurrently) give the other party to the Dispute notice of its intention to refer the Dispute to adjudication (the "**Notice of Adjudication**"). The party giving the Notice of Adjudication (the "**Referring Party**") shall by the same means of communication send a copy of the Notice of Adjudication to an adjudicator selected in accordance with paragraph 4.2 below or paragraph 4.11 below (the "**Adjudicator**").
- 4.2 The Adjudicator nominated to consider a Dispute referred to him shall, subject to paragraph 4.11, be selected on a strictly rotational basis from the relevant panel of adjudicators appointed in accordance with the following:
 - 4.2.1 there shall be two (2) panels of adjudicators, one in respect of construction matters (the "**Construction Panel**") and one in respect of operational and maintenance matters (the "**Operational Panel**"). All the adjudicators on each panel shall be wholly independent of Project Co, the Board, the relevant Sub-Contractor and any of the major competitors of Project Co or the relevant Sub-Contractor;

- 4.2.2 the Construction Panel shall be comprised of three (3) adjudicators as identified in paragraph 7 (*Panel Members*);
- 4.2.3 the Operational Panel shall be comprised of three (3) adjudicators as identified in paragraph 7 (*Panel Members*);
- 4.2.4 if any member of either panel resigns during the term of the Agreement, a replacement adjudicator shall be appointed by Project Co and the Board as soon as practicable;
- 4.2.5 if Project Co and the Board are unable to agree on the identity of the adjudicators to be selected for the panels or any replacement adjudicator, the Chairman (or Vice Chairman) for the time being of the Chartered Institute of Arbitrators Scottish Branch shall appoint such adjudicator(s) within seven (7) days of any application for such appointment by either party;
- 4.2.6 in the event that the first panel member is unable or unwilling to confirm acceptance of his appointment as Adjudicator or where he fails to respond within two (2) days of the date of the Notice of Adjudication, then the Referring Party shall invite the person next in line to act as Adjudicator. In the event that the second panel member is unwilling or unable to confirm acceptance of his appointment as Adjudicator within four (4) days of the date of the Notice of Adjudication or if the parties disagree as to the relevant panel of adjudicators to be used, then the Referring Party may apply to the Chairman (or Vice Chairman) for the time being of the Chartered Institute of Arbitrators Scottish Branch who shall within seven (7) days of the date of the Notice of Adjudication, nominate an Adjudicator (who shall also within the same period, confirm acceptance of his appointment as Adjudicator) to determine the Dispute described in the Notice of Adjudication;
- 4.2.7 no member of either panel shall be entitled to accept an appointment to act as Adjudicator unless he is willing also to be appointed as the adjudicator to adjudicate any dispute which:
- a) may arise between Project Co and the Contractor and raises issues which, in the opinion of Project Co, are substantially the same as or connected with the Dispute in relation to which he has been appointed; and/or
 - b) may arise between Project Co and the Service Provider and raises issues which, in the opinion of Project Co, are substantially the same as or connected with the Dispute in relation to which he has been appointed; and/or
 - c) may arise between Project Co and the Independent Tester and raises issues which, in the opinion of Project Co, are substantially the same as or connected with the Dispute in relation to which he has been appointed.

- 4.3 The Referring Party shall, within seven (7) days of the date of the Notice of Adjudication, serve its statement of case (the "**Referral Notice**") on the Adjudicator (appointed pursuant to paragraph 4.2) and the other party to the Dispute (the "**Responding Party**"). The Referral Notice shall set out each element of the

Referring Party's claim and the relief or remedy sought in sufficient detail so as to enable the Responding Party to understand and, where appropriate, respond to the claim and the Referral Notice shall be accompanied by copies of, or relevant extracts from, this Agreement and such other documents as the Referring Party intends to rely upon. The date of the referral of the Dispute (the "Referral") shall be the date of the Referral Notice.

- 4.4 Within seven (7) days of appointment in relation to a particular Dispute, the Adjudicator shall establish the procedure and timetable for the adjudication. The Adjudicator shall have absolute discretion as to how to conduct the adjudication, including whether a meeting is necessary. He shall establish the procedure and timetable subject to any limitation within this Agreement. The parties shall comply with any request or direction of the Adjudicator in relation to the adjudication.
- 4.5 The Adjudicator shall reach a decision on the Dispute within twenty-eight (28) days of the date of the Referral (or such other period as the parties may agree). The Adjudicator may extend the period of twenty eight (28) days by up to fourteen (14) days with the consent of the Referring Party. Unless the parties otherwise agree, the Adjudicator shall give reasons for his decision. Unless and until the Dispute is finally determined by Court proceedings or by an agreement in writing between the parties, the Adjudicator's decision shall be binding on both parties who shall forthwith give effect to the decision.
- 4.6 The Adjudicator's costs of any reference shall be borne as the Adjudicator shall specify or, in default, equally by the parties. Each party shall bear its own costs arising out of the adjudication, including legal costs and the costs and expenses of any witnesses.
- 4.7 The Adjudicator shall be deemed not to be an arbitrator but shall render his decision as an adjudicator and the law relating to arbitration shall not apply to the Adjudicator or his determination or the procedure by which he reached his determination.
- 4.8 The Adjudicator shall act fairly and impartially and may take the initiative in ascertaining the facts and the law. The Adjudicator shall have the power to open up, review and revise any opinion, certificate, instruction, determination or decision of whatever nature given or made under this Agreement.
- 4.9 All information, data or documentation disclosed or delivered by a party to the Adjudicator in consequence of or in connection with his appointment as Adjudicator shall be treated as confidential. The Adjudicator shall not, save as permitted by Clause 61 (*Confidentiality*), disclose to any person or company any such information, data or documentation and all such information, data or documentation shall remain the property of the party disclosing or delivering the same and all copies shall be returned to such party on completion of the Adjudicator's work.
- 4.10 The Adjudicator is not liable for anything done or omitted in the discharge or purported discharge of his functions as Adjudicator unless the act or omission is in bad faith. Any employee or agent of the Adjudicator is similarly protected from liability.
 - 4.10A.1 The Adjudicator may on his own initiative or on the request of the Referring Party or Responding Party correct his decision so as to remove a clerical or typographical error arising by accident or omission.

4.10A.2 Any correction of a decision shall be made within five (5) days of the date upon which the Adjudicator's decision was delivered to the parties.

4.10A.3 Any correction of a decision shall form part of the decision.

4.11 If any Dispute raises issues which, in the opinion of Project Co, are substantially the same as or connected with issues raised in a dispute or difference arising out of or relating to any other agreement (all such agreements being referred to as the "**Related Agreements**") between:

4.11.1 Project Co and the Contractor;

4.11.2 Project Co and the Service Provider; and/or,

4.11.3 Project Co and the Independent Tester,

which was or has been referred to adjudication (the "**Related Adjudication**") and an adjudicator has already been appointed (the "**Related Adjudicator**") then Project Co may request that the Dispute be referred to the Related Adjudicator and paragraphs 4.12 to 4.14 shall apply.

4.12 Subject to paragraphs 4.13 and 4.14 below, in the event that a Related Adjudicator orders that a Dispute under this Agreement be consolidated with a Related Adjudication with which he is dealing under the Related Agreement, then:

4.12.1 with effect from the time of such order, the Dispute shall be determined by the Related Adjudicator, who shall become the Adjudicator; and

4.12.2 such order shall be binding on Project Co and the Board and both of them shall acknowledge the appointment of the Related Adjudicator as the adjudicator of the Dispute, with Project Co or the Board (as the case may be) using its best endeavours to procure that the third party who is a party to the Related Agreement shall with effect from the time of such order comply with the requirements of the Related Agreement (including if applicable any requirement or direction of the Related Adjudicator appointed under such Related Agreement) as to the future conduct of the determination of the Dispute and the Related Adjudication; and

4.12.3 notwithstanding paragraph 4.6, Project Co and the Board shall be jointly responsible with the third party who is a party to the Related Agreement for the Related Adjudicator's fees and expenses including those of any specialist consultant appointed under the adjudication procedure in the Related Agreement, in respect of the period in which the Dispute is consolidated with the Related Adjudication pursuant to an order of the Related Adjudicator ("**Consolidated Adjudication Costs**"). Project Co and the Board agree that the Related Adjudicator shall have the discretion to make directions to require Project Co, the Board and the third party who is a party to the Related Agreement to pay or make contribution to the Consolidated Adjudication Costs in different proportions. If no such directions are made, Project Co, the Board and the third party who is a party to the Related Agreement shall bear the Consolidated Adjudication Costs in equal shares, and if Project Co, the Board or the third party has paid more

than such equal share, that party or third party shall be entitled to a contribution from the other party, parties or third party, as the case may be.

- 4.13 Notwithstanding anything to the contrary a Dispute under this Agreement may only be consolidated with a Related Adjudication, if the Related Adjudicator receives particulars of the Dispute within ten (10) days of the referral of the Related Adjudication to the Related Adjudicator under the Related Agreement.
- 4.14 Where Project Co requests that a Dispute under this Agreement be consolidated (in terms of paragraph 4.11) with a Related Adjudication and heard by the Related Adjudicator, the Dispute may only be consolidated where the Board has previously consented in writing to the identity of the Related Adjudicator appointed in respect of the Related Adjudication. The Board's consent to such request shall not be unreasonably withheld and if the Board refuses to consent, it must give reasons in writing for its refusal. Should the Board fail to respond within two (2) days of receipt of such a request it shall be deemed to have consented to the appointment of the Related Adjudicator. Where the Related Adjudicator is on the Construction Panel or Operational Panel at the time of the Referral then the Board shall be deemed to have consented to the appointment of the Related Adjudicator.

5 COURT PROCEEDINGS

Subject to paragraph 4 (*Adjudication*) all Disputes, to the extent not finally resolved pursuant to the procedures set out in the foregoing provisions of this Schedule Part 20 (*Dispute Resolution Procedure*), shall be referred to [REDACTED]

6 SUBMISSIONS IN RELATION TO ADJUDICATION

- 6.1 If any Dispute raises issues which relate to:
- 6.1.1 any dispute between Project Co and the Contractor arising under the Construction Contract or otherwise affects the relationship or rights of Project Co and/or the Contractor under the Construction Contract (the "**Construction Contract Dispute**"); or
 - 6.1.2 any dispute between Project Co and the Service Provider arising under the Service Contract or otherwise affects the relationship or rights of Project Co and/or the Service Provider under the Service Contract (the "**Service Contract Dispute**"); or
 - 6.1.3 any dispute between Project Co and the Independent Tester arising under the Independent Tester Contract or otherwise affects the relationship or rights of Project Co and/or the Independent Tester under the Independent Tester Contract (the "**Independent Tester Contract Dispute**"),

then Project Co may include as part of its submissions made to the Adjudicator submissions made by the Contractor or by the Service Provider or the Independent Tester as appropriate.

- 6.2 Any submissions made by the Contractor or the Service Provider or the Independent Tester shall:

- 6.2.1 be made within the time limits applicable to the delivery of submissions by Project Co to the Adjudicator; and
- 6.2.2 concern only those matters which relate to the Dispute between the Board and Project Co arising out of this Agreement or in connection therewith.
- 6.3 Where the Contractor or the Service Provider or the Independent Tester makes submissions in any reference before the Adjudicator, the Adjudicator's costs of such reference shall be borne as the Adjudicator shall specify, or in default, one-third by the Board and two-thirds by Project Co.
- 6.4 The Board shall have no liability to the Contractor or the Service Provider or the Independent Tester arising out of or in connection with any decision of the Adjudicator or in respect of the costs of the Contractor or the Service Provider or the Independent Tester in participating in the resolution of any Dispute under this Agreement.
- 6.5 Project Co shall not allow the Contractor or the Service Provider or the Independent Tester access to any Confidential Information relevant to the issues in dispute between the Board and Project Co save where:
 - 6.5.1 the Confidential Information is relevant also to the issues relating to the Construction Contract Dispute or the Service Contract Dispute or the Independent Tester Contract Dispute as the case may be; and
 - 6.5.2 Project Co has first delivered to the Board a written undertaking from the Contractor and/or the Service Provider and/or the Independent Tester (as appropriate) addressed to the Board that they shall not use any such Confidential Information otherwise than for the purpose of the dispute resolution proceedings under this Agreement and that they shall not disclose such Confidential Information to any third party other than the Adjudicator or the courts or any professional adviser engaged by the Contractor or the Service Provider or Independent Tester (as appropriate) to advise in connection with the Dispute.

7 PANEL MEMBERS

The panel members referred to in paragraph 4 are as follows:

Construction Panel		
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]

FOISA
 s 38(1)(b)
 EIR
 Regulation
 11

PAGES
482 - 484 (PART)
REDACTED.

FOISA
s 38 (1)(b)
EIR
Regulation 11.

8 NO LOSS

Where the Board would otherwise be expressly liable to make payment to Project Co of sums which include amounts payable in turn by Project Co to any Sub-Contractor, the Board shall not be entitled to withhold, reduce or avoid any such payment to Project Co in reliance only on the fact that the amount which is due from Project Co to the Sub-Contractor or the entitlement of the Sub-Contractor to payment of such amount as a result of the circumstances giving rise to the Board's obligation to pay, is conditional on the entitlement of, or receipt of payment by Project Co from the Board.

9 CONTINUING OBLIGATIONS

Unless this Agreement has already been repudiated or terminated, the parties shall, (notwithstanding that any Dispute is subject to the Dispute Resolution Procedure set out in this Schedule Part 20 (*Dispute Resolution Procedure*)), continue to carry out their obligations in accordance with this Agreement.

SCHEDULE PART 21

PROJECT CO INFORMATION

REDACTED
p 485 - 491

FOISA § 38(1)(b)
EIR Regulation 11.

(FOISA § 25
information otherwise
available)

SCHEDULE PART 22

CERTIFICATES

Handback Certificate

Issued by: Board's Representative
Address: []
Board: **LOTHIAN HEALTH BOARD**
Address: []
Project Co: **[PROJECT CO]**
Address: []
Issue date:

Works :

Situated at :

Project Agreement dated:

I/we certify that the condition of the Facilities is in accordance with paragraph 1 of Schedule Part 18 (*Handback Procedure*) of above mentioned Project Agreement.

To be signed by or for the issuer named above.

Signed.....
LOTHIAN HEALTH BOARD

Certificate of Practical Completion

Issued by: Independent Tester – []

Address: []

Project Co: [PROJECT CO]

Address: []

Board: **LOTHIAN HEALTH BOARD**

Address: [].

Contractor: [CONTRACTOR]

Address: []

Issue date:

Works:

Situated at:

Project Agreement dated:

Under the terms of the above-mentioned Project Agreement,
I/we certify that the Actual Completion Date of the Works was achieved on [].

To be signed by or for the issuer named above.

Signed.....
[INDEPENDENT TESTER]

Commissioning Completion Certificate

Issued by: Independent Tester – []

Address: []

Hold Co: [PROJECT CO]

Address: []

Board: **LOTHIAN HEALTH BOARD**

Address: []

Contractor: [CONTRACTOR]

Address: []

Issue date:

Works:

Situated at:

Project Agreement dated:

Under the terms of the above-mentioned Project Agreement,

I/we certify that the Actual Commissioning End Date was achieved on [].

To be signed by or for the issuer named above.

Signed.....
[INDEPENDENT TESTER]

SCHEDULE PART 23

REFINANCING

Requirement for Board Consent

1 Project Co shall obtain the Board's prior written consent to any Qualifying Refinancing and both the Board and Project Co shall at all times act in good faith with respect to any Refinancing.

2 The Board shall be entitled to receive:

2.1 a [redacted] share of the Margin Gain arising from any Qualifying Refinancing which gives rise to a reduction in the Margin from the Margin as shown in the Senior Funding Agreements as at Financial Close (or, in the case of a second or subsequent Qualifying Refinancing, from the Margin as shown in the Senior Funding Agreements as updated at the immediately preceding Qualifying Refinancing);

FOISA
§ 33(1)(b)
§ 30(c)
EIR
Regulation
10(5)(e)

2.2 a share of any Refinancing Gain (arising otherwise than from a reduction in Margin) from a Qualifying Refinancing, in respect of any Refinancing Gain (when considered in aggregate with all previous Qualifying Refinancings) as follows:

2.2.1 for a Refinancing Gain from [redacted]

FOISA
§ 33(1)(b)

2.2.2 for a Refinancing Gain from [redacted]

§ 30(c)

2.2.3 for a Refinancing Gain in excess [redacted]

EIR
Regulation
10(5)(e)

3 The Board shall not withhold or delay its consent to a Qualifying Refinancing to obtain a greater share of the Refinancing Gain than that specified in paragraph 2 above.

Project Co Details

4 Project Co shall promptly provide the Board with full details of any proposed Qualifying Refinancing, including a copy of the proposed financial model relating to it (if any) and the basis for the assumptions used in the proposed financial model. The Board shall (before, during and at any time after any Refinancing) have unrestricted rights of audit over any financial model and documentation (including any aspect of the calculation of the Refinancing Gain) used in connection with the Refinancing whether that Refinancing is a Qualifying Refinancing or not.

Receipt of Gain

5 The Board shall have the right to elect to receive its share of any Refinancing Gain (including any Margin Gain) as:

5.1 a single payment being the proportion (corresponding to the proportion of the Refinancing Gain to which the Board is entitled pursuant to paragraph 2 above) of the amount which, but for the provisions of this Schedule Part 23 (Refinancing), would otherwise be capable of being released as a Distribution and/or a Surplus Payment on

or about the date of the Refinancing;

- 5.2 a reduction in the Annual Service Payments over the remaining term of this Agreement; or
- 5.3 a combination of the above.

Method of Calculation

- 6 The Board and Project Co will negotiate in good faith to agree the basis and method of calculation of the Refinancing Gain (including any Margin Gain) and payment of the Board's share of the Refinancing Gain (taking into account how the Board has elected to receive its share of the Refinancing Gain under paragraph 5 (*Receipt of Gain*) above). If the parties fail to agree the basis and method of calculation of the Refinancing Gain or the payment of the Board's share, the dispute shall be determined in accordance with Schedule Part 20 (*Dispute Resolution Procedure*).

Costs

- 7 The Refinancing Gain (including any Margin Gain) shall be calculated after taking into account any breakage costs necessary to facilitate the Qualifying Refinancing together with the reasonable and proper professional costs that each party directly incurs in relation to the Qualifying Refinancing and on the basis that all reasonable and proper professional costs incurred by the Board will be paid to the Board by Project Co within twenty eight (28) days of any Qualifying Refinancing. Such costs shall be allocated pro rata between the Margin Gain (if any) and the remaining Refinancing Gain.

- 8 Without prejudice to the other provisions of this Schedule Part 23 (*Refinancing*), Project Co shall:

- 8.1 notify the Board of all Notifiable Financings on becoming aware of the same and again when they are entered into and provide full details of the same; and
- 8.2 include a provision in the Funding Agreements (other than the Subordinated Funding Agreements) whereby it is entitled to be informed of any proposals which the Senior Funders may have to refinance the Funding Agreements (other than the Subordinated Funding Agreements).

Definitions

In this Schedule Part 23 (*Refinancing*) and elsewhere in this Agreement (save where Schedule Part 1 (*Definitions and Interpretation*) provides to the contrary) the following words and expressions shall have the following meanings:

"Distribution"

means:

- (a) whether in cash or in kind, any:
 - i. dividend or other distribution in respect of share capital (whether made validly in accordance with the Articles of Association or

- otherwise);
- ii. reduction of capital, redemption or purchase of shares or any other reorganisation or variation to share capital;
- iii. payments under the Subordinated Funding Agreements (whether of principal, interest, breakage costs or otherwise);
- iv. payment, loan, contractual arrangement or transfer of assets or rights to the extent (in each case) it was put in place after Financial Close and was neither in the ordinary course of business nor on reasonable commercial terms;
- v. the receipt of any other benefit which is not received in the ordinary course of business and on reasonable commercial terms; or

- (b) the early release of any Contingent Funding Liabilities, the amount of such release being deemed to be a gain for the purposes of any calculation of Refinancing Gain;

“EEA”

means from time to time the European Economic Area as created by The Agreement on the European Economic Area 1992 or any successor or replacement body, association, entity or organisation which has assumed either or both the function and responsibilities of the European Economic Area;

“Exempt Refinancing”

means:

- (a) any Refinancing that was fully taken into account in the calculation of the Annual Service Payments;
- (b) a change in taxation or change in accounting treatment;
- (c) the exercise of rights, waivers, consents and similar actions which relate to day to day administrative and supervisory matters, and which are in respect of:
 - i. breach of representations and warranties or undertakings;
 - ii. movement of monies between the Project Accounts in accordance with the terms of the

Senior Funding Agreements as at Financial Close;

- iii. late or non-provision of information, consents or licences;
- iv. amendments to Sub-Contracts;
- v. approval of revised technical and economic assumptions for financial model runs (to the extent required for forecasts under the Funding Agreements);
- vi. restrictions imposed by Senior Funders on the dates at which the debt contributed by the Senior Lenders can be advanced to Project Co under the Senior Funding Agreements and/or amounts released from Drawdown Account during the Availability Period, each as defined in the Common Terms Agreement and which are given as a result of any failure by Project Co to ensure that the construction work is performed in accordance with the agreed construction programme and which is notified in writing by Project Co or the Senior Funders to the Board prior to being given;
- vii. changes to milestones for drawdown and/or amounts released from the Drawdown Account during the Availability Period set out in the Common Terms Agreement and which are given as a result of any failure by Project Co to ensure that construction work is performed in accordance with the agreed construction programme and which is notified in writing by Project Co or the Senior Funders to the Board prior to being given;
- viii. failure by Project Co to obtain any consent by statutory bodies required by the Senior Funding Agreements; or
- ix. voting by Senior Funders and the voting arrangements between the Senior Funders in respect of the levels of approval required by them under the Funding Agreements;

(d) any amendment, variation or supplement of any agreement approved by the Board

as part of any Qualifying Change under this Agreement;

- (e) any sale of shares in Project Co or HoldCo by the shareholders or securitisation of the existing rights and/or interests attaching to shares in Project Co or HoldCo provided that this paragraph (e) shall, in respect of shares in HoldCo, only apply for so long as HoldCo holds 100% of the issued share capital of Project Co;
- (f) any sale or transfer of the Subordinated Funders' existing rights and/or interests under the Subordinated Funding Agreements or securitisation of the Subordinated Funders' existing rights and/or interests under the Subordinated Funding Agreements; or
- (g) any Qualifying Bank Transaction;

"Insurance Undertaking"

has the meaning given in the rules from time to time of the Financial Services Board;

[REDACTED]

FOLSA s 33(1)(b)
EIR Reg 10(5)(e)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

FOISA s 33(1)(b)
EIR Reg 10(5)(c)



"Net Present Value"

means the aggregate of the discounted values, calculated as at the relevant date, of each of the relevant projected cashflows, in each case discounted at [REDACTED]

"Notifiable Financings"

means any Refinancing described in paragraphs (a) or (c) of the definition of Refinancing and any other arrangement which has or would have a similar effect or which has or would have the effect of limiting Project Co's or any Associated Company's ability to carry out any such refinancing or other arrangements that would have a similar effect;

"Project Accounts"

means accounts referred to in and required to be established under the Senior Funding Agreements;

"Qualifying Bank Transaction"

means:

- (a) the syndication by a Senior Funder, in the ordinary course of its business, of any of its rights or interests in the Senior Funding Agreements;
- (b) the grant by a Senior Funder of any rights of participation, or the disposition by Senior Funder of any of its rights or interests (other than as specified in paragraph (a) above in respect of the Senior Funding Agreements in favour of:
 - i. any other Senior Funder;
 - ii. any institution which is recognised or permitted under the law of any member state of the EEA to carry on the business of a credit institution pursuant to Council Directive 2006/48/EC relating to the taking up and pursuit of business of credit institutions or which is otherwise permitted to

accept deposits in the United Kingdom or any other EEA member state;

- iii. a local authority or public authority;
- iv. a trustee of a charitable trust which has (or has had at any time during the previous two years) assets of at least [redacted] (or its equivalent in any other currency at the relevant time); *FOISA s 33(1)(b) s 30(c)*
- v. a trustee of an occupational pension scheme or stakeholder pension scheme where the trust has (or has had at any time during the previous two years) at least 50 members and assets under management of at least [redacted] (or its equivalent in any other currency at the relevant time); *EIR Regulation 10(5)(e)*
- vi. an EEA or Swiss Insurance Undertaking; *FOISA s 33(1)(b) s 30(c) EIR Regulation 10(5)(e)*
- vii. a Regulated Collective Investment Scheme;
- viii. any Qualifying Institution; or
- ix. any other institution in respect of which the prior written consent of the Board has been given; and/or

(c) the grant by a Senior Funder of any other form of benefit or interest in either the Senior Funding Agreements or the revenues or assets of Project Co or HoldCo, whether by way of security or otherwise, in favour of:

- i. any other Senior Funder;
- ii. any institution specified in paragraphs bii to bvii above;
- iii. any Qualifying Institution; or
- iv. any other institution in respect of which the prior written consent of the Board has been given;

"Qualifying Institutions"

means [redacted]

"Qualifying Refinancing"

means any Refinancing that will give rise to a Refinancing Gain greater than zero that is not an

"Refinancing"

Exempt Refinancing;

means:

- (a) any amendment, variation, novation, supplement or replacement of any Funding Agreement (other than any Subordinated Funding Agreement);
- (b) the exercise of any right, or the grant of any waiver or consent, under any Funding Agreement (other than any Subordinated Funding Agreement);
- (c) the disposition of any rights or interests in, or the creation of any rights of participation in respect of, the Funding Agreements (other than the Subordinated Funding Agreements) or the creation or granting of any other form of benefit or interest in either the Funders' Agreements (other than the Subordinated Funding Agreements) or the contracts, revenues or assets of Project Co whether by way of security or otherwise; or
- (d) any other arrangement put in place by Project Co or another person which has an effect which is similar to any of (a)-(c) above or which has the effect of limiting Project Co's or any Associated Company's ability to carry out any of (a)-(c) above;

"Refinancing Gain"

means an amount equal to the greater of zero and [(A - B)], where:

A = the Net Present Value of the Surplus Payments projected immediately prior to the Refinancing (taking into account the effect of the Refinancing using the Financial Model as updated (including as to the performance of the Project) so as to be current immediately prior to the Refinancing but disregarding any Distribution

FOISA s 33 (1)(b)
EIR Reg 10(5)(e)

be made over the remaining term of this Agreement following the Refinancing; and

B = the Net Present Value of the Surplus Payments projected immediately prior to the Refinancing (but without taking into account the effect of the Refinancing and using the Financial Model as updated (including as to the performance of the Project) so as to be current immediately prior to the Refinancing) to be made over the

remaining term of this Agreement following the Refinancing;

"Regulated Collective Investment Scheme"

has the meaning given in the rules from time to time of the Financial Services Authority;

FOISA
s37(1)(b)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

EIR
Reg 10(b)(e)

SCHEDULE PART 24



NOT USED
TO P 506.

REDACTED

SCHEDULE PART 25

INSURANCE PROCEEDS ACCOUNT AGREEMENT

AGREEMENT

AMONG:

- (1) IHS LOTHIAN LIMITED (registered under number SC493676) whose registered office is Burness Paull LLP, 50 Lothian Road, Festival Square, Edinburgh, EH3 9WJ. (the "Issuer"); and
- (2) LOTHIAN HEALTH BOARD, a health board constituted in Scotland under the National Health Service (Constitution of Health Boards) (Scotland) Order 1974 (S.I. 1974/267) as amended by the National Health Service (Constitution of Health Boards) (Scotland) Amendment Order 2003 (S.S.I. 2003/217) pursuant to Section 2 of the National Health Service (Scotland) Act 1978 as amended by section 28 of the National Health Service and Community Care Act 1990 and having its principal address at Waverley Gate, 2-4 Waterloo Place, Edinburgh EH1 3EG (the "Board");
- (3) [REDACTED] (the "Account Bank"); and
- (4) [REDACTED] (the "Security Trustee").

FOISA 538(11)
EIR
Regulation 11

WHEREAS

- (A) The Issuer and the Board have agreed to open an insurance proceeds account in their joint names.
- 1 The parties hereto have agreed to set out the terms on which payments may be made to or from that account in this Agreement.

IT IS AGREED as follows:

1 DEFINITIONS AND INTERPRETATION

- "Credit Provider" means the Senior Funders, as such term is defined in the Project Agreement;
- "Event of Default" has the meaning given in Clause 4.5 (*General Provisions for the Account*) of this Agreement;
- "Proceeds Account" has the meaning given to it in the Common Terms Agreement;
- "Qualifying Bank" means any institutions which is recognised or permitted under the law of any member state of the EEA to carry on the business of a credit institution pursuant to Council Directive 2006/48EC relating to the taking up and pursuit of the business of credit institutions or which is otherwise permitted to accept deposits in the United Kingdom or any other EU member state;
- "Project Agreement" means the agreement dated on or around the date of this Agreement between the Project Co and the Board in relation to the design, development, construction and provision of certain services in connection with the re-provision of the Royal Hospital for Sick Children, Child and Adolescent Mental Health Service and the Department for Clinical Neuroscience in a single building adjoining the Royal Infirmary of

Edinburgh at Little France at the Site and Off-Site;

"Senior Finance Documents"

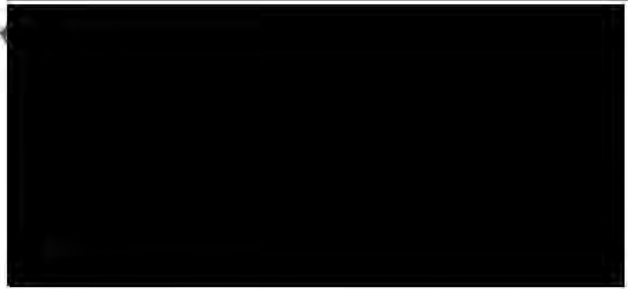
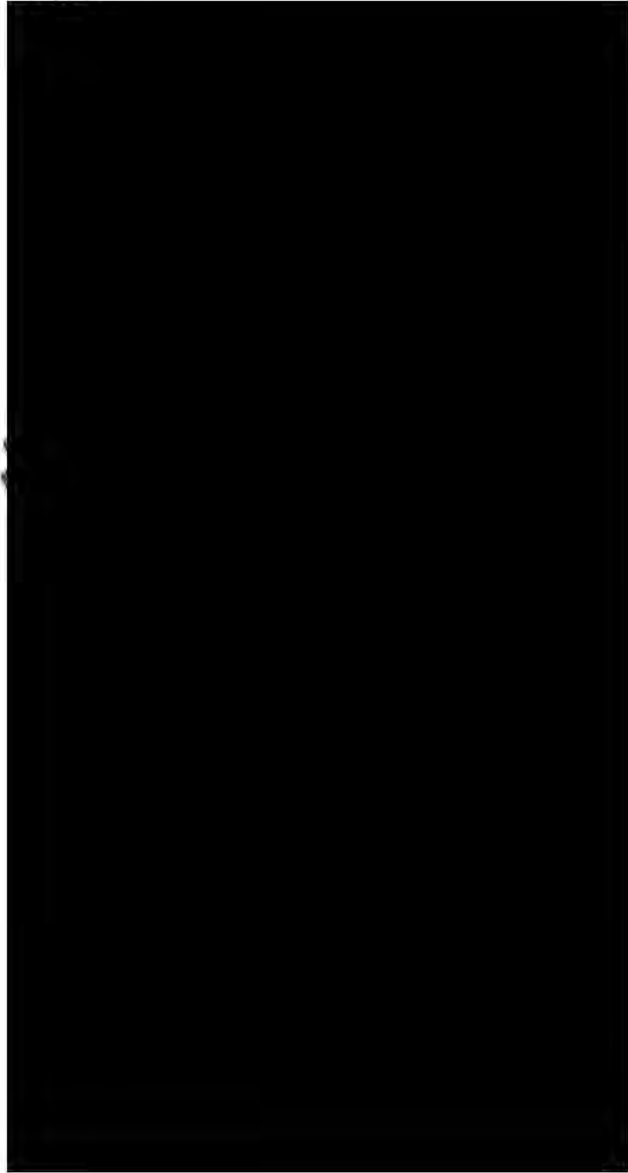


"Security Documents"

means:

FOISA
5 33 (1) (b)
EIR
Reg 10 (b) (e)

* *
* *



1.1 Capitalised terms defined in the Project Agreement shall have the same meaning in

this Agreement.

1.2 European Economic and Monetary Union

In the event that the United Kingdom joins EMU any figures expressed in "£" and "sterling" under this Agreement shall be converted into Euro at the rate for conversion of sterling into Euro established by the Council of the European Union pursuant to the Treaty (including compliance with rules relating to rounding in accordance with European Community regulations) and any reference to a figure in "£" or "Sterling" shall mean that figure adjusted into Euro.

2 INSURANCE PROCEEDS ACCOUNT

Each of the Issuer and the Board (together the "Account Holders") hereby appoint Sumitomo Mitsui Corporation Europe Limited as the Account Bank.

2.1 The Account Bank has opened on its books, at its office at [REDACTED] an account in the joint names of the Account Holders designated the Board Insurance Proceeds Account (the "Account").

FOISA
§ 38 (1)(b)
EIR Regulation 1

2.2 The Account Bank shall, save as otherwise provided herein, maintain the Account in accordance with its usual practices, provided that, in the event of any conflict between the provisions of this Agreement and any applicable mandate, the provisions of this Agreement shall prevail.

2.3 Notwithstanding anything else in this Agreement, no person shall request or require that any withdrawal be made from the Account if it would cause the Account to become overdrawn and to the extent that any withdrawal (if made in full) would cause the Account to become so overdrawn, such withdrawal shall be made in part in as great an amount as possible as will not result in such Account becoming overdrawn.

2.4 Where any withdrawal required under this Agreement cannot be made in its entirety, the Account Bank shall promptly notify both of the Account Holders of that fact and provide details of the payment not made, the date on which it should have been made and the amount unpaid.

2.5 Each amount from time to time standing to the credit of the Account shall bear interest at the rate agreed between the Account Bank and the Account Holders from time to time, such interest to be credited to the Account in respect of which such interest has accrued in accordance with the relevant mandate.

2.6 Subject to and in accordance with the provisions of this Agreement, including without limitation Clause 4 (*General Provisions for the Account*) of this Agreement, the Account Bank agrees that it shall make such payments out of the amount standing to the credit of the Account as may from time to time be requested by the Account Holders jointly subject to the restrictions as contained in this Agreement. Save as otherwise provided in this Agreement, no party shall be entitled to require the Account Bank to make, and the Account Bank shall not make, any payment out of the amount standing to the credit of the Account.

2.7 Subject to Clause 8.6 (*The Account Bank*) of this Agreement, the Account Holders

shall maintain the Account with the Account Bank until the termination of the Project Agreement. If so instructed after the termination of the Project Agreement, the Account Bank shall, at the sole cost and expense of the Issuer, terminate the Account in accordance with the relevant instructions and pay any amount standing to the credit of such accounts as the Account Holders may elect in accordance with Clause 4.1 (*General Provisions for the Account*) of this Agreement.

3 RECEIPTS AND PAYMENTS

- 3.1 The Account may only be used in accordance with the terms of and for the purposes set out in this Clause 3 (*Receipts and Payments*).
- 3.2 The Account shall be used for receiving, to the extent required by Clause 53 (*Insurance*) of the Project Agreement, the proceeds of all Insurances (as defined in the Project Agreement).
- 3.3 Subject to restrictions set out in this Agreement, the Account shall only be used for applying the proceeds of the insurances in accordance with Clause 53 (*Insurance*) of the Project Agreement either directly or indirectly by way of the reimbursement to the Issuer of costs or expenses incurred or monies paid by it (or on its behalf) in or towards satisfaction of the reinstatement restoration or replacement requirements of that Clause 53 (*Insurance*). In the event that any amount standing to the credit of the Account is not so required to be applied, such amount shall (subject to Clauses 4.3 and 4.5 (*General Provisions for the Agreement*) below) be paid by the Account Bank to the Proceeds Account, or as otherwise instructed by the Security Trustee pursuant to Clause 4.5 below.

4 GENERAL PROVISIONS FOR THE ACCOUNT

- 4.1 Subject to Clauses 4.3 and 4.5 below, and provided that:
 - 4.1.1 the Account Bank has received notice in writing from two signatories, one of which shall be an authorised signatory of the Issuer and the other an authorised signatory of the Board, as listed under the applicable mandate that such payment is authorised under this Agreement; and
 - 4.1.2 no notice has been given to the Account Bank by the Credit Provider prior to the making of such payment or transfer of an Event of Default which is subsisting and the Account Bank has no actual notice that an Event of Default will occur as a result of the making of any such payment or transfer,

the Account Bank agrees that it shall only make payments or transfers from the Account on the request of the Account Holders.

- 4.2 The Board undertakes to provide notice to the Account Bank as prescribed in Clause 4.1.1 for, the purposes of applying any part of the balance standing to the credit of the Account in accordance with Clause 3.3 (*Receipts and Payments*) of this Agreement.

Each of the Account Bank and the Issuer shall be entitled to treat any act of the authorised signatory of the Board as being expressly authorised by the Board and neither the Account Bank nor the Issuer shall be required to determine whether an

express authority has in fact been given.

- 4.3 No payments or transfers from the Account shall be made after an Event of Default which is continuing until the Credit Provider has confirmed to the Account Bank that such payment or transfer may be made except as expressly permitted under this Agreement. The Account Bank shall not be under any obligation to investigate the compliance of any payment with this Agreement.
- 4.4 All amounts withdrawn from the Account for transfer to another account or for application in or towards making a specific payment or meeting a specific liability shall be transferred to that account or applied in or towards making that payment or meeting that liability, and for no other purpose.
- 4.5 Notwithstanding any other provision of this Agreement, at any time following the occurrence of any Event of Default (as defined in Schedule Part 4 (*Funders' Direct Agreement*) of the Project Agreement) which is continuing and has not been waived or remedied, the Security Trustee may at any time give notice to the Account Bank instructing it not to act on the instructions of or at the request of the Issuer in relation to any sums at any such time standing to the credit of the Account. Without prejudice to the foregoing, the Account Bank agrees that it shall pay any amount standing to the credit of the Account and payable to the Issuer in accordance with Clause 3.3 (*Receipts and Payments*) of this Agreement to such a bank account as the Security Trustee shall direct following the occurrence of any Event of Default. The Account Bank agrees that it shall not so act and shall act on the instructions of the Security Trustee in place of the Issuer.
- 4.6 In establishing the balance standing to the credit of the Account at any time, the Account Bank may take into account credits to and withdrawals from such Account which are to be made on such day.

5 QUALIFYING BANK

If at any time the Account Bank ceases to be a Qualifying Bank, the Account Holders shall promptly open or cause to be opened a new account with a Qualifying Bank on the same terms as the Account and the Account Holders shall take all such action as may be required to open the new account.

6 CHARGES

The charges of the Account Bank (if any) for the operation of the Account shall be for the account of the Account Holders in equal amounts and shall be debited from the balance standing to the credit of the Account as from time to time agreed between the Account Bank, the Board and the Issuer.

7 MANDATES

Each of the Account Holders will deliver to the Account Bank on or prior to the date hereof the applicable mandate together with authorised signature lists for both the Issuer and the Board.

8 THE ACCOUNT BANK

- 8.1 The Account Bank may:
- 8.1.1 engage and pay reasonable fees for the advice or services of any lawyers, accountants or other experts whose advice or services may to it seem necessary, expedient or desirable and rely upon any advice so obtained;
 - 8.1.2 rely upon any communication or document believed by it to be genuine and, in particular, rely upon any notice, request or other communication of the Account Holders for the purposes of this Agreement if such notice, request or other communication purports to be signed or sent by or on behalf of an authorised signatory of the Account Holders;
 - 8.1.3 assume that no Event of Default has occurred unless it has actual notice to the contrary; and
 - 8.1.4 assume that all conditions for the making of any payment out of the amount standing to the credit of the Account which is specified in the Project Agreement or any of the Senior Finance Documents has been satisfied, unless it has actual notice to the contrary.
- 8.2 Notwithstanding anything to the contrary expressed or implied herein and subject to Clause 2 (*Insurance Proceeds Account*) of this Agreement, the Account Bank shall not:
- 8.2.1 be bound to enquire as to the occurrence or otherwise of an Event of Default or be affected by notice of any of the same except by reason of and to the extent expressly provided in this Agreement;
 - 8.2.2 be bound to account to any other party hereto for any sum or the profit element of any sum received by it for its own account;
 - 8.2.3 save as provided in this Agreement be bound to disclose to any other person any information relating to any other party hereto;
 - 8.2.4 be under any fiduciary duty towards any other party hereto or under any obligations other than those for which express provision is made in this Agreement;
 - 8.2.5 have any responsibility to ensure that the information set out in any instructions received by it hereunder are correct or to check or enquire as to or otherwise be affected by whether any condition has been or will be met or fulfilled or any instruction is properly given on behalf of the person from whom it purports to be given or any instruction is given properly other than to exercise the bankers duty of care; or
 - 8.2.6 have any responsibility to any party if any instruction which should be given by the Account Holders to the Account Bank under or in connection with this Agreement is for any reason not received by the Account Bank or is not made at the time it should be made.

- 8.3 The Account Bank does not have and does not accept any responsibility for the accuracy and/or completeness of any information (other than statements provided in accordance with Clause 9.2 (*Acknowledgements by the Account Bank*) of this Agreement) and the Account Bank shall not be under any liability as a result of taking or omitting to take any action in relation to the Account, save in the case of negligence or wilful misconduct or breach of its obligations under this Agreement.
- 8.4 Each of the other parties hereto agrees that it will not assert or seek to assert against any director, officer or employee of the Account Bank any claim it might have against the Account Bank in respect of the matters referred to in Clause 8.3 above.
- 8.5 The Account Bank may accept deposits from, lend money to, invest in and generally engage in any kind of banking or other business with the Account Holders, the Shareholders and any other party to any of the Project Documents.
- 8.6 The Account Bank may, at any time, (without assigning any reason therefor) notify the Account Holders in writing that it wishes to cease to be a party hereto as Account Bank (a "**cessation notice**"). Upon receipt of a cessation notice the Account Holders may nominate a Qualifying Bank as a successor to the Account Bank (a "**successor Account Bank**"). If no such nomination is made before the date specified in the cessation notice as being the date on which the Account Bank wishes to cease to be a party hereto (the "**cessation date**") (which date shall be a Business Day falling not less than thirty (30) days after the date of delivery of the cessation notice to the Account Holders) then the Account Bank may nominate a Qualifying Bank as successor Account Bank itself.
- 8.7 If a successor Account Bank is nominated under the provisions of Clause 8.6 above, then on the cessation date, provided the successor Account Bank has executed and delivered to the Account Holders a deed of novation in such form as the Account Holders may require undertaking to become a party to and bound by the terms and conditions of this Agreement and to become a party to such other documents as may be required by the Security Trustee in order to perfect the security created by the Senior Finance Documents:
- 8.7.1 the successor Account Bank shall open on its books at its principal office an account equivalent to that described in Clause 2 (*Insurance Proceeds Account*) of this Agreement and any amounts standing to the credit of the Account shall be transferred to the corresponding one of such account;
- 8.7.2 any reference in the Project Agreement or any Senior Finance Document to the Account shall be deemed to refer to the corresponding account opened pursuant to Clause 8.7.1;
- 8.7.3 the Account Bank shall cease to be a party hereto as Account Bank and shall cease to have any obligation hereunder in such capacity (but without prejudice to any accrued liabilities under this Agreement and its obligations under this Clause 8 (*The Account Bank*)) (but shall remain entitled to the benefit of the provisions of this Clause 8 (*The Account Bank*)); and
- 8.7.4 the successor Account Bank and each of the other parties hereto shall have the same rights and obligations amongst themselves as they would have had if such successor Account Bank had been an original party hereto as Account Bank.

9 ACKNOWLEDGEMENTS BY THE ACCOUNT BANK

9.1 Notwithstanding anything to the contrary in any applicable mandate, the Account Bank hereby waives so far as it may validly and lawfully do so any right it has or may hereafter acquire to combine, consolidate or merge the Account with any other account of the Account Bank, Account Holders or the Security Trustee or any other person or with any liabilities of Account Holders or the Security Trustee or any other person to the Account Bank. In addition, the Account Bank agrees so far as it may validly and lawfully do so that it may not set off, combine, withhold or transfer any sum standing to the credit of the Account in or towards satisfaction of any liabilities to the Account Bank of the Account Holders, the Security Trustee or any other person.

9.2 After the date hereof and until the Account Bank has been notified by the Account Holders of the termination of the Project Agreement or until the Account Bank ceases to be a party to this Agreement pursuant to the provisions of Clause 8.7 (*The Account Bank*) above, the Account Bank shall provide each of the Account Holders and the Security Trustee with statements in respect of the Account, such statement to be supplied in accordance with any reasonable request therefore by the Account Holders.

10 ASSIGNATION

The Account Holders may not assign any of their rights under this Agreement or in relation to the Account otherwise than pursuant to the Security Documents or as permitted under the Project Agreement. The Security Trustee may assign its rights under this Agreement to a successor Security Trustee appointed in accordance with the Security Trust and Intercreditor Deed and shall promptly give notice of any such assignation to the Account Bank. The Account Bank shall not be entitled to novate (except in accordance with Clause 8.7 (*The Account Bank*) above) or assign all or any part of its rights under this Agreement.

11 SECURITY TRUSTEE

The Security Trustee is party hereto solely for the purpose of receiving the benefits and exercising the rights specifically allocated to it under the terms of this Agreement.

12 FURTHER ASSURANCE

The parties hereto agree that they will co-operate fully to do all such further acts and things and execute any further documents as may be necessary or reasonably desirable to give full effect to the arrangements contemplated by this Agreement, subject to any such party being reimbursed to its satisfaction for any costs, expenses (including VAT) liabilities or fees reasonably incurred by it in the negotiation, preparation or execution of any such further documents.

13 AMENDMENTS

The provisions of this Agreement may not be amended (otherwise than in accordance with the terms hereof) except by written agreement between all the parties hereto.

14 NOTICES

14.1 Each communication to be made hereunder shall be made in writing and, unless otherwise stated, may be made by facsimile or letter delivered by registered post or courier.

14.2 Any communication or document to be made or delivered by one person to another pursuant to or in connection with this Agreement shall (unless that other person has by ten days' written notice to the other specified another address) be made or delivered to that other person at the address set out below identified with its signature below or identified with its signature in any deed of novation and shall be deemed to have been made or delivered:

14.2.1 (in the case of any communication made by letter) when delivered to that address; or

14.2.2 (in the case of any communication by facsimile) when transmission of such facsimile communication has been received in legible form and receipt has been confirmed, and communication verified, by telephone,

provided that (a) if such communication or document would otherwise be deemed to have been received on a day which is not a Business Day it shall be deemed to have been received on the next subsequent Business Day, (b) if any communication is made or document is delivered to the Security Trustee, such communication or document shall be effective only if the same is expressly marked for the attention of the officer identified the Security Trustee, as the case may be, below (or such other officer as the Credit Provider or the Security Trustee, as the case may be, shall from time to time specify for this purpose) and (c) if any communication or document is made or delivered to the Account Bank or the Security Trustee, such communication or document shall be effective only when received by the Account Bank, or the Security Trustee.

14.3 Notice to the Account Bank at any other office than the address shown beside its execution of this Agreement or such substitute address notified in accordance with Clause 14.2 above shall not constitute notice to the Account Bank unless agreed in writing by the Account Bank by reference to this Agreement.

15 MISCELLANEOUS

The parties hereto each acknowledge that the Security Trustee when acting hereunder shall be acting in accordance with and subject to the terms of the Security Trust and Intercreditor Deed.

16 GOVERNING LAW AND JURISDICTION

This Agreement is governed by, and shall be construed in accordance with, Scottish law.

17 THIRD PARTY RIGHTS

Save to the extent expressly provided in this Agreement, it is expressly declared that no rights shall be conferred under and arising out of this Agreement upon any person who is not a party to this Agreement and, without prejudice to the foregoing generality, there shall not be created by this Agreement a jus quaesitum tertio in favour of any person whatsoever.

IN WITNESS WHEREOF: these presents typewritten on this and the preceding [] pages are executed by the parties hereto as follows:

SIGNED for and on behalf of the said **IHS Lothian Limited** acting under a power of attorney

at

on

by

.....

Print Full Name Attorney

and

.....

Print Full Name Attorney

SIGNED for and on behalf of
Lothian Health Board

at

on the day
of 2015

by

.....
Authorised Signatory

..... Full Name

Before this witness

..... Witness

..... Full Name

..... Address

.....

Signed by

[Redacted Signature]

POISA s38 (1)(b)
EIR Reg 11.

at

on the day
of 2015

by

.....
Authorised Signatory

.....Full Name

.....
Authorised Signatory

.....Full Name

Signed by



*FOISA 538(1)(b)
EIR Reg 11.*

at

on

Acting by its duly
Authorised Sealing Officer

.....
Sealing Officer

Before this witness

.....
Witness

Address

.....

.....

SCHEDULE PART 26

COMMERCIALLY SENSITIVE INFORMATION

Where information or material falls within more than one category identified in column 1 of the table below, it shall be deemed to fall within the category whose corresponding period of confidentiality identified in column 2 of the table below will expire the soonest.

Category of Information/Material	Period for which information is to be kept confidential
Financial Model (as at Financial Close)	From the Effective Date until the date falling two (2) years after the Actual Completion Date
Financial Model (amended from time to time in accordance with this Agreement)	From the date of the relevant Financial Model until the date falling two (2) years after the later of: 1 the Actual Completion Date; and 2 the date on which the amendments to Financial Model are agreed in accordance with this Agreement
Prices within the Catalogue of Small Works and Services	Period during which the relevant prices are applicable
Small Works and Services Rates	Period during which the relevant Small Works and Services Rates are applicable
Project Co bank account information	Project Term
Project IRR	In the case of the Project IRR contained in the Financial Model as at Financial Close from the Effective Date until the date falling two (2) years after the Actual Completion Date In the case of the Project IRR contained in the Financial Model as amended from time to time in accordance with this Agreement, from the date of the relevant Financial Model until the date falling two (2) years after the later of: 3 the Actual Completion Date; and 4 the date of the Financial Model containing the relevant information
Ancillary Documents	Project Term
Funding Agreements	Project Term
Information about Project Co's processes, methodologies, working methods and information relating to the development of new processes and methodologies which amounts to a trade secret or which, if disclosed, could reasonably be considered to provide a commercial advantage to Project	Trade secrets – Project Term All other cases – five (5) years from the date on which the information is produced to the Board

Co's competitors	
Breakdown of prices within the overall contract price (to the extent not disclosed within the Financial Model)	Project Term
Information on Project Co's costing mechanisms including information obtained from Project Co relating to project risks and pricing of the same and cost information relating to third party contractors and the Sub-Contractors	Project Term
Financial term sheets and related funding information including any funder pricing	Two (2) years from the date on which the information is produced to the Board
Information relating to the appointment of Project Co as the preferred bidder to the Project (including the preferred bidder letter and correspondence and minutes relating to the same)	Until the date falling two (2) years after the Actual Completion Date
Information contained within or relating to Project Co's bid for the Project except as otherwise listed in this Schedule Part 26 (<i>Commercially Sensitive Information</i>) or otherwise provided in the Agreement	Until the date falling two (2) years after the Actual Completion Date

SCHEDULE PART 27

PLANS

~~REDACTED~~

REDACTED
(TO PAGE 546)

FOIA 33 (1)(b)
EIR Reg 10(5)(e)

SCHEDULE PART 28

BOARD POLICIES

The Board Policies are the Board Policies as set out below and as set out on the disc in the Agreed Form identified and executed as the Schedule Part 28 (*Board Policies*) of this Agreement, referred to in and forming part of this Agreement.

REDACTED
(To PAGE 548)

FOISA 525(1).

SCHEDULE PART 29

PLANNING

RETRACTED

(TO PAGE 578)

FOISA s25(D)

SCHEDULE PART 30

BOARD WORKS

REDACTED
(to PAGE 580)
FOIA s 33 (1)(b)
BIR Reg 10(5)(e)

SCHEDULE PART 31

██████████ INTERFACE WITH CAMPUS SITE AND/OR CAMPUS FACILITIES

RETRACTED

(TO PAGE 723)
FOISA 533(b)(6)
EIR 10(5)(e)

SCHEDULE PART 32
COMMUNITY BENEFITS

REDACTED

(TO END OF
DOCUMENT)

FOISA 533 (1)(b)
EIR Reg 10(5)(e)

EIB PROFILES FIXED 1

KEY DATES	
Construction Milestones	
Financial Close	13-Feb-15
Construction Commencement (month starting)	01-Mar-15
Construction Completion (month ending)	31-Jul-17
Operations Milestones	
End of Construction	30-Jun-17
Start of Operations	01-Aug-17
Operations Completion	31-Jul-42

PROJECT ANALYSIS	
Pre-tax Project IRR (real)	
Post-tax Project IRR (real)	
Pre-tax Project IRR (nominal)	
Post-tax Project IRR (nominal)	

SHAREHOLDER IRR	
Nominal Post SPV Tax (NPD)	Actual

UNITARY PAYMENT	
Annual Service Payment as of 13-Feb-15	
Annual Service Payment in first year of operations (nominal)	
NPV (UP only)	
NPV (Surpluses)	
NPV (NHS Lothian - Total) (mid period discounting)	
NPV (NHS Lothian) - Per Board Proforma	
Discount Rate (nominal)	6.0875%
Discount Date	02-Oct-14
Unitary Payment Indexation	
RPI linked	26.0%

FINANCIAL CLOSE SET-UP	
EIB debt profile fixed?	YES
EIB max portion of outstanding debt	OK
M&G cumulative repayment lag max	OK
Institutional investor checks (annuity repayment check)	OK
M&G repayment leg max - SF	
M&G repayment leg max - SSF	

OTHER ASSUMPTIONS		
Average Tax Rate	20.0%	
Inflation Forecast	From Date	Percentage
	31-Mar-12	2.50%
	31-Mar-13	2.50%
	31-Mar-14	2.50%
	31-Mar-46	2.50%
	31-Mar-47	2.50%
Swap Rate	2.04%	

SOURCES AND APPLICATIONS OF FUNDS SUMMARY (Fin. Close)

Sources of Funds		
Unitary Payment		
RPI Swap Revenue	-	-
Third Party Revenue	-	-
Total Shareholder Funding		
Total Senior Subordinated Facility Debt Funding		
Equity Bridge Loan Drawdowns	-	-
Grant Bridge Loan Drawdowns	-	-
Senior Bank Debt*	146,406	79.77%
Bond Funding	-	-
Land sale	-	-
Capital injection	-	-
Construction Security Facility	-	-
Interest Earned	-	-
Construction Deposit Withdrawals	-	-
Total Sources of Funds	183,546	100.00%
Applications of Funds		
Construction Payments	151,728	82.67%
Asset Renewal Expenditure	-	-
SPC Advisor's Fees and Costs		
Bank's Fees and Upfront Bond Fees	-	-
Interest Expense		
Banks costs / fees		
Equity costs / fees		
SPC Running and Insurance Costs	-	-
Operating Costs		
Other Costs		
Tax / VAT Payments	206	0.11%
Reserve Cashflows	5,829	3.18%
Equity Bridge Loan Repayment	-	-
Grant Bridge Loan Repayment	-	-
Construction Debt Repayments	-	-
Construction Deposits	-	-
Total Applications of Funds	183,546	100.00%

LONG TERM FINANCING SOURCES

Senior Debt Finance*		
Tranche A		
Tranche B	-	-
Tranche C	-	-
Senior Bond	-	-
PPB I	-	-
PPB II	-	-
Total	146,406	80.34%
		87.32%
Senior Subordinated Debt		
Total		
Junior Debt Finance		
Investor 2	-	-
Investor 3	-	-
Total Junior Debt Finance		
Total Project Funds Raised	182,242	100.00%
Gearing at Financial Close		
Gearing after Construction		

COVERAGE RATIOS

	Target	Actual
Senior Debt ASDCR - Annual Backward		
Minimum	1.20x	OK
Average	1.40x	OK
Combined ASDCR - Annual Backward		
Minimum	1.20x	OK
Average		OK
Senior Loan Life Cover Ratio		
Minimum	1.25x	OK
Average		
Combined Loan Life Cover Ratio		
Minimum		
Average		
Senior Project Life Cover Ratio		
Minimum		
Average		

KEY CONVERGENCE INDICATORS

	Distance	%
Checks tab		
		OK
Debt Profile		
Convergence Distance		OK
Min ADSCR		
Avg ADSCR		
Subdebt		
Max Subdebt Rolled-Up Interest		sub-debt repaid? OK
Final Balance		OK
Subdebt Coupon		
Unpaid Subdebt	£ -	
Facilities, Junior Debt, Reserves, ... Sizing		
Bank Macro		OK
Bond Macro		OK
Subdebt Macro		OK
Tax provision ok		
Tax provision check:		OK

The contract specific financial information that has been redacted is exempt under s33(1)(b) of FOISA as disclosure of the redacted information would be likely to prejudice substantially the interests of NHS Lothian. In addition, having reviewed the request we consider that the information is exempt under s30(c) as it is likely to prejudice the effective conduct of public affairs. Under the EIRs regulation 10(5)(e) regulation, information is excluded from publication if publication would, or would be likely to, prejudice substantially the confidentiality of commercially sensitive information.

Real Gilt	2.61%
LIBOR - Cash (average over concession)	0.00%
GIC Rate	0.00%
Working Capital Assumption: Delay in Receipt of Unitary Payment (months)	0

SOURCES AND APPLICATIONS OF FUNDS SUMMARY (Fin. Close)

Sources of Funds

COVERAGE RATIOS

Target Actual

Senior Debt ASDCR - Annual Backward

