

DATED

1998

CALDERDALE HEALTHCARE NHS TRUST

and

CATALYST HEALTHCARE (CALDERDALE) PLC

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CONCESSION AGREEMENT  
in relation to a  
Single Hospital for  
Calderdale Healthcare NHS Trust

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## **CONCESSION AGREEMENT**

**THIS CONCESSION AGREEMENT** is made the            day of            1998

### **BETWEEN**

- (1) CALDERDALE HEALTHCARE NHS TRUST of Royal Halifax Infirmary, Free School Lane, Halifax, West Yorkshire, HX1 2YP (the “Trust”) such expression to include successors in title to the Trust to the extent that the Trust may lawfully bind its successors; and
- (2) CATALYST HEALTHCARE (CALDERDALE) PLC, a company incorporated in England and Wales with registered number 3524906 whose registered office is at 2<sup>nd</sup> Floor, Peter House, 2-14 Oxford Street, Manchester M1 5AN (“Concessionco”) such expression to include successors in title.

### **RECITALS:**

- (A) The Trust was established by the Calderdale Healthcare National Health Service Trust (Establishment) Order 1992 (as amended) (the “Order”), in exercise of the powers conferred on the Secretary of State for Health by the National Health Service and Community Care Act 1990 (the “NHS Act”).
- (B) The Trust’s functions pursuant to Section 5(1) (b) of the NHS Act and the Order include providing and managing the hospital accommodation and services at, inter alia, the Halifax General Hospital and the Trust is under a duty pursuant to Schedule 2 to the Act to carry out such functions effectively, efficiently and economically.
- (C) The Trust, having due regard to its functions and duties, wishes to make provision for a Hospital for Calderdale on the site of Halifax General Hospital and has actively sought the participation of the private sector to operate healthcare facilities at such hospital and in connection therewith to provide related services pursuant to the United Kingdom Government’s Private Finance Initiative.
- (D) Accordingly, on 24<sup>th</sup> May 1996 the Trust issued an invitation to tender for certain works comprising the design and construction of a Hospital for Calderdale and for the provision of certain services at such hospital and that tender has been awarded to Concessionco.
- (E) This Agreement sets out the terms and conditions subject to which Concessionco will operate healthcare facilities and provide related services at such hospital together with the terms and conditions upon which Concessionco will carry out the works necessary to provide such healthcare facilities for such operation and provision of services.
- (F) The entry into this Agreement was approved at a meeting of the Trust Board held on 30 July 1998 and is (together with certain agreements referred to in the relevant certificates herein) certified in the form set out at Schedule 26 as an Externally Financed Development Agreement by the Secretary of State for Health for the purposes of and as defined in the National Health Service (Private Finance) Act 1997.
- (G) The parties have perused final drafts of the Project Documents and are aware of the terms thereof.



**NOW IT IS HEREBY AGREED** as follows:

**SECTION A: PRELIMINARY**

1. **DEFINITIONS**

**“Account in Trust”**

means an interest bearing deposit account to be opened with Bank of Scotland, in the joint names of the Trust and Concessionco to be operated in accordance with Clause 18.

**“Accounting Date”**

means the 31 March, 30 June, 30 September and 31 December.

**“Act”**

means the Town and Country Planning Act 1990.

**“Additional Business”**

means any business or service in addition to the Services provided or procured by Concessionco pursuant to Clause 29 and which shall not include any clinical business or service.

**“Additional Works Variation”**

means any change in the design, nature, quality, functionality or quantity of any Section of the Works implemented after the Completion of such Section pursuant to Clause 18 and which shall include any addition to the Hospital and any reduction in size of the Hospital.

**“Adjudication Rules”**

means those rules annexed as Schedule 24, as supplemented and varied by Clause 41 and deleting Rule 15 as shown in the said Schedule.

**“Adjusted Lender Liabilities”**

means at any time after the delivery by Concessionco to the Trust of a Trust Share Refinancing Notice or any Exempt Refinancing Notice pursuant to Clause 51 the amount of principal and interest scheduled in the most recent Trust Share Refinancing Notice or Exempt Refinancing Notice to be outstanding as at any date of termination of this Agreement (after taking account of all Variations under Clause 18 and Trust Changes of Law under Clause 52) under the Debt Agreement(s) plus Market Breakage Costs.

**“Adjudicator”**

means such adjudicator or adjudicators as may be appointed pursuant to Clause 41.2 on the terms set out in Schedule 24 or such other terms as the parties may agree.

**“Advance Letters”**

means letters issued by the Department of Health (in the form of NHS Circulars with the prefix “AL”) informing NHS employers of changes in rates of pay for NHS employees.

**“Agreement for Lease”**

means the agreement for lease entered into between the Trust and Concessionco on the date of the execution of this Agreement in the form set out in Schedule 3.

**“Agreement for Underlease”**

means the agreement for underlease entered into between Concessionco and the Trust on the date of execution of this Agreement in the form set out in Schedule 3.

**“Ancillary Staffs Increase”**

means any increase in the rates of pay of analogous grades for the purposes of the Ancillary Staffs Council of the Whitley Councils for Health Services (Great Britain) or any successor body (as advised in Advance Letters or required to be implemented as a result of an Equal Pay Ruling) and payable at the times and in the manner therein set out which the Hotel Services Provider pays or will pay to all relevant employees engaged in the provision of the Hotel Services.

**“Appeal Proceedings”**

means any and all proceedings instituted before the court or other appropriate tribunal body person or forum whatever in pursuance of an application or appeal in respect of the decision of the Planning Authority or the Secretary of State or relating to or consequent upon any application made for Planning Consent including (without limiting the generality of the foregoing):

- (a) any appeal to the Secretary of State following a planning refusal;
- (b) any consideration by the Secretary of State of any such application referred to him under section 77 of the Act;
- (c) Judicial Review Proceedings; or
- (d) any reconsideration by the Planning Authority or the Secretary of State of any such application upon remission to it or him.

**“Applicable Standards”**

means those standards with which Concessionco has agreed to comply pursuant to and on the terms set out in Part 1.2 of Schedule 4, including NHS Requirements.

**“Availability Deduction”**

means the amount of deduction from the Availability Element for any Month calculated in accordance with Clauses 33.8 to 33.15.

**“Availability Element”**

means the Availability Element identified in Table 2 in Schedule 20, adjusted pursuant to the provisions of Clauses 18, 33.7, 33.8 to 33.15 and 51 and any other applicable provisions of this Agreement.

**“Bank of Scotland”**

means the Governor and Company of the Bank of Scotland.

**“Base Annual Volume Element”**

means in respect of the Catering Service the figure set out in the Volume Element column in Table 2 of Schedule 20 (which represents the amount of the Variable Fee multiplied by the annual Base Case Activity Projection) as adjusted pursuant to the provisions of Clauses 18 and 33.7 of this Agreement.

**“Base Case Activity Projections”**

bears the meaning set out in Schedule 12.

**“Base Contract Sum Analysis”**

means the document set out at Part 4.1 of Schedule 4.

**“Base Contract Sum”**

means the amount of £76,225,859, as adjusted pursuant to Clause 18 and any other applicable provisions of this Agreement.

**“Base Criteria”**

means the contents of Parts 1.1 to 1.4 of Schedule 4, as the same may be varied according to the terms of this Agreement.

**“Benchmarking”**

means a benchmarking exercise undertaken by both parties pursuant to Clause 35.

**“Benchmarking Date”**

means in respect of all Services other than the Estates Maintenance Service and without prejudice to the Trust’s rights pursuant to Clause 52.5, each of the sixth (6<sup>th</sup>), twelfth (12<sup>th</sup>), eighteenth (18<sup>th</sup>), twenty-fourth (24<sup>th</sup>), thirtieth (30<sup>th</sup>), thirty-sixth (36<sup>th</sup>), forty-second (42<sup>nd</sup>), forty-eighth (48<sup>th</sup>) and fifty-fourth (54<sup>th</sup>) anniversaries of the 1<sup>st</sup> April immediately preceding the Services Commencement Date, or if the Services Commencement Date falls on the 1<sup>st</sup> April, the anniversary of the Services Commencement Date.

**“Borrower Debenture”**

means the fixed and floating charge debenture dated on or about the date of this Agreement given by Concessionco in favour of the Security Trustee, as the same may be amended, supplemented, modified or novated from time to time.

**“Building Contractor”**

means the party responsible for performing the Works pursuant to the Construction Contract who shall be Bovis Construction Limited or another party of equivalent standing in all material respects appointed in accordance with this Agreement.

**“Building Refurbishment”**

means the amounts for building refurbishment within the Availability Element identified in the availability fee schedule of the Financial Model adjusted pursuant to Clauses 18 and any other applicable provision of this Agreement

**“Building Restrictive Covenant”**

means the restrictive covenant contained in a conveyance dated 4 March 1895 not to erect any buildings within fifty (50) feet of the North side of Godfrey Road and to keep the land as gardens or pleasure grounds and plant the same with trees shrubs and flowers.

**“Business Day”**

means any day other than Saturday or Sunday, Christmas Day or Good Friday and other than a bank holiday in England within the meaning given by Section 1 of the Banking and Financial Dealings Act 1971.

**“Capital Change in Law”**

means a Change in Law which creates an obligation on Concessionco to incur after the Services Commencement Date Capital Expenditure on the Hospital and which:

- (a) is individually equal to or greater than £10,000; or
- (b) cumulatively causes the amount of Capital Expenditure incurred by Concessionco consequent upon Capital Changes in Law to exceed £15,000 in any Year

both such figures being adjusted by the RPI Adjustment on 1<sup>st</sup> April each year.

**“Capital Expenditure”**

means any expenditure classified as such within generally accepted accounting principles applicable in the United Kingdom from time to time (including all costs referred to in Clause 18.8.1).

### **“Capped Lender Liabilities”**

means:

- (a) prior to the delivery by Concessionco to the Trust of a Trust Share Refinancing Notice or an Exempt Refinancing Notice pursuant to Clause 51 the lesser of:
  - (i) Lender Liabilities; and
  - (ii) the product of (y) Original Lender Liabilities and (z) 1.25; and
- (b) after the delivery by Concessionco to the Trust of a Trust Share Refinancing Notice or an Exempt Refinancing Notice pursuant to Clause 51 the lesser of:
  - (i) the product of (y) Original Lender Liabilities plus £15 million and (z) 1.25; and
  - (ii) the product of (y) Adjusted Lender Liabilities and (z) 1.25.

### **“Car Parking Service”**

means the service provided pursuant to the Car Parking Service Specification Arrangement.

### **“Catering Service”**

means the service provided pursuant to the Catering Service Specification Arrangement.

### **“Change in Law”**

means, without prejudice to Clause 2.4, any enactment, revocation, amendment or change in interpretation (not subject to appeal) of any Law by any court or other judicial forum, any coroner or commission of inquiry, any local authority or any statutory undertaker or Competent Authority or any other person having such power or jurisdiction over the parties or the subject matter of this Agreement.

### **“Change in Law Notice”**

means a notice which Concessionco is entitled to serve on the Trust pursuant to Clause 52.2.

### **“Change in NHS Requirement”**

means the coming into effect of any new NHS Requirement or any revocation, amendment or change in interpretation of any NHS Requirement.

### **“Change in VAT Law”**

means any Change in Law relating to VAT predominantly affecting the NHS or the provision of healthcare, any NHS Trust or any successor to any of them or predominantly affecting healthcare providers and/or the providers of any supplies or services to any of the above named (“an NHS Provider”) where such change in law relates to the provision of supplies or services predominantly to any of the above named and shall include any such Change in Law

affecting the recovery (whether by way of credit, set off against output tax, repayment or otherwise) of input tax by an NHS Provider.

**“Class”**

means any class of issued share capital of Concessionco.

**“Class Amount”**

means, in respect of any Class, an amount equal to the product of the Share Amount in respect of each Share of such Class multiplied by the number of Shares in such Class.

**“Client Contingency”**

means the sum of £17,828 identified within the Base Contract Sum Analysis as adjusted pursuant to Clause 18 and any other applicable provisions of this Agreement.

**“Clinical Negligence Scheme for NHS Trusts”**

means the scheme, established by Section 21 of the National Health Service and Community Care Act 1990 and which is administered by the National Health Service Litigation Authority, to enable NHS Trusts to make provision to meet their liabilities to third parties in relation to clinical negligence, or any such other successor, replacement or equivalent scheme from time to time in force.

**“Clinical Services”**

means all activities of the Trust at the Trust’s Premises comprising or in direct support of patient care.

**“Collateral Warranties”**

means the deeds of collateral warranty to be given by the Building Contractor and Relevant Consultants in the forms of the appropriate drafts set out in Schedule 5 or in the case of other warranties referred to in Clause 16 substantially in the form of such drafts or in such other form as the Trust may approve in writing such approval not to be unreasonably withheld or delayed.

**“Commissioning”**

means the commissioning work to be carried out in accordance with the Outline Commissioning Schedule as superseded by the Detailed Commissioning Schedule and in accordance with this Agreement and shall include both Pre Completion and Post Completion Commissioning as therein identified, with responsibilities and obligations allocated to the parties as therein specified.

**“Commissioning Programme”**

has the meaning ascribed to it in Clause 23.2.

**“Compensation”**

means:

- (a) in respect of Force Majeure Events and Uninsurable Risks, amounts calculated in accordance with Part A of Schedule 1;
- (b) in respect of Trust Defaults, amounts calculated in accordance with Part B of Schedule 1; and
- (c) in respect of Compensation Events, amounts calculated in accordance with Part C of Schedule 1.

**“Compensation Event”**

means any:

- (a) act or omission of any visitor to the Trust’s Premises which shall include any person appointed by the Trust as a replacement Service Provider pursuant to Clause 63.2.2 (excluding any employee of or visitor to Concessionco, the Building Contractor, any Service Provider or their respective sub-contractors) except where Concessionco is in breach of its obligations under this Agreement in failing to prevent the presence of any such person on the Trust’s Premises or where the remedy or rectification of the consequences of the act or omission of any such person is to be dealt with by Concessionco in the ordinary course of providing the Services;
- (b) Trust Defect;
- (c) discovery of Contaminated Land or Hazardous Substances;
- (d) Serious and Widespread Infection;
- (e) Concessionco Latent Defect; or
- (f) of the circumstances set out in Clause 13.1.5.

**“Competent Authority”**

means any agency, authority (including any planning authority or other body hearing any Appeal Proceedings), department, inspectorate, minister, ministry official or statutory person (whether autonomous or not) having jurisdiction over all or any of the parties or the subject matter of this Agreement.

**“Complete”**

means any Section or Sections having been completed in accordance with this Agreement and “Completed” and “Completion” shall be construed accordingly. The same shall be regarded as Complete irrespective of the existence of outstanding Snagging Items or Relevant Works.

**“Completion Certificate”**

means the Certificate issued or deemed to be issued by the Independent Certifier pursuant to Clauses 23 and 26 when any Section or portion of the Works or the Trust Refurbishment Works is or are Complete.

**“Completion Date”**

means in respect of each Section, the respective dates for Completion therefor identified in Part 2.5 of Schedule 4 as adjusted from time to time in accordance with Clauses 18 and 24 or any other applicable provision of this Agreement.

**“Concessionco Additional Works Variation”**

means an Additional Works Variation made in accordance with Clause 18.1 or the last sentence of Clause 18.2.1.

**“Concessionco Data”**

means all data held or stored on Concessionco’s IT System and which relates to the provision of the Services.

**“Concessionco IT System”**

means all information technology equipment including voice and data equipment (whether hardware or software and including any media upon which data is stored) which is necessary and/or appropriate to provide the Services in accordance with the terms and conditions of the Agreement.

**“Concessionco Latent Defect”**

means any defect in a Concessionco Refurbishment Area which is not:

- (a) a defect which a competent, properly qualified contractor or professional consultant exercising all reasonable skill, care and diligence having regard to the nature and scope of Concessionco Refurbishment Works could reasonably be expected to discover prior to the execution date of this Agreement having carried out all due and proper inspections and surveys; or
- (b) a defect arising due to any breach of this Agreement by Concessionco or of the Construction Contract by the Building Contractor or any breach of contract of their respective sub-contractors, employees, servants or agents.

**“Concessionco Latent Defect Cap”**

means an amount of £50,000 (adjusted by the RPI Adjustment) for each Year which shall neither be cumulative nor carried forward to the extent unused.



**“Concessionco Necessary Consent”**

means those Necessary Consents necessary for the carrying out of the Works or the performance of the Services (excluding any Trust Necessary Consents) including without limitation those listed in part 25.4(a) of Schedule 25.

**“Concessionco Refurbishment Areas”**

means the areas identified as such on the plans comprising Part 1.1.3 of Schedule 4.

**“Concessionco Refurbishment Works”**

means the Sections identified as such in Part 2.5.1 of Schedule 4.

**“Concessionco Representative”**

means the representative of Concessionco responsible for the day to day monitoring of the Works and the Services and notified as such from time to time in writing to the Trust.

**“Concessionco Services Variation”**

means a Services Variation made in accordance with Clause 18.1 or the last sentence of Clause 18.2.1.

**“Concessionco Variation”**

means any Variation made or deemed to be made in accordance with Clause 18.1 or the last sentence of Clause 18.2.1.

**“Concessionco Works Variation”**

means a Works Variation made in accordance with Clause 18.1 or the last sentence of Clause 18.2.1.

**“Condition”**

means the condition set out in Clause 3.1.

**“Confidential Information”**

means information as described in Clause 42.4;

**“Confirmed Variation Instruction”**

means an instruction for a Variation issued by the Trust to Concessionco pursuant to Clause 18 or any other applicable provision of this Agreement or, in the case of a Deemed Trust Variation, deemed to be so issued pursuant to this Agreement.

**“Consent Applications”**

means the applications for the Necessary Consents made by Concessionco and Necessary Consent Application means any one of them.

**“Construction Contract”**

means the contract to be entered into between Concessionco and the Building Contractor for, inter alia, the design, construction and completion of the Works such contract, subject to Clause 15.1, to be substantially in the form set out at Schedule 6.

**“Contaminated Land”**

means land containing substances or materials which are present in sufficient quantities or concentrations so as to cause harm directly or indirectly to flora, persons, property, buildings, soil, water or air, such as to require action to be taken in order to comply with any Law, direction or order of any Competent Authority or Good Industry Practice and which Concessionco or the Building Contractor having exercised all reasonable skill, care and diligence as a competent properly qualified concession company or contractor respectively could not be reasonably expected to have discovered prior to the execution of this Agreement.

**“Contract Period”**

means the period from commencement of Phase 1 to the expiry of Phase 2, subject to the provisions of this Agreement governing termination of this Agreement prior to the end of Phase 2 and to the provisions of this Agreement governing extensions of the Contract Period.

**“Cost Build Up”**

means the Total Funding Costs less £3 million.

**“Cost to Complete”**

means the costs reasonably anticipated by the parties as at the date of termination of this Agreement to be reasonably and properly incurred by the Trust to complete the Works pursuant to and in accordance with the requirements of this Agreement over the period of the Timescale (which costs shall include any interest (including interest chargeable to the Trust by any Department of HM Government but no other costs) accruing only over the Timescale incurred by the Trust in respect of the funding required by the Trust to finance the completion of the Works) less the aggregate of (i) any insurance proceeds received or which will be received pursuant to policies maintained pursuant to Schedule 9 and which are or are to be applied against such costs; and (ii) all amounts standing to the credit of the Account in Trust which have not been paid to Concessionco as at the date of termination;

**“Creditors”**

means the Senior Lenders, the Mezzanine Lenders and the Swap Counterparties.

**“Cure Period”**

means in relation to Units in category A or B areas two hours and in relation to Units in category C areas three hours.

**“Custodian”**

means the Clifford Chance or any replacement thereof pursuant to the Custody Agreement.

**“Custody Agreement”**

means the Agreement between the Trust, Concessionco and the Custodian relating to the custody of the Financial Model and in or substantially in the form set out in Schedule 22.

**“Data Book”**

means the Financial Model operating procedures and protocols annexed in provisional form as part of Schedule 22, as updated at Financial Close and as the same may be modified by agreement between the parties with the agreement of the Senior Lenders from time to time following the Effective Date.

**“Day”**

except where otherwise expressly stated, means any period of 24 hours ending at midnight.

**“Debt Agreements”**

means the Senior Debt Agreements, the Mezzanine Debt Agreements and the Swaps.

**“Deemed Trust Variation”**

means a Trust Variation deemed by any applicable provision of this Agreement to have been proposed, instructed or agreed by the Trust, and “Deemed Trust Additional Works Variation”, “Deemed Trust Services Variation” and “Deemed Trust Works Variation” shall be construed accordingly.

**“Default Contract Rate”**

means the rate of interest to be paid by either party to the other hereunder in respect of any and all sums as specifically provided herein which rate unless otherwise agreed shall be 2% per annum above, (and shall accrue and be compounded on the same basis as), the Senior Debt Agreement Rate. Following expiry or cancellation of all Senior Debt Agreements, the said rate shall be the annual base rate of Bank of Scotland (or any other major UK clearing bank agreed between the parties) plus 3% per annum (compounded quarterly on each Accounting Date).

**“Demonstrable Healthcare Requirements”**

means a requirement in accordance with the then current policy of the NHS for the efficient delivery of healthcare involving the provision of services by the Trust or as required to meet the statutory duties of the Trust.

**“Deposit Rate”**

means, at any time and in respect of any sum, the rate of interest payable by Bank of Scotland on such sum for a period of six months.

**“Design Approval”**

means the process defined in Clauses 17.4 to 17.21.

**“Design Consultation”**

means the process defined in Clause 17.3.

**“Design Programme”**

means together the explanatory notes for Design Consultation and Design Approval and the design programme set out at Part 2.2 of Schedule 4, as the same may be amended pursuant to Clauses 17 and 18.

**“Design Proposal”**

means the proposals listed in the Design Programme containing formal proposals relating to Scheme or Detailed Design to be submitted in accordance with Clause 17.15.

**“Design Stages”**

means the two sequential stages referred to in Clause 17.4.

**“Detailed Commissioning Schedule”**

means the detailed commissioning schedule superseding the Outline Commissioning Schedule referred to at Clause 23.1 as may be agreed between the parties or determined pursuant to Clause 23.

**“Detailed Design”**

bears the meaning set out in Clause 17.4.

**“Direct Agreement”**

means the agreement to be entered into on or about the date hereof between the Trust and the Creditors (or the Security Trustee on their behalf) relating to the Project or any other Direct Agreement entered into pursuant to Clause 51.

**“Discount Rate”**

means at any time, in respect of any amount which is anticipated to be paid on any particular date, an annually compounded discount rate equal to, for the purposes of:

- (a) Clause 66.8 (calculating the Maximum Compensation Amount), the Non-Default Contract Rate at the date of termination of this Agreement;
- (b) Clause 18.20.2 (calculating Concessionco’s estimate of total payments or other credits to be made in its favour in consequence of disputed items), the Deposit Rate; and
- (c) Clause 67.1.4 (calculating the goodwill in the Project), 0.12.

**“Discriminatory Bill”**

has the meaning given to it in Clause 61.1.5.

### **“Discriminatory Change in Law”**

means a Change in Law the effect of which is to:

- (a) discriminate against hospitals or other assets the construction of which is funded wholly or partly by private finance in relation to hospitals or other assets the construction of which is funded using public finance;
- (b) discriminate against the Hospital in relation to other hospitals;
- (c) discriminate against:
  - (i) companies entering into Externally Funded Development Agreements (as defined in the National Health Service (Private Finance) Act 1997) in relation to companies not entering such agreements;
  - (ii) Concessionco and other entities specifically providing services similar to the Services to NHS Bodies (as defined in the National Health Service and Community Care Act 1990) and/or any successors of such entities in relation to entities not so providing services; or
  - (iii) companies entering into contracts for the design, build, finance and operation of facilities for the National Health Service contracting authorities or the successors thereto within the meaning of the Public Works Contracts Regulations 1991 in relation to companies not entering into such contracts; or
- (d) discriminate against Concessionco in relation to other companies.

### **“Dispute”**

shall mean any difference or dispute of whatever nature between the Trust directly or through the Trust Representative and Concessionco directly or through the Concessionco Representative arising under, out of or in connection with this Agreement including any question of interpretation thereof.

### **“Disputes Resolution Procedure”**

means together the provisions of Clauses 40 and 41 and the Adjudication Rules.

### **“Domestic Services”**

means the services provided pursuant to the Domestic Service Specification Arrangement.

### **“Early Termination Date”**

means any of the days which is 60 Days after the 30<sup>th</sup>, 40<sup>th</sup> or the 50<sup>th</sup> anniversary of the New Build Completion Date subject to extension or amendment pursuant to this Agreement.

### **“Effective Date”**

means the first Day on which the Condition has been satisfied or waived.

**“Employees”**

means those persons employed immediately prior to the Services Commencement Date in the provision of services equivalent to the Services whose contracts of employment transfer (as the law may determine) to Concessionco or to the Hotel Services Provider or the Estates Maintenance Services Provider pursuant to Clause 38.1 or pursuant to Clause 38.2.

**“Employee Transfer Notice”**

has the meaning conferred by Clause 68.3.1.

**“Environmental Permits”**

means any permits, licences, consents or other authorisations (including records thereof) required under any Environmental Requirements for the provision by Concessionco of the Services specified in this Agreement.

**“Environmental Requirements”**

means any Law which relates to the generation, management, treatment, disposal and control of waste, the pollution or protection of the environment or the protection of the health of humans, animals or plants (other than Health and Safety Law).

**“Endorsed Design”**

means drawings or other documents endorsed in accordance with Clause 17.3.7.

**“End Date”**

means the day which is 60 days after the 60<sup>th</sup> anniversary of the New Build Completion Date.

**“Equipment”**

means the equipment listed in the Room Data Sheets together with all replacements thereof provided pursuant to Clause 28.

**“Estates Maintenance Services”**

means the services provided pursuant to the Estates Maintenance Services Specification Arrangement.

**“Estates Maintenance Services Agreement”** means the contract entered into on or about the date hereof between Concessionco and the Estates Maintenance Services Provider for the provision of the Estates Maintenance Services.

**“Estates Maintenance Services Employees”**

means those Employees employed immediately prior to the Services Commencement Date in the provision of services equivalent to the Estates Maintenance Services whose contracts of employment transfer (as the law may determine) to Concessionco or to the Estates Maintenance Services Provider pursuant to the Regulations or pursuant to Clause 38.2.

**“Estates Maintenance Services Provider”**

means the party responsible for performing the Estates Maintenance Services and who shall be Bovis Facilities Management (a division of Bovis Construction Limited) or such other party (including Concessionco) as may be appointed or act in accordance with this Agreement.

**“Exempt Refinancing Notice”**

means a Refinancing Notice in respect of a Refinancing the Refinancing Date of which is outside the Trust Uplift Period to which are annexed:

- (a) an updated Financial Model as at the Refinancing Date (immediately prior to the Refinancing becoming effective);
- (b) a Financial Model as at the Refinancing Date (immediately after the Refinancing becoming effective); and
- (c) Model Adjustments.

**“Expedited Procedure”**

means a procedure further described in Clause 17.13 for the approval of a Design Proposal on a basis more expeditious than that described in Clause 17.15.

**“Existing Services”**

means pipes, mains, conduits, drains, channels, cables, wires and other media for the carrying of water, sewage, electricity, gas, telecommunications, data or other services or utilities on or under the Trust’s Premises and existing as at the date of this Agreement.

**“Fault”**

means a failure to comply with any Service Specification Arrangement (as specifically provided in each).

**“Final Design”**

bears the meaning set out in Clause 17.6.1.

**“Final Maturity Date”**

means the date specified in the relevant Debt Agreement upon which the final amount of principal outstanding due from Concessionco to the relevant Creditors is scheduled to be fully discharged.

**“Financial Close”**

means the satisfaction or waiver of all conditions precedent, (save any condition requiring that this Agreement has become unconditional) to the Debt Agreements and the Direct Agreement.

**“Financial Model”**

means the financial model of Concessionco as annexed hereto in provisional form as part of Schedule 22 as updated at Financial Close and as amended from time to time as specifically provided in Schedule 22 or in any other applicable provisions of this Agreement.

**“Finished”**

means the progression of the design and construction of any portion of a Section to the point that such portion would, but for final cleaning, connection to services, Snagging Items or completion of any Finishing Items, be ready for certification as Complete.

**“Finishing Certificate”**

means a certificate issued pursuant to Clause 23.4.3(a).

**“Finishing Items”**

means final cleaning, connection to services, Snagging Items and any other outstanding items or matters agreed between the parties as requiring work prior to the certification of the relevant Section as Complete.

**“Finishing List”**

means a list of Finishing Items.

**“First Early Termination Date”**

means the earliest Early Termination Date.

**“Force Majeure Event”**

means any of the following events:

- (a) war, civil war (whether declared or undeclared) or armed conflict arising within and affecting the United Kingdom; or
- (b) nuclear explosion, radioactive, chemical or biological contamination of the whole or part of the Trust’s Premises arising from any of the events at (a) above or arising from an act of terrorism; or
- (c) pressure waves caused by aircraft or other aerial devices travelling at sonic or supersonic speeds; or
- (d) acts of terrorism.

**“Frozen Annual Holiday Pay Entitlement”**

means any sum of money which becomes payable to any Employee on the termination of that Employee’s employment and which relates to holiday entitlement accrued by that Employee in relation to the period of such employment prior to the holiday year which was in effect at the date of termination and as provided for in the Whitley Agreements.



**“Good Industry Practice”**

means the exercise of that degree of skill, diligence, prudence and foresight which would reasonably and ordinarily be expected from a skilled and experienced contractor seeking to comply with his contractual obligations, complying (without prejudice to Clause 52) with all applicable Law and engaged in the same type of undertaking and under the same or similar circumstances and conditions as that in which the relevant matter arises.

**“Group 1 Equipment”**

means the equipment described as such in the schedule of components by room annexed to each Room Data Sheet.

**“Group 2 Equipment”**

means the equipment described as such in the schedule of components by room annexed to each Room Data Sheet.

**“Group 3 Equipment”**

means the equipment described as such in the schedule of components by room annexed to each Room Data Sheet.

**“Guarantee”**

means in respect of each Additional Business approved by the Trust pursuant to Clause 29 or each Retail Service carried out pursuant to Clause 30, the amount to be guaranteed by Concessionco to the Trust which shall be as stated in Clause 30.8.3 in respect of Retail Services or agreed in accordance with Clause 29.11.1 in respect of any Additional Business.

**“Hazardous Substance”**

means any substance (including without limitation any liquid, solid, vapour, gas or radiation) which may cause material harm to or have a material deleterious effect on the environment or to human health, and which Concessionco, the Building Contractor or the Service Providers having exercised all reasonable skill, care and diligence as a competent properly qualified concession company, contractor or service provider respectively could not reasonably be expected to have discovered prior to the execution of this Agreement.

**“Health and Safety Legislation”**

means legislation which applies specifically to workplace health, safety and welfare maintenance;

**“Health Specific Change in Law”**

means any Change in Law which applies predominantly to:

- (a) the National Health Service or the provision of healthcare; and/or
- (b) NHS Trusts and/or successors thereof; and/or

- (c) the Trust and/or successors thereof; and/or
- (d) the Hospital or hospitals generally,

other than any Change in Law relating to the Whitley Agreements.

**“Holdco”**

means Catalyst Healthcare (Calderdale) Holdings Limited (Company number 3525139).

**“Hospital”**

means the hospital to be designed, constructed and/or refurbished and/or operated pursuant to this Agreement on the Trust’s Premises which shall include a mental health villa but shall not include any residential accommodation provided for any employees of the Trust or Concessionco who from time to time may be employed to work there notwithstanding that such accommodation shall be associated with such employment.

**“Hotel Services”**

means each of the Car Parking; Security; Porterage; Catering; Domestic; and Linen and Laundry Services, the scope of which is set out in the relevant Service Specification Arrangements.

**“Hotel Services Agreement”**

means the contract entered into on or about the date hereof between Concessionco and the Hotel Services Provider for the provision of the Hotel Services.

**“Hotel Services Employees”**

means those Employees employed immediately prior to the Services Commencement Date in the provision of services equivalent to the Hotel Services whose contracts of employment transfer (as the law may determine) to Concessionco or to the Hotel Services Provider pursuant to the Regulations or pursuant to Clause 38.2.

**“Hotel Services Period of Liability”**

has the meaning set out in Clause 38.5.2A(iii).

**“Hotel Services Provider”**

means the party or parties responsible for performing any or all of the Hotel Services and who shall be RCO Support Services Ltd. or such other party or parties (including Concessionco) as may be appointed or act in accordance with this Agreement.

**“Hotel Services Provider Staff Profile”**

means the profile specified in Schedule 13.

**“Hotel Services Staff Costs”**

means the salary and staff costs of the Hotel Services Provider as set out in the staff costs columns of Table 1 in Schedule 20 as adjusted from time to time pursuant to Clauses 6, 18 and 33.7 of this Agreement.

**“HC Debenture”**

means the fixed and floating charge debenture dated on or about the date of this Agreement given by Holdco in favour of the Security Trustee, as the same may be amended, supplemented, modified or novated from time to time.

**“Independent Certifier”**

means MPM Adams Limited who shall be appointed jointly by and owing a duty of care to each of the parties and the Senior Lenders and the Mezzanine Lenders, under an appointment substantially in the form set out in Schedule 29 prior to the commencement of the Works or, if they shall be unwilling or unable to perform that function at any time, such other Independent Certifier as the parties may agree, with the approval of the Senior Lenders. The Independent Certifier shall carry out the functions described in this Agreement and in the said appointment.

**“Initial Design”**

means the drawings and design data described in Part 3 of Schedule 4.

**“Inpatient Night”**

means in respect of any Day during Phase 2 a number equal to the number of patients who remain admitted to the Hospital (but not discharged) as inpatients as at midnight at the end of that Day.

**“Insured Risk”**

means an event listed in Part A of Schedule 9 unless it has become an Uninsurable Risk.

**“Intellectual Property”**

means as the context requires current and/or future legal and equitable interests in copyright and rights in the nature of copyright, design right (whether registered or unregistered) and all patents, know-how and trade secrets.

**“Intercreditor Agreement”**

means the agreement defined as such in the Senior Debt Agreements.

**“Invoice”**

means the invoice issued by Concessionco pursuant to Clause 33.30.1.

**“Invoice Date”**

has the meaning ascribed to it in Clause 33.30.1.

**“Invoice Month”**

has the meaning ascribed to it in Clause 33.30.1.

**“IT System”**

means either the Concessionco IT System or Trust IT System as the context requires.

**“Judicial Review Proceedings”**

means any application for judicial review under Order 53 of the Rules of the Supreme Court and any application pursuant to section 288 of the Town and Country Planning Act 1990, including in each case any appeal to a Higher Court following a judgement of a Lower Court.

**“Junior Debt”**

means amounts outstanding pursuant to the Junior Debt Agreements.

**“Junior Debt Agreements”**

means the Original Junior Debt Agreement dated on or about the date hereof and any agreement ancillary thereto or any financing document or agreement entered into by Concessionco with any other Junior Lender (or representative or trustee of any other Junior Lender) in respect of the Project to supplement or replace such existing Junior Debt Agreement, as any such document or agreement may be amended, supplemented, modified or novated from time to time.

**“Junior Lenders”**

means the Original Junior Lenders and any other person who is party (or whose representative or trustee is party) to a Junior Debt Agreement whose claims (or the claims of whose representative or trustee) rank pari passu with the claims of the Original Junior Lenders under the Original Junior Debt Agreement (or would do so if such claims still existed).

**“Law”**

means any law, proclamation, decision, rule, regulation, order, resolution, notice, rule of court, bye-law, directive, statute, statutory instrument, standards, codes of conduct or other instrument or requirement having the force of law by whomsoever made, issued, declared, passed or otherwise enacted, created or given effect by HM Parliament, the Council Commission or Parliament of the European Union, any court or other judicial forum, any coroner or commission of inquiry, any local authority or any statutory undertaker or relevant authority or any other person having such power, related to or affecting the Project.

**“Lease”**

means the lease to be entered into between the Trust and Concessionco pursuant to the Agreement for Lease.

### **“Lender Liabilities”**

means at the relevant time the aggregate of the sums certified in writing by any Creditor or Concessionco as being:

- (a) the amount of principal, interest, broken funding costs, default interest, banking fees, costs and expenses due and any other sums due from Concessionco to the Creditors (or any of them) in respect of the Project under the terms of the Debt Agreements; and
- (b) Market Breakage Costs

PROVIDED THAT in the event of manifest error in the calculation of the sums so certified either party may notify the said error in writing to the other and:

- (a) any sum or sums unaffected by such error shall be deemed to constitute part of Lender Liabilities and the parties shall in relation thereto continue to give effect to the relevant provisions of this Agreement; and
- (b) the sum or sums affected by such error shall be forthwith re-certified by the original certifying party and thereupon comprise the balance of Lender Liabilities (subject to the like proviso in respect of manifest error).

### **“Linen and Laundry Service”**

means the services provided pursuant to the Linen and Laundry Service Specification Arrangement.

### **“Maintenance”**

means any Planned Preventative Maintenance or Programmed Maintenance excluding any maintenance necessitated by any negligence or default of Concessionco or breach of its obligations hereunder.

### **“Maintenance Cap”**

means a cap of £3,750 (subject to the RPI Adjustment) on the expenditure required to be made by Concessionco pursuant to Clause 26 within successive three month periods, the first such period commencing on the Services Commencement Date.

### **“Market Breakage Costs”**

means any net amount payable by any Creditor or Concessionco under any hedging agreement entered into by it for the purpose of hedging its exposure to inflation or interest rate variations under the Debt Agreements and any costs associated with the early repayment of amounts outstanding under any of the Debt Agreements by reason of the termination of this Agreement in accordance with its terms provided always that there is no double counting of such liabilities (for the avoidance of doubt, this may be a negative amount).

**“Market Testing”**

means the tendering exercise to be carried out by Concessionco pursuant to Clause 35 and Schedule 14.

**“Mark-up”**

means 12½ percent.

**“Method Statements”**

means Part 2.4 of Schedule 4.

**“Mezzanine Debt”**

means the finance available to Concessionco and drawdown pursuant to the Mezzanine Debt Agreements.

**“Mezzanine Debt Agreements”**

means the Original Mezzanine Debt Agreements and any agreement ancillary thereto and any financing document or agreement entered into by Concessionco with any other Mezzanine Lender (or representative or trustee of any other Mezzanine Lender) in respect of the Project to supplement or replace such existing Mezzanine Debt Agreements, as any such document or agreement may be amended, supplemented, modified or novated from time to time.

**“Mezzanine Debt Agreement Rate”**

means the rate of interest for the time being payable by Concessionco to the Mezzanine Lenders in respect of loans outstanding under the Mezzanine Debt Agreements.

**“Mezzanine Lenders”**

means the Original Mezzanine Lenders and any other person who is party (or whose representative or trustee is party) to a Mezzanine Debt Agreement whose claims (or the claims of whose representative or trustee) rank pari passu with the claims of the Original Mezzanine Lender under the Original Mezzanine Debt Agreements (or would do so if such claims still existed).

**“Original Mezzanine Lenders’ Liabilities”**

means the amount of principal and interest scheduled as at the Effective Date to be outstanding as at any date of termination of this Agreement under the Original Mezzanine Debt Agreement (after taking account of all Variations under Clause 18 and Trust Changes of Law under Clause 52).

**“Millennium Compliant”**

means that neither the performance nor functionality of a computer system (including any related hardware, software, communications facilities and data) or any other equipment shall be affected by dates prior to, during and after the Year 2000 including but not limited to the ability of such computer systems and equipment to function accurately and without

interruption handle date information before, during and after 1 January 2000 including, but not limited to, accepting all date inputs, providing correct date outputs and correctly performing calculations on dates or portions of dates; respond to and process two digit year inputs in a way which resolves the ambiguity as to century in a disclosed, defined and pre determined manner, store and provide outputs of date information in ways which are similarly unambiguous as to century, and recognise the Year 2000 as a leap year.

**“Model Adjustments”**

means the adjustments to be made to the Financial Model to reflect the Refinancing proposals referred to in the Refinancing Notice (which, where the relevant Refinancing Notice is a Trust Share Refinancing Notice, shall be produced on the assumption that the Uplift Amount is passed to the Trust (by way of deduction from the Total Payment)) to give effect to a Refinancing.

**“Month”**

means the month commencing on 1 January and every calendar month thereafter.

**“National Health Service (“NHS”)”**

means the health service established in pursuance of section 1 of the National Health Service Act 1946 and continued under Section 1(1) of the National Health Service Act 1977;

**“Necessary Consents”**

means:

- (a) all approvals, consents, licences, permissions, certificates and statutory agreements required from any Competent Authority or orders under the Act; and
- (b) all consents and agreements from and with third parties necessary for the carrying out and completion of the Project.

**“Net Present Value”**

means, at any time (the “Present Date”) in relation to any amount (“A”) which is anticipated to be paid on any particular date (the “Future Date”), an amount (“D”) which is equal to such amount (A) discounted back from the Future Date to the Present Date calculated in accordance with the following formula:

$$D = \frac{A}{(1 + R)^N}$$

where:

R is the Discount Rate; and

N is a number equal to the number of years (including fractions of a year) from and including the Present Date to and including the Future Date.

**“Network Infrastructure”**

means the communication facilities as set out in Appendix A of Part 1.2 of Schedule 4 as developed in accordance with Clause 17.

**“New Appointee”**

means each person other than the Employees whom Concessionco or any Service Provider shall employ for the purposes of this Agreement.

**“New Build Areas”**

means the areas identified as such on the plans comprising Part 1.1.3 of Schedule 4.

**“New Build Completion Date”**

means the Day upon which the New Build Works are scheduled to be completed, being 1 April 2001 as varied from time to time in accordance with this Agreement.

**“New Build Works”**

means all those Sections (save for Concessionco Refurbishment Works) shown in Part 2.5.1 of Schedule 4 for which, at the date of this Agreement, the Completion Date shown in the said Part falls on or before 1 April 2001.

**“NHS Requirements”**

means the guidance, instruction, recommendations and/or directions (including those of the Department of Health, the National Health Service, NHS Estates or equivalent bodies of any of them) with which Concessionco is obliged to comply, pursuant to and on the terms set out in Part 1.2 of Schedule 4 and any other applicable provisions of this Agreement.

**“NHS Trust”**

means a body established pursuant to Section 5 of the National Health Service and Community Care Act 1990;

**“Non-Default Contract Rate”**

means the rate of interest to be paid by either party to the other hereunder in respect of any and all sums as specifically provided herein which rate unless otherwise agreed shall be (and shall accrue and be compounded on the same basis as) any Senior Debt Agreement Rate. Following the date on which no further sums are or may be payable under the Senior Debt Agreements, the said rate shall be the annual base rate of Bank of Scotland (or any other major UK clearing bank agreed between the parties) plus 1% per annum (compounded monthly).

**“Notice of Unavailability”**

means the notice set out in Schedule 18 and issued pursuant to Clause 33.10



**“Off-Site Utilities Failure”**

means any failure in the availability during Phase 1 or Phase 2 of electricity, gas, oil, telecommunications or other data connections, drainage or water at the Hospital and the consequences thereof where such failure occurs otherwise than as a result of Concessionco’s negligence, default or breach of this Agreement.

**“Operational Policies”**

means the document contained in Part 1.3 of Schedule 4.

**“Original Debt Agreements”**

means the Original Senior Debt Agreements, the Original Mezzanine Debt Agreements and the Original Swap.

**“Original Junior Debt Agreement”**

means the on-loan agreement dated on or about the date of this Agreement made between Concessionco as borrower and the Original Junior Lender.

**“Original Junior Lenders”**

means Holdco.

**“Original Lender Liabilities”**

means the amount of principal and interest scheduled as at the Effective Date to be outstanding as at any date of termination of this Agreement (after taking account of all Variations under Clause 18 and Trust Changes of Law under Clause 52) under the Original Debt Agreements plus Market Breakage Costs.

**“Original Mezzanine Debt Agreements”**

means the documents defined as the “Mezzanine Finance Documents” in the Intercreditor Agreement.

**“Original Mezzanine Lenders”**

means the Agent, the Account Bank the Security Trustee and the banks (including, for the avoidance of doubt, any person becoming a party thereto as a Bank pursuant to Clause 29.3 thereof) (as such terms are defined in the Original Mezzanine Debt Agreements).

**“Original Senior Debt Agreements”**

means the documents defined as “Senior Finance Documents” in the Intercreditor Agreement.

**“Original Senior Lenders”**

means the Arrangers, the Security Trustee, the Agent, the Account Bank, the Technical Bank, the Health Bank and the Banks (including, for the avoidance of doubt, any person becoming a

party to the Original Senior Debt Agreement as a Bank pursuant to Clause 29.3 thereof) (as such terms are defined in the Original Senior Debt Agreements).

**“Original Swaps”**

means the swap and swaption agreements evidenced by a master agreement dated on or about the date of this Agreement and the confirmations dated on or about the date of this Agreement made between Concessionco and either Halifax plc or the Bank of Scotland.

**“Outline Commissioning Schedule”**

means the schedule set out in Part 16.1 of Schedule 16.

**“Payroll Costs”**

means all wages, bonuses, commissions, National Insurance contributions, holiday pay and employers’ contributions to the Pension Scheme or any Replacement Pension Scheme under Clause 38 and other wage or salary benefits payable to any Employee or any other employee of the Service Providers during the currency of his employment.

**“Performance Cost”**

means the amount described as such in Table 1 of Schedule 20.

**“Performance Deductions”**

means, in respect of any Month, the amount calculated in accordance with Clause 33.18.

**“Performance Element”**

means in each Year the total of the Performance Element for each of the Services identified in the Performance Element Column in Table 2 of Schedule 20 as adjusted pursuant to Clauses 18, 33.7 and 35 and any other applicable provisions of this Agreement.

**“Performance Factor”**

has the meaning ascribed to it in each Service Specification Arrangement.

**“Person”**

means any natural person, firm, corporation, company, voluntary association, partnership, joint venture, trust, incorporated organisation unincorporated organisation, Competent Authority or other entity (in each case whether or not having separate legal personality).

**“Phase 1”**

means the period from the Effective Date until midnight at the end of the Day before the Services Commencement Date.

**“Phase 2”**

means, subject to Clause 56 and other applicable provisions of this Agreement, the period from the Services Commencement Date until midnight at the end of the Day which is 60 Days after the 60th anniversary of the New Build Completion Date.

**“Phase 2 Certifier”**

means an independent certifier appointed jointly by and owing a duty of care to each of the parties and the Senior Lenders and on terms agreed by the parties with the approval of the Senior Lenders such approval not to be unreasonably withheld.

**“Planning Consent”**

means the planning consent for the Project dated 13 July 1998 as annexed at Schedule 25.1.

**“Planned Preventative Maintenance”**

means works performed in carrying out a programme of maintenance, which shall be limited to inspecting, cleaning, lubricating and testing at intervals predetermined in accordance with guidance laid down by:

- (a) relevant professions/trade bodies;
- (b) manufacturers/installers;
- (c) Applicable Standards;
- (d) Good Industry Practice;
- (e) Law (subject to Clause 52);

the purposes of which are to:

1. keep plant, equipment, services and premises in a safe, effective and efficient operating condition;
2. limit the deterioration of the whole and parts of the Trust Premises;
3. reduce wear on moving parts;
4. reduce or avoid reactive maintenance caused by breakdown or failure; and
5. minimise replacement costs;

and which, for the avoidance of doubt:

- (a) does not include any replacement of any part or the whole of any item;
- (b) is carried out at frequencies not less than that required by Law and Applicable Standards;
- (c) includes the maintenance of appropriate records;

- (d) is dynamic in that it recognises deficiencies in its system of operation and is updated and amended to suit the premises and installation;
- (e) includes a testing regime intended to monitor the extent to which the purposes described in 1 to 5 above are met; and
- (f) includes the preparation of, but not the carrying out of works identified in, forward maintenance registers.

**“Points”**

means points earned by Concessionco in respect of the performance of the Services as further described in Clause 33 and the relevant Service Specification Arrangements.

**“Points Notice”**

means a notice to be issued by Concessionco pursuant to Clause 33.16.

**“Portering Services”**

means the services provided pursuant to the Portering Service Specification Arrangement.

**“Post-Completion Commissioning”**

has the meaning set out in the Outline Commissioning Schedule.

**“Pre-Completion Commissioning”**

has the meaning set out in the Outline Commissioning Schedule.

**“Programme”**

means the programme as set out in Part 2.1 of Schedule 4 as may be amended from time to time pursuant to the terms of this Agreement.

**“Programmed Maintenance”**

means lifecycle replacement work and maintenance (other than Planned Preventative Maintenance) carried out by Concessionco in connection with the Estates Maintenance Service on the giving of reasonable notice to the Trust, which is not necessitated by any negligence or default of Concessionco or breach of its obligations hereunder.

**“Project”**

means the Works and the Services.

**“Project Documents”**

means this Agreement, the Agreement for Lease, the Agreement for Underlease, the Lease, the Underlease, the Construction Contract, the Direct Agreement, the Hotel Services Agreement, the Estates Maintenance Services Agreement, the Debt Agreements, the Junior Debt Agreement and the Schedules to such documents, but excluding any documents referred to therein which are not specifically listed in this definition.

**“Projected RPI Adjustment”**

means in respect of any future period, the RPI Adjustment which was forecast (as at the date of termination of this Agreement) in the Senior Lenders’ financial model operated for the purpose of the Senior Debt Agreement.

**“Quality Assurance System”**

means the systems to be developed and described as such in Clause 34 and the Service Specification Arrangements.

**“Redundant”**

means dismissed from employment by reason of redundancy as defined in Section 139(1) Employment Rights Act 1996.

**“Redundancy Payment”**

means any payment due pursuant to Section 162 of the Employment Rights Act 1996 (any such payment for the avoidance of doubt to include any payment made as a result of redundancy pursuant to the Whitley Agreements including, for the avoidance of doubt any such payment required to be made pursuant to Section 45 and/or 46 of the General Whitley Council Handbook).

**“Refinancing”**

means either a refinancing of Concessionco’s obligations under the Debt Agreements involving repayment of all or substantially all of the obligations of Concessionco under the Debt Agreements or an amendment, supplement or modification to the Debt Agreements where the Trust is reasonably required by Concessionco to execute any documentation in accordance with Clause 51.

**“Refinancing Date”**

means the date upon which a Refinancing is or is to be effective.

**“Refinancing Notice”**

means a notice from Concessionco to the Trust identifying a proposed Refinancing and the documents and other items required from the Trust and attaching the Debt Agreement(s) referred to therein, in the form of a Trust Share Refinancing Notice, a Refinancing Notification or an Exempt Refinancing Notice.

**“Refinancing Notification”**

means a Refinancing Notice in respect of a Refinancing the Refinancing Date of which is in the Trust Uplift Period to which are annexed:

- (a) an updated Financial Model as at the Refinancing Date (immediately prior to the Refinancing becoming effective)

- (b) a Financial Model as at the Refinancing Date (immediately after the Refinancing becoming effective)
- (c) Model Adjustments.

**“Regulations”**

means the Transfer of Undertakings (Protection of Employment) Regulations 1981 (as amended) and, to the extent that it is enforceable against either of the parties hereto, Council Directive No. 77/187/EEC.

**“Relevant Completion Date”**

means in relation to any of the Sections, the New Build Works, the Works or the Trust Refurbishment Works the Completion Date thereof.

**“Relevant Consultants”**

means RTKL (UK) Ltd and Oscar Faber Group Limited or such other parties appointed in their place pursuant to Clause 15.1.2.

**“Relevant Works”**

shall mean works to be completed in any Section, following Completion of the same in connection with the installation of services or other common works.

**“Relief Event”**

means the occurrence of any of the following:

- (a) any accidental loss, damage or obstruction to any roads or services (to the extent not constituting Off-Site Utilities Failures) serving the Trust’s Premises;
- (b) any failure or shortage of power, fuel, water supply, drainage, telecommunications or transport (to the extent not constituting Trust Defects, Trust Refurbishment Area Defects or Off Site Utilities Failure);
- (c) the occurrence and direct consequences of severe weather, flood, drought, windstorm, tempest, erosion, earthquake, lightning, volcanic eruption, fire, explosion or of ionising radiation.
- (d) a national strike;
- (e) any official or unofficial strike, lock-out, go slow or other dispute (excluding any Trust Strike) generally affecting the construction or service provision industries or a significant sector thereof but excluding any such strike, lock-out, go slow or other dispute affecting only Concessionco or any of its sub-contractors;
- (f) civil commotion/rebellion or protester action;

- (g) acts or omissions of any statutory undertakers or local authorities in breach (save where Clause 13.1.5 applies) of their statutory or other legal duties (and to the extent not constituting an Off-Site Utilities Failure or falling within (a) or (b) above);
- (h) any Off-Site Utilities Failure;
- (i) (in Phase 2 only) accidental loss or damage to the Site or the Hospital, where “accidental” has the meaning which is customary in the London insurance market;

provided in each case that the same is not due to any breach of this Agreement (whether caused by Concessionco, the Building Contractor, Service Providers or their respective servants, agents or subcontractors) by or other deliberate or negligent act, omission or default on the part of Concessionco or its servants or agents.

**“Remuneration Comparison Amount”**

means the sum of Performance Factors 1 to 3 in Schedule 20, Table 1, in respect of staff costs.

**“Retail Catering Service”**

means the Catering Service comprised in the Hotel Services to the extent that it relates to the operation of the staff and visitors’ restaurant.

**“Retail Car Parking Service”**

means the Car Parking Service comprised in the Hotel Services.

**“Retail Services”**

means the Retail Catering and Retail Car Parking Services.

**“Revenue”**

means the revenue received or receivable under terms of payment contained in the agreement for Retail Services or Additional Businesses without double counting between Years by Concessionco or any person connected with Concessionco (excluding VAT) in each Year from each of the businesses carried out pursuant to Clauses 29 and 30.

**“Room Data Sheets”**

means the room data sheets contained in Part 1.4 of Schedule 4.

**“Royalty Payment”**

means the payment or payments to be made by the Trust to Concessionco as described in Clause 33.29.

**“RPI”**

means the General Index of Retail Prices (all Items) published from time to time by the Office for National Statistics or, if such index shall cease to be published, such other retail prices index as may be so published in substitution therefor or as rebased; or in the event of there being no direct substitute such index as shall be nearest to RPI as determined by agreement or in the absence thereof by the Disputes Resolution Procedure.

**“RPI Adjustment”**

means, in respect of any Year:

$$\frac{\text{RPI (2)} - \text{RPI (1)}}{\text{RPI (1)}}$$

$$\text{RPI (1)}$$

expressed as a percentage where RPI(1) is the RPI at the end of the previous Year and RPI(2) is the RPI at the end of the Year.

Indexation will be carried out using the actual index during the first three-quarters of any year and the estimated index during the remaining quarter. An adjustment will be made once the actual index for the final quarter is known.

Where the first adjustment is to be made on 1 April 1999 such calculation shall take account of the two years elapsed since April 1997.

**“Schedule 20 Adjustments”**

means the adjustments to be made to Schedule 20 to give effect to a Refinancing in respect of which Concessionco has delivered a Trust Share Refinancing Notice.

**“Scheme Design”**

bears the meaning set out in Clause 17.4.

**“Secretary of State’s Letter”**

means the letter to be provided by the Secretary of State for Health in the form annexed as Schedule 19.

**“Section”**

means a subdivision of the Works or the Trust Refurbishment Works as described in Part 2.5 of Schedule 4.

**“Section 106 Agreement”**

means the undertaking made on 13 July 1998 pursuant to Section 106 of the Town and Country Planning Act 1990 a copy of which is annexed at Schedule 25.2.

**“Security Service”**

means the services provided pursuant to the Security Service Specification Arrangement.



**“Security Trustee”** means Halifax plc (or any successor), as the person in whose favour security is created pursuant to the Debt Agreements on behalf of the Creditors.

**“Senior Debt Agreements”**

means the Original Senior Debt Agreements and any agreement ancillary thereto and any financing document or agreement entered into by Concessionco with any other Senior Lender (or representative or trustee of any other Senior Lender) in respect of the Project to supplement or replace such existing Senior Debt Agreements, as any such document or agreement may be amended, supplemented, modified or novated from time to time.

**“Senior Debt Agreement Rate”**

means the rate of interest for the time being payable by Concessionco to the Senior Lenders in respect of loans outstanding under the Senior Debt Agreement.

**“Senior Lender Liabilities”**

means at the relevant time the aggregate of the sums certified in writing by any Senior Lender or Concessionco as being:

- (a) the amount of principal, interest, broken funding costs, default interest, banking fees, costs and expenses and any other sums due from Concessionco to the Senior Lender (or any of them) in respect of the Project under the terms of the Senior Debt Agreement; and
- (b) Market Breakage Costs.

PROVIDED THAT in the event of manifest error in the calculation of the sums so certified either party may notify the said error in writing to the other and:

- (a) any sum or sums unaffected by such error shall be deemed to constitute part of Senior Lender Liabilities and the parties shall in relation thereto continue to give effect to the relevant provisions of this Agreement; and
- (b) the sum or sums affected by such error shall be forthwith re-certified by the original certifying party and thereupon comprise the balance of Senior Lender Liabilities (subject to the like proviso in respect of manifest error).

**“Senior Lenders”**

means the Original Senior Lenders and any other person who is party (or whose representative or trustee is party) to a Senior Debt Agreement whose claims (or the claims of whose representative or trustee) rank pari passu with the claims of the Original Senior Lenders under the Original Senior Debt Agreements (or would do so if such claims still existed).

**“Serious and Widespread Infection”**

means any biological infection or biological contamination which has originated on the Trust’s Premises or arises from cross infection on the Trust’s Premises or from the presence thereon

of any patient or visitor which is sufficient to have an adverse effect on the ability of Concessionco to comply with its obligations under this Agreement.

**“Service Contracts”**

means the agreements entered into between Concessionco and the Service Providers for the provision of the Services.

**“Service Manager”**

means the person or persons appointed pursuant to Clause 37 in respect of each or all of the Services to manage such Services.

**“Service Provider”**

means any party providing any Service or Services pursuant to this Agreement whether Concessionco, the Estates Maintenance Provider, the Hotel Services Provider or any sub-contractor of any of them.

**“Service Specification Arrangement”**

means, in relation to each of the Services, the provisions so described and set out in Schedule 2, PROVIDED THAT Security, Car Parking and Porterage shall be treated as one Service Specification Arrangement for the purposes set out in Clauses 33.20 to 33.26 and 58 to 60 and for any other purpose connected with the termination of any Service Provider, Service or of this Agreement but not, for the avoidance of doubt, for the purpose of calculating any Performance Deductions.

**“Services”**

means the Hotel Services (and each of them) and the Estates Maintenance Service (including the Retail Services) excluding any catering or other services which are provided at Halifax General Hospital at the date hereof by the Voluntary Organisations PROVIDED THAT Security, Car Parking and Porterage shall be treated as one Service Specification Arrangement for the purposes set out in Clauses 33.20 to 33.26 and 58 to 60 and for any other purpose connected with the termination of any Service Provider, Service or of this Agreement but not, for the avoidance of doubt, for the purpose of calculating any Performance Deductions.

**“Services Commencement Date”**

means the date 60 Days after Completion of the New Build Works.

**“Services Variation”**

means any change in the nature, quality, manner of provision or quantity of the Services.

**“Share”**

means any share of the issued share capital of Concessionco; and

**“Share Amount”**

means, in respect of each Share, the amount payable as determined in accordance with Clause 67.1.6.

**“Shared Software”**

means any software, such as e-mail software, which is acquired by or licensed to either party for the purposes of the same being used by either party to facilitate the conduct of the Services.

**“Shareholders”**

means the shareholders of Concessionco from time to time acting in such capacity.

**“Shareholder Return”**

means, at any time, the after tax return to the Shareholders and the Junior Lenders calculated as an internal rate of return based on the injections of, and payments in respect of, share capital of Concessionco and Junior Debt as shown in the then most recent Financial Model.

**“Sharps”**

means non-compressible clinical items which may have been contaminated or infected by use whether or not by or on behalf of the Trust.

**“Site”**

means the place or places being on the Trust’s Premises where the Works are to be carried out and more particularly shown coloured in the plan set out in Part 2.3 of Schedule 4.

**“Snagging Items”**

means minor limited blemishes, minor defects or minor unfinished work in any Section or the Trust Refurbishment Works which do not have a material effect on the Trust’s ability to carry out Clinical Services or Concessionco’s ability to provide the Services.

**“Snagging List”**

means the list of Snagging Items approved by the Independent Certifier pursuant to Clause 23.5.

**“Sub-Area”**

means an area so described in the table contained in Section E of Schedule 28.

**“Subsidiary”**

has the meaning ascribed to it in Section 736 of the Companies Act 1985 (as amended).

**“Supplement”**

means in respect of each of the Additional Businesses approved by the Trust pursuant to Clause 29 and Retail Services undertaken pursuant to Clause 30, the amount payable by Concessionco to the Trust if the Revenue exceeds the Threshold in any Year, expressed as a percentage of any such excess.

**“Swaps”**

means the Original Swaps or any swap, swaption or other derivative transaction or agreement entered into by Concessionco in respect of the Project Documents with any other Swap Counterparty to supplement or replace such existing Swaps, as any such transaction or agreement may be amended, supplemented, modified or novated from time to time.

**“Swap Counterparties”**

means the Original Swap Counterparty and/or any Counterparty to any Swap transaction entered into by Concessionco to hedge its exposure to, inter alia, changes in inflation or interest rates payable under the Debt Agreements.

**“Temporary Decant Works”**

means those temporary works defined in Parts 1.1.4, 1.1.5, 1.2 (Appendix E), 1.4.4 and 2.5.3 of Schedule 4.

**“Termination Indicator”**

means any termination indicator applicable in respect of the relevant Service as the same is described in Schedule 2.

**“Termination Indicators Notice”**

means a notice listing one or more Termination Indicators as referred to in Clause 33.20.

**“Termination Period”**

shall mean any period of six (6) months commencing on the last day of the Invoice Month in respect of which a Termination Indicators Notice is issued pursuant to Clause 33.20 showing that two or more Termination Indicators are extant provided that, for the purposes of this definition, no Termination Indicator from an earlier month which has been relied upon for the purposes of commencing a Termination Period shall be carried forward into any subsequent month for the purposes of commencing a further Termination Period.

**“Termination Warning”**

means a written notice issued to Concessionco by the Trust pursuant to Clause 33.21.

**“Threshold”**

means in respect of each Additional Business approved by the Trust pursuant to Clause 29 or Retail Service undertaken pursuant to Clause 30, the amount of Revenue in any Year above which it is agreed by the parties that the Supplement will be payable.

**“Timescale”**

means the reasonable timescale for the completion of the Works as agreed or determined in accordance with Clause 66.

**“Total Adjustments”**

means the positive or negative adjustments to be made to the part of the Total Payment attributable to the previous Invoice Month to reflect, inter alia, the levels of performance and availability actually achieved in respect of that Month and shall be the net total of the Availability Deductions, the Performance Deductions, the Volume Adjustment, the sum referred to in Clause 28.5, the Guarantee, the Supplement (if any) and the Royalty Payment (if any) PROVIDED THAT in respect of the first Invoice Month in Phase 2 the Total Adjustments shall be limited to the applicable portion of the Guarantee.

**“Total Funding Costs”**

means £                    or such other sum calculated in accordance with any adjustments or other circumstances as referred to in Clauses 18 or 52 or any other applicable provision of this Agreement.

**“Total Payment”**

means in respect of each Year the payment (comprising the aggregate of the Availability Element, the Performance Element and the Base Annual Volume Element) as set out in Table 2 of Schedule 20 and adjusted in accordance with Clauses 18, 33.7, 35, 51 and 52 (inclusive).

**“Trust Additional Works Variation”**

means an Additional Works Variation agreed by the Trust pursuant to Clause 18.3 or proposed by the Trust pursuant to Clause 18.4 or a Deemed Trust Additional Works Variation.

**“Trust Areas”**

means all areas in Trust Premises which are not New Build, Concessionco Refurbishment Areas or Trust Refurbishment Areas.

**“Trust Change in Law”**

means any change in law which is:

- (a) a Change in NHS Requirement;
- (b) a Discriminatory Change in Law;
- (c) a Health Specific Change in Law;
- (d) a Capital Change in Law; or
- (e) a Change in VAT Law.

**“Trust Contractor”**

means any contractor directly employed by the Trust and subcontractors of such contractor at any tier including without limitation any person so directly employed to perform any Hotel Service upon termination of any Service Specification Arrangement (other than Concessionco acting pursuant to this Agreement or the Building Contractor or Service Providers acting as sub-contractors to Concessionco).

**“Trust Data”**

means any information in relation to:

- (a) the Trust’s patients, staff or the Trust’s clinical activities; and
- (b) the provision of the Services and which is required by the Trust or any successor service provider post-termination for the purposes of ensuring the transfer of Services back to the Trust or a successor service provider;
- (c) which is held or stored on Concessionco’s IT System.

**“Trust Default”**

means any breach of this Agreement by the Trust (not being a Trust Defect) or other neglect, default or wrongful act or omission of the Trust, any persons carrying out clinical activities on the Trust’s Premises, Voluntary Organisations, patients, Trust Contractors or their respective employees, agents and sub-contractors (excluding in each case Concessionco, its employees, agents and sub-contractors (except where any such sub-contractor is acting as a Trust Contractor) and the operators of any Additional Business pursuant to Clause 29), together with:

- (a) Trust Strikes;
- (b) the failure or malfunction of or occurrence of defect in or damage caused by any Trust Equipment or Trust IT System occurring for any reason whatsoever;
- (c) any Trust Refurbishment Works Defect; or
- (d) any event expressly defined in this Agreement as a Trust Default.

**“Trust Default NPV”**

means the Net Present Value of the future cashflows to be paid by Concessionco to the Shareholders and the Junior Lenders as shown in the then most recent Financial Model (as at the date immediately prior, where appropriate, to termination of this Agreement).

**“Trust Defect”**

means:

- (a) any defect in the Trust Refurbishment Areas or Trust Areas (except for a Trust Refurbishment Works Defect) whether inherent or arising in consequence of the Trust Refurbishment Works or otherwise as referred to in Clause 22;

- (b) any defect in Existing Services other than those for which Concessionco is responsible pursuant to Clause 22.3.

**“Trust Dwellings”**

means three dwellings in Dryclough Road owned by the Trust and adjacent to the north west boundary of the Trust’s Premises.

**“Trust Equipment”**

means any Group 2 or Group 3 Equipment and the replacement thereof and any other equipment, consumable or other items on the Trust Premises for the use of the Trust (excluding items that are Group 1 Equipment (save all mortuary hoists) or are brought on to the Trust Premises by Concessionco, the Building Contractor, any Service Provider or any of their respective subcontractors).

**“Trust’s IT System”**

means the information technology equipment and software owned or used by the Trust at the Hospital (including, for the avoidance of doubt, all clinical systems and the patient administration system and voice and data equipment but excluding Concessionco IT System) from time to time during the term of this Agreement.

**“Trust Necessary Consents”**

means those Necessary Consents required by the Trust to carry out the Clinical Services and its other obligations under this Agreement including without limitation those listed in Part 25.4(b) of Schedule 25.

**“Trust’s Premises”**

means the freehold property details of which are shown edged red in the Lease being part of the freehold property comprised in Title Number WYK532014.

**“Trust Refurbishment Areas”**

means the areas identified as such on the plans comprising Part 1.1.3 of Schedule 4.

**“Trust Refurbishment Works”**

means the Sections identified as such in Part 2.5.2 of Schedule 4.

**“Trust Refurbishment Works Defect”**

means any failure by the Trust or any Trust Contractor or their respective subcontractors to execute the Trust Refurbishment Works in accordance with Clause 26.2.

**“Trust Representative”**

means the representative of the Trust responsible for the day to day monitoring of the Works and the Services and notified as such in writing from time to time to Concessionco and who shall report to the Chief Executive Officer of the Trust.

**“Trust Refurbishment Defects Liability Period”**

means a period of 12 months from completion of the last Section of Trust Refurbishment Works.

**“Trust Services Variation”**

means a Services Variation agreed by the Trust pursuant to Clause 18.3 or proposed by the Trust pursuant to Clause 18.4 or a Deemed Services Trust Variation.

**“Trust Share Refinancing Notice”**

means a Refinancing Notice in respect of a Refinancing the Refinancing Date of which is in the Trust Uplift Period to which are annexed:

- (a) an updated Financial Model as at the Refinancing Date (immediately prior to the Refinancing becoming effective);
- (b) a Financial Model as at the Refinancing Date (immediately after the Refinancing becoming effective) produced on the assumption that no allowance for the Uplift Share is made;
- (c) a Financial Model as at the Refinancing Date (immediately after the Refinancing becoming effective) produced on the assumption that the Uplift Share is provided to the Trust (by way of reduction in the Total Payment);
- (d) the amount of the Uplift Share;
- (e) Model Adjustments; and
- (f) Schedule 20 Adjustments.

**“Trust Strike”**

means any official or unofficial strike, lock-out, go slow or other dispute affecting Trust Staff or Trust Contractors (but not Concessionco any Service Provider or their Contractors or Sub-contractors) or a significant sector thereof.

**“Trust Uplift Period”**

means:

- (a) if no Refinancing Notice has previously been delivered, the period expiring 5 years from the Services Commencement Date;
- (b) if a single Trust Share Refinancing Notice or Refinancing Notification has previously been delivered and that Refinancing involved the same Creditors as are involved in the Refinancing which is currently proposed, the period expiring 3 years from the Refinancing Date of the Refinancing referred to in the previous Trust Share Refinancing Notice or Refinancing Notification; or



- (c) if a single Trust Share Refinancing Notice or Refinancing Notification has previously been delivered and that Refinancing involved different Creditors from those involved in the Refinancing which is currently proposed the period expiring on the earlier of (i) 5 years from the Services Commencement Date and (ii) 3 years from the Refinancing Date of the Refinancing referred to in the previous Trust Share Refinancing Notice or Refinancing Notification.

**“Trust Variation”**

means a Variation agreed by the Trust pursuant to Clause 18.3 or proposed by the Trust pursuant to Clause 18.4 or a Deemed Trust Variation.

**“Trust Works Variation”**

means a Works Variation agreed by the Trust pursuant to Clause 18.3 or proposed by the Trust pursuant to Clause 18.4 or a Deemed Trust Works Variation.

**“Unavailable”**

bears the meaning set out in Clause 33.9 and Unavailability shall be construed accordingly.

**“Unavailability Criteria”**

means those criteria identified in Part 2 of Schedule 18.

**“Underlease”**

means the underlease to be entered into between the Trust and Concessionco pursuant to the Agreement for Underlease.

**“Uninsurable Risk”**

means a risk listed in Part A of Schedule 9 and which is not also listed in Part B2 of Schedule 9 in respect of which, after the Services Commencement Date, Concessionco is unable to obtain insurance either at all or at reasonable commercial rates from reputable insurers in the London insurance market on terms materially identical to those summarised in Part A of Schedule 9 as may be amended pursuant to Clause 39 save where such inability to obtain such insurance at reasonable commercial rates relates directly to negligence, breach of this Agreement or other default by or of Concessionco, its agents, sub-contractors or employees.

**“Unit”**

means the discrete areas of the Hospital appearing in the Unit column with respect to category A and B areas in Part 2 of Schedule 18 or as developed in respect of category C areas pursuant to Part 2 of Schedule 18.

**“Uplift Share”**

means in respect of any Refinancing in respect of which Concessionco has delivered a Trust Share Refinancing Notice, the amount by which the Total Payment (over a full year) should be reduced in order to produce the following result:

$$SR(z) = SR(y) - ((SR(y) - SR(x)) \times 0.1)$$

where

SR(x) is the Shareholder Return as at the Refinancing Date (immediately before the Refinancing becoming effective)

SR(y) is the Shareholder Return as at the Refinancing Date (immediately after the Refinancing becoming effective) with no allowance for the Uplift Share

SR(z) is the Shareholder Return as at the Refinancing Date (immediately after the Refinancing becoming effective) after making allowance for the Uplift Share.

**“User Restrictive Covenant”**

means the restrictive covenant against using part of the Site as an infectious hospital for the receipt or treatment of any dangerous or infectious disease which is referred to on conveyances dated 4 March 1895 and 13 August 1921.

**“VAT”**

means the value added tax introduced by the Finance Act 1972 which is under the care and management of the Commissioners of Customs and Excise.

**“Value of Remuneration”**

means:

- (a) subject to paragraphs (b) and (c) and to clause 6.4 the actual cost as at the Services Commencement Date expressed as an annual figure of the Hotel Services Provider employing Hotel Services Employees which comply with the Hotel Services Provider Staff Profile in relation to the following matters, namely (i) wages, (ii) bonuses, (iii) commissions, (iv) National Insurance contributions, (v) holiday pay, (vi) employers’ contributions to the Pension Scheme or any Replacement Pension Scheme under Clause 38 and (vii) other wage or salary benefits including any effect of an increase in hourly rates of pay of an Employee which is caused by a decrease in the number of that Employee’s weekly hours;
- (b) there shall be excluded from calculation of the cost under paragraph (a) the amount of any item there listed which is caused by or arises in connection with the incremental progression up a payscale in accordance with his contract of employment on or before the Services Commencement Date of any person who as at the Services Commencement Date becomes a Hotel Services Employee;
- (c) items (iv) and (vi) within paragraph (a) shall only be taken into account to the extent that increases in them are caused by increases in any of items (i) to (iii), (v) and (vii).

**“Variable Costs”**

means the variable costs per Inpatient Night as set out in Table 4 of Schedule 20 of providing the Catering Service.

**“Variable Fee”**

means the variable fee per Inpatient Night as set out in the Volume column in Table 4 of Schedule 20 which is due from the Trust to Concessionco in respect of the Catering Service (being the Variable Costs x (1 plus the Mark-up)).

**“Variation”**

means any Works Variation, Additional Works Variation or Services Variation.

**“Volume Adjustment”**

means the amount of adjustment to the Base Annual Volume Element calculated each Invoice Month for the Catering Services provided by Concessionco as is more particularly described in Clause 33.28 of this Agreement and which adjustment is made to reflect actual levels of volume achieved.

**“Voluntary Organisations”**

means the League of Friends or any successor or other similar voluntary non-profit-making organisation.

**“Warranties”**

means the warranties listed at Schedule 11 and subject to Clause 45.

**“Whitley Agreements”**

means (1) National Health Service Maintenance Staff Pay and Conditions of Service; (2) Whitley Councils for the Health Service (Great Britain) Ancillary Staffs Council - Rates of Pay, Conditions of Service and General Information; (3) Whitley Councils for the Health Services (Great Britain) Administrative and Clerical Staffs Council - Pay and Conditions of Services (subject in the case of senior managers to the Secretary of State’s Direction dated 27 January 1989); (4) Whitley Councils for the Health Services (Great Britain) Conditions of Service of Employees within the Whitley Councils for the Health Services (Great Britain); and (5) Whitley Councils for the Health Services (Great Britain) Professional and Technical Staffs B Council and any agreements derived from a process of national collective bargaining which shall replace any of them.

**“Works”**

means the design and construction works (excluding the Trust Refurbishment Works and the Temporary Decant Works but including the Relevant Works and Concessionco Refurbishment Works), including the provision of Group 1 Equipment (save for that described in Schedule 4 as provided by the Estates Maintenance Service Provider or the Hotel Services Provider) to be

carried out pursuant to this Agreement by Concessionco all as more particularly described in Schedule 4, as varied by Works Variations.

**“Works Variation”**

means a change in the Base Criteria, the Initial Design or any approved Scheme or Detailed Design implemented prior to the Completion of that Section to which it relates and which makes necessary any change in the design, nature, quality, functionality or quantity of works contained in such Section.

**“Year”**

means any period of twelve months beginning 1 April unless this Agreement specifically otherwise provides.

**“1995 Order”**

means the Town and Country Planning (General Development Procedure) Order 1995 or such other amending order.

**2. INTERPRETATION**

- 2.1 Any reference to the number of a Clause or sub-Clause shall be to a Clause or sub-Clause of this Agreement and any reference to a Schedule shall be to a schedule to this Agreement, unless otherwise expressly stated.
- 2.2 Clause and other headings are for convenience only and shall not affect the construction thereof.
- 2.3 Terms defined in the Schedules shall have the meaning ascribed to them therein and such definitions shall, subject to Clause 2.6, apply to this Agreement.
- 2.4 Any reference to any Act of Parliament, statutory instrument or any European legislation shall be deemed to include any amendment, replacement or re-enactment thereof for the time being in force and to include any bye-laws, licences, statutory instruments, rules, regulations, orders, notices, directions, consents or permissions made thereunder and any conditions attaching thereto (provided that, any such amendment, replacement, re-enactment, making or attachment taking place after the date of this Agreement shall be deemed to be a Change in Law).
- 2.5 Except where the context otherwise requires the words denoting the singular include the plural and vice versa; words denoting any gender include all genders, words denoting persons include partnerships, National Health Service Trusts, Local Authorities, Health Authorities, unincorporated associations and corporations and vice versa.
- 2.6 Any reference to this Agreement shall include the Schedules hereto and to the extent of any inconsistency Clauses shall take precedence over Schedules.
- 2.7 Each and every obligation of the parties shall be construed separately.

- 2.8 Any reference to the Trust shall, where the context requires, include any permitted successor in title. Any reference to the NHS shall, where the context requires, include any permitted successor in title.
- 2.9 Where general words are followed or preceded by specific examples, the nature of the specific examples shall not restrict or qualify the natural meaning of the general words and the “ejusdem generis” rule shall not apply.
- 2.10 All monetary figures quoted in this Agreement are stated as at 1 April 1997 and, where any such figures are in accordance with provisions of this Agreement subject to adjustment in accordance with the RPI Adjustment the first such adjustment will be on 1 April 1999 taking into account the two years from 1 April 1997.

### 3. **CONDITIONS PRECEDENT**

- 3.1 Subject to Clauses 3.3 and 3.4, this Agreement shall become effective on the Effective Date, the sole condition of Financial Close having been satisfied in accordance with this Agreement.
- 3.2 Each of the parties hereby undertakes with the other that in so far as the Condition remains unsatisfied after the date hereof that each party will use its best endeavours to secure that such Condition is so satisfied.
- 3.3 The following Clauses shall become effective at the date of this Agreement:  
1, 2, 3, 4, 6, 7, 9, 10, 11.1, 13.1, 15, 16, 27, 40, 41, 42, 45, 65, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85 and 86.
- 3.4 If all the provisions of this Agreement shall not have come into effect within three months (or such longer period as may be agreed between the parties) of the date hereof it shall lapse and neither party shall have any claim against the other under this Agreement except in respect of existing claims as at the date it lapses.

### 4. **DURATION**

Phase 1 of this Agreement shall commence on the Effective Date and shall continue unless previously terminated in accordance with the terms of this Agreement until midnight at the end of the Day before the Services Commencement Date.

Phase 2 of this Agreement shall commence on the Services Commencement Date and shall continue unless previously terminated in accordance with the terms of this Agreement until midnight at the end of the Day which is 60 Days after the 60<sup>th</sup> anniversary of the New Build Completion Date, subject to any extensions pursuant to Clause 56.

### 5. **PROVISION OF INFORMATION**

- 5.1 Each party hereto undertakes to the other that it shall throughout the Contract Period provide the other party with the information specified in Schedule 21 and that such information shall be full, true and accurate in all material respects PROVIDED THAT each party acknowledges to the other that forecasted information amounts to no more than a genuine estimate arrived at after reasonable enquiry.

5.2 Subject always to Clause 5.3, Concessionco shall provide to the Trust no later than ten (10) Business Days from a written request therefor such information about the performance of any of the Works or Services as the Trust may reasonably require.

5.3 The Trust shall pay to Concessionco a reasonable fee in respect of information provided pursuant to Clause 5.2 (which may include photocopying and reasonable employment costs) PROVIDED THAT no such fee shall be payable where Concessionco is otherwise obliged to provide the said information to the Trust pursuant to the terms of this Agreement.

6. **PENDING SERVICES COMMENCEMENT DATE**

6.1 During and throughout the period between the date of the execution of this Agreement and the Services Commencement Date the Trust shall, except as this Agreement shall expressly otherwise provide, retain control over all aspects of the Trust's business and activities including, but not limited to, the appointment or dismissal of any of its employees or effecting any change in the terms and conditions of employment of any of its employees.

6.2 NOT USED.

6.3 NOT USED.

6.4 If the Trust shall effect any change to the terms and conditions of employees engaged in the provision of services equivalent to the Hotel Services so as to cause the Value of Remuneration to exceed the Remuneration Comparison Amount indexed by reference to increases calculated in accordance with the method applicable to the Ancillary Staffs Increase such excess shall constitute a Deemed Trust Variation for the purposes of Clause 18 and for the avoidance of doubt the Hotel Services Staff Costs shall be increased as a result of the Deemed Trust Variation Provided always that any change to the terms and conditions of employees holding posts identified in Schedule 13 as Managers shall be disregarded in calculating the Value of Remuneration for this Clause.

6.5 If the Trust shall effect any change to the terms and conditions of employees engaged in the provision of service equivalent to the Estates Maintenance Services and the effect of that change taken together with any other changes to the terms and conditions of employees so engaged is to vary differentials between different posts, such change shall constitute a Deemed Trust Variation if it is made outside the normal course of business or conduct of a NHS trust.

6.6 NOT USED.

6.7 The Trust undertakes:

- (a) on the Day falling two months before the Services Commencement Date, to serve Concessionco with a list of persons employed by Trust at such time for the purposes of the provision of services equivalent to the Services;
- (b) by no later than the Day falling Ten Business Days prior to the Services Commencement Date to serve a list of persons who the Trust believes will be the Employees at the Services Commencement Date; and

- (c) to serve upon the Services Commencement Date a list of the Employees as at the Services Commencement Date;

and to provide on each such date details of the terms and conditions on which they are employed and their dates of continuous employment and to warrant that such details will be true accurate and complete when given. The Trust shall supply to Concessionco relevant personnel records applicable to the Employees.

- 6.8 At least 12 months prior to the anticipated Services Commencement Date the Trust and Concessionco will establish a consultative committee to manage the change process and the transfer of the employees and to ensure that all necessary practical and administrative steps can be taken prior to Services Commencement Date by means of co-operation between the Trust and Concessionco in accordance with this Agreement.

- 6.8.1 It is acknowledged that the objective of both the Trust and Concessionco shall be to ensure that the transfer of the Employees in accordance with this Agreement at Services Commencement Date is effected appropriately and that all necessary practical and administrative steps can be taken prior to Services Commencement Date by means of co-operation between the Trust and Concessionco.

## 7. **EXCLUSIVE APPOINTMENT**

- 7.1 The Trust hereby exclusively appoints Concessionco to carry out the Works and the Services during the Contract Period subject to and in accordance with the terms of this Agreement.
- 7.2 In the performance of their respective rights and obligations under this Agreement Concessionco and the Trust shall comply fully at all times with all Law.

## 8. **ASSISTANCE AND CO-OPERATION**

- 8.1 The Trust shall render all reasonable assistance (such assistance not to be unreasonably withheld or delayed) to Concessionco and do all things reasonably necessary to enable Concessionco to comply with Concessionco's obligations in relation to the performance of the Works, the Services, the Retail Services and any Additional Business, subject to the terms and conditions of this Agreement, and without prejudice to Clause 5, such assistance shall include (but not be limited to) the prompt supply to Concessionco of such information as may be reasonably required by Concessionco for the performance of its obligations and which is within the care or control of the Trust, save to the extent that the Trust is restricted as a matter of law from supplying such information.
- 8.2 Save to the extent permitted pursuant to Clause 8.3, the Trust, Trust Contractors and their respective employees, agents and sub-contractors shall not (whether by act or omission) obstruct, hinder or prevent Concessionco, the Building Contractor or any Service Provider, or their respective employees, agents or sub-contractors, from carrying out any of Concessionco's obligations under this Agreement.
- 8.3 The Trust shall have the right (without prejudice to Clause 8.4) at any time by notice in writing to require Concessionco to suspend or vary the timing of the Works if (but to the extent only that) such Works have a material adverse effect on any of the Clinical Services. The said

notice shall give particulars of the Works to which it applies, the adverse effect complained of and the extent of the variation or suspension necessary in the Trust's view in consequence of the same (including details of the adverse effect on Clinical Services). Concessionco shall forthwith comply with any such notice.

8.4 Where the Trust requires Concessionco to suspend or vary the timing of the Works pursuant to Clause 8.3:

- (a) where during Phase 1 such requirement arises
  - (i) from failure by Concessionco to carry out the Works in accordance with the Programme, the Method Statements, the shared possession agreements or determinations made in accordance with Clause 11.2(b); or
  - (ii) from failure by Concessionco or the Building Contractor to apply to the timing of the Works the experience to be reasonably expected of a building contractor engaged in works similar to the Works so as to minimise any adverse effect on the delivery of any Clinical Services;then Concessionco shall not be entitled to any extension of time, Compensation or other remedy or relief in consequence of such suspension;
- (b) where any such requirement is made in circumstances other than those set out in Clause 8.4(a) such requirement shall be treated as a Trust Default;
- (c) if the direction of the Trust pursuant to Clause 8.3 results in a permanent suspension or variation:-
  - (i) where such suspension or variation is directed under Clause 8.4(a), such direction shall for the purpose of the permanent effects thereof be deemed to be a Concessionco Variation and Concessionco shall bear the risk and costs in respect thereof; and
  - (ii) where such suspension or variation is directed under Clause 8.4 (b), such direction shall for the purposes of the permanent effects thereof be treated as a Deemed Trust Variation; and
- (d) the Trust shall revoke as soon as appropriate any notice in writing issued in accordance with Clause 8.3.

## 9. INDEMNITIES

9.1 Concessionco shall indemnify and keep indemnified the Trust against all actions, proceedings, costs, claims, demands, liabilities, losses and expenses (excluding consequential losses) whatsoever in respect of or in connection with:

- (a) any damage to property, real or personal;
- (b) any infringement of any third party Intellectual Property arising out of the use of Concessionco's Intellectual Property or any third party Intellectual Property used



by Concessionco in the performance of the Works and the provision of the Services;

- (c) the use by Concessionco of any Trust Intellectual Property beyond the scope of any rights to use the same granted to Concessionco by the Trust pursuant to this Agreement; and
- (d) injury to persons, including injury resulting in death;

to the extent that the same is caused by any breach by Concessionco of this Agreement (whether caused by Concessionco, or (save where acting as a Trust Contractor) the Building Contractor, any Service Provider or their respective employees, agents, servants or subcontractors) or any negligence on the part of Concessionco, its servants or agents; and except insofar as the same shall be due to any Trust Default (excluding Trust Strikes) PROVIDED THAT in relation to (a), (b) and (c) above Concessionco's liability under this Clause 9.1 shall not exceed £30 million in respect of any single event or sequence of similar events.

9.2 The Trust shall indemnify and keep indemnified Concessionco against all actions, proceedings, claims, demands, costs, liabilities and expenses (excluding consequential losses) whatsoever in connection with:

- (a) any damage to property, real or personal;
- (b) any infringement of any third party Intellectual Property arising out of the use of the Trust's Intellectual Property or any third party Intellectual Property used by the Trust in the performance of the Works and the provision of the Services;
- (c) the use by the Trust of any Concessionco Intellectual Property beyond the scope of any rights to use the same granted to the Trust pursuant to this Agreement; and
- (d) injury to persons, including injury resulting in death;

to the extent that the same is caused by any breach by the Trust of this Agreement (whether caused by the Trust, any Trust Contractor, any person carrying out clinical activities for or on behalf of the Trust at the Hospital, or their respective employees agents, servants or sub-contractors) or any negligence on the part of the Trust, its servants or agents or of any person carrying out clinical activities for or on behalf of the Trust at the Hospital; and except insofar as the same shall be due to any breach of this Agreement by Concessionco or other neglect, default or wrongful act or omission of Concessionco, or (save where acting as a Trust Contractor) the Building Contractor, any Service Provider, or their respective employees, agents, servants or sub-contractors) PROVIDED THAT in relation to (a), (b) and (c) above the Trust's liability under this Clause 9.2 shall not exceed £30 million in respect of any single event or sequence of similar events.

9.3 Subject to any requirements contained in insurance policies established and maintained pursuant to Clause 39 or otherwise (with which the parties agree to comply):

- (a) if either party (“the Indemnified Party”) receives any notice, demand, letter or other document concerning any claim from which it appears that it is or may reasonably expect to become entitled to indemnification pursuant to this Agreement, it shall give notice in writing to the other party (“the Indemnifying Party”) of such claim as soon as reasonably practicable.
- (b) On receipt of a notice pursuant to (a) above, the Indemnifying Party shall:
  - (i) provided that it admits the Indemnified Party’s entitlement as aforesaid, be entitled to resist the claim in the name of the Indemnified Party at the Indemnifying Party’s own expense and to have the conduct of any defence, dispute, compromise or appeal of the claim and of any incidental negotiations; and
  - (ii) at the request of the Indemnified Party use reasonable endeavours to enforce the terms of any relevant contract in order to recover the Indemnified Party’s losses; and the Indemnified Party shall give the Indemnifying Party all reasonable co-operation, access and assistance for the purposes of considering and resisting such claim.
- (c) If the Indemnifying Party fails within 28 days of receipt of the aforesaid notice to confirm in writing its intention to apply Clause 9.3(b), or thereafter fails to comply with the same, the Indemnified Party shall be free to pay or settle the claim on such terms as it may in its absolute discretion think fit.

**10. MITIGATION AND CALCULATION OF COMPENSATION**

- 10.1 Whenever either Party is entitled to assert against the other any claim or to obtain from the other any benefit, relief or remedy pursuant to or arising out of this Agreement (whether by way of additional, continued or adjusted payment, indemnity, extension of any time or period, relief from performance, award or deduction of Points, application of Termination Indicators or otherwise), the first named Party shall be obliged to take reasonable and appropriate steps to mitigate the effects of the event or circumstance in respect of which such claim, benefit, relief or remedy has arisen, PROVIDED THAT the Trust shall not be obliged to make good any failure by Concessionco in performance or in the delivery of Services or any Unavailability AND THAT neither party shall be entitled to make any claim against or obtain any relief or remedy from the other to the extent that the circumstances giving rise to the claim or the right to obtain any benefit, relief or remedy arises from or is caused by or based on any negligence or breach of this Agreement by the first named Party or its employees, agents, servants or sub-contractors.
- 10.2 Where in this Agreement it is provided that the Trust will pay Compensation to or indemnify Concessionco, the Trust shall not be entitled to withhold, reduce or avoid any such payment to Concessionco:
- (a) in reliance only on the fact that any amount which is due from Concessionco to the Building Contractor or any Service Provider as a result of the circumstances giving rise to the Trust’s obligation to pay Compensation to or indemnify

Concessionco is conditional on receipt of payment by Concessionco from the Trust; or

- (b) on the basis that the provisions in the relevant Project Document with the Building Contractor or any Service Provider are unreasonable.

## 11. PREMISES AND ACCESS

11.1 The parties shall execute and exchange the Agreement for Lease and Agreement for Underlease upon the date of execution of this Agreement.

11.2 Subject to the provisions of Clause 8, the Trust shall until the grant of the Lease permit Concessionco, the Building Contractor the Service Providers and their respective employees, servants, agents, workmen, sub-contractors, and suppliers to enter the Site as licensees and to enjoy:

- (a) exclusive possession during the periods of construction of the Sections identified as such in Part 2.5.1 of Schedule 4 along with work sites in any other Sections in which Concessionco is carrying out the Works;
- (b) without prejudice to Clause 11.2(a) shared possession with the Trust and Trust Contractors during the periods of construction of the Sections identified as such in Part 2.5.1 of Schedule 4 to the extent necessary to allow Concessionco access to perform its obligations hereunder, to an extent and at time to be agreed in writing no later than 8 weeks after the completion of Scheme Design (unless such period is extended by agreement between the parties) or determined by the Dispute Resolution Procedure; and
- (c) non-exclusive possession of or access to such other parts of the Trust Premises which Concessionco may reasonably require to perform its obligations hereunder. Such non exclusive possession or access shall be subject to Concessionco complying with all reasonable instructions of the Trust in relation thereto and shall be granted only in so far as is reasonably necessary to perform or in anticipation of the performance of the Works, Services, Retail Services and Additional Businesses or for the purposes of using such other part or parts of the Trust's Premises as may be made available by the Trust for use by Concessionco.

11.3 Concessionco shall use best endeavours to procure that at all times the officers, agents, representatives or employees of itself or its agents and sub-contractors present at the Trust's Premises in order to perform the Works or Services shall obey the reasonable instructions of the Trust or the Trust Representative directed to ensuring that such presence complies with the Law. Where performance of the Works and/or Services affects or is likely to affect the activities of the Trust, Concessionco shall use best endeavours to procure that officers, agents, representatives or employees of itself and its agents and sub-contractors shall observe any reasonable conditions laid down from time to time by the Trust in relation to the conduct of such officers, agents, representatives or employees while on the Trust Premises of which prior written notice has been given to Concessionco by the Trust or the Trust Representative and in

respect of which the Trust shall have consulted with Concessionco prior to their becoming effective.

11.4 If this Agreement remains in force during the period commencing on the Day after the expiry of the term granted by the Underlease, Concessionco shall permit the Trust as licensee and those authorised by it including any Trust Contractor and their respective employees, servants, agents, workmen and sub-contractors to enter the premises previously demised by the Underlease and to use and enjoy the same and the rights appurtenant thereto in the same terms set out in the Underlease as though the term of the Underlease had not expired (subject to the Trust during such period continuing to observe and perform the obligations on its part contained in the Underlease).

11.5 The Trust shall deliver to Concessionco on or before the dates indicated on the Programme (or such revised dates as may be applicable pursuant to Clause 24 or otherwise agreed between the parties) possession of each Section identified in Part 2.5.1 of Schedule 4 in the manner referred to therein.

11.6

11.6.1 Concessionco shall carry out the Temporary Decant Works in accordance with the requirements as set out in Schedule 4 as developed in accordance with Clause 11.6.3.

11.6.2 The Trust shall deliver on or before the dates indicated in the Programme (or such revised dates as may be applicable pursuant to Clause 24 or otherwise agreed between the parties) vacant possession of each Section within the Temporary Decant Works so as to enable Concessionco to perform such works in accordance with Clause 11.6.1.

11.6.3 The parties agree that the room outline works schedules contained in Schedule 4 prepared for each portion of the Temporary Decant Works shall be developed and agreed not less than 8 weeks before commencement of the relevant Temporary Decant Works.

11.7

11.7.1 Concessionco shall give to the Trust not less than 12 months' notice in writing prior to commencing any of the Works in the vicinity of the Trust Dwellings, together with an estimate of the time required to complete such part of the Works.

11.7.2 If it is reasonably necessary, for the purpose of avoiding any liability which Concessionco would otherwise incur in connection with the carrying out of the Works to secure the temporary vacation of the Trust Dwellings, the notice referred to in 11.7.1 may require the Trust to, and the Trust shall, secure the same prior to the commencement of the relevant part of the Works.

11.7.3 Concessionco shall give a further notice to the Trust not less than 14 days prior to the date on which Concessionco considers that the Trust Dwellings can be re-occupied following completion of the relevant part of the Works.

## **12. RESTRICTIVE COVENANTS**

- 12.1 Any actions, proceedings, injunctions, claims or demands brought or obtained by any person in respect of and all other consequences of the existence or enforcement of (a) the User Restrictive Covenant or (b) any breaches of the Building Restrictive Covenant where such breaches exist at the Effective Date or where such breaches are committed by the Trust or any Trust Contractor after the Effective Date shall constitute a Trust Default.
- 12.2 If an injunction or any other court order or remedy obtained by any person in respect of the User Restrictive Covenant or in respect of any breaches of the Building Restrictive Covenant where such breaches exist at or are committed by the Trust or any Trust Contractor after the Effective Date causes a delay to a material part of the Works which has caused or will on the balance of probabilities result in a delay to the Services Commencement Date or causes an interruption in a material part of the Services lasting in each case more than 12 Months, Concessionco may terminate this Agreement by notice in writing and the provisions of Clauses 61 and 67 shall apply in respect of such termination.
- 12.3 Subject to Clause 12.4 Concessionco shall (to the extent that it is not so prevented as a result of any breaches of the Building Restrictive Covenant where such breaches exist at the Effective Date or are committed by the Trust or any Trust Contractor after the Effective Date) comply with the Building Restrictive Covenant, and shall indemnify and keep indemnified the Trust against all actions, proceedings, cost, claims, demands, losses and expenses (excluding consequential losses) whatsoever in respect of or in connection with any breach by Concessionco of this Clause 12.3 provided always that Concessionco shall not be obliged to rectify or remedy any breaches of the Building Restrictive Covenant where such breaches arise as a result of a Trust Variation as referred to in Clause 12.4 or exist at the Effective Date, or where such breaches are committed by the Trust or any Trust Contractor after the Effective Date, nor to indemnify the Trust in respect of such breaches.
- 12.4 Concessionco's obligations shall include the responsibility to ensure that the design of the Works or of any Works Variation or Additional Works Variation carried out by Concessionco does not breach the Building Restrictive Covenant, provided that where a Trust Variation would give rise to a breach of the Building Restrictive Covenant, Concessionco shall so notify the Trust and, if the Trust elects to proceed with the relevant Variation, Clauses 12.1 and 12.2 shall apply as if any breach arising as a result of implementation of the relevant Variation was committed by the Trust.

## **SECTION B: PHASE 1**

### **13. DESIGN AND CONSTRUCTION OBLIGATIONS**

- 13.1 Save as set out in Clause 13.1A, 13.1.4 or elsewhere in this Agreement, Concessionco shall obtain or procure the obtaining of all Concessionco Necessary Consents.
- 13.1A The Trust shall obtain or procure the obtaining of all Trust Necessary Consents.
- 13.1B Each party shall provide the other with all reasonable assistance in obtaining or procuring the obtaining of the relevant Necessary Consents. The parties will ensure that Necessary

Consents which they are obliged to obtain are obtained in good time so as not to delay or prevent the progress of the Works or to delay Completion of the Works or any Section.

- 13.1.1 Either party shall subject to Clause 13.1.3 indemnify the other from and against all and any liabilities arising from the defaulting party's failure to comply with any condition in connection with any Necessary Consent.
- 13.1.2
- (a) Where the Planning Consent is revoked or modified such that the extent of the same is insufficient for the implementation and completion of the Works so as to require Appeal Proceedings the Trust and Concessionco shall, subject to Clauses 13.1.3 and 13.1.4, share the costs of any Appeal Proceedings in accordance with Clauses 13.1.6 and 13.1.7 on an equal basis, save where the need for the Appeal Proceedings has arisen wholly from any act, omission or delay of one party (whether or not such act, omission or default constitutes a breach by that party of this Agreement) when such costs shall be borne by that party up to a maximum of £50,000 and thereafter equally shared; and
  - (b) the Trust will expeditiously supply information within its possession and otherwise use its reasonable endeavours in order to assist Concessionco to comply with its obligations as referred to in Clause 13.1 and shall sign any further necessary planning or other similar agreements as may be reasonable and required for the carrying out of the Works. The costs of compliance with such agreements shall be shared equally, subject to Clauses 13.1.3 and 13.1.4.
- 13.1.3 Concessionco shall comply with the Section 106 Agreement and shall indemnify the Trust in relation to all expenses reasonably and properly incurred by the Trust pursuant to the terms of or as a condition of any planning consent referred to in Clause 13.1.2(a) being granted, subject to a maximum of £90,000 which sum is included within the Base Contract Sum. Where amounts required to be paid by Concessionco to the Trust pursuant to this Clause do not reach £90,000, the balance not expended shall be credited to the Client Contingency.
- 13.1.4 The responsibility for obtaining and risk of not obtaining any Necessary Consent relating to a Variation, and all costs and risks of delay arising from obtaining the same or any appeal, review, enquiry, planning agreement or revocation in relation thereto, shall be borne entirely by the Trust in respect of Trust Variations and by Concessionco in respect of Concessionco Variations (without prejudice to any rights conferred by this Agreement to amend or withdraw any Variation) and Clauses 13.1.2(a) and 13.1.3 shall not apply to the same. Concessionco shall, at the Trust's risk and expense as aforesaid, give all reasonable assistance in the application for and procurement of Necessary Consents for Trust Variations.
- 13.1.5 Any delay arising from the suspension, revocation or modification of the Planning Consent and from any Appeal Proceedings relating to the same, and the suspension, revocation or modification of any other Necessary Consent from any Competent

Authority (together in all cases with any consequential delay or disruption to the Works or Services) shall be deemed to constitute a Compensation Event.

13.1.6 Any dispute between the parties as to whether or not any Appeal Proceedings should be instituted, discontinued or settled (having due regard to the merits and prospects of success of such Appeal Proceedings) shall be referred to Leading Counsel for determination, the costs of such referral to be shared equally by the parties.

13.1.7 Leading Counsel so instructed shall act as an expert and his decision shall be final and binding on the parties.

13.1.8 Leading Counsel shall:

- (a) invite each party to submit to him within such time as he shall stipulate its reasons for its opinion (which shall not be limited to any reasons previously given) supported by such evidence and/or other information as it shall consider appropriate;
- (b) afford to each party an opportunity to make counter-submissions; and
- (c) give written reasons for his decision.

13.1.9 For the purposes of this clause "Leading Counsel" means Duncan Ouseley QC or if he shall be unable or unwilling to act such other leading counsel specialising in matters relating to town and country planning as the Trust and Concessionco shall agree upon or in default of agreement as shall be nominated on the application of either party by the President of the Law Society.

13.1.10 In the event of either:

- (a) a revocation of the Planning Consent; or
- (b) a suspension, variation or modification of its terms the effect of which would on the balance of probabilities be to cause a delay to the completion of the New Build Works of more than 12 months following the relevant Completion Date or an increase of more than 10% in the cost of the Works in respect of which either Leading Counsel advises that no Appeal Proceedings should be taken or, following any such Appeal Proceedings, the relevant decision is upheld with the effects stated above

then either party shall have the right to terminate this Agreement, such termination being deemed to occur:

- (i) under Clause 63 where the process of revocation, suspension, variation or modification to the Planning Consent commences within 3 months following the Effective Date; or
- (ii) under Clause 61 (where the process of revocation, suspension, variation or modification commences more than 3 months after the Effective Date).

13.2 Concessionco shall carry out and complete the Works:

- 13.2.1 in accordance with the Base Criteria (as the same have been or may be developed into the Detailed Design in accordance with Clause 17);
- 13.2.2 so that the Works when completed are in accordance with the Base Criteria and meet the performance requirements therein specified (as the same have been or may be developed into the Detailed Design in accordance with Clause 17);
- 13.2.3 in accordance with all Necessary Consents, Applicable Standards and Law;
- 13.2.4 in a good and workmanlike manner to a good quality using new (where appropriate and unless otherwise specified or required by planning consents) and suitable materials and equipment;
- 13.2.5 using reasonable skill and care to ensure that the Works and Concessionco's IT System are Millennium Compliant;
- 13.2.6 in accordance with this Agreement;
- 13.2.7 so that it has not and shall not recommend or select for use in or incorporate into the Works any goods or materials which are generally known at the time of use to be deleterious to health and safety or to the durability of buildings and/or other structures and/or facilities and/or plant and machinery in the particular circumstances in which they are used or which are otherwise not in accordance with the Building Research Establishment Digest, British Standards and Codes of Practice or equivalent European or international standards recognised in the United Kingdom Codes of Practice current at the date of use; and
- 13.2.8 subject to Clauses 24 and 25, in accordance with the Programme and so that Completion of each Section of the Works shall take place on or before the Completion Date for each such Section.

PROVIDED THAT if there is any conflict among Clauses 13.2.1 to 13.2.8, Clause 13.2.3 shall be paramount.

- 13.3 In carrying out its design obligations in relation to the Works, Concessionco warrants that it has exercised and shall continue to exercise or procure that there is exercised the degree of reasonable skill and care to be expected of a professionally qualified and competent designer experienced in carrying out the design of work of a similar size, scope, complexity and nature as the Works.

#### 14. **CDM REGULATIONS**

- 14.1 Concessionco shall, for the purposes of The Construction (Design & Management) Regulations 1994 ("the CDM Regulations"), be the Client in relation to the Works and Concessionco shall serve a declaration to that effect on the Health & Safety Executive within 10 Business Days of the date of execution of this Agreement and shall simultaneously provide a copy of such declaration to the Trust.
- 14.2 For the purposes of the CDM Regulations, Concessionco will not be the agent of the Trust.



- 14.3 Concessionco shall comply with its obligations under the CDM Regulations as Client in relation to the Works and shall use reasonable endeavours to procure compliance with the CDM Regulations by the Relevant Consultants the Planning Supervisor, the Building Contractor and such contractors as may be appointed by Concessionco or the Building Contractor in relation to the Works.
- 14.4 In relation to the Works Concessionco shall, in particular:
- 14.4.1 appoint the Planning Supervisor and Principal Contractor (both as defined in the CDM Regulations);
  - 14.4.2 reasonably satisfy itself that the Planning Supervisor, the Principal Contractor, the Relevant Consultants and any contractors appointed in relation to the Works are competent and have adequate resources to comply with their respective obligations under the CDM Regulations;
  - 14.4.3 ensure, so far as it is reasonably practicable, that the Health & Safety Plan (as defined in the CDM Regulations) is in place prior to commencement of construction of the Works;
  - 14.4.4 provide site information and other relevant information to the Planning Supervisor so that the Planning Supervisor can carry out his duties under the CDM Regulations; and
  - 14.4.5 keep such Health and Safety File (as required by the CDM Regulations) updated and available for inspection by those engaged upon the Works and such third parties as may be authorised by the Trust and for the avoidance of doubt shall (on the giving of reasonable notice by the Trust) promptly provide the Trust with sight of the Health and Safety File at all reasonable times.
- 14.5 The Trust will keep such Health and Safety File as required by and otherwise comply or use reasonable endeavours to ensure compliance by Trust Contractors, consultants and subcontractors with the CDM Regulations in respect of the Trust Refurbishment Works.
- 14.6 Upon Completion of the Works, Concessionco shall provide a certified copy of the full and complete Health and Safety File to the Trust and Concessionco hereby grants to the Trust an irrevocable, royalty free and non-exclusive licence to use and reproduce any information or documents contained at any time within the Health & Safety File for any and all purposes connected with the Works, the Services and the Hospital. Such licence shall carry the right to grant sub-licences and shall be transferable to third parties.
- 14.7 In so far as the beneficial ownership of copyright and all other intellectual property and design rights in any information or documents to be contained at any time in the Health & Safety File will be vested in any person other than Concessionco, Concessionco shall procure, as a condition precedent to the appointment of such beneficial owner, that he grants to the Trust an irrevocable, royalty free and non-exclusive licence to use and reproduce the Health & Safety File for any and all purposes connected with the Works, the Services and the Hospital. Such licence shall carry the right to grant sub-licences and shall be transferable to third parties.

14.8 Concessionco shall, for the duration of Phase 2, maintain and update the Health & Safety File together with the Trust's copy thereof and ensure its availability for use in connection with such future works as may be carried out to the completed Works. A certified copy of any alterations or additions to the Health & Safety File shall be provided to the Trust within 5 Business Days of such addition or alteration taking effect.

14.9 The Trust shall provide and grant the equivalent copies and licences as are referred to in Clauses 14.5 to 14.7 in respect of the Health and Safety File relating to the Trust Refurbishment Works, to the extent reasonably required by Concessionco for the purpose of complying with its obligations under this Agreement.

## 15. **APPOINTMENT OF PROFESSIONAL CONSULTANTS AND BUILDING CONTRACTOR**

15.1 Concessionco shall forthwith upon execution of this Agreement:

15.1.1 enter into the Construction Contract with the Building Contractor, and to which no material amendment shall be made without prior approval by the Trust, such approval not to be unreasonably withheld; and

15.1.2 procure that the Building Contractor enters into appointment agreements with the Relevant Consultants or their respective successors each of which shall be executed as a Deed substantially in the form set out at Schedule 29 and to which no material amendment whenever proposed shall be made without prior approval by the Trust, such approval not to be unreasonably withheld.

15.2 Concessionco shall comply with the terms of and carry out its duties under the Construction Contract save that nothing herein shall prohibit Concessionco from pursuing any remedy against the Building Contractor for breach of the Construction Contract including without limitation termination of the Building Contractor's employment under the Construction Contract or acceptance of the Building Contractor's repudiatory breach.

15.3 Concessionco shall not compromise or waive any claims it may have against the Building Contractor in any way which would or might adversely affect the interests of the Trust PROVIDED THAT Concessionco shall not be in breach of its obligations under this Clause if it acts in accordance with directions given by the Senior Lenders pursuant to the Senior Debt Agreements and/or in accordance with the Direct Agreement.

## 16. **COLLATERAL WARRANTIES**

16.1 Concessionco shall, forthwith upon execution of this Agreement, procure and deliver to the Trust duly executed Collateral Warranties executed by each of the Relevant Consultants and by the Building Contractor and shall use reasonable endeavours promptly to procure and deliver to the Trust duly executed collateral warranties in a substantially similar form to the Collateral Warranties (or in such other form as the Trust may reasonably agree) from any consultant or contractor appointed in replacement of any Relevant Consultant or Building Contractor appointed at the date of this Agreement and from any other consultant to or subcontractor of the Building Contractor whose work includes any material element of design (inter alia by including in any draft agreements provided to such replacements or other parties' provisions requiring such warranties).

## 17. DEVELOPMENT OF FINAL DESIGN

### 17.1 Intent

The parties acknowledge that the Agreement has been executed at a stage when the design of the Works has been only partially developed. The procedure agreed in this Clause is intended to enable the design to be finalised in a manner which permits a reasonable degree of participation by the Trust and recognises the financial and timing constraints applicable to Concessionco. While each Party acknowledges that the other may exercise in full the rights conferred, and be obliged to comply with the obligations imposed, upon it by this Clause, it also agrees to explore on a continuous basis methods by which the agreed procedures can be operated in a flexible and pragmatic manner.

### 17.2 Design Process Development

The development of the design of the Works will comprise two elements, namely:

Design Consultation; and

Design Approval;

each as more particularly described in Clauses 17.3 to 17.21 respectively as follows:

### 17.3 Design Consultation

- 17.3.1 The Design Programme identifies dates by which draft design data (not constituting formal Design Proposals) for the Works are to be submitted by or on behalf of Concessionco to the Trust, and periods during which such draft data will be the subject of consultation and discussion among Concessionco, the Building Contractor, the Service Providers, the Relevant Consultants and the Trust. Such draft design data will consist of draft versions of elements of the Scheme Design or Detailed Design which are considered by Concessionco to comply with the Base Criteria and to involve no additional cost or time or risk implications for the Trust and which have not yet been the subject of formal Design Proposals; Provided that Concessionco may also submit and the Trust may also request draft versions of elements of the Scheme Design or Detailed Design which may involve additional cost, time or risk implications for the Trust and to be accompanied by outline particulars of the time and cost implications of any proposed Variations contained therein.
- 17.3.2 Concessionco and the Trust each undertakes to the other to make available at the times indicated in the Design Programme representatives with the degree of seniority and professional skill necessary to enable the discussions and consultations referred to above to be implemented in a constructive and informed manner. Such representatives shall include, in the case of Concessionco, employees of the Contractor and the Relevant Consultants and, in the case of the Trust, user group representatives and other clinical staff as necessary.
- 17.3.3 In preparing proposed design solutions for elements of Scheme Design or Detailed Design during any consultation period concerning the same, to the extent that any proposed solutions may alter previously approved design in relation to that element,

Concessionco shall exercise all reasonable skill, care and diligence to achieve design solutions which will minimise cost, time or risk implications for the Trust. Where such design solutions are likely to result in a Trust Variation, Concessionco shall use reasonable endeavours to keep, any additional costs, time or risk implications for the Trust to a minimum.

- 17.3.4 Subject to Clause 17.3.9, Concessionco shall be entitled to submit, and the Trust obliged to process in accordance with Clauses 17.7 and 17.15 below, a formal Design Proposal submitted at any time after the completion of the period of Design Consultation and on or before the submission date identified in the Design Programme in respect of the design which is the subject of such a proposal.
- 17.3.5 Save where otherwise clearly indicated by the use and due execution of the prescribed forms referred to in Clause 17.14, or in the absence of any applicable form by an express written reference to the applicable Clause of the Agreement duly executed by the Trust and/or Concessionco Representative, no submission of draft design data by Concessionco or request for, response to or comment on such data by the Trust in the course of the consultation and discussion referred to in this Clause 17.3 shall constitute a Design Proposal, a formal response thereto, a proposal for or confirmation of a Trust or Concessionco Variation or otherwise create or evidence an intention to create any legal obligation on either party, whether pursuant to this Agreement or otherwise.
- 17.3.6 The Trust shall have no power pursuant to Clauses 17.3.1 to compel Concessionco to enhance or revise any draft design data prior to or as a condition of including the same in any Design Proposal or to vary the Base Criteria, the Initial Design or any approved Scheme or Detailed Design. The contents and approval of any Design Proposal, and any Variation of the Base Criteria, the Initial Design or of any approved Scheme Design or Detailed Design, are regulated by Clauses 17.3.7, 17.3.9, 17.4 to 17.21 and 18 respectively.
- 17.3.7 Where, prior to the submission of any formal Design Proposal, the parties have, through the Design Consultation process, established in relation to the whole or any part of the design which is the subject thereof a consensus as to the relevant design solution, and thus as to the contents of any such proposal, they may endorse the drawings or other documents which express that consensus as “accepted subject to formal approval”, using the form prescribed in Part 5.1 of Schedule 4, and the same shall thereupon become an Endorsed Design. Concessionco shall ensure that the subsequent Design Proposal (or relevant part thereof) submitted in respect of any Endorsed Design embodies and complies with the same. The period for approval of any Design Proposal or part thereof conforming with such Endorsed Design shall be reduced, pursuant to Clause 17.15.2, to 5 Business Days.
- 17.3.8 Prior to the finalisation of any Endorsed Design, Concessionco shall state in writing whether any part thereof would, if endorsed by the Trust, constitute a Trust or Concessionco Variation and, if so, shall include in such statement an estimate of any increase or decrease in amounts payable by the Trust or delay to the Works resulting therefrom to such level of detail as is then reasonably practicable. Such statements

shall be incorporated as part of any Endorsed Design and shall as to the incidence of any increase, decrease or delay be binding on the parties, Provided that Concessionco shall not be bound to include the aforesaid estimates of the extent of any payment adjustments or delays in the Design Proposal submitted pursuant to such Endorsed Design and the Trust shall not be bound to approve such Design Proposal submitted if the aforesaid estimates are not included in it.

17.3.9 Where at the end of the period of Design Consultation prescribed by the Design Programme in respect of any part of the design the Parties have failed to agree an Endorsed Design in respect of the same, they shall forthwith convene meetings of senior representatives of each of them (and of the Building Contractor and/or any Relevant Consultant and/or other affected parties if necessary) who shall be authorised and use all reasonable endeavours to finalise such an Endorsed Design on or before the date for submission of the relevant formal Design Proposal prescribed by the Design Programme. Concessionco shall defer submission of the said formal Design Proposal pending the earlier of the agreement of such an Endorsed Design or, if none is agreed, the latest date for submission of the relevant Design Proposal indicated on the Design Programme.

#### 17.4 Design Approval

The Initial Design having been approved by the Trust on the terms set out in Clause 17.7, the further preparation and approval of the design of the Works shall take place in two sequential Design Stages, namely:

Scheme Design; and

Detailed Design,

each as more particularly described in the Design Programme.

#### 17.5 Individual Approval

In respect of the generality of the Works, approval of the preceding stage of the design is a condition of submitting Design Proposals in respect of any later stage, save as expressly provided in Clause 17.13. The commencement of construction of any part of the Works is also dependent, save as expressly provided in Clauses 17.13 or 17.17.2, on approval by the Trust's Representative of the Detailed Design relating thereto in accordance with Clause 17.15. However, the sequence of design approvals may be applied separately to those individual elements of the Works as may be agreed in writing between Concessionco and the Trust Representative from time to time, the agreement of the Trust Representative not to be unreasonably delayed or withheld. It will not be necessary for the Trust Representative to approve the Scheme Design for the entire Works before receiving individual Detailed Design Proposals in respect of items so agreed.

#### 17.6 Final Design and Completion

17.6.1 The Scheme and Detailed Design for each Section, when finalised and approved pursuant to Clause 17.15, shall, together with further "as built" data and production

information (which is not subject to the Design Consultation or Approval Process) comprise the Final Design in respect of such Section. Concessionco shall, within 90 Days after the Completion Certificate of each Section of the Works, assemble and deliver to the Trust, six (6) copies of the Final Design relating to such Section.

- 17.6.2 If (subject to Finishing or Snagging Items and any Relevant Works) a portion or Section of the Works has been constructed such that it complies with the approved Detailed Design relating thereto, the Trust (without prejudice to Clauses 17.12.A and 21.6) shall not raise any objection to the certification by the Independent Certifier of Finishing of that portion or Completion of that Section on the grounds of any alleged defect in design provided that this Clause shall not operate to prejudice any rights of the Trust in respect of any defect in design.

#### 17.7 Initial Design

The Initial Design has been approved by the Trust as at the date of execution of this Agreement on the terms set out in Clauses 17.12 and 17.12A. All Scheme and Detailed Design Proposals will be submitted in writing by Concessionco to the Trust Representative and processed to approval in accordance with Clause 17.15 below. Concessionco shall submit and the Trust Representative shall process all Design Proposals in accordance with the Design Programme.

#### 17.8 Law

All Design Proposals shall (and the Initial Design is warranted by Concessionco to) comply with the Law, the Necessary Consents and Applicable Standards. The Trust shall not be obliged to approve or further consider any Design Proposal which does not so comply.

#### 17.9 Approvals

- 17.9.1 The Trust Representative shall be obliged to return marked "Approved" in accordance with Clause 17.15.2:
- 17.9.2 any Scheme Design Proposal or part thereof which is in accordance with those elements of the Initial Design approved by the Trust by the terms of Clause 17.12;
- 17.9.3 any Scheme Design Proposal or part thereof which is not dealt with as part of the approved Initial Design but which is in accordance with the Base Criteria;
- 17.9.4 any Detailed Design Proposal or part thereof which is in accordance with the Scheme Design previously approved in relation to the subject matter thereof;
- 17.9.5 any Scheme or Detailed Design Proposal or part thereof which is in accordance with any Endorsed Design; and
- 17.9.6 any Scheme or Detailed Design Proposal or part thereof which is necessary for the implementation of any element of the Initial, Scheme or Detailed Design respectively which has already been approved, provided that in each case the same also complies with Applicable Standards, the Necessary Consents the Law, any Endorsed Design agreed in respect thereof and (subject to Clause 17.12) the Base Criteria.

#### 17.10 Notice of Variations

As part of each Design Proposal submitted pursuant to Clause 17.3.4, Concessionco shall confirm in writing to the Trust the extent to which, if at all, the contents of such proposal would in the reasonable opinion of Concessionco constitute, if implemented, a Variation and, if so, whether such Variation would constitute a Concessionco or a Trust Variation, the approximate time and cost implications thereof (attaching such substantiating data as is practicable at the time) and the provisions of Clause 18 applicable thereto. Where an Endorsed Design forming part of any Design Proposal already incorporates statements relating to Variations as described in Clause 17.3.8, Concessionco shall be deemed to comply with this requirement by repeating the same statements in the relevant Design Proposal. Those parts of any such proposal which are not asserted by Concessionco to constitute potential Variations shall be dealt pursuant to this Clause 17. Such parts of the Proposal asserted by Concessionco to constitute potential Variations shall thereafter be dealt with either:

where the Trust agrees in principle to the execution of such Variation, pursuant to Clause 18, the agreement or determination of the form of such Variation being deemed approval by the Trust of the Design Proposal comprised therein; or

where the Trust either does not agree in principle either that a Variation would arise or objects to the Proposed Variation, pursuant to the Disputes Resolution Procedure. In the event the said procedure determines that the relevant part of any proposal would constitute a Variation which Concessionco is not entitled by the terms of this Agreement to implement, Concessionco shall re-submit the relevant part of the said Design Proposal on a basis which complies with this Agreement.

#### 17.11 Variations

The Trust Representative shall have no right to amend the Base Criteria, any part of the Initial Design approved pursuant to Clause 17.12 or any Scheme or Detailed Design Proposal which complies with this Agreement or has been approved, save by means of a Trust Variation permitted pursuant to Clause 18.

#### 17.12 Compliance

The Initial Design, to the extent of the design and technical proposals contained therein (but not otherwise), is approved by the Trust in accordance with this Clause 17.12 in respect of:

- 17.12.1 the functional content of all buildings;
- 17.12.2 department layouts and their relationships;
- 17.12.3 relationships of rooms and layout of rooms within departments and corridors and circulation space within departments subject to further proving at 1:50 level save for those elements already proved at 1:50 level in the Initial Design;
- 17.12.3A the useable room by room schedules of areas (“room areas”) set out in Part 3.3.1 of Schedule 4 (and in the event of any inconsistency between the Room Data Sheets and such room areas, the room areas shall take precedence so that any amendment necessary to conform the Room Data Sheets and room areas will be a Trust Variation);

17.12.4 the Group 1 Equipment;

17.12.5

- (a) the useable departmental areas as set out in Part 3.3.2 of Schedule 4, inclusive of clinical and circulation space, internal walls, small pipe enclosures and pilasters, but excluding all other services and structural elements;
- (b) the useable communication areas outside departments as set out in Part 3.3.2 of Schedule 4, inclusive of internal walls, small pipe enclosures and pilasters, but excluding all other services and structural elements; and
- (c) the building envelope areas as set out in Part 3.3.2 of Schedule 4, inclusive of the subsequent introduction of structure and services but preserving the useable areas referred to in (a) and (b);

17.12.6 the Architectural Statement in Schedule 4; and

17.12.7 the Operational Policies, insofar as implemented in the Initial Design, save in respect of relationships of rooms and layouts of rooms within departments and corridors and circulation space, which are approved only on the terms set out in Clause 17.12.3.

17.12A. Approval

The approval given by the Trust under Clause 17.12 in relation to the Initial Design, (and in relation to the equivalent elements of the Scheme and Detailed Design), shall be binding and irrevocable in establishing Concessionco's compliance with those specific requirements of the Trust referred to in Clause 17.12 above provided that Concessionco shall otherwise remain fully responsible in all respects for the design of the Works and any mistakes, inaccuracy, omission or defects in the same.

17.13 Expedited Procedure

In addition to the procedure described in Clause 17.15, the Trust Representative and Concessionco may from time to time agree to follow an expedited procedure (the "Expedited Procedure") where the relevant portion of the Works is sufficiently self-contained or the commencement of construction in relation thereto is sufficiently urgent to warrant such a procedure. Either party may request the consent of the other to the application of the Expedited Procedure at any time by 5 Business Days prior notice in writing and, where the request is based on the urgency of construction commencement, the other party may not unreasonably decline such a request. Concessionco shall not be entitled to invoke the Expedited Procedure to facilitate the achievement of Completion of any Section prior to the Relevant Completion Date, save where the Parties have previously agreed to such date. The Expedited Procedure may involve any or a combination of:

17.13.1 the commencement of any part of the Design Consultation process or the approval of Scheme or Detailed Design Proposals at dates earlier than those shown in the Design Programme (provided that neither party may by the use of Expedited Procedure compel the other party to accept a period for Design Consultation in relation to any portion of the Works shorter than that indicated on the Design Programme);



- 17.13.2 the combination of approval stages so that, for example, Detailed Design approval is made directly from the Base Criteria;
- 17.13.3 the commencement of construction on the basis of the Base Criteria or the Initial or approved Scheme Design, in advance of the approval of the Detailed Design in relation thereto; or
- 17.13.4 such other procedure as the parties may agree in writing from time to time.

#### 17.14 Forms and Meetings

- 17.14.1 Endorsed Designs produced pursuant to Clause 17.3.7, Design Proposals, the Trust Representative's approvals thereof or comments thereon and requests for or agreements to the application of the Expedited Procedure described in Clause 17.13 shall all be made on the respective forms annexed as Part 5.3 of Schedule 4.

Acceptances, Design Proposals, approvals and requests made other than on such forms shall be of no effect, save where the same are executed in writing by the Trust and/or Concessionco Representatives as required and clearly express an intention so to have effect.

- 17.14.2 In lieu of the sequential submission of and response to Design Proposals or requests for the Expedited Procedure, the parties may from time to time convene meetings, or use other meetings convened as part of Design Consultation, for the purpose of progressing the finalisation of portions of the design, and the Trust Representative and Concessionco may complete Endorsed Designs, Design Proposals, Expedited Procedure requests and approvals thereof, comments thereon or consents thereto in the course of such meetings.
- 17.14.3 Provided that the content of the forms set out as Part 5 of Schedule 4 is adhered to, the same may be prepared and signed by the authorised representatives of the parties as endorsements on the face of design drawings or other documents and a single drawing or document may be endorsed with both a Design Proposal and the Trust Representative's approval thereof or comments thereon.

#### 17.15 Approval Procedure

The approval procedure for each Design Proposal shall be as follows:

- 17.15.1 Concessionco shall submit each Design Proposal to the Trust Representative after the Completion of Design Consultation in relation to the relevant portion of the design and on or before the submission date set out in the Design Programme. Each Design Proposal shall be submitted together with such method statements and other supporting documents as are reasonably required by the Trust Representative in order properly to assess the same pursuant to Clause 17.15.2.
- 17.15.2 The Trust shall procure that the Trust Representative shall within 10 Business Days (or 5 Business Days to the extent that an Endorsed Design has been agreed or within such other period as the parties may agree) of the date of receipt of a Design Proposal submitted in accordance with Clause 17.15.1 or of an amended Design Proposal re-submitted in accordance with Clause 17.17 (also deemed to be a Design Proposal)

return such Design Proposal to Concessionco. The returned proposal shall be marked “Approved”, “Approved with Comments” or “Comments” provided that, when carrying out its review of any Design Proposal, the Trust may only return such Design Proposal marked “Approved with Comments” or “Comments” where permitted to do so in accordance with Clause 17.9. The Trust shall procure that all comments made by the Trust Representative are reasonably particularised and cross referenced to the relevant provisions of the Base Criteria, Law, Necessary Consents, Applicable Standards or other relevant elements of the Initial, Scheme or Detailed Design. Where different and discrete parts of a Design Proposal require different degrees of comment or approval as described above, or are subject to different return periods, the Trust Representative shall respond separately in respect of each part within the period applicable thereto. The references in this Clause to Design Proposal and the procedures applicable thereto shall be deemed to apply equally to any such part.

- 17.16 In the event that the Trust Representative fails to return any Design Proposal to Concessionco in accordance with the requirements of Clause 17.15.2, such Design Proposal shall be deemed to have been returned by the Trust Representative marked “Approved”. Concessionco shall not be entitled to any extension of time, or any additional payment in relation to any such failure.
- 17.17 In the event that a Design Proposal is returned marked “Approved”, Concessionco may proceed to Detailed Design or, as the case may be, construction of that portion of the Works to which such Design Proposal relates. In the event that such Design Proposal is returned in accordance with Clause 17.15.2 marked “Approved with Comments” or “Comments”, Concessionco may at its option:
- 17.17.1 if it accepts the Trust’s entitlement to return the Design Proposal marked “Approved with Comments” or “Comments”, proceed to Detailed Design or, as the case may be, construction of the relevant part of the Works and implement such comments (where marked “Approved with Comments”) or resubmit that part of the said Design Proposal to which the comments relate amended to take account of such comments (where marked “Comments”) in which even the process described in Clause 17.15.2 shall be repeated; or
- 17.17.2 if it disputes the Trust’s entitlement to return the Design Proposal marked as aforesaid either:
- (a) proceed at its own risk to implement the Scheme or Detailed Design or, as the case may be, construction of that part of the Works to which any such comments relate without incorporating the said comments or resubmitting the Design Proposal (as the case may be); or
- (b) in the case of a Design Proposal marked “Approved with Comments” proceed to implement the Scheme or Detailed Design or, as the case may be, construction of that part of the Works incorporating the said comments pending the outcome of the Dispute Resolution Procedure referred to in Clause 17.18 below; or

- (c) decline to proceed with the Scheme or Detailed Design or, as the case may be, construction of that part of the Works pending the outcome of the reference to the Dispute Resolution Procedure referred to Clause 17.18 below,

PROVIDED THAT in all cases Concessionco shall be free to proceed with any part of the Scheme or Detailed Design or, as the case may be, construction of the Works which are unaffected by any comments made by the Trust notwithstanding any pending dispute relating to such comments.

17.18 If Concessionco disputes the Trust's entitlement to return any Design Proposal marked "Approved with Comments" or "Comments", Concessionco shall, notwithstanding that it may have elected to proceed at its own risk pursuant to Clause 17.17.2, submit such dispute to the Dispute Resolution Procedure by serving notice on the Trust within 7 Business Days of the return to it of such Design Proposal, provided that the Trust shall be entitled to invoke the said procedure at any time prior to expiry of such period if notified by Concessionco that it disputes the Trust's entitlement as aforesaid, or if Detailed Design or Works are performed by Concessionco in disregard of comments made on the Trust's behalf. If it is concluded pursuant to the Dispute Resolution Procedure that the Trust was not so entitled:

17.18.1 the return of such Design Proposal marked "Approved with Comments" or "Comments" shall be deemed to constitute a notice given pursuant to Clause 18.4 by the Trust of a proposed Variation (or, in the case of any prior implementation of any comments, a Confirmed Variation Instruction pursuant to Clause 18.6.3) and the provisions of Clause 18 shall apply accordingly; and

17.18.2 any delay occasioned by a suspension of the design or the Works affected by disputed comments pending outcome of the Dispute Resolution Procedure shall be deemed to fall within Clause 24.2.1.

17.19 Concessionco shall not be entitled to any additional payment and/or extension of time for completion of the Works in the event that it is necessary to alter, amend or otherwise vary a Design Proposal or any part of the Works to take account of any comments which the Trust is entitled to make in accordance with Clause 17.15.2.

17.20 Any Design Proposal which is returned to Concessionco in accordance with Clause 17.15.2 marked or deemed to be marked "Approved" (and in the case of a Design Proposal marked "Approved with Comments", that part of the Design Proposal which is not subject to the Trust's comments) shall forthwith comprise part of the approved Concept, Scheme or Detailed Design, as the case may be.

17.21 Nothing in this Clause 17 shall affect the Trust's or Concessionco's right to propose a Variation in accordance with Clause 18.

17.22 Design Programme

17.22.1 The Design Programme shall be amended:

17.22.2 in the circumstances referred to in Clause 24;

17.22.3 in consequence of any application of the Expedited Procedure; or

17.22.4 at any other time by agreement in writing between the Trust and Concessionco Representatives.

The extent and nature of such amendments may be proposed by either party. Amendments pursuant to Clauses 17.22.1 and 17.22.2 shall be referred to the Dispute Resolution Procedure if not agreed within 7 Business Days of any such proposal. A failure to agree pursuant to Clause 17.22.3 shall not be referable to the Dispute Resolution Procedure.

## 18. VARIATIONS

### PART I - CLASSIFICATION OF VARIATIONS

#### Elective Concessionco Variations

18.1 Concessionco may, subject to giving prior notice to the Trust, make Concessionco Variations:

- 18.1.1 during Phase 1, to the Base Criteria which will not materially adversely affect
- (a) the quality, functionality, content, extent or appearance of the Works or the structural, mechanical or electrical performance or function or design life of the Hospital or any significant portion thereof; or
  - (b) the quality, functionality or extent of the Services or their ability to meet the requirements of Schedule 2
- 18.1.2 during Phase 1 to the Initial Design or the previously approved Scheme or Detailed Design which will not materially adversely affect
- (a) the quality, functionality, content, extent or appearance of the Works or their ability to meet the Base Criteria or the structural, mechanical or electrical performance or function or design life of the Hospital or any significant portion thereof; or
  - (b) the quality, functionality or extent of the Services or their ability to meet the requirements of Schedule 2
- 18.1.3 during Phase 2 to the Hospital which do not materially adversely affect
- (a) the quality, functionality, content, extent, appearance, or the structural, mechanical or electrical performance or function or design life of the Hospital or any significant portion thereof; or
  - (b) the quality, functionality or extent of the Services or their ability to meet the requirements of Schedule 2
- 18.1.4 at any time to the Services which will not materially affect their quality, functionality or extent or their ability to meet the requirements of Schedule 2;

PROVIDED THAT such Concessionco Variations are not (in the case of Works Variations) projected (based on the then current Programme) to delay the Completion of the Works or any Section thereof beyond the Completion Date then applicable thereto and will not (in the case

of any such Variation) result in any additional cost, risk or adverse consequences to the Trust and provided further that any such Variation is not in breach of any Applicable Standard, NHS Requirement or Law. Should the Trust contend that any such proposed Concessionco Variation would cause any of the above mentioned material adverse effects or delays or increase any cost or risk to the Trust or give rise to any adverse consequences to the Trust or any such breaches, it shall so notify Concessionco within 10 Business Days of having received such notice (including in its notification details of the grounds of any such contention) and if Concessionco disputes any such contention by the Trust, either party may refer the matter to the Disputes Resolution Procedure. If Concessionco has not received such notice from the Trust within the said period, such Concessionco Variation shall be deemed to be permitted by this Clause and shall, unless withdrawn by Concessionco, be put into effect. In the event of receipt of such written notice from the Trust, Concessionco may also elect in respect only of the Variations referred to in Clauses 18.1.1 and 18.1.2, at its own cost and risk, to proceed with the implementation of any proposed Concessionco Variation pending the determination of the validity of such notice pursuant to the Dispute Resolution Procedure provided that such Concessionco Variation does not relate to any of the Services and does not have any effect on any of the Services. Concessionco may at any time prior to the implementation thereof withdraw any proposed Concessionco Variation.

## **Necessary Variations**

### 18.2

- 18.2.1 Concessionco shall upon prior written notice to the Trust further be entitled, without prejudice to its other rights, to make any Variation necessary (including that referred to in Schedule 4 Part 7.1) to ensure compliance by the Works or the Services with the Base Criteria, any other requirement of this Agreement, any Necessary Consent if required from any Competent Authority or Law, whether or not such a Variation will cause delay to the completion of the Works or any Section beyond the Completion Date then applicable thereto or any of the other adverse effects referred to in Clause 18.1.

Where the need for any such Variation arises from:

- (a) any Concessionco Latent Defect (without prejudice to the Trust's entitlements pursuant to Clause 22);
- (b) any Change in Law as described in Clause 52;
- (c) any Trust Default or Compensation Event (save to the extent caused in turn by any default or breach by Concessionco or its servants, agents, contractors or employees of Concessionco's obligations under this Agreement); or
- (d) the User Restrictive Covenant;
- (e) any breach of the Building Restrictive Covenants where such breach exists at the Effective Date or is committed by the Trust after the Effective Date; or

- (f) any change to the terms of the Planning Consent or consequential changes to the Section 106 Agreement or modification to any other Necessary Consent as referred to in Clause 13.1.5 occurring after the Effective Date, following the exercise of any power by the Competent Authority or any challenge to the said consent save where such challenge is made by or as a result of any act or default of Concessionco,

the Variation shall be a Deemed Trust Variation and Concessionco shall be entitled to an extension of any Completion Date and adjustment of the Programme and Design Programme pursuant to Clause 24 (in the case of Works Variations) and payment pursuant to Clauses 18.7 to 18.10 in respect thereof. In all other cases, Concessionco shall implement the same as a Concessionco Variation at its own cost and risk and no extension of any Completion Date or adjustment of the Programme or Design Programme or increase to the Total Payment shall be made or permitted.

### **Consensual Trust Variations**

- 18.3 Concessionco may propose Variations in circumstances other than those set out in Clauses 18.1 and 18.2, provided that in relation thereto Concessionco submits to the Trust Representative its proposals in accordance with Clause 18.6.2(a) to (g). If the Trust, having considered the proposals, reaches in its absolute discretion agreement with Concessionco pursuant to Clause 18.6.3 to such Variation it shall issue a Confirmed Variation Instruction to Concessionco which shall then put the same into effect as a Trust Variation. The Trust shall have no power, and the Disputes Resolution Procedure no jurisdiction, to compel the implementation of any Variation proposed pursuant to this Clause 18.3 in the absence of the agreement of Concessionco.

### **Requested And Deemed Trust Variations**

- 18.4 The Trust may at any time propose Trust Variations, such proposals to be made by written notice from the Trust Representative containing brief particulars of the proposed Trust Variation. Concessionco shall not be obliged to carry out a Trust Variation proposed pursuant to this Clause 18.4 where it serves notice upon the Trust within 7 Business Days of receipt of the Trust's proposal that, in Concessionco's reasonable opinion, such Trust Variation:
  - 18.4.1 would result (in the case of a Trust Works Variation) in an extension of the Completion Date for the New Build Works of more than 3 months either alone or when aggregated with extensions of time previously granted for other Trust Works Variations;
  - 18.4.2 would result (in the case of a Trust Works Variation) in an increase or decrease (when aggregated with other such increases or decreases respectively arising from earlier Trust Works Variations) in the cost to Concessionco of carrying out the Works (in the categories described in Clause 18.8.1) equal to or greater than £3,600,000 (in the case of increases) or £3,200,000 (in the case of decreases).

PROVIDED THAT for the purposes of this Clause 18.4.2:

- (a) the total of all cost increases and the total of all cost decreases resulting from such Trust Works Variations shall each be calculated separately, and the limits

above referred to applied to each, without regard to the netting effect of decreases or increases respectively occasioned by other Trust Works Variations;

- (b) the debiting or crediting of the Client Contingency for the purposes, respectively, of partly or wholly funding or reflecting a saving achieved by a Trust Works Variation shall be deemed to be a cost increase or decrease; and
  - (c) the cost of Trust Works Variations deemed to have been confirmed in respect of the rectification of Concessionco Latent Defects or Trust Defects pursuant to Clause 22 or of any Trust Change of Law pursuant to Clause 52 shall be excluded from accruals towards the aforesaid financial and time limits (but all other deemed or proposed Trust Works Variations shall be included);
- 18.4.3 would be in breach of any Applicable Standard, NHS Requirement or Law, whether applicable to the Trust or Concessionco or Concessionco's sub-contractors;
- 18.4.4 would after implementation adversely affect the structural, mechanical or electrical performance or function or design life of the Hospital or any significant portion thereof or, to a material extent, any Equipment therein for which Concessionco is responsible;
- 18.4.5 is proposed (in the case of a Trust Works Variation) later than a date 3 months prior to the actual date of Completion of the New Build Works projected by the then current Programme;
- 18.4.6 would (in the case of a Trust Works Variation,) cause an increase of greater than 5% in the Total Payment for any Year;
- 18.4.7 is one which the Trust will, on the balance of probabilities, be unable to fund in accordance with this Clause 18;
- 18.4.8 increases the risks other than by an immaterial amount of any Unit becoming Unavailable or failing to comply with any Law or of Concessionco incurring any Performance Deductions or Termination Indicators; or
- 18.4.9 if the documentation referred to in Clause 18.5 is not provided to Concessionco.

Any such notice shall be accompanied by Concessionco's grounds for such opinion and, in the event that the Trust Representative disputes the same, the parties shall meet and shall use reasonable endeavours to reach agreement in relation thereto, failing which the matter shall be determined by reference to the Disputes Resolution Procedure. Pending such determination Concessionco shall be under no obligation to proceed with the relevant Variation. If Concessionco's notice is upheld, Concessionco shall not be obliged to implement the proposed Variation provided that where the Trust is required to implement the proposed variation by Law or in Phase 2 by Demonstrable Healthcare Requirements the parties shall endeavour through negotiation to agree on a basis upon which, notwithstanding its previous objection, Concessionco will carry out the Variation. If no such agreement has been reached within fifteen (15) Business Days following the acceptance or determination of the validity of Concessionco's aforementioned notice, the Trust may (if and only if required by Law or (in

Phase 2) by Demonstrable Healthcare Requirements) proceed with the subject matter of the Variation and shall be at liberty to execute or implement the Variation itself or through a third party and Concessionco shall permit the Trust so to do and shall provide such co-operation as the Trust may reasonably require provided always that in executing or implementing such a Variation, the Trust shall ensure that the Variation does not give rise to any of the consequences referred to in Clauses 18.4.3, 18.4.4 or 18.4.8. Any such third party employed by the Trust (and its subcontractors at any tier) shall be deemed to be Trust Contractors.

18.5 At the same time as the Trust proposes a Trust Variation pursuant to Clause 18.4 (or as soon as reasonably practicable following receipt by the Trust of a Change in Law Notice), the Trust shall notify Concessionco of the extent to which the Trust is required to obtain in accordance with the procedures of the National Health Service:

- (i) any written approval to the proposed Trust Variation (and the financial consequences thereof for the Trust) by any of Her Majesty's Treasury or by the Secretary of State for Health;
- (ii) any approval from Calderdale and Kirklees Health Authority or any successors of the principal purchasers of the Trust (or their equivalent) confirming their approval of the proposed Trust Variation.

Once, in accordance with this Clause 18, the terms of the proposed Trust Variation are agreed and/or determined, the Trust shall provide to Concessionco evidence of any such approval referred to in (i) and (ii) above (drafted to reflect such agreed and/or determined Trust Variation).

18.6 Where Concessionco has not served notice pursuant to Clause 18.4 or it is determined pursuant to the Dispute Resolution Procedure that Concessionco was not entitled to serve any such notice, the following procedure shall apply:

18.6.1 The Trust Representative shall within 10 Business Days of its initial proposal or 5 Business Days of the said determination give to Concessionco a further notice indicating in detail the nature of the proposed Trust Variation or, in the case of a Change in Law Notice, the Trust's comments on such Notice. Within 5 Business Days after receipt of such notice, the parties shall meet to discuss such proposed Trust Variation, the Trust providing such further information as Concessionco may reasonably require including, without limitation, detailed information as to the Trust's requirements and its proposals for their implementation.

18.6.2 Within a reasonable period after the meeting referred to in Clause 18.6.1 and in any event within 20 Business Days after receipt of the notice referred to in Clause 18.6.1 Concessionco shall, acting reasonably, submit to the Trust Representative in relation to each proposed Trust Variation:

- (a) design proposals (in the case of Trust Works Variations and Trust Additional Works Variations) for review together with such method statements and other supporting documentation reasonably required by the Trust;



- (b) estimates of additions to or savings in costs in the categories referred to in Clause 18.8;
- (c) an estimate (in the case of Trust Works Variations) as to the anticipated adjustment to the Programme, the Design Programme and/or any Relevant Completion Date;
- (d) details of any additions or amendments to the Necessary Consents arising from implementation (all costs, delays and other risks associated with such additions or amendments being borne by the Trust);
- (e) such other proposals or estimates as may in the reasonable opinion of Concessionco be necessary for the implementation of the proposed Trust Variation or as a consequence thereof;
- (f) estimates of any subsequent adjustment to the Total Payment and of any other additional or adjusted payments, illustrated by reference to draft amendments to the Financial Model (prepared in accordance with Schedule 22) and calculated with reference to the applicable methods of payment referred to in Clause 18.9; and
- (g) such other information and details as the Trust may reasonably require.

18.6.3 In the event that Concessionco's proposals submitted pursuant to Clause 18.6.2 are agreed in full then (without prejudice to compliance by both parties with the remainder of this Clause 18.6) the Trust Representative shall issue a Confirmed Variation Instruction within 5 Business Days from the date when such proposals are agreed. Concessionco shall give effect thereto forthwith upon (but not prior to) the final grant of any applicable new or amended Necessary Consents, payment by the Trust (if applicable) of the relevant sums into the Account in Trust or (if applicable) the waiver or satisfaction of any conditions to the disbursement of any additional external finance raised by Concessionco. The Trust Representative (in the case of Trust Works Variations) shall make such adjustment to the Programme and Design Programme and grant such extension or reduction of time (if any) for Completion of each Section as has been agreed and effect shall be given (in all cases) to any increase or reduction in capital, operating, financing and other costs as may be agreed to arise as a result of the Variation. The Financial Model shall, if applicable, be adjusted in accordance with Schedule 22 and the Base Contract Sum and Total Funding Cost shall (in the case of Trust Works Variations) be amended accordingly. The Trust shall thereafter make in accordance with Clause 87 any further or additional payments applicable in consequence of the agreement of the aforementioned proposals.

18.6.4 If no agreement can be reached in relation to the proposals referred to in Clause 18.6.2 the Parties shall meet and shall use reasonable endeavours to reach agreement in relation thereto. Failing agreement within 5 Business Days of the receipt by the Trust of the said proposals, the Trust shall notify to Concessionco within a further 5 Business Days whether the proposed Trust Variation should be discontinued (failure to notify being deemed discontinuance) or whether a Confirmed Variation Instruction

should be issued. In the latter case it shall issue a Confirmed Variation Instruction and the amount payable for or in connection with the same pursuant to this Clause 18, (together with any adjustment to the Programme and Design Programme and any extension of any Relevant Completion Date as may be applicable in the case of a Trust Works Variation) shall, to the extent not agreed, be referred forthwith to the Disputes Resolution Procedure. Thereafter the Trust Representative shall make such adjustment to the Programme and Design Programme and grant such extension of time (if any) as may have been determined at each stage of the Dispute Resolution Procedure and effect shall be given (in all cases) to the determined cost, time and other financial consequences of the Confirmed Variation Instruction, including any amendments to the Financial Model in accordance with Schedule 22, any adjustments to the Total Payment and the making of any other payments required to be made by the Trust.

- 18.6.5 If the Trust elects not to or is deemed or determined not to be entitled to issue a Confirmed Variation Instruction, Concessionco shall be paid as a lump sum within 30 days of such election or determination its reasonable costs of providing the information set out in Clause 18.6.2 to the extent that such costs have exceeded £3,000 (exclusive of VAT) in any month or to the extent that the aggregate of such costs which have not been so reimbursed is greater than £7,500 (exclusive of VAT), both figures being subject to RPI Adjustment in each year following the Services Commencement Date.
- 18.6.6 If the Trust Representative notifies Concessionco of a proposed Trust Variation pursuant to Clause 18.6 Concessionco shall not be obliged to commence any construction work, varied Services or other activities pursuant to such proposed Trust Variation until such time as the Trust Representative issues a Confirmed Variation Instruction, the cost and time consequences of such Variation and/or the Trust's entitlement to issue such an instruction are agreed or determined by the Disputes Resolution Procedure in accordance with Clauses 18.6.4, the Trust has obtained any amended Necessary Consents and made any applicable payments into the Account in Trust or, if applicable, waiver or satisfaction of conditions of any external financing obtained by Concessionco has been obtained and the Trust has complied with Clause 18.5. Pending satisfaction of such conditions, Concessionco will use reasonable endeavours, if requested to do so by the Trust, to commence design work, but only to the extent in relation to any proposed Trust Works Variation that the same would not delay or impede design work for the remainder of the Works. Any period elapsing prior to the fulfilment of such conditions shall, subject to Clause 10.1, be included in any extension of time awarded pursuant to Clause 24.
- 18.6.7 Where, in Phase 2, there occurs any material, long term change in the functions, nature or operations of the Trust which would constitute a Trust Services Variation if proposed by the Trust, Concessionco shall serve written notice to that effect on the Trust and the said change shall be valued and carried out (unless revoked by a further Trust Variation) as a Deemed Trust Variation pursuant to this Clause 18 PROVIDED THAT any dispute as to whether the circumstances described in this Clause 18.6.7 have arisen may be referred to the Dispute Resolutions Procedure.

- 18.6.8 The Trust shall not be entitled to elect to discontinue any Deemed Trust Variation PROVIDED THAT, save in the case of Deemed Variations arising pursuant to Clauses 52, the Trust shall be entitled to propose a further Trust Variation cancelling or modifying a Deemed Trust Variation.

### **Valuation of Variations**

- 18.7 The determination of amounts payable by the Trust or of other financial adjustments in respect of Trust Variations, where such amounts or adjustments are not agreed pursuant to Clause 18.6.3, shall, inter alia, involve:
- 18.7.1 a determination of any increase or reduction in the costs incurred or to be incurred by Concessionco in respect thereof pursuant to Clause 18.8;
  - 18.7.2 an identification of the payment method applicable pursuant to Clause 18.10; and
  - 18.7.3 an identification of any further costs or other factors to be included in any valuation in consequence of the payment method adopted pursuant to Clause 18.10.

It is agreed to be a fundamental principle of all such determinations that the financial position of Concessionco (including its ability to meet out of the Availability Element the repayment obligations, cover ratios and other relevant covenants in the Debt Agreements and to maintain the Mark-up and Shareholder Return) shall be preserved as a result of the implementation of a Trust Variation.

### **Determination of Direct Costs**

- 18.8 All Trust Variations (including Deemed Trust Variations) are to be evaluated so as to reimburse and/or reflect:
- 18.8.1 any additional or reduced costs of design, construction, commissioning or repair, based (in the case of Trust Works Variations) upon the rates and prices contained in the Base Contract Sum Analysis insofar as applicable (and in respect of Additional Works Variations upon a fair and reasonable arm's length valuation) and taking into consideration design and construction cost inflation in relation to any varied works and any other incomplete works delayed thereby.
  - 18.8.2 any addition or reduction in financing costs resulting from the funding of the Trust Variation and from any consequential delay to other incomplete works including any Market Breakage Costs or unwinding costs, cancellation costs or other costs incurred in consequence of any cost reductions;
  - 18.8.3 any reasonable addition or reduction in the costs of or revenues derived from providing the Services (including increased or reduced payments to Service Providers); or
  - 18.8.4 any other increase or decrease in the cost of performing Concessionco's obligations hereunder, including without limitation costs of renewal and maintenance, effects on Retail Services and Additional Businesses pursuant to Clauses 29 and 30, insurance, professional fees and overheads.

- 18.9 Each of the Trust and Concessionco shall, in considering Variations proposed by the other, use reasonable endeavours to achieve a reduction in or minimise increases in (as the case may be) the Total Payment. PROVIDED THAT no Variation be valued so as to conflict with the principle referred to in Clause 18.7.3

### **Financial Consequences of Trust Variations**

- 18.10 Payment to Concessionco for Trust Variations shall be made by any or a combination of debits from the Client Contingency (in the case of Trust Works Variations only), lump sum payments by the Trust or increases in Total Payments, as applicable. Cost reductions achieved by Trust Variations shall be reflected in an increase in the Client Contingency (in the case of Trust Works Variations only) and, to the extent applicable, adjustments to Total Payments. The selection and application of the method of payment or cost reduction shall be governed by this Clause 18 and other applicable provisions of this Agreement.

### **Client Contingency**

- 18.11 Where a Trust Works Variation results in a reduction in cost to Concessionco as determined pursuant to Clauses 18.7 and 18.8, the whole or any part of the portion of that reduction attributable to the Building Contractor pursuant to the Design and Build Contract may at the option of the Trust be added as a ledger entry to the Client Contingency. No adjustment to the Base Contract Sum or any Element of the Total Payment shall be made either at that time or subsequently in consequence of such addition. The balance of any such reduction not so added (or any reduction resulting from any other category of Trust Variation) shall be reflected in a reduction in the Total Payment calculated by reference to the Financial Model and in accordance with Schedule 22.
- 18.12 Where a Trust Works Variation the subject of a Confirmed Variation Instruction results in an increase in cost to Concessionco, as determined pursuant to Clauses 18.7 and 18.8, then, subject to Clause 18.4.2, the Trust shall be entitled (but not obliged) to have debited as a ledger entry from the Client Contingency (to the extent that the Client Contingency is sufficient) the whole or any part of that portion of any increase attributable to the Building Contractor pursuant to the Design and Build Contract. Where the Trust elects not or is not entitled to debit such costs from the Client Contingency, or to the extent that the said costs exceed the then available positive balance of such contingency or result from any other category of Trust Variation, such costs shall be paid by the Trust by whichever of the other methods stipulated in Clause 18.10 is applicable.
- 18.12.1 To the extent that there is at the date of Completion of the New Build Works any credit balance in the Client Contingency, the same shall thereafter enure for the benefit of Concessionco and shall not be available for the funding of Variations or other Trust expenditure, nor result in any reduction in any Element of the Total Payment.
- 18.12.2 The Client Contingency is for use only as contemplated in Clauses 18 and 19 and the Trust shall not be entitled to use the Client Contingency for any other purpose, whether by way of set-off or otherwise.

## External Funding

- 18.13 Where a Trust Variation results in the requirement for a Capital Expenditure by Concessionco in excess of £10,000 (to the extent that the Trust has not elected to pay itself for the same by a lump sum pursuant to Clause 18.15 or exercised any right to debit the Client Contingency) Concessionco shall use reasonable endeavours to source external financing to fund such increase. Repayment and servicing of any such financing shall then be met by adjustments in future Total Payments. Concessionco shall use reasonable endeavours to obtain such financing on terms that will give rise to as low an increase in future Total Payments as may reasonably be achieved, consistent with the principle referred to in Clause 18.7 and, if provided by the Senior Lenders without exceeding the Final Maturity Date of the Senior Debt Agreements. Where Creditors, Junior Lenders, Shareholders or Holdco or any of them are entitled to and do decline to make available any financing or Creditors are entitled to and do decline to consent to Concessionco arranging alternative external financing to fund such increase, Concessionco shall be deemed to have used reasonable endeavours as aforesaid. In determining a rate of return on any additional equity required to fund the Variation it shall be assumed that there is no change in the risk profile of the Project to that contemplated in that version of the Financial Model current immediately prior to implementation of the Variation PROVIDED THAT where Concessionco is able to demonstrate that such a Variation gives rise to additional risks being assumed by Concessionco as a consequence of the said Variation, Concessionco shall be entitled to adjustments to the Total Payment which increase the Shareholders Return reasonably required to compensate the providers thereof for such additional risks arising solely as a consequence of such Variation. The adjustments to the Total Payments necessary to cover the repayment and servicing of any external financing raised by Concessionco shall further be calculated:
- 18.13.1 by reference to the actual maturities or repayment or distribution date and other repayment terms, ratio requirements, covenants and other conditions of such external financing;
  - 18.13.2 to the extent necessary to ensure that the repayment and servicing of such financing does not cause any breach by Concessionco of any repayment obligations, ratios or other covenants in the Debt Agreements, or any diminution in the Shareholder Return; and
  - 18.13.3 by reference to the then current version of the Financial Model, in accordance with Schedule 22.
- 18.14 To the extent that a Trust Variation of any category results in an increase or decrease in operating costs or other costs to be incurred or in revenues to be received in Phase 2, or in the requirement for Capital Expenditure by Concessionco of less than £10,000 (subject to the RPI Adjustment) amounts shall be added to or deducted from the applicable element of the Total Payment in any relevant Year taking into account the actual timing and amount of such cost or revenue adjustments and further increases will be made to the Availability Element to the extent necessary to ensure that such cost increases do not cause any breach of the principle referred to in Clause 18.7, in each case by reference to the then current version of the Financial Model in accordance with Schedule 22.

## Trust Funding

- 18.15 Where, despite the exercise of reasonable endeavours as defined therein, Concessionco is unable to source the external funding referred to in Clause 18.13, and in any case where the Trust so elects, the Trust may itself pay for the lump sum expenditure by a lump sum payment or payments. Where the Trust is unable or elects not to fund such a payment, it shall forthwith so notify Concessionco, the relevant Trust Variation shall be deemed to have been revoked and the provisions of Clause 18.6.5 shall apply PROVIDED THAT in the case of a Deemed Trust Variation which the Trust is unable to withdraw, the Trust shall remain obliged to make a lump sum payment and inability or refusal to do so shall be deemed to be a failure to pay by the Trust in an amount equal to the sum otherwise payable, for the purposes of Clause 61 and otherwise.
- 18.16 Any lump sum payment which the Trust agrees or is obliged to make to fund a Trust Variation shall, subject to Clause 18.17, be paid in full into the Account in Trust prior to and as a condition of Concessionco commencing the implementation of the said Variation, and in any event within 5 Business Days of the fulfilment of all other conditions to implementation. The Trust and Concessionco shall act as joint signatories and trustees for the Account in Trust in relation to such sums. The objects, beneficiaries and operation of the Account in Trust shall be as follows:
- 18.16.1 With regard to any Variation in respect of which monies are required to be paid into the Account in Trust, prior to and as a condition of such payment, the parties shall agree (or the Disputes Resolution Procedure determine):
- (a) appropriate milestones towards the completion of such Variation or other events the achievement or occurrence of which shall entitle Concessionco to receive parts of such sum from the Account in Trust; and
  - (b) the amount which shall be payable to Concessionco from the Account in Trust upon the certification by the Independent Certifier (in the case of Trust Works Variations) or by the Phase 2 Certifier (in the case of Trust Additional Works Variations) of the achievement of each milestone or upon the occurrence of the agreed or determined payment event, amounting in aggregate to the full amount of the lump sum.
- 18.16.2 Where it is certified by the Independent Certifier or the Phase 2 Certifier that a relevant milestone has been achieved and that therefore any sum is due to Concessionco pursuant to Clause 18.16.1 above, or where any other agreed or determined payment event occurs, payment of such amount shall be made out of the Account in Trust to Concessionco within 5 Business Days of such certification or occurrence (failure by the Trust to authorise such payment constituting a payment default by the Trust in that amount as at the 5<sup>th</sup> such Business Day).
- 18.16.3 If any sum paid into the Account in Trust above is agreed by the parties or determined by the Dispute Resolution Procedure to be in excess of the total amount payable to Concessionco in respect of the relevant Variation, any such excess shall forthwith be released to the Trust together with any interest which has accrued on such excess.

- 18.16.4 If the Trust fails to make any payment into the Account in Trust in the amount of or at the time required by this Clause, it shall (where revocation is possible and without prejudice to Concessionco's other remedies) be deemed to have revoked the relevant Confirmed Variation Instruction and Concessionco shall be compensated on the basis set out in Clause 18.6.5.
- 18.16.5 Subject to Clause 18.16.6, the Trust shall be the sole beneficiary of all sums held in the Account in Trust until payment is due to be made to Concessionco pursuant to Clause 18.16.2, at which time Concessionco shall become the sole beneficiary in respect of the amount of such payment, the Trust remaining sole beneficiary of any balance.
- 18.16.6 Upon termination of this Agreement, the Trust shall account to Concessionco from the sums held in the Account in Trust for the value of work carried out by Concessionco prior to the date of termination.
- 18.17 The Trust shall be obliged to fund by way of lump sum payments pursuant to this Clause 18.17, and such that there is no double counting, any principal and interest falling due or any other payments whatsoever which Concessionco is obliged to make to the Creditors or any of them pursuant to the Debt Agreements during any period by which the Services Commencement Date is delayed in consequence of any Trust Variation together with:
- (a) any additional amounts payable by Concessionco to the Creditors pursuant to the Debt Agreements arising during and/or incurred in consequence of such period of delay; and
  - (b) to the extent not covered by any adjustment to the Total Payment, any part of the Availability Element which would have been paid but for such delay and which Concessionco would have applied towards payments under the Debt Agreements falling due following the Services Commencement Date (if not so delayed) or in otherwise complying with its obligations under such documents.
- The Parties may, in conjunction with the Creditors, agree payment arrangements different to those described in Clause 18.10 in respect of such payments, including direct payment into an account or accounts nominated by the Creditors.
- 18.18 Any increase or decrease in costs or revenues, consequent adjustments to the Client Contingency or the Total Payment pursuant to Clause 18.10, payments by the Trust, raising or repayments by Concessionco of additional finance and other financial consequences of Trust Variations shall be reflected by adjustment to the Financial Model in accordance with Schedule 22, to Schedule 20, to the Base Case Activity Projections, Base Contract Sum, Original Lender Liabilities or Adjusted Lender Liabilities (as applicable) and the Total Funding Cost.
- 18.19 Where either party identifies prior to the Completion of any Section a Services Variation or Additional Works Variation to be implemented in relation to such Section following its Completion, it may serve the initial notice or proposal relating thereto prior to such Completion and the procedures set out in Clauses 18.1 to 18.6 shall thereafter apply.

18.20 For the purposes of determining disputes arising pursuant to this Clause 18 the Disputes Resolution Procedure shall be applied as follows:

18.20.1 Where the dispute relates to the entitlement of either party to make or give or withhold its consent to the making of any Variation then, regardless of the estimated value of the relevant Variation, the parties shall abide by the decision of the Adjudicator pending review by the Court but remain at liberty to refer that decision to the Courts pursuant to Clause 40. In the event that the Court revises or amends the Adjudicator's decision, the party who challenged that decision shall be indemnified and made whole by the other party to the extent of any cost, loss, liability or damage reasonably incurred by the first party in consequence complying with the Adjudicator's decision and not recovered under the other provisions of this Agreement.

18.20.2 Where the dispute relates to the valuation of, payment for, or any other financial consequence of the implementation of a Variation, the amount in dispute shall be deemed to be the Net Present Value of Concessionco's estimate of the total payments or other credits to be made in its favour in consequence of the disputed items.

19. **NUMBER NOT USED**

20. **NUMBER NOT USED**

21. **INSPECTION, MEETING AND SUPPLY OF INFORMATION**

21.1 At all reasonable times during the execution of the Works, the Trust and any person authorised by the Trust, the Independent Certifier and the Senior Lender's technical adviser will have the right to enter the Site and inspect the Works (subject to giving reasonable prior notice to Concessionco and to the Building Contractor and to complying with their security and safety procedures) to view the state and progress of the Works, to inspect workmanship, goods and materials used or intended to be used in the Works and to ascertain generally that provisions of this Agreement have been and are being complied with.

21.2 The Trust shall notify Concessionco in writing of any non-compliance found upon such inspection and provide details of the said non-compliance and make representations to Concessionco generally concerning the state and progress of the Works as applicable.

21.3 For the avoidance of doubt nothing in this Agreement shall require Concessionco to interfere with the Building Contractor's method for complying with the terms of the Building Contract.

21.4 Concessionco shall procure that the Building Contractor regularly convenes such meetings as may be prudent and necessary (including design team meetings) relating to the Works which Concessionco and the Consultants (or those of them that may be appropriate in the reasonable opinion of the Building Contractor) shall attend and the Trust and/or the Trust Representative and the Service Providers shall also be entitled to attend.

21.5 Concessionco shall procure that the Building Contractor provides the Trust (either in documentary or electronic form) upon reasonable request with 3 copies of all drawings and 3 copies of all other information (including method statements, programmes and health and safety policies/procedures) as the Trust may reasonably require in connection with the extent or



nature of the Works PROVIDED THAT any such requirement shall be deemed to be unreasonable where such copies have already been provided pursuant to Concessionco's other obligations under this Agreement and provided that Concessionco may at its discretion make a reasonable charge for any additional copies required by the Trust in excess of the three copies above referred to.

- 21.6 Save as provided for in Clause 17.12A, the liability of Concessionco under this Agreement shall not be reduced or excluded by any approval, comment, representation, consent, endorsement, enquiry or inspection into any relevant matter which may be made or carried out by or on behalf of the Trust or by any failure to meet or give any such approval, comment, representation, consent, enquiry or inspection or by the appointment of or terms of Concessionco's agreements with the Building Contractor and any Service Providers. The provisions of this Clause 21.6 shall not apply to any express binding directions and/or instructions issued in writing to Concessionco by the Trust or the Trust Representative which are not Variations but which compel Concessionco to do or not to do anything which would, but for this provision, render Concessionco liable to the Trust under this Agreement and in such circumstances, the liability of Concessionco shall be reduced to the extent it would otherwise arise as a result of Concessionco complying with such directions or instructions.
- 21.7 Except where already provided pursuant to Clause 21.5 Concessionco shall procure that the Trust Representative is provided with copies of the following within 10 Business Days of the same being prepared, executed or issued as appropriate (save to the extent that the same have already otherwise been provided to the Trust hereunder):
- 21.7.1 the Construction Contract (including all annexes thereto and all material amendments thereto or variations issued thereunder from time to time);
  - 21.7.2 any necessary revisions of the Programme and Design Programme;
  - 21.7.3 all Necessary Consents;
  - 21.7.4 minutes of Site meetings which materially affect the progress of the Works and of all minuted design team meetings;
  - 21.7.5 all test certificates and commissioning reports; and
  - 21.7.6 all material notices and certificates issued under or pursuant to the Construction Contract.

## 22. DEFECTS AND EXISTING SERVICES

### 22.1 Rectification of Defects

- 22.1.1 Concessionco may in its absolute discretion carry out such works of repair and preventative maintenance consequent upon any Concessionco Latent Defect and (during Phase 2) upon any Trust Refurbishment Works Defect (but not during the Trust Refurbishment Works Defects Liability Period) or Trust Defect or any damage caused thereby as shall be necessary to render the affected part of the Works or the Hospital safe and weatherproof, to avoid further damage or defects and to minimise disruption to the continuation of the Works or Services. Concessionco shall also carry

out such further immediate works of repair and maintenance in consequence of such defects or damage as the Trust may direct in writing. Concessionco shall, subject to Clause 22.1.2, be entitled to recover Compensation in respect of any such defect and in respect of such works or further works pursuant to Clause 55. Such compensation shall be payable in respect of Concessionco Latent Defects and Trust Defects on the basis that the same constitute Compensation Events and in respect of Trust Refurbishment Works Defects on the basis that the same constitute Trust Defaults.

22.1.2 In respect of a Concessionco Latent Defect, Concessionco shall only be entitled to Compensation pursuant to Clause 22.1.1 from the Trust in any Year in the amount by which the aggregate cost of such repair of such defect or damage or preventative maintenance incurred in relation thereto, when aggregated with the like costs incurred in relation to all Concessionco Latent Defects in that Year, exceeds the Concessionco Latent Defect Cap. Any sums recovered by Concessionco from its insurers in relation to the cost of repair or preventative maintenance in relation to any Concessionco Latent Defect or Trust Defect shall not be recoverable from the Trust and the costs reimbursed by such recovery shall not be taken into account in determining whether or not the Concessionco Latent Defect Cap has been reached or exceeded.

22.1.3 Concessionco is and shall remain fully liable in accordance with this Agreement for defects arising in the Works and sums expended in repair or preventative maintenance relating to the same shall not be reimbursed by the Trust or taken into account in calculating whether the Concessionco Latent Defect Cap has been reached or exceeded.

## 22.2 Carrying out of Repair/Preventative Work

22.2.1 The Trust may elect in its discretion to require Concessionco to implement a Variation in consequence of a Concessionco Latent Defect, Trust Defect or Trust Refurbishment Works Defect (or of any damage caused thereby or repair or preventative maintenance carried out in relation thereto) for the purposes of implementing any permanent alteration in the Works or Services which is consequential upon any such defect, damage, repair or maintenance. Where any such defect, damage, repair or maintenance results in any such permanent alteration in the Works or Services, it shall constitute a Deemed Trust Variation in the event that the Trust has not, within 20 Business Days of the occurrence of the relevant defect or damage, expressly instructed such a Variation.

22.2.2 Clause 18 shall apply to any Variation or Change instructed or deemed to be instructed by the Trust pursuant to Clause 22.2.1, and Concessionco shall be entitled to payment to the extent of any costs or losses not reflected by the payment of Compensation, PROVIDED THAT the Trust's right to adjust the Availability Element in consequence of any omission shall be limited on the terms provided in Clause 18.7 and 18.9. The Trust shall in any event remain liable to pay Compensation to Concessionco pursuant to Clauses 22.1.1 and 22.2.2.

## 22.3 Existing Services

- 22.3.1 Concessionco shall be responsible for:
- (a) ensuring that Existing Services to which the Works are required to be connected are of sufficient capacity and compatibility;
  - (b) connecting the New Build Works and Concessionco Refurbishment Works to mains services connection points; and
  - (c) repairing any defect or insufficiency in any Existing Services where necessary to make the connections referred to in (a) or (b) above, save that no such responsibility shall arise where such defect or insufficiency exists in that part of any Existing Services running beneath buildings existing at the Effective Date.
- 22.3.2 Where in the course of carrying out the Works Concessionco identifies a defect in Existing Services falling outside Concessionco's responsibilities as defined in Clause 22.3.1 above but whose rectification is in Concessionco's opinion necessary or desirable for the purposes of operating the Hospital or performing the Services, Concessionco shall notify the defect in writing to the Trust and the Trust shall thereupon either:
- (a) order the defect to be repaired or replaced either by a Trust Contractor or by way of Trust Variation; or
  - (b) decline to order such repair or replacement, in which case the Trust shall be responsible for all loss, damage or liability suffered by Concessionco in consequence of the same on a Trust Default basis.
- 22.3.3 To the extent that the Works are carried out over, under or adjacent to any Existing Services, Concessionco shall avoid any damage to the said services arising in consequence of the Works, and shall rectify any damage so caused.

## 23. COMMISSIONING AND COMPLETION

### 23.1.1 Commissioning

On approval of the Detailed Design by the Trust in accordance with Clause 17 the Detailed Commissioning Schedule shall be developed by the parties from the Outline Commissioning Schedule and shall include modifications and additions to the Outline Commissioning Schedule to show and describe the steps necessary, the party responsible for taking each of such steps and the timing and sequence of each of such steps in order to demonstrate that:

- (a) Pre-Completion Commissioning within each Section will be completed by the Relevant Completion Date in accordance with this Agreement; and
- (b) Post Completion Commissioning (as the same are defined in the Outline Commissioning Schedule) will be completed by the Services Commencement Date in accordance with this Agreement.

Concessionco and the Trust have exercised all reasonable skill, care and diligence in the preparation of the Outline Commissioning Schedule and shall exercise all reasonable skill,

care and diligence in the development of the Detailed Commissioning Schedule so as to minimise the need for any increase or modification to the parties' commissioning responsibilities. Any increase or modification to Concessionco's commissioning obligations in the course of preparation of the Detailed Commissioning Schedule shall be treated as a Trust Variation and the provisions in Clause 18 shall apply, PROVIDED THAT any increase or modification to Concessionco's commissioning responsibilities which should have been reasonably foreseen by Concessionco exercising all reasonable skill, care and diligence shall be treated as a Concessionco Variation.

- 23.1.2 In the absence of agreement as to the Detailed Commissioning Schedule within 8 weeks after completion of the Detailed Design (or such longer period as the parties may agree) the finalisation of the said Schedule will be referred to the Disputes Resolution Procedure.
- 23.1.3 Without prejudice to Clause 18, when agreed or determined as herein provided the terms of the Detailed Commissioning Schedule shall be binding upon the parties.
- 23.2 Concessionco shall undertake all Commissioning for which it is responsible in accordance with the Detailed Commissioning Schedule and the Trust shall co-operate with and provide assistance to Concessionco. In respect of each Section, Concessionco shall, not less than 30 days prior to the date for commencement of Pre-Completion Commissioning thereof shown on the then current Programme, provide to the Trust a copy of the Commissioning Programme provided to Concessionco by the Building Contractor in relation thereto. Concessionco shall at the same time provide outline particulars, in respect of those Sections annotated "Y" in Schedule 4, Part 2.5.1, of the continuing access which it will require to those Sections following Completion thereof for the performance of Relevant Works, and particulars of the Relevant Works themselves. Concessionco shall ensure that the Trust Representative is invited to witness all Pre-Completion Commissioning and is provided with all reports on Commissioning and such information as he may reasonably require in relation thereto and the Trust shall co-operate with and provide all assistance to Concessionco.
- 23.2.1 The Trust shall undertake all Post-Completion Commissioning and Pre-Completion Commissioning for which it is responsible in accordance with the Detailed Commissioning Schedule and Concessionco shall co-operate with and provide assistance to the Trust.
- 23.2.2 Where the Trust commences Post-Completion Commissioning in respect of any Section of the Works prior to Completion thereof (which it may only do with the written consent of Concessionco) the Trust shall not thereafter be able to contend that the said Section has not been Completed and the Independent Certifier shall certify the same as Complete if failure to Complete the same is the result of the Trust so commencing Post-Completion Commissioning.
- 23.3 If the Trust Representative or the Concessionco Representative, acting reasonably, makes any comment in relation to the carrying out of the Pre-Completion Commissioning, Concessionco or the Trust (as the case may be) shall take due regard of such comment.
- 23.4 Interim Certification of Portions of the Works

- 23.4.1 Where Concessionco considers that a material portion of any Section of the Works has, prior to the overall Completion of that Section, been Finished, it may give notice to that effect to the Independent Certifier and the Trust Representative, together with a Finishing List relevant to that portion. At any time within 7 Days after the giving of Concessionco's notice hereunder, the Trust may make such representations as it sees fit regarding such notice and the adequacy of the Finishing List.
- 23.4.2 During the development of the Detailed Commissioning Schedule, the parties shall agree a schedule of such portions of a Section or Sections to which the Trust will be entitled to have access ("Access Schedule") for carrying out Pre-Completion Commissioning as referred to in Clause 23.4.5(a). The Access Schedule shall be deemed to be a part of the Detailed Commissioning Schedule and in the event the parties are unable to agree an Access Schedule within 8 weeks after completion of the Detailed Design (or such longer period as the parties may agree) the finalisation of the said Schedule will be referred to the Disputes Resolution Procedure.
- 23.4.3 Within 7 days of receipt of the notice referred to in 23.4.1 the Independent Certifier shall, in conjunction with the Trust and Concessionco, inspect the relevant portion and either:
- (a) issue a Finishing Certificate certifying the date on which the relevant portion was Finished and that he is satisfied with the Finishing List; or
  - (b) give instructions in writing to Concessionco specifying all work which in his opinion is required to be done by Concessionco as a condition of issuing such a certificate (following which Concessionco may serve a further notice pursuant to Clause 23.4.1).
- 23.4.4 Any Finishing Certificate and Finishing List issued and finalised pursuant to Clause 23.4.3 shall, to the extent of the works so certified as Finished, continue to be binding on the Parties and on the Independent Certifier in relation to the relevant portion for the purposes of issuing a Certificate of Completion in respect of the Section in which the said portion is located, save in respect of any defect or damage occurring or becoming apparent after Finishing the portion, responsibility for which shall be apportioned pursuant to the other terms of this Agreement (for example as a Trust Default, Compensation Event, Trust Defect, Concessionco Latent Defect or otherwise) and rectification of which (unless Snagging Items) shall be a precondition to Completion of the relevant Section.
- 23.4.5 During any period between Finishing of any portion pursuant to Clause 23.4.1 and Completion of the Section in which that portion is located, Concessionco shall:
- (a) remain in exclusive possession of the same save to the extent that the Trust is entitled to carry out Pre-Completion Commissioning or the Parties agree to allow the Trust to have access to the relevant portion for the early performance of any Post-Completion Commissioning, installation or testing of Trust Equipment or such other purposes as they may agree; and

- (b) remain responsible for the care thereof on the like basis as if the same had not been Finished, save in relation to any damage or defect for which the Trust is responsible.

Where both parties are carrying out or procuring work in the relevant portion following its Finishing (including Concessionco's Pre or Post Completion Commissioning or any Relevant Works) each shall use reasonable endeavours to avoid disruption, delay or inconvenience to the other.

### **Completion of Sections**

23.5 When Concessionco considers that each Section is complete, it may give a notice to that effect to the Independent Certifier together with:

23.5.1 a draft Snagging List for such Section and an undertaking to the Trust to finish any Snagging Items as soon as practicable and in any event within 90 Days after the Services Commencement Date (or such longer period as the Parties agree); and

23.5.2 detailed particulars of outstanding Relevant Works and the continuing access which it will require for such Relevant Works. Such notice, undertaking and particulars shall be in writing and copied to the Trust and shall be deemed to be a request by Concessionco for the Independent Certifier to issue a Completion Certificate in respect of the said Section. At any time within the period of 7 Days after the giving of Concessionco's notice hereunder the Trust may make such representations as it sees fit regarding such notice or the adequacy of the Snagging List.

23.6 The Independent Certifier shall within 7 Days of the date of delivery of such notice either issue to Concessionco (with a copy to the Trust) a Completion Certificate stating the date on which in his opinion the relevant Section was Complete in accordance with this Agreement and that he is satisfied with the adequacy of the Snagging List or else give instructions in writing to Concessionco specifying all the work which in the Independent Certifier's opinion is required to be done by Concessionco before issuing such certificate (any earlier Finishing Certificates for portions within the relevant Sections being binding upon him on the basis set out in Clause 23.4.4). If the Independent Certifier shall give such instructions then Concessionco shall be entitled to receive such Completion Certificate within 7 days of completion of the work specified in the said instructions to the reasonable satisfaction of the Independent Certifier. Either party may commence any outstanding Post-Completion Commissioning in respect of the relevant Section for which it is responsible during the period of 7 days from the issue of Concessionco's notice pursuant to Clause 23.5 provided always that:

- (a) any party undertaking such commissioning in such circumstances will do so entirely at its own risk; and
- (b) the undertaking of such commissioning by the Trust in such circumstances will not constitute an admission by the Trust that the relevant Section is Complete.
- (c) the Trust shall cease such commissioning if it impedes Concessionco from completing any Works specified by the Independent Certifier as a condition of issuing any Completion Certificate.

- 23.7 Concessionco shall complete all Snagging Items as soon as practicable (taking into account any delay in Commissioning which may be caused by the completion of Snagging Items) after the issue of the relevant Completion Certificate unless so to do would in the reasonable opinion of either party delay the Commissioning for which that party is responsible pursuant to Schedule 16, and the Trust shall allow Concessionco reasonable access to the Trust's Premises for that purpose. Snagging Items shall in any event be completed within 90 Days after Services Commencement Date (or such longer period as the Parties may agree), PROVIDED THAT the Trust shall use reasonable endeavours to enable Concessionco to carry out the same at times when the relevant part of any Unit is in any event not required for use by the Trust.
- 23.8 If either party disputes any decision or failure to decide of the Independent Certifier as to when any portion or Section was Complete (such decision to include any decision of the Independent Certifier as to the adequacy of the Snagging List) it may within 7 days of issue of the Relevant Completion Certificate or within 14 days of Concessionco giving notice under Clause 23.5 and not thereafter refer the dispute to the Disputes Resolution Procedure. If a Completion Certificate has been issued and no such reference is made within that period the Completion Certificate shall be conclusive evidence that the relevant Section was Complete at the time specified therein and shall be final and binding on the parties. If a Completion Certificate has not been issued and neither party has referred the matter to the Disputes Resolution Procedure within 14 days of Concessionco giving notice under Clause 23.5, the Certification of Completion of the relevant Section shall not be deemed to have been issued and Concessionco may at any time thereafter serve a further notice under Clause 23.5. If pursuant to the Disputes Resolution Procedure it is determined that the relevant Section is Complete, then the Completion Certificate shall be deemed to have been issued on the date on which such determination was made and the said determination shall establish the actual date on which the relevant Section was Complete and any other matter referred to in Clause 23.5.
- 23.9 While the Contractor may request a Finishing Certificate for a portion of a Section at any time, it shall not be entitled to the certification of Completion of any Section or of the New Build Works on a date which is earlier than the Completion Date applicable thereto. The Parties may, in their discretion, agree to earlier certification of Completion in relation to any other Section or Sections.
- 23.10 At any time during the period of 60 days subsequent to Completion of the New Build Works the Trust shall be entitled to access to the Works to carry out any Commissioning then outstanding in accordance with the Detailed Commissioning Schedule and shall complete all Commissioning for which it is responsible pursuant to Schedule 16 within such period of 60 days.
- 23.11 The extent and nature of areas required by Concessionco and its subcontractors to complete the Relevant Works shall be agreed between the parties within 14 days following receipt of the notice from Concessionco referred to in Clause 23.5 or, failing such agreement, forthwith determined by the Dispute Resolution Procedure. The Trust shall grant access to Concessionco and its subcontractors in accordance with such agreement or determination to the relevant parts of the Completed Section. The Independent Certifier shall be required to certify Completion of those Sections annotated "Y" in Schedule 4 Part 2.5.1 notwithstanding the requirement to perform Relevant Works therein.

- 23.12 For the period between their Completion and the Services Commencement Date, those Sections annotated “P” in Schedule 4 Part 2.5.1 shall be occupied by the Trust and/or its contractors, employees, patients and others. As between Concessionco and the Trust, the said Sections and all equipment, furniture, fittings and other Items therein shall remain entirely at the risk of the Trust during that period, subject only to any right of the Trust pursuant to the express terms of this Agreement to any indemnity from or other remedies against Concessionco in consequence of the breaches or defaults of Concessionco.
- 23.13 Not later than 30 Days prior to the Services Commencement Date, Concessionco and the Trust shall procure the commencement by their respective representatives of a survey of the condition of those Sections occupied by the Trust as referred to in Clause 23.12 and endeavour to produce not later than the Services Commencement Date an agreed condition survey. Failing such an inspection or agreed survey by the dates referred to, either party may instruct the Independent Certifier to produce a condition survey as at the Services Commencement Date and to compile and preserve such further evidence of the condition of the said Sections as may seem to him reasonable to assist in the resolution of any subsequent disputes between the parties.
- 23.14 The Trust shall be obliged to hand back all Sections occupied by it pursuant to Clause 23.12 to Concessionco with effect from midnight at the beginning of the Services Commencement Date in the condition in which they were required by this Agreement to be as at the respective dates of their Completion, excepting only minor wear and tear, uncompleted Snagging Items and any defects which by this Agreement are the responsibility of Concessionco. At Concessionco’s option, either the Trust shall repair at the Trust’s expense any other defects or damage present in such Sections (Concessionco being entitled to Compensation in respect of such defects and repair on the basis that the same constitute Trust Default) or Concessionco may repair the same itself (subject to like rights to Compensation extending also to the costs of such repairs).

24. **EXTENSION OF TIME - WORKS**

- 24.1 If and whenever it becomes reasonably apparent that the progress of any Section of the Works (including the design thereof) is being or is likely to be delayed by the occurrence of any one or more of the events set out at Clause 24.2 then, as soon as reasonably practicable after such delay or likely delay becomes apparent to it, Concessionco shall give to the Trust Representative notice of the cause and the circumstances thereof followed, as soon as reasonably practicable thereafter and in any event within 21 Days, of receipt of Concessionco’s notice by reasonable particulars of the expected effects of such delay including any resulting delay to the Completion of any Section or to the achievement of any activity shown in the Programme or Design Programme which Concessionco is obliged to execute or complete by dates or within periods stipulated therein. Such particulars shall include copies of all notices, particulars and estimates given by the Building Contractor to Concessionco in respect of the said delay or likely delay. The Trust Representative shall, as soon as reasonably practicable thereafter, having regard to the sufficiency of any particulars provided to him as aforesaid, make such extension of any relevant date or period in the Programme, or Design Programme and of any Relevant Completion Date(s) as is fair and reasonable in all the circumstances. Concessionco shall use reasonable endeavours to avoid or mitigate such delay and the effects thereof.



- 24.2 The events referred to at Clause 24.1 are as follows:
- 24.2.1 any Trust Default or other act of prevention (except to the extent arising from any default or neglect of Concessionco) on the part of the Trust;
  - 24.2.2 any Force Majeure Event, Compensation Event, Uninsurable Risk or Relief Event;
  - 24.2.3 any Trust Variation, whether deemed or expressly instructed;
  - 24.2.4 the unreasonable giving of instructions by the Trust Representative pursuant to Clause 11.3;
  - 24.2.5 any direction by the Trust pursuant to Clause 8.3 the consequences of which are governed by Clause 8.4(b);
  - 24.2.6 the existence of the User Restrictive Covenant or any injunction or other proceedings or events consequent upon its existence;
  - 24.2.7 any breaches of the Building Restrictive Covenant where such breaches exist at the Effective Date or any breaches committed by the Trust or any Trust Contractor after the Effective Date, or any injunction or other proceedings or events consequent upon such breaches;
  - 24.2.8 the presence of any Trust Defect, Trust Refurbishment Works Defect or Concessionco Latent Defect and any damage caused by or repair or preventative maintenance carried out in respect of the same to the extent that such damage is not caused by Concessionco acting in breach of this Agreement.
- 24.3 Concessionco shall give such further notices to the Trust Representative as may be reasonably necessary and shall give the Trust Representative such further information which he may reasonably require for keeping up to date the notice and particulars referred to in Clause 24.1.
- 24.4 The giving by Concessionco of the notices and particulars referred to in Clause 24.3 shall not be conditions precedent to the granting by the Trust Representative of any extension of time otherwise due hereunder.

25. **DELAY TO THE WORKS**

Where Concessionco shall have failed to achieve Completion of the Works by a date twelve (12) months after the latest Completion Date for any Section of the Works, the Trust shall be entitled to terminate this Agreement and the provisions of Clauses 60 and 66 shall apply. Such entitlement shall, together with the rights referred to in Clauses 26.2.1 and 60.1.1, be the sole and exclusive remedy of the Trust in respect of any failure by Concessionco for any reason whatsoever to procure Completion of any Section or of the New Build Works or the Works by the Relevant Completion Date or the achievement of any other activity shown in the Programme or Design Programme which Concessionco is obliged to execute or complete by a date stipulated therein. The Trust unconditionally and irrevocably waives any right to claim or deduct liquidated or unliquidated damages or to claim any other relief or remedy whatsoever (save as provided above) in respect of any such failure.

26. **TRUST REFURBISHMENT AREAS AND TRUST AREAS - WORKS AND MAINTENANCE OBLIGATIONS**

**Trust Refurbishment Works**

- 26.1 The Trust shall procure the Completion of each Section within the Trust Refurbishment Works on or before the Relevant Completion Date, subject only to extensions of time to the extent that the completion of the Trust Refurbishment Works is delayed by any breach of this Agreement or other act of prevention of Concessionco or its sub-contractors (save to the extent arising from any Relief Event, Force Majeure Event, Uninsurable Risk, Compensation Event or Trust Default). The procedures and requirements (mutatis mutandis) set out in Clauses 24.1, 24.3 and 24.4 shall apply to such extensions, substituting references to Concessionco with references to the Trust and references to the Trust Representative with references to the Concessionco Representative. The sole right of Concessionco in respect of any failure by the Trust to procure Completion as aforesaid shall be as set out in Clause 26.2.1.
- 26.2 The Trust Refurbishment Works shall be completed to no lesser quality of specification and standards of workmanship than the Concessionco Refurbishment Works and in compliance with the Law, Applicable Standards and Necessary Consents.
- 26.2.1 During any period between the Services Commencement Date and Completion of the Trust Refurbishment Works and between the Services Commencement Date and the Relevant Completion Dates of Sections annotated "L" in Schedule 4 Part 2.5.1 the Trust shall pay the Availability, Performance and Volume Elements (and the Royalty Payment if applicable) to the full extent to which the same would have been payable but for the non completion of the Trust Refurbishment Works or the said Sections of the Works on such Sections SAVE THAT:
- (a) payment of the Performance and Volume Elements shall be reduced to the extent that Concessionco is reasonably able to mitigate its costs of providing the Services (subject to preserving the Mark-up in any event);
  - (b) during any period for which the Relevant Completion Date for the Trust Refurbishment Works has been extended pursuant to Clause 26.1 (such extension being deemed to take effect at the end of any aggregate delay beyond the previously applicable Relevant Completion Date) Clause 26.2.1(a) shall not apply and the Trust Refurbishment Areas shall be deemed to be Unavailable and the provisions of Clause 33 shall apply;
  - (c) Concessionco shall reimburse the Trust in respect of any direct loss, damages, costs and expenses incurred by the Trust (including but without limitation those damages, costs and expenses properly due and payable by the Trust to the Trust Contractor carrying out the Trust Refurbishment Works, subject to the Trust Contractor being obliged to take reasonable steps to mitigate the effects of the circumstances giving rise to such damages, costs and expenses) in consequence of any delay to such works caused by Concessionco, the Building Contractor any Service Provider or any of their respective employees, sub-contractors, servants or agents; and

- (d) where any sums payable by Concessionco to the Trust pursuant to (c) above are to be recovered by Concessionco from the Building Contractor, any Service Provider or any of their respective employees, sub-contractors, servants or agents, Concessionco's obligation to pay such sums to the Trust shall be deferred until the earlier of:
  - (i) the date of recovery by Concessionco of such sums from the relevant third party; and
  - (ii) the date which is 1 year after the Services Commencement Date;

provided always that interest shall be payable by Concessionco to the Trust on the whole of such sums to be calculated at the Default Contract Rate from the date upon which the relevant loss, damages, cost or expenses are incurred by the Trust until the date of payment.

26.3 The Trust Representative shall keep Concessionco and the Senior Lender's technical adviser fully informed as to the programme for and the conduct of the Trust Refurbishment Works and shall afford the Concessionco Representative and the Independent Certifier facilities to inspect the progress and completion of the Trust Refurbishment Works at reasonable times by prior appointment, together with the like invitations to meetings as are given to the Trust pursuant to Clause 21.4.

26.4 The Completion of the Trust Refurbishment Works shall be evidenced by a completion certificate issued by the Independent Certifier following the procedures set out in Clause 23.

If either party disputes the decision of the Independent Certifier as to whether the Trust Refurbishment Works were Complete at the time specified in the Independent Certifier's completion certificate it may within 14 days of issue of the same refer the dispute to the Disputes Resolution Procedure, and if no such reference is made within that period such completion certificate shall be conclusive evidence that the Trust Refurbishment Works were Complete at the time specified therein and shall be final and binding on the parties.

#### **Maintenance in Trust Refurbishment Areas and Trust Areas**

26.5 Concessionco's obligations in respect of the Estates Maintenance Service in the Trust Refurbishment Areas and Trust Areas shall be:

- (a) to provide Planned Preventative Maintenance as identified as such in the Estates Maintenance Service Specification Arrangement;
- (b) to carry out internal and external decoration works in accordance with Outcome Standards 3.1 and 3.3 of the Estates Maintenance Service Specification Arrangement; and
- (c) to use reasonable skill and care to identify and report to the Trust any maintenance or repairs (other than Planned Preventative Maintenance) that become necessary in the Trust Refurbishment Areas and Trust Areas.

26.6 All maintenance in the Trust Refurbishment Areas and Trust Areas other than that referred to in Clause 26.5 (including without limitation plant replacements) and maintenance or repairs

identified by Concessionco pursuant to Clause 26.5(c) shall be the responsibility of and cost of the Trust PROVIDED THAT Concessionco shall perform any maintenance (excluding plant replacements) and repairs that individually cost (on the basis of materials, plant and labour) less than seventy five pounds (subject to the RPI Adjustment) PROVIDED THAT the cost of such maintenance and repairs shall not exceed the Maintenance Cap.

26.7 In the event that Concessionco fails to comply with its obligations set out in Clause 26.6, and such failure gives rise to circumstances which entitle the Trust to make deductions pursuant to Clause 33 and Schedules 2 and 18 from the Performance Element, such deductions shall only be made until the earliest to occur of the following:

- (a) the Trust serves notice on Concessionco that it does not require Concessionco to remedy such failure (such notice to be deemed to constitute a request for a Trust Variation); and
- (b) such failure is remedied.

26.8 Without prejudice to Clause 26.7, the Trust shall be entitled to compensation from Concessionco for any costs and expenses incurred by the Trust in relation to any repair or maintenance that the Trust undertakes as a result of such breach by Concessionco of its obligations PROVIDED THAT such costs shall only include those costs over and above the cost of repair or maintenance that the Trust would have incurred had Concessionco not been in default.

## 27. **COPYRIGHT AND INTELLECTUAL PROPERTY RIGHTS**

27.1 Concessionco hereby warrants to the Trust that in the design and construction of the Works and in the provision of the Services it will not infringe any Intellectual Property and it will procure that no such infringement will take place by its employees, agents or sub-contractors (including without limitation, the Building Contractor and the Consultants) and Concessionco shall indemnify the Trust from and against all actions, proceedings, costs, claims, demands, liabilities, losses and expenses whatsoever in any way arising from any breach of such warranty.

27.2 Concessionco hereby grants to the Trust an irrevocable, royalty free, non-transferable and non-exclusive licence (which shall include the right to grant sub-licences) to use and reproduce any Intellectual Property (including, as-built and maintenance and operational information and documentation) relating to the Works (or the Hospital (as the same shall be otherwise amended, improved, modified or redesigned from time to time by Concessionco), or for any purpose connected with the completion of the Works and Trust's use of or occupation of the Hospital or any part thereof pursuant to the Agreement or its interest in the Hospital.

27.3 Concessionco shall grant (or shall procure that the person who can grant in respect thereof shall grant) to the Trust an irrevocable, royalty free non-transferable and non-exclusive licence to use and reproduce any Intellectual Property relating to the Services which is used by the current Service Provider or Service Providers (to the extent that it is legally able to do so) such licence to carry the right to grant sub-licences. Such licence:

- (a) shall be granted immediately upon termination of this Agreement; and

- (b) shall expire six months after the termination of this Agreement or the date upon which a new Service Provider takes over provision of the Services;

PROVIDED THAT any such Intellectual Property owner other than Concessionco may be entitled to require, as a condition precedent to the grant of such licence, that the Trust pay any fee or other money due but unpaid to such copyright owner by Concessionco provided that such fees or other moneys shall have been fully disclosed to the Trust prior to the Trust accepting any such obligation and that Concessionco shall indemnify the Trust in respect of any such fee or other money which the Trust is obliged to provide to any Intellectual Property owner pursuant to this Clause.

27.4 Concessionco shall at any time during Phase 1 on reasonable notice from the Trust, produce such evidence of its compliance, or ability to comply (as appropriate) with its obligations under Clauses 27.1 and 27.2 as may be reasonably required by the Trust.

27.4.1 The Trust acknowledges that, as between it and Concessionco, any and all of Concessionco's Intellectual Property rights referred to in Clause 27.2 are and shall remain the sole property of Concessionco or the third party from whom Concessionco has procured the Trust's licence to use such Intellectual Property.

27.4.2 In the event that new Intellectual Property evolves or is generated by Concessionco or arises in the performance by Concessionco of its obligations under this Agreement, the Trust acknowledges that the Intellectual Property rights therein shall belong to Concessionco unless otherwise agreed in writing by Concessionco but shall be subject to the obligation of Concessionco to grant to the Trust a licence or licences in the same form, subject to the same terms and conditions and having the same effect as those licence granted pursuant to Clauses 27.2 and 27.3.

27.5

27.5.1 Notwithstanding Clause 27.4 (but without prejudice to Clause 27.5.2), Concessionco agrees to assign (or procure the assignment by the relevant Service Provider) to the Trust of any Intellectual Property which subsists in any software developed by Concessionco (or the relevant Service Provider) specifically for the Project, either jointly by agreement with the Trust or at the Trust's request (in which case the Trust's request shall amount to a Trust Variation). Such assignment shall take effect immediately upon the creation of such software.

27.5.2 If the jointly developed software is based on any software which is proprietary to Concessionco (or the relevant Service Provider) the assignment shall be subject to the grant of a licence back from the Trust to Concessionco (and/or the relevant Service Provider) in respect of such software which permits Concessionco (and/or the relevant Service Provider) to grant sub-licences of the jointly developed software to third parties and the payment of an appropriate royalty to the Trust in respect of each such sub-licence to third parties.

27.6 In the event that the parties jointly develop any software in accordance with Clause 27.5, the indemnities set out in Clause 9 shall extend to all actions, procedures, costs, claims, demands, liabilities, losses and expenses whatsoever in any way arising out of any infringement of any

third party intellectual property right arising solely out of the contribution to the jointly developed software of the indemnifying party provided always that the parties shall co-operate together to reduce, as far as possible the adverse effects of any such infringement.

28. **EQUIPMENT**

- 28.1 Concessionco shall provide and install at its expense all the Group 1 Equipment not included in the Works, (save for all mortuary hoists) in accordance with Clauses 13.2 and 13.3 by the New Build Completion Date and shall throughout Phase 2, repair, maintain and replace all such Equipment at Concessionco's expense in accordance with Schedule 2.
- 28.2 The Trust shall by the dates set out in the Detailed Commissioning Schedule provide and install at its expense and thereafter maintain and at its discretion replace the Groups 2 and 3 Equipment and all mortuary hoists, save for:
- (a) equipment listed in the Room Data Sheets relating to Concessionco's exclusive use areas as Group 2 or 3 Equipment;
  - (b) the maintenance and replacement of wheelchairs and mortuary concealment trolleys.
- 28.3 The Trust shall further provide Concessionco with 40 wheelchairs in good condition at Services Commencement Date, in consideration for which Concessionco will make a payment to the Trust of £10,000.
- 28.4 The Trust will provide to Concessionco sufficient clean linen to the relevant standards to enable Concessionco to meet its performance obligations under the Linen and Laundry Service Specification Arrangement.
- 28.5 In consideration for the obligation set out in Clause 28.4, Concessionco will pay to the Trust £15,000 per annum (adjusted annually on 1 April by the RPI Adjustment) by way of an adjustment of  $\frac{1}{12}$ th each month by way of addition to the Total Adjustments.
- 28.6 The Trust shall in accordance with the Detailed Commissioning Schedule dismantle, remove, transport to and install into the Hospital all Group 2 and Group 3 Equipment in so far as such equipment is in use by the Trust at other locations owned or controlled by the Trust and in consideration thereof Concessionco shall pay the Trust the sum of £70,000 within 30 Days of such work being certified completed to the reasonable satisfaction of the Independent Certifier.
- 28.7 In discharging its obligations under this Clause 28 each party shall comply with the Outline Commissioning Schedule as developed into the Detailed Commissioning Schedule.
- 28.8 Subject to the provisions of Clause 8 and Clause 11 the Trust shall during Phase 2 permit Concessionco, the Service Provider(s) and their employees, servants, agents, workmen and sub-contractors to use the following categories of Trust Equipment and facilities, namely :
- Medical gas cylinder trolleys
  - Industrial and special gases cylinder trolleys

- Patient movement trolleys including beds used for this purpose
- Lifting aids required in the handling of patients
- Linen exchange trolleys
- Mobile linen bag holders (“Linen Skips”)
- Refuse sack holders
- Refuse skips for clinical waste disposal
- Refuse skips, compactor or alternative for domestic waste disposal

and such other items as may be agreed from time to time (excluding any clinical equipment) as may be necessary for the purpose of providing the Services (and such ancillary purposes as are reasonable in all the circumstances) but not otherwise and subject always to Clauses 36 and 37.

28.9 The permission given under Clause 28.8 is personal to Concessionco the Service Provider(s) and their employees, servants, agents, workmen and sub-contractors and shall cease immediately on the termination of Phase 2.

## **SECTION C: PHASE 2 AND GENERAL PROVISIONS**

### **29. INCOME GENERATION**

29.1 Concessionco shall have the exclusive right as agent with power to grant sub-agencies (subject always to Clauses 29.10 and 29.11) upon the Trust’s behalf to carry on any Additional Business on the Trust’s Premises from the Services Commencement Date so as to generate additional income for the Trust and Concessionco under the provisions of this Clause 29 PROVIDED THAT Concessionco’s exclusive rights under this Clause 29.1 shall not apply to (and Concessionco shall not object to a continuation of) the catering or other services which are provided at the Halifax General Hospital by Voluntary Organisations at the date hereof or as may be agreed between the parties from time to time.

29.2 Such Additional Businesses shall be carried on in those areas of the Trust’s Premises as may be agreed between the parties in the process of development of Detailed Design in accordance with Clause 17 or thereafter as may be allocated by agreement between the parties.

29.3 In the event that Concessionco proposes to carry on a business as an Additional Business, the Trust shall first approve:

- (a) the category of business;
- (b) the style of trading;
- (c) the identity of each individual operator;
- (d) the arrangements between Concessionco, the Trust and such individual operator (including the basis on which Revenue is to be received); and

- (e) the terms of any lease, licence or tenancy agreement with the operator.

29.4 Concessionco, in acting as agent for the Trust :

- (a) shall be entitled to retain for its own account all sums earned from the Additional Business which it is not expressly obliged to pay (whether directly or by set-off) to the Trust;
- (b) may use for its own purposes any information (other than information relating to individual patients' medical records or conditions) obtained by it in carrying out the Additional Business;
- (c) shall be entitled, subject to the specific provisions of this Agreement, to run the Additional Business as it thinks fit; and
- (d) may perform services similar to the Additional Business for its own account (and not as agent for the Trust) outside the Hospital.

These paragraphs also apply to any sub-agent appointed by Concessionco to carry out any Additional Business.

29.5 Subject to Clause 29.3(e), the Trust shall enter into such form of lease or licence with the operator of the Additional Business as Concessionco shall negotiate subject to the Trust receiving from Concessionco an indemnity in such form as it may reasonably require in respect of any obligations which the Trust has to incur to the said operator in order to secure the relevant Additional Business. Concessionco shall act as the agent of the Trust for all purposes in enforcing the obligations of the operator of the Additional Business and the collection of sums due to the Trust. The Trust shall take such action as Concessionco shall reasonably require in connection with such enforcement and the parties shall share equally the costs of any such enforcement.

29.6 Concessionco shall keep and maintain full and complete books and records in respect of any and all Additional Businesses which shall clearly show the Revenue from such businesses.

29.7 Concessionco shall deliver to the Trust a fully particularised statement of account showing the Revenue from each and every Additional Business for the three month period (or part thereof, as appropriate) immediately preceding each Accounting Date within 28 Business Days after such Accounting Date.

29.8 Subject to Clause 42, the Trust shall be entitled at any time upon prior written request to inspect all the books and records of Concessionco or the operator of any Additional Business as appropriate and it shall be a condition of the Trust approving the identity of any such operator that such operator shall give irrevocable consent for the Trust its officers employees and agents to inspect all books and records relating to any such business carried on at the Trust's Premises and for such purpose to enter upon any premises of Concessionco or any such operator where such books and records may be kept for the purpose of such inspection.

29.9 If upon any such inspection the Trust shall find that monies payable to the Trust pursuant to this Clause have been understated by Concessionco such underpayment shall be payable to the Trust in full forthwith together with interest thereupon at the Default Contract Rate calculated



from the date when such payment should have been made AND if any such underpayment shall exceed the amount disclosed and paid by 10% or more then any reasonable costs of such investigation shall be paid and reimbursed to the Trust by Concessionco.

29.10 Subject to Clause 29.13.2, Concessionco shall pay to the Trust in respect of each Additional Business for each Year the total of the following:

29.10.1 the Guarantee (which shall be payable even if there is no Revenue in respect of any Additional Business); and

29.10.2 the Supplement which only shall be payable if the Revenue of the Additional Business in any Year exceeds the Threshold.

29.11

29.11.1 In the event that Concessionco proposes to carry on an Additional Business the parties shall agree in respect of such business figures for the Guarantee, the Threshold and the Supplement relating thereto and endorse a memorandum of such agreement herein and in the absence of any such agreement Concessionco shall not be entitled to conduct any such Additional Business. The Agreement of the Trust to such figures shall not be unreasonably withheld or delayed.

29.11.2 The applicable amount of the Guarantee in respect of an Additional Business for any month shall be included in the Total Adjustments which form part of the Invoice issued by Concessionco to the Trust pursuant to Clause 33.30, and shall be deemed so included if omitted.

29.12 The Trust shall pay to Concessionco:

(a) if the Revenue from any Additional Business is equal to or less than the Guarantee the difference between the Guarantee and the Threshold;

(b) if the Revenue from any Additional Business exceeds the Guarantee but does not exceed the Threshold the difference between the Threshold and the Revenue achieved.

29.13

29.13.1 No failure to reach agreement pursuant to Clause 29.11.1 shall be referred to the Disputes Resolution Procedure, and no adjudicator or Court shall be empowered to impose on the parties terms relating to the conduct of any Additional Business in the absence of their voluntary agreement. For the avoidance of doubt, where there is a failure to reach agreement pursuant to 29.11.1, Concessionco shall not be entitled to carry out the Additional Business in question.

29.13.2 In reaching an agreement relating to any Additional Business the parties may agree payment or other terms different or additional to those described in Clause 29.10.

29.14 In respect of each Year after the Services Commencement Date, payment of the Supplement by Concessionco or payments by the Trust pursuant to Clause 29.11 in respect of any Additional

Business shall be made on May 15<sup>th</sup> following the end of such Year (or the next Business Day thereafter) and (where applicable) shall be set off against one another.

29.15 Concessionco shall procure that any lease or licence entered into pursuant to Clause 29.5 shall contain a provision whereby the operator of the relevant Additional Business indemnifies the Trust against all actions, proceedings, claims, damages, demands, fines, penalties, expenses, legal remedies, compensation, Court or tribunal orders, award costs and all other liabilities connected with or arising from the acts or omissions by the operators of Additional Businesses in respect of the employment or the termination of employment of staff employed by the operators of Additional Businesses provided that this indemnity shall not apply where a claim is based upon or related to the act or omission of any employee or officer of the Trust. The Trust shall be entitled to withhold approval to any proposed arrangement for any Additional Business where the indemnity referred to in this Clause 29.15 is not in a form which is acceptable to the Trust.

29.15A Concessionco shall use all reasonable endeavours to procure that any operator of Additional Businesses shall comply with all material policies and procedures of the Trust which may bear upon the security of the Hospital or the safety, health or well-being of patients, visitors or those working in the Hospital or on the handling of major incidents.

29.16 If the Trust and Concessionco agree to the carrying on of an Additional Business, the parties shall ensure that such Additional Business will not interfere with the provision of the Retail Services, increase the cost of providing them or have a materially adverse effect on the Revenue to be generated by the Retail Services.

### 30. **RETAIL SERVICES**

30.1 Concessionco shall from the Services Commencement Date as agent with power to grant sub-agencies for and on behalf of the Trust (but subject always to Clauses 30.8 or 30.9) carry on the Retail Services.

30.2 Concessionco, in acting as agent for the Trust :

- (a) shall be entitled to retain for its own account all sums earned from the Retail Services which it is not expressly obliged to pay (whether directly or by set-off) to the Trust;
- (b) may use for its own purposes any information (other than information relating to individual patients' medical records or conditions) obtained by it in carrying out the Retail Services;
- (c) shall be entitled, subject to the specific provisions of this Agreement, to run the Retail Services as it thinks fit; and
- (d) may perform services similar to the Retail Services for its own account (and not as agent for the Trust) outside the Hospital.

These paragraphs also apply to any sub-agent appointed by Concessionco to carry on the Retail Services.

- 30.3 The Trust shall enter into such form of lease or licence with the operator of the Retail Services as Concessionco shall negotiate (in a form subject to the approval of the Trust, such approval not to be unreasonably withheld or delayed) subject to the Trust receiving from Concessionco an indemnity in such form as it may reasonably require in respect of any obligations which the Trust has to incur to the said operator in order to secure the relevant Retail Service. Concessionco shall act as the agent of the Trust for all purposes in enforcing the obligations of the operator of such Services and the collection of sums due to the Trust. The Trust shall take such action as Concessionco shall reasonably require in connection with such enforcement and the parties shall share equally the costs of any such enforcement, and the Trust shall be entitled to approve the identity of any individual operator (RCO Support Services Ltd. being hereby approved) and the arrangements between Concessionco and such operator for the receipt of Revenue. Such approval shall not be unreasonably withheld or delayed.
- 30.4 Concessionco shall procure that the lease or licence entered into pursuant to Clause 30.3 shall contain a provision whereby the operator of the relevant Retail Service indemnifies the Trust against all actions, proceedings, claims, damages, demands, fines, penalties, expenses, legal remedies, compensation, Court or tribunal orders, award costs and all other liabilities connected with or arising from the acts or omissions by the operators of Retail Services in respect of the employment or the termination of employment of staff employed by the operators of Retail Services which may transfer to the Trust or a Trust Contractor (when the provisions of Clause 59.4.5 shall apply mutatis mutandis) as a result of the Regulations provided that this indemnity shall not apply where a claim is based upon or related to the act or omission of any employee or officer of the Trust. No liability upon the Trust to make any payment pursuant to Clause 30.10 in respect of the relevant Retail Service shall arise unless and until the Trust is satisfied that the lease or licence has been duly executed in a form which includes the indemnity referred to in this Clause 30.4.
- 30.5 Concessionco shall insofar as is reasonably practicable perform and procure performance of the Retail Services in a manner consistent with compliance with policies and procedures referred to in Clause 43.
- 30.6 Concessionco shall keep and maintain full and accurate accounts in respect of any and all such businesses which shall clearly show the Revenue received from each of the Retail Services.
- 30.7 Concessionco shall deliver to the Trust a fully particularised statement of account showing the Revenue received from each Retail Service for the three month period (or part thereof, as appropriate) immediately preceding each Accounting Date within 28 days after such Accounting Date.
- 30.8 Subject to Clause 42, the Trust shall be entitled at any time upon prior written request to inspect all the books and records of Concessionco or the operator of any Retail Service as appropriate and it shall be a condition of the Trust approving the identity of any such operator that such operator shall give irrevocable consent for the Trust its officers employees and agents to inspect all books and records relating to any such business carried on at the Trust's Premises and for such purpose to enter upon any premises of Concessionco or any such operator where such books and records may be kept for the purpose of such inspection.

30.9 If upon any such inspection the Trust shall find that monies payable to the Trust pursuant to this Clause have been understated by Concessionco such underpayment shall be payable to the Trust in full forthwith together with interest thereupon at the Default Contract Rate calculated from the date when such payment should have been made AND if any such underpayment shall exceed the amount disclosed and paid by 10% or more then any reasonable costs of such investigation shall be paid and reimbursed to the Trust by Concessionco.

30.10 Concessionco shall pay (in accordance with Clauses 30.10.4 and 30.12 as appropriate) to the Trust in respect of each Retail Service the total of the following:

30.10.1 the Guarantee (which shall be payable regardless of the amount if any, of Revenue received by Concessionco from the provider of the Retail Service in question or the extent of the Retail Service provided by it); and

30.10.2 the Supplement which only shall be payable if the Revenue received by Concessionco from the Retail Service in question in any Year exceeds the Threshold.

30.10.3 The amounts (exclusive of VAT) of the Guarantee and the Threshold are as follows as at 1.4.97:

	<b>Guarantee</b>	<b>Threshold</b>	<b>Supplement</b>
Car Parking	£104,000	£176,000	80% of Revenue beyond the Threshold
Catering	£219,000	£251,000	20% of Revenue beyond the Threshold

Upon the 1<sup>st</sup> day of April in each Year of the Contract Period the figures for the Guarantee and the Threshold shall be adjusted annually in accordance with the RPI Adjustment.

30.10.4 One twelfth of the amount of the Guarantee in respect of each Retail Service shall be included in the Total Adjustments for each Month which shall form part of the Invoice issued by Concessionco to the Trust pursuant to Clause 33.30, and shall be deemed so included if omitted.

30.11 The Trust shall pay to Concessionco:

- (a) if the Revenue received by Concessionco from the Retail Service in question does not exceed the Guarantee the amount of the difference between the Guarantee and the Threshold;
- (b) if the Revenue received by Concessionco from the Retail Service in question exceeds the Guarantee but does not exceed the Threshold the difference between the Threshold and the Revenue so received.

30.12 In respect of any Year after the Services Commencement Date, payment of the Supplement by Concessionco or payments by the Trust pursuant to Clause 30.11 shall be made in respect of any such year on May 15<sup>th</sup> or the immediately following Business Day if May 15<sup>th</sup> is not a

Business Day, following the end of such Year and (where applicable) shall be set off against one another.

31. **EMERGENCY STEP-IN**

- 31.1 Without prejudice to any other right of the Trust set out elsewhere in this Agreement, the Trust may, upon written notice specifying such failure, take such steps as are reasonably necessary, using all reasonable care and skill to be expected of a prudent NHS Trust, to remedy or rectify any serious failure by Concessionco to perform any of the Services in accordance with and to the standards required by this Agreement or to cure the Unavailability of any Unit (or may engage others to take such steps on its behalf) where such failure or Unavailability results, or is likely to result, in a serious threat to the health or safety of any person on the Trust's Premises or the inability of the Trust to perform any material Clinical Service or to comply with its material obligations under any Law PROVIDED THAT the Trust may only exercise such a right to the extent that its other remedies under this Agreement would be insufficient to avert or prevent such failure on the part of Concessionco.
- 31.2 Throughout the exercise by the Trust (or others on its behalf) of the rights referred to in Clause 31.1 above, the Trust shall continue to make payments in full of each Element of the Total Payment which would otherwise be payable on the basis of zero Unavailability and provision of all Services in accordance with this Agreement. The Trust shall, further, indemnify and keep indemnified Concessionco in respect of all costs, expenses, losses or liabilities suffered or incurred by Concessionco in consequence of any damage to property, injury or death to persons caused by any act or omission of the Trust (or its servants, agents or subcontractors) or any others exercising such rights on its behalf in the course of the exercise of such rights.
- 31.2.1 The Trust shall in the event that there is a relevant transfer pursuant to the Regulations procure that any Trust Contractor shall comply and act in accordance with all obligations imposed by Law in respect of the employees of Concessionco and/or the Service Providers engaged in the provision of the Services immediately prior to the commencement of the Trust's emergency step-in during the period of the Trust's emergency step-in and the Trust shall indemnify and keep indemnified Concessionco and/or the Service Providers in respect of any actions, proceedings, claims, damages, demands, fees, penalties, expenses, legal remedies, compensation, court or Tribunal orders, awards costs and all other liabilities connected with or arising from any act or omission of the Trust or any Trust Contractor when exercising the Trust's right of emergency step-in to the extent only that such matter relates to any such employee; and
- 31.2.2 During the period of emergency step-in and in the event there is a relevant transfer pursuant to the Regulations the Trust will not amend the terms and conditions of employees of Concessionco or the Service Providers unless it is necessary to do so to remedy the failure of Concessionco or the Service Provider to perform the services.
- 31.2.3 The Trust, Concessionco and the Service Providers shall use reasonable endeavours to minimise any liabilities of Concessionco and the Service Providers in respect of Redundancy Payments which may be occasioned as a result of the exercise of the Trust's rights to step in pursuant to clause 31.1.

- 31.3 The Trust (and any others acting on its behalf) shall forthwith cease the exercise of the rights referred to in Clause 31.1 and vacate any parts of the Trust Premises occupied by them for that purpose within 48 hours after receipt from Concessionco of a notice in writing confirming Concessionco's willingness and ability to resume the performance of its obligations (such notice to be accompanied by reasonable substantiation) or in any event upon completion of the rectification or remediation of the relevant failure or Unavailability.
- 31.4 Concessionco shall reimburse to the Trust, within 5 days of receipt of a properly particularised written demand from the Trust any reasonable costs incurred by the Trust in the exercise of the rights referred to in Clause 31.1 which are additional to the costs which would have been incurred by the Trust in any event but for the exercise of such rights such reimbursement to be in lieu of any adjustment to the Total Payment otherwise applicable in respect of matters arising during the step in period.
- 31.5 The exercise of the Trust's rights under Clause 31.1 shall be without prejudice to its rights to notify any Termination Indicators (or serve any Termination Warnings based thereon) in respect of any failure occurring prior to the exercise of the Trust's rights pursuant to Clause 31.1 or after resumption of performance by Concessionco.

## 32. UTILITIES

- 32.1 Without prejudice to Clauses 22.3 and 55 and from the Services Commencement Date, Concessionco shall be responsible for entering into contracts or procuring the entry by the Estates Maintenance Service Provider into contracts with suppliers of electricity, gas, oil and water for the supply of the same at reasonably competitive market rates to the Trust Premises.
- 32.2 Concessionco shall be or shall procure that the Estates Maintenance Service Provider shall be responsible in the first instance for making all payments under such contracts.
- 32.3 On presentation of any VAT (if applicable) invoice together with documentation proving full and appropriate payment of such bill by Concessionco or the Estates Maintenance Service Provider (as appropriate) on electricity, gas, oil or water for use at the Trust's Premises, the Trust shall forthwith pay to Concessionco an amount equal to the amount shown on such invoice PROVIDED THAT if payment is made more than three (3) Business Days after the date of presentation of such invoice the Trust shall pay interest on the amount of such invoice at the Default Contract Rate from the date which is three (3) Business Days after the date of presentation of such invoice until payment. Such payment shall be in addition to the payments made by the Trust pursuant to Clause 33.

## 32A PROVISION OF SERVICES

- 32A.1 Concessionco shall for the consideration set out in Clause 33 provide the Services in accordance with the Service Specification Arrangements set out in Schedule 2.
- 32A.2 Concessionco shall during and throughout Phase 2 use or shall procure that the Service Provider(s) shall use all reasonable care and skill in the provision of the Services and shall provide the Services in accordance with all of the standards, specifications and other provisions as set out in this Agreement, the Service Specification Arrangements and in compliance with all Law.

- 32A.3 Save as otherwise expressly stated in this Agreement or any Service Specification Arrangement, Concessionco shall provide or shall procure that the Service Provider(s) provide all staff, equipment and materials required for the provision of the Services in accordance with the specifications set out in the Service Specification Arrangements and with the terms of this Agreement provided that the Trust's right and remedies in respect of any breach of Concessionco's obligations under Clauses 32A.1, 32A.2 or 32A.3 shall be limited as set out in Clause 46.
- 32A.4 Without prejudice to the Trust's rights under Clause 33, Concessionco shall ensure that the Services are provided at all times in such a way as to minimise avoidable inconvenience to the Trust and to ensure that no unreasonable disruption is caused to the Trust's clinical or other activities. The Trust shall have the right (by way of the remedy for breach of this Clause) at any time by notice in writing to suspend or vary the timing of the provision of all or any of the Services if (but to the extent only that) such Services have a material adverse effect on any of the Clinical Services. The said notice shall give particulars of the Services to which it applies, the adverse effect complained of and the extent of the variation or suspension necessary in the Trust's view in consequence of the same (including details of the adverse effect on Clinical Services). Concessionco shall forthwith comply with any such notice.
- 32A.4.1 Where the Trust requires Concessionco to suspend or vary the timing of any of the Services pursuant to Clause 32A.4 and such requirement arises from any breach by Concessionco of its obligations under this Agreement, Concessionco shall not be entitled to any extension of time, Compensation or other remedy of relief in consequence of such suspension or variation.
- 32A.4.2 Where any such requirement is made in circumstances other than those set out in 32A.4.1, such requirement shall be treated as a Trust Default unless and until the Trust proposes a Trust Variation and a Confirmed Variation Instruction is issued in respect of such Variation.
- 32A.5 No amendments which have or may have a material adverse effect on the Trust shall be made to the Service Contracts without the written approval of the Trust, such approval not to be unreasonably withheld or delayed.

33. **PAYMENT**

- 33.1 The Trust shall (subject to Clause 55) pay to Concessionco with effect from (and including) the Services Commencement Date the Total Payment as adjusted by and in accordance with the provisions of this Clause 33 PROVIDED THAT no payment of any part of the Total Payment pursuant to Clause 33 shall be made to Concessionco prior to the Services Commencement Date but without prejudice to Concessionco's right to receive any payment for a Trust Variation or Compensation Event or any other payment which the Trust is required to make prior to the said date by the terms of this Agreement.
- 33.2 In addition to the payment referred to in Clause 33.1 the Trust shall pay to Concessionco the Royalty Payment.
- 33.3 For the purposes of this Clause 33 "Hour" means any hour or part thereof commencing at the end of a Cure Period and each hour thereafter (or part thereof).

33.4 If, following any payment made by the Trust pursuant to this Clause, it is subsequently agreed between the parties or determined by the Disputes Resolution Procedure that the amount of any such payment was either higher or lower than the amount due then the party which has received the excess, payment shall pay to the other party such excess together with interest at the Non-Default Contract Rate, provided always that no dispute regarding the correct amount due shall be first raised more than 12 months after the due date for payment.

33.5 Save as otherwise herein provided, if the amount or calculation of any sum invoiced pursuant to Clause 33.30.1 is disputed by either party (the “Disputed Amount”) prior to payment of the same pursuant to Clause 33.30 the Trust shall pay the Disputed Amount in full PROVIDED THAT Concessionco shall raise no dispute (other than in relation to the effect of a Trust Variation) in relation to the Guarantee and without prejudice to the accrual of Termination Indicators pursuant to and for all the purposes of Clause 33.20, such Termination Indicators to have no effect on the Trust’s obligation to pay such Disputed Amount in full pursuant to this Clause 33.5. If by the terms of an award made by an Adjudicator pursuant to the Disputes Resolution Procedure in relation to which Concessionco has not commenced court proceedings within 20 Business Days of the Adjudicator’s award, or of a judgement from a court of competent jurisdiction pursuant to Clauses 41.2.6 or 41.2.7, the Disputed Amount is found not to be due and payable by the Trust, then Concessionco shall pay to the Trust, the Disputed Amount together with interest at the Default Contract Rate on the Disputed Amount which shall have accrued on a daily basis from the date on which the Disputed Amount was paid by the Trust until the date of the payment of the same by Concessionco.

33.6 The Total Payment shall be adjusted pro rata in accordance with Clause 87.4 but shall not be adjusted in accordance with Clause 87.3.

33.7

33.7.1 Subject to Clause 33.7.4, upon the 1st day of each Year of the Contract Period (the first such adjustment to be made on 1<sup>st</sup> April 1999) the amounts of each element of the Total Payment shall be adjusted by the RPI Adjustment save only to the extent provided in Sub-Clauses 33.7.2 to 33.7.5.

33.7.2

- (a) The Hotel Services Staff Costs subject to any increase pursuant to Clause 6.4 shall be adjusted in each Year of the Contract Period (the first such adjustment to be made effective from 1 April 1998) until the 1<sup>st</sup> April following Services Commencement Date by the Ancillary Staff Increase.
- (b) with effect from 1<sup>st</sup> April following the Services Commencement Date (“Calculation Date”) until (but excluding) the first Benchmarking Date so that the adjusted amount shall be:

$$A \times \left( \frac{B + 99}{100} \right)$$



where

A = the Hotel Services Staff Costs as adjusted pursuant to this clause for the period up to the relevant Calculation Date;

B = the percentage figure by which A would increase if Ancillary Staffs Increase were applied to A in the year following the relevant Calculation Date;

(c) by the RPI Adjustment on the first Benchmarking Date and on each 1<sup>st</sup> April thereafter.

33.7.3 In any Year during Phase 1 the Availability Element shall be adjusted by the greater of 3% and the RPI Adjustment.

33.7.4 In any Year which commences on a Benchmarking Date any elements of the Performance Cost or the Variable Cost which are adjusted in consequence of a Benchmarking or Market Testing pursuant to Clause 35 shall not be adjusted pursuant to Clause 33.7; and

33.7.5 In respect of the Performance Cost and the Variable Cost for the Hotel Services save and excluding the Hotel Services Staff Costs in each of the five Years from 1<sup>st</sup> April immediately following the Services Commencement Date such adjustment shall be by the RPI Adjustment less one per cent.

### **Availability Deductions**

33.8 The amount of the Availability Deductions shall be ascertained pursuant to the procedure set out in Clauses 33.9 to 33.15 provided that no amounts shall be included in the Availability Deductions unless and until the procedure set out in Clause 33.10 has been properly complied with, such compliance being a mandatory precondition to any such inclusion. Any Unit of the Hospital shall be deemed available unless it is Unavailable.

33.9 A Unit of the Hospital will be Unavailable if one or more of the Unavailability Criteria set out in Part 2 of Schedule 18 occurs at the Hospital otherwise than:

(a) as a result of any Trust Default or any Compensation Event or other act or omission of the Trust, any person carrying out clinical activities on the Trust's Premises, Voluntary Organisations, patients, Trust Contractors or their respective employees, agents and sub-contractors where such agents and sub-contractors are acting within the scope of their agency or sub-contract;

(b) as a result of a Trust Defect, Trust Refurbishment Works Defect or Concessionco Latent Defect (and/or damage caused by repair or preventative maintenance relating thereto) to the extent that such damage is not caused by Concessionco acting in breach of this Agreement;

(c) as a result of Concessionco or any Service Provider carrying out Maintenance in accordance with this Agreement;

- (d) prior to the Completion Dates of those Sections annotated “L” in Schedule 4, Part 2.5.1 or Completion of the Trust Refurbishment Works (subject to Clause 26.1) in respect of any part of the Hospital the subject of or affected by the ongoing works thereon;
- (e) as a result of the occurrence of any Force Majeure Event or Uninsurable Risk (and/or the consequences thereof); or
- (f) as a result of any actions or proceedings brought to enforce (i) the User Restrictive Covenant; or (ii) the Building Restrictive Covenant in respect of breaches in existence at the Effective Date or any breaches committed by the Trust or any Trust Contractor along with the outcome of any such proceedings or any other consequence of the existence of the User Restrictive Covenant or of the Building Restrictive Covenant to the extent that the Trust assumes responsibility for such consequence under this Agreement;

and such circumstances shall have caused any Units of the Hospital identified in Schedule 18 not to be available for use by the Trust for the purposes set out in Schedule 18;

33.10 If a Unit is Unavailable, the following procedure shall apply:

33.10.1 the Trust Representative may complete and serve on the Concessionco Representative, Section 1 of the Notice of Unavailability;

33.10.2 if following receipt of such notice by the Concessionco Representative such circumstances (or any of them) remain unremedied, (one form of remedy being Concessionco providing an equivalent and suitable (in the reasonable opinion of the Trust) alternative area) for longer than the Cure Period which applies to the Unit in question (in each case commencing at the time when Section 1 of the Notice of Unavailability was received by Concessionco in accordance with Clause 33.10.1), the Trust Representative may complete and serve on the Concessionco Representative Section 2 of the Notice of Unavailability, PROVIDED THAT the Trust shall not be entitled to serve Section 2 of the Notice of Unavailability unless:

(a) such Unit shall have been taken out of use by the Trust and remains out of use; and

(b) the Trust requires the use of such Unit for the purposes set out in Schedule 18;

33.10.3 following the service on the Concessionco Representative of Section 2 of the Notice of Unavailability Concessionco shall, subject to Clause 33.5, be subject to deductions from the Availability Element in relation to the Unit in question PROVIDED THAT such Unit shall:

(i) have been taken out of use by the Trust and remain out of use; and

(ii) the Trust requires the use of such Unit for the purposes set out in Schedule 18.

Such deductions shall be made in relation to each Hour of Unavailability following the end of the relevant Cure Period and pursuant to Clause 33.14 until the earliest of the following:

- (a) Concessionco completing and serving on the Trust Representative Section 3 of the Notice of Unavailability pursuant to Clause 33.10.4; or
- (b) the time at which the Trust serves (or ought to have served) notice pursuant to Clause 33.11 to the effect that it no longer requires the use of the Unit for the purpose set out in Schedule 18; or
- (c) the Trust making use of the Unit for any purpose whatsoever except for access to other areas or to retrieve items needed for patient care; and

33.10.4 As soon as the circumstances which have rendered a Unit Unavailable pursuant to Clause 33.10 have ceased to exist, or been remedied by Concessionco or its sub-contractors, Concessionco shall be entitled to serve Section 3 of the Notice of Unavailability, following the service of which the Trust shall, pursuant to Clause 33.10.3 be no longer entitled to make deductions from the Availability Element in respect of the circumstances or Unit in question.

33.11 If the Trust no longer requires the use of any Unit for the purposes set out in Schedule 18 (or in relation to C Areas for the purposes identified in the Room Data Sheets) in respect of which any deduction from the Availability Element is being made, the Trust shall give notice to Concessionco in writing as soon as reasonably practicable stating that the Trust does not require the use of the Unit and deductions from the Availability Element shall no longer be made. If the Trust subsequently requires the Unit or Units and one or more of the Unavailability Criteria continues other than in the circumstances set out in Clause 33.9, then the Trust Representative may serve Section 1 of the Notice of Unavailability and the provisions of Clauses 33.10 to 33.16 shall apply.

33.12 The total amount of Availability Deductions for any Invoice Month shall be calculated by adding all Availability Deductions the Trust is entitled to make pursuant to Clause 33.10.3 in that month.

33.13 The Trust shall procure that the Trust Representative shall at all times act reasonably in carrying out his functions under Clause 33.10.

33.14 Without prejudice to Clause 33.5, in the event that the Trust is entitled to make deductions from the Availability Element pursuant to Clause 33.10.3, the Availability Deduction for each Hour of Unavailability (such deductions to be made only in relation to Hours after the expiry of the relevant Cure Period) shall be equal to “R” calculated in accordance with the following formula:

$$R = \frac{c \times d}{b}$$

b

in respect of Units in A and B areas as determined in Part 2 of Schedule 18 PROVIDED THAT the deduction for the first Hour of Unavailability shall be R x 2; and

$$R = \frac{c \times d \times e}{b}$$

b

in respect of Units in C areas as determined in Part 2 of Schedule 18 PROVIDED THAT the deduction for the first Hour of Unavailability shall be  $R \times 2$ ,

where:

“b” equals the number of hours in the Year in question;

“c” equals the amount of the Availability Element for the Year in which the Unavailability occurs ;

“d” equals the percentage indicated in Part 2 of Schedule 18 in respect of the Unit which is Unavailable;

“e” equals the percentage of C area which is Unavailable as set out in Schedule 18; and

33.15 It is acknowledged by the parties that changes in clinical practices may necessitate changes in areas included in the Classifications “A”, “B” and “C” in Schedule 18 (such changes only to be made at the instigation of the Trust). In such an event the parties shall agree appropriate adjustments to the percentages in Part 2 of Schedule 18 to ensure always that the percentages of all “A”, “B” and “C” areas as identified in Schedule 18 total one hundred percent (100%). The percentages of areas classified as “A”, “B” and “C” may not be changed from the ratio of 50%, 40% and 10% respectively. If the parties fail to agree to any such adjustment within 14 days after a full written request therefor by one party the matter shall be referred to the Disputes Resolution Procedure to determine the reclassification that has in fact occurred, subject to the limitations set out in this Clause 33.15. The consequent adjustments to such classifications, if any, whether by agreement between the parties or as a result of a determination pursuant to the Disputes Resolution Procedure shall be treated as a Trust Change pursuant to Clause 18.

### **Performance Deductions**

33.16 Concessionco shall each Month prepare a Points Notice setting out the calculation of the Performance Deductions in accordance with Clauses 33.18 to 33.24 for inclusion in each Invoice issued pursuant to Clause 33.30.1.

33.17 The Service Score for each Service expressed as a percentage in respect of each Performance Factor of each Service in respect of the Month preceding the Invoice Month shall be S,

calculated as follows:  $S = \frac{A}{E}$

where:

A = the number of Points actually earned in respect of each Outcome Standard in the relevant Service Specification Arrangement with the relevant Performance Factor as calculated in accordance with Clause 6.1 of Schedule 2.

E = the maximum number of Points available in respect of each Performance Factor as shown in Appendix 4 of the relevant Service Specification Arrangement.

33.18 Subject to Clause 33.19A, the adjusted Performance Element payable in respect of the Outcome Standards relating to any Service for each Performance Factor shall be Y, where:

$$Y = F \times G$$

on the basis that:

F = one-twelfth of the Performance Element for that Service and for that Performance Factor as shown in Schedule 20 (as amended from time to time pursuant to this Agreement); and

G = the percentage shown in the relevant column of Appendix 5 of Schedule 2 against the Service Score (as determined pursuant to Clause 33.17).

33.18A In respect of each Service, the figures calculated for each Performance Factor for the relevant Month pursuant to Clause 33.18 shall be added together to find the adjusted Performance Element payable for that Service in respect of that Month.

33.18B The Performance Deduction in respect of any Month shall be equal to the aggregate of deductions to be made from the Performance Element for each Performance Factor for each Service, each such deduction to equal Z, where:

$$Z = F \text{ minus } Y.$$

33.19 For the purposes of Clause 33.18, “Y”, in respect of each Performance Factor within any Hotel Service, shall be calculated using Appendix 6, rather than Appendix 5, in determining “G” in respect of that Hotel Service, if, at any time, the total Termination Indicators accrued as recorded on Terminators Indicators Notices for that Hotel Service equals 2 or more.

33.19A Where any of the circumstances set out at (a) or (b) below applies, the adjusted Performance Element payable in respect of the Outcome Standards relating to any Service for each Performance Factor shall be Y, where  $Y = F \times S$  on the basis that:

F has the meaning set out in Clause 33.18; and

S has the meaning set out in Clause 33.17:

- (a) during the third complete Month after the Services Commencement Date; and
- (b) from the date on which a Service Provider is replaced until the end of the first month following that date.

### **Termination Indicators and Termination Warnings**

33.20 Without prejudice to Clause 55.7, the Trust may issue a Termination Indicators Notice in respect of any Service if:

33.20.1 at the end of any Invoice Month any Termination Indicators have accrued in that Invoice Month pursuant to Appendix 7 of Schedule 2 in respect of that Service; or

33.20.2 any Termination Indicators remain in force in relation to previous Invoice Months pursuant to Clause 33.26;

PROVIDED THAT if the Trust elects not to issue a Termination Indicators Notice in respect of any Termination Indicators pursuant to this Clause 33.20, such Termination Indicators shall on the first day of the Invoice Month following the Month in which the Trust became entitled to issue the notice, cease to have any effect.

33.21 If at the end of any Termination Period the number of Termination Indicators as recorded on the Termination Indicators Notice equals two (2) or more, the Trust will be entitled to issue to Concessionco a Termination Warning for that Service within 3 Business Days of the end of such Termination Period.

33.21A Without prejudice to Clauses 40 and 41, the accrual of Termination Indicators pursuant to Clause 33.20 shall operate notwithstanding any objection or dispute raised by Concessionco in respect thereof, save where the accrual of any Termination Indicator would entitle the Trust to issue a Service Provider Termination Notice pursuant to Clause 33.22 in which circumstances:

- (a) Concessionco may without prejudice to the generality of Clause 40 and 41, refer the matter to the Disputes Resolution Procedure within 5 Business Days of its receipt of the relevant Termination Indicators Notice; and
- (b) if Concessionco shall have exercised its right under (a) above, the Service Provider Termination Notice in respect of the disputed Termination Indicator shall not take effect unless and until the dispute is determined in the Trust's favour.

### **Replacement of Service Providers**

33.22 If, at any time during the period of 3 Months starting on the Day after the date of the issue of the Termination Warning, the total Termination Indicators recorded in a Termination Indicators Notice for such Service equals two (2) or more (which total shall not include any Termination Indicators accrued prior to the issue of the Termination Warning under Clause 33.21) the following procedure shall apply:

33.22.1 The Trust may within 7 days of the circumstances set out in Clause 33.22 arising give written notice to Concessionco ("a Service Provider Termination Notice"), directing Concessionco to terminate and replace the Service Provider in question within 90 Days of the date of receipt of such notice by Concessionco;

33.22.2 Subject to Clause 58.1.1 Concessionco may procure a replacement Service Provider (the identity of such replacement Service Provider to have been approved in advance in writing by the Trust in accordance with the provisions of Clause 53);

33.22.3 Concessionco shall be deemed to have replaced the Service Provider and complied with Clauses 33.22.1 and 33.22.2 and the Trust shall be deemed to have given approval in accordance with Clause 53 if Concessionco serves a written notice on the Trust confirming that it is undertaking the Service itself. Concessionco shall be

entitled to obtain a replacement Service Provider at a later date provided the provisions of Clause 53 are complied with and PROVIDED FURTHER THAT:

- (a) in respect of a temporary provision of Services by Concessionco lasting not more than 30 Business Days after Concessionco serves the written notice referred to in Clause 33.22.3 (such period to be incorporated within and not to be in addition to the period of 90 Days specified in Clause 33.22.1), such further replacement of a Service Provider by Concessionco shall not be included for the purposes of calculating the number of Service Provider Termination Notices which the Trust has given in a Benchmarking Period for the purposes of Clause 58.1.1; and
- (b) in respect of all other provision of Services by Concessionco after Concessionco serves the written notice referred to in Clause 33.22.3, such further replacement of a Service Provider by Concessionco shall be included for the purposes of calculating the number of Service Provider Termination Notices which the Trust has given in a Benchmarking Period for the purposes of Clause 58.1.1.

33.23 No Points or Termination Indicators recorded in any Points Notice or Termination Indicators Notice in respect of any Service shall have any application to any other Points Notice or Termination Indicators Notice for any other Service.

33.24 No Termination Indicators shall accrue or appear on any Termination Indicators Notice in respect of any Service:

33.24.1 which relate to the performance of any Service during the period which commences on the Services Commencement Date and ends on the last day of the third complete Month thereafter;

33.24.2 in the event that a Service Provider is replaced for any reason during the period which commences on the date of such replacement and ends on the last day of the first Month following such replacement.

33.25 In the event that a Service Provider is replaced (including by Concessionco if Concessionco undertakes to perform the relevant Service itself), for any reason whatsoever, the new Service Provider shall commence with zero Termination Indicators and any previous Termination Indicators with respect to the Service shall cease to have any effect.

33.26 For the purposes of this Clause 33, any Termination Indicators accrued as recorded on any Termination Indicators Notice or Termination Warning for any of the Services, shall not appear in more than three successive Termination Indicators Notices and thereafter shall be deemed never to have been recorded.

### **Availability and Performance Deductions**

33.27

33.27.1 Where any single event or occurrence or any combination of events or occurrences renders Concessionco liable both to Performance Deductions and Availability

Deductions pursuant to this Clause in any Invoice Month, it is hereby agreed and acknowledged that both such deductions shall be made.

33.27.2 Where the failure by Concessionco to provide one Service:

- (a) in accordance with the relevant Service Specification Arrangement; or
- (b) so as to render a Unit Unavailable pursuant to Clause 33.9;

has an adverse effect on the provision of any other Service, no resulting failure to earn Points in respect of that other Service shall be taken into account at any time in determining whether or not a Termination Indicator has accrued.

### **Volume Adjustment**

33.28

33.28.1 The Volume Adjustment in any Month shall in respect of the Catering Services be equal to “VA” calculated in accordance with the following formula:

$$VA = (A \times B) - (C \times B)$$

where

A is the actual number of Inpatient Nights in such Month;

B is the Variable Fee for the Catering Services either:

- (a) at or below the Base Case Activity Projection for the Month of the Year in question in which case the Variable Fee in Column 1 of Table 4 of Schedule 20 shall apply; or
- (b) above the Base Case Activity Projection for the Month of the Year in question in which case the Variable Fee in Column 2 of Table 4 of Schedule 20 shall apply; and

C is the Base Case Activity Projection for the Month in question set out in Column 1 or Column 2 as appropriate in Schedule 12 (or any other number applicable following a Variation).

### **Royalty Payment**

33.29

33.29.1 Within three months after the end of each financial year of the Trust which occurs during Phase 2 the Trust shall deliver to Concessionco a reasonably particularised account showing all actual contracted income from purchasers for acute healthcare services received by the Trust for the immediately preceding financial year in excess of the Trust’s budgeted annual contracted income for acute healthcare services for that financial year and separately such particulars in respect of costs and expenses directly incurred by the Trust in earning any such income in excess of any such budgeted annual contract income and expenditure for any such year. The budgeted annual



contracted income shall be based on the annual plan submitted to the NHS in April of that year.

- 33.29.2 Together with the delivery of such account, the Trust shall pay (exclusive of any Value Added Tax chargeable thereupon) to Concessionco a royalty calculated at the rate of 15% per annum upon the difference between the amount of actual income in excess of the Trust's budgeted contracted income for the year in question (calculated pursuant to Clause 33.29.1) less such costs and expenses directly incurred in earning such excess contracted income in consideration of Concessionco having contributed to the ability of the Trust to earn such excess contracted income.
- 33.29.3 Any and all royalties payable pursuant to this Clause by the Trust to Concessionco shall bear interest at the Non Default Contract Rate from the due date of payment until the actual date of payment.

### **Mechanics of Payment**

#### 33.30

- 33.30.1 On the 8<sup>th</sup> Business Day of each Month for the first 36 months in Phase 2 and thereafter on the last Business Day of each Month (the "Invoice Date") Concessionco shall issue the Invoice to the Trust for:
- (a) the Total Payment in respect of that Month (the "Invoice Month"), which shall be an amount equal to one twelfth of the Total Payment for that Year PROVIDED THAT if the Services Commencement Date does not fall on the first day of a Month or the termination date of this Agreement or a Service Specification Arrangement does not fall on the last day of a Month such amount shall be adjusted pro-rata for such Invoice Months to reflect the number of days actually in that Invoice Month; and
  - (b) the Total Adjustments in respect of the previous month, save in respect of each of the first 36 months of Phase 2 where the invoice will record the Total Adjustment in respect of the month immediately prior to the previous month in respect of the Volume Adjustment.
- 33.30.2 The amount of the Total Adjustments which Concessionco believes should be made, shall be listed together with all relevant calculations and supporting information including the Points Notice.
- 33.30.3 On or before the last Business Day of the Invoice Month for the first 36 Months in Phase 2 and thereafter on the 12<sup>th</sup> Business Day after the Invoice Date (the "Payment Date") the Trust shall pay in immediately available cleared funds to Concessionco the amount invoiced in accordance with Clause 33.30.1.
- 33.30.4 Within 5 Business Days of the Invoice Date the Trust shall respond in writing to such Invoice, such response to state whether the Trust accepts or challenges the Total Adjustments and issue the Termination Indicators Notice (but only if a Termination Indicators Notice is to be issued in accordance with Clause 33.20). If the Trust fails to

issue its response within the required period, the Trust shall be deemed to accept in full all the contents of such Invoice including the Total Adjustments for the purposes of agreeing the Invoice for the Invoice Month but without prejudice to the Trust's right subsequently to challenge any matter relating to such Invoice within 12 months, pursuant to Clause 33.4 and 33.5.

- 33.30.5 Within 5 Business Days of receipt of the Trust's response pursuant to Clause 33.30.4, Concessionco shall notify the Trust in writing as to whether it accepts or challenges the Termination Indicators Notice (if any). If Concessionco fails to notify the Trust within the required period, Concessionco shall be deemed to accept in full all the contents of such Termination Indicators Notice for the purpose of agreeing the Invoice for the Invoice Month but without prejudice to Concessionco's right subsequently to challenge any matter relating to such notice of the Termination Indicators Notice in question within 12 months pursuant to Clauses 33.4 and 33.5.
- 33.30.6 Any disputes in relation to any amounts payable pursuant to this Clause 33.30 shall be dealt with in accordance with the procedure set out in Clause 33.4 and 33.5.
- 33.30.7 If the Trust does not pay the amount included in the invoice by the Payment Date pursuant to Clause 33.30.3, the Trust shall pay interest on such sum at the Default Contract Rate which shall accrue on a daily basis from the Payment Date until the date of payment.
- 33.30.8 The Trust shall by the 15<sup>th</sup> Business Day of each Month provide to Concessionco and on the instruction of Concessionco to the Hotel Services Provider, a statement of the number of Inpatient Nights for the previous Month for inclusion in the Invoice to be issued by Concessionco pursuant to Clause 33.30.1. Concessionco shall be entitled independently to audit the Trust's record to confirm that the numbers of Inpatient Nights stated for any month is correct.
- 33.31 All business rates payable with regard to the Trust's Premises shall be paid upon the due date for payment directly to the local authority by the Trust. If payment is not made by or upon such date Concessionco may, having given the Trust not less than 5 Business Days' written notice of its intention, make such payment itself and reclaim the relevant amount from the Trust. The Trust shall be obliged to reimburse Concessionco in full within 3 Business Days of receipt of a written notice from Concessionco (with appropriate substantiation) that Concessionco has made such payment to the local authority. If such amount (or part thereof) remains outstanding for longer than 3 Business Days after such receipt, interest on the outstanding amount shall be payable by the Trust to Concessionco at the Default Contract Rate.

#### **Hotel Service Unavailability Performance Deductions**

- 33.32 The further adjustments (if any) to be included in the Performance Deductions shall be determined pursuant to the procedure set out in Clauses 33.32.1 to 33.32.6.
- 33.32.1 If one or more of the circumstances set out at Section A Part B items (a) or (b) of Schedule 28 occurs at the Hospital otherwise than:

- (a) as a result of any Trust Default or of any Compensation Event or other act or omission of the Trust, any persons carrying out clinical activities on the Trust's Premises, Voluntary Organisations, patients, Trust Contractors or their respective employees, agents and sub-contractors where such agents and sub-contractors are acting within the scope of their agency or sub-contract;
- (b) as a result of a Trust Defect, Trust Refurbishment Works Defect or Concessionco Latent Defect (and/or damage caused by repair or preventative maintenance relating thereto) to the extent that such damage is not caused by Concessionco acting in breach of this Agreement;
- (c) as a result of Concessionco or any Service Provider carrying out Maintenance in accordance with this Agreement;
- (d) prior to the Completion Dates of those Sections annotated "L" in Schedule 4 Part 2.5.1 or Completion of the Trust Refurbishment Works (subject to Clause 26.1) in respect of any part of the Hospital the subject of or affected by the ongoing works thereon;
- (e) as a result of the occurrence of any Force Majeure Event or Uninsurable Risk (and/or the consequences thereof); or
- (f) as a result of any actions or proceedings brought to enforce (i) the User Restrictive Covenant; or (ii) the Building Restrictive Covenants in respect of breaches in existence at the Effective Date or any breaches committed by the Trust or any Trust Contractor along with the outcome of any such proceedings or any other consequence of the existence of the User Restrictive Covenant or of the Building Restrictive Covenant to the extent that the Trust assumes responsibility for such consequence under this Agreement;

the procedure set out in Clause 33.32.1A shall apply

#### 33.32.1A

- (a) the Trust Representative may complete and serve Section A of the Notice of Non-Performance in the form set out in Section A of Schedule 28;
- (b) if following receipt of such notice by the Concessionco Representative, such circumstances (or any of them) shall remain unremedied (one form of remedy being Concessionco being able to provide a suitable (in the reasonable opinion of the Trust Representative) alternative service or area within the time limits set out in Section A, Part B, item (a) or (b) (as appropriate) of Schedule 28 (in each case commencing at the time when Section A of the Notice of Non-Performance was received by Concessionco in accordance with this Clause 33.32), then the Trust Representative may complete Section B of the Notice of Non-Performance set out in Schedule 28 and may serve such notice on the Concessionco Representative.

(c) In the event that the Trust serves Section B of the Notice of Non-Performance on Concessionco, such service and notice to be served strictly in accordance with this Clause 33.32 the Trust may:

(i) in respect of the circumstances set out at Section A, Part B, item (a) of Schedule 28, add an amount to the Performance Deductions for the relevant Invoice Month, for each Day in which the Section B notice remains in force pursuant to Clause 33.32.2. Such amount shall equal “z” where:

$$z = \frac{P \times A}{N \times a}$$

where:

P = the Performance Element for the Linen and Laundry Service;

N = the number of days in the Year;

a = the number of Sub-Areas in the relevant Hospital Areas;

A = the Applicable Percentage for the Area set out in Section E of Schedule 28

(ii) in respect of the circumstances set out at Section A, Part B item (b)(i) or (ii) of Schedule 28 and in the event that the area is taken out of use by the Trust, add an amount to the Performance Deductions for the relevant Invoice Month for each day in which the Section B notice remains in force pursuant to Clause 33.32. Such amount shall equal “z” where:

$$z = \frac{c \times d}{N}$$

where:

“c” = the amount of the Availability Element for the Year in which the Unavailability occurs;

“d” = the percentage indicated in Part 2 of Schedule 18 in respect of the Unit which is Unavailable.

“N” = the number of days in the Year

(iii) in respect of the circumstances set out in Section A, Part B item (b)(i) or (ii) of Schedule 28 where the area is not taken out of use, add an amount to the Performance Deductions for the relevant Invoice Month for each day in which the Section B notice remains in force. Such amount shall be “z” where:

$$z = \frac{P \times d}{N}$$

where:

“d” equals the percentage indicated in Part 2 of Schedule 18 in respect of the Unit which is Unavailable.

“P” means the Performance Element for the Domestic Service; and

“N” the number of days in the Year

33.32.2 Any notice issued pursuant to sub-Clause 33.32.1 shall remain in force until the earliest of:

- (a) Concessionco completing and issuing to the Trust Representative Section C of the Notice of Non-Performance;
- (b) the time at which the Trust serves (or ought to have served) notice to the effect that it no longer requires the area or service; or
- (c) in relation to deductions pursuant to Clause 33.32.1A(c)(ii) the Trust making any use of the area (if relevant) for any purpose whatsoever except for access to other areas or to retrieve items needed for patient care.

33.32.3 If any of the circumstances set out at Section D of Schedule 28 occur otherwise than as a result of the circumstances set out in Clause 33.32.1 the following procedure shall apply:

- (a) the Trust Representative may complete and serve on the Concessionco Representative a Notice of Non-Provision of Two Consecutive Meals in the form set out in Schedule D of Schedule 28; and
- (b) the Trust may, following service of the notice set out at Clause 33.32.3(a) include in the Performance Deductions for the relevant Invoice Month for each day in respect of which a Section D notice is served an amount which equals “Z” calculated as follows:

$$Z = \frac{P}{N} \times \frac{A}{A}$$

where:

P Means the Performance Element for the Catering Service;

N = the number of days in the Year

- a = the number of Sub-Areas in the relevant Hospital Areas
- A = the Applicable Percentage for the Area set out in Section E of Schedule 28.

PROVIDED THAT such deductions may only be made once in respect of any Sub-Area in any one Day.

- 33.32.4 A Section D notice shall be issued on each Day on which there is a failure to provide two consecutive meals.
- 33.32.5 The provisions of Clauses 33.32 shall be without prejudice to any of the Trust's rights and remedies elsewhere in Clauses 33.8 and 33.17 to 33.23.
- 33.32.6 The total amount of Performance Deductions for any Service for any invoice Month calculated in accordance with Clauses 33.16 to 33.19, 33.32 and 33.33 shall not exceed the monthly Performance Element for that Service.
- 33.32.7 For the avoidance of doubt:
  - (i) performance deductions in respect of Clause 33.32 will be on the basis of one full Day's deduction for each Day (or part thereof) that the non-performance remains unremedied; and
  - (ii) only one deduction in respect of Clause 33.32 shall be made in respect of any Sub-Area in any one Day.

#### **Additional Pensions Adjustment To Performance Element**

33.33 If Concessionco does not establish or procure the establishment of the Pension Scheme (as defined in Clause 38.18.1) and notify the Trust by the Services Commencement Date of such establishment or if Concessionco does not maintain the Pension Scheme (or a replacement scheme which is equivalent to the Pension Scheme) for such period as there are Pensionable Employees (as defined in Clause 38.18) employed by Concessionco or a Service Provider, in respect of some or all of the Services ("the Services Affected"), the amount of the Performance Element shall be adjusted in relation to the Services Affected by deducting "z" from the Performance Element for that Month (and for each subsequent Month in which the Pension Scheme has not been established or maintained):-

"z" = 40% of 1/12 of the annual Performance Element for the Services Affected

PROVIDED THAT if an adjustment occurs under this Clause because Concessionco has:-

- (a) not procured the establishment of the Pension Scheme due to circumstances which are beyond Concessionco's control (any dispute concerning which may be referred by either party to the Disputes Resolution Procedure) and within 18 months of the Services Commencement Date Concessionco procures the establishment of the Pension Scheme or a replacement scheme which is equivalent to the Pension Scheme and the Trust is notified of the establishment of such scheme and the Pensionable Employees are provided with pensionable

service under such scheme backdated to the Services Commencement Date, the Trust will pay on demand to Concessionco an amount equal to 40% of 1/12<sup>th</sup> of the annual Performance Element for the Year in which the original deduction pursuant to Clause 33.33 was made for the Services Affected multiplied by the number of Months for which the adjustment under this Clause 33.33 applied; or

- (b) not procured the establishment of the Pension Scheme due to circumstances which are within Concessionco's control (any dispute concerning which may be referred by either party to the Disputes Resolution Procedure) and within 18 months of the Services Commencement Date Concessionco procures the establishment of the Pension Scheme or a replacement scheme which is equivalent to the Pension Scheme and the Trust is notified of the establishment of such scheme and the Pensionable Employees are provided with pensionable service under such scheme backdated to the Services Commencement Date, the Trust will pay on demand to Concessionco an amount equal to 15% of 1/12<sup>th</sup> of the annual Performance Element for the Year in which the original deduction pursuant to Clause 33.33 was made for the Services Affected multiplied by the number of Months for which the adjustment under this Clause 33.33 applied; or
- (c) not maintained the Pension Scheme and the failure to maintain the Pension Scheme is rectified by Concessionco within 18 months of the failure to maintain so that the Pensionable Employees are provided with pensionable service under the Pension Scheme (or a replacement scheme, as the case may be) backdated to the date of the failure to maintain the Pension Scheme the Trust will pay on demand to Concessionco an amount equal to 15% of 1/12<sup>th</sup> of the annual Performance Element for the Year in which the original deduction pursuant to Clause 33.33 was made for the Services Affected multiplied by the number of Months for which the adjustment under this Clause 33.33 applied.

## **Service**

33.34 Where this Clause 33 provides for the service of any notice:

- (a) by the Trust or Trust Representative upon the Concessionco Representative or for the receipt by the Concessionco Representative of any notice from the Trust or the Trust Representative; or
- (b) by Concessionco or the Concessionco Representative upon the Trust Representative or for the receipt by the Trust Representative of any notice from Concessionco or the Concessionco Representative;

such service or receipt shall be deemed to have taken place for all the purposes of this Clause 33 immediately upon the completion of the transmission of a copy of such notice by facsimile transmission (i) by the Trust Representative to facsimile number 0171 730 0524 (or such other number as Concessionco may notify to the Trust in writing) marked for the attention of the Concessionco Representative in the case of (a) above and (ii) by the Concessionco Representative to facsimile number 01422 353164 (or such other number as the Trust may notify to Concessionco in writing) marked for the attention of the Trust Representative in the

case of (b) above. Both parties shall ensure the provision of a suitable, fully operational facsimile machine for the receipt of such copy notices at all times and it is agreed by the parties that should the receipt by either party of any copy notice be prevented by any reason, service or receipt pursuant to this Clause 33.34 shall be deemed to have occurred for all purposes connected with this Clause 33 if the party serving the notice produces a transmission report from its facsimile machine indicating that the facsimile was sent in its entirety to the appropriate facsimile number and the deemed time of service or receipt shall be the time specified on such transmission report. The party serving the notice shall then be obliged to deliver to the Concessionco Representative or the Trust Representative (as the case may be) the original notice as soon as is reasonably practicable.

34. **QUALITY ASSURANCE**

- 34.1 Concessionco will follow the Quality Assurance Systems and Fault reporting procedures for all of the Services developed by the parties in accordance with the Service Specification Arrangements and this Agreement, such quality assurance and Fault reporting to be conducted at Concessionco's expense.
- 34.2 Without prejudice to the generality of Clause 34.1, all such Quality Assurance Systems and Fault reporting carried out by Concessionco shall be carried out by way of systems and procedures approved by the Trust and such reporting system shall be developed from the framework of the outline for performance measurement set out in the Service Specification Arrangements. Any complaint or Fault reported pursuant to this Clause 34 or coming to the Trust's attention in any manner whatsoever shall be noted in writing by the Trust and Concessionco.
- 34.3 The Trust shall not unreasonably or vexatiously withhold or delay any approval under Clause 34.2.
- 34.4 The Trust shall at all times have the right to observe inspect and satisfy itself as to the adequacy of the procedures carried out pursuant to this Clause 34 and to carry out sample checks upon such procedures or otherwise to audit Concessionco's performance in the provision of the Services in accordance with the Service Specification Arrangements as the Trust may consider appropriate and Concessionco shall provide the Trust with all assistance, co-operation, access, documentation, records and other information as may be reasonably necessary for the Trust to exercise such right.
- 34.5 Concessionco shall at the end of every Month issue a report to the Trust which sets out details of all complaints and Faults in relation to the provision of the Services (whether such complaint is from a patient, Trust staff or otherwise and whether such complaint is made in writing or orally).
- 34.6 Concessionco shall use reasonable endeavours to procure that its agents and subcontractors comply with all reasonable requests of the Trust to improve, alter or repeat any of its quality assurance or Fault reporting systems and procedures.
- 34.7 Entirely without prejudice to the Trust's entitlement to reduce the Availability Element and the Performance Element in accordance with the provisions of this Agreement, the Concessionco Representative and the Trust Representative shall have regular monthly meetings to discuss the



provision of each of the Services. Such monthly meetings shall be held in addition to any other meetings which are specified in any Service Specification Arrangement. Such meetings shall be chaired by the Trust Representative and minuted by the Trust, copies of such minutes to be circulated to Concessionco. At each such meeting, Concessionco shall issue a report to the Trust setting out details of all complaints and Faults in relation to the provision of the Services (whether such complaint is from a patient, Trust staff or otherwise and whether such complaint is made in writing or orally). Any complaints or problems relating to the provision of the Services shall be discussed at such meetings and appropriate action shall be taken. The rights and obligations set out in this Clause 34.7 shall be without prejudice to the rights and obligations set out elsewhere in this Agreement.

34.8 Concessionco's quality assurance and Fault reporting procedures carried out pursuant to this Clause 34 shall be of the quality, efficiency and reliability of a prudent and reputable contractor providing comparable services elsewhere for projects of this size.

## 35. **BENCHMARKING AND MARKET TESTING**

### **Benchmarking**

35.1 At any time not less than twelve months prior to any Benchmarking Date the Trust may require Concessionco to initiate a Benchmarking at Concessionco's expense in relation to any Service other than the Estates Maintenance Service.

35.1.1 The purpose of such Benchmarking shall be to determine the amount of the Performance Cost and the Variable Cost in respect of such Services for the period from such Benchmarking Date.

35.1.2 The Benchmarking shall consist of an exercise undertaken by both parties on the basis of an objective comparison (where possible by reference to previously agreed reference sites being general hospitals of similar size to the Hospital) to determine whether the Trust is paying a fair market price for the provision of the Services. Such exercise shall be carried out by comparing the standards, specifications, scope and prices of the Services with the standards, specifications, scope and prices of similar services provided by comparable reputable organisations possessing similar degrees of skill, human resources, financial status and reputation as the current Service Provider and assuming the imposition on such organisations of pension obligations and contractual obligations and liabilities not materially more onerous than those in the relevant Services Contract in the form entered into on the date of this Agreement. PROVIDED THAT any elements within the price of the Services representing the Mark-up shall be excluded for the purposes of such comparison (although such Mark-up shall be included in the relevant payment to Concessionco following the conclusion of the Benchmarking).

35.1.3 The parties agree that any Benchmarking or Market Testing shall be carried out in good faith and that each party shall act reasonably in relation to any such Benchmarking or Market Testing PROVIDED THAT neither party shall by virtue of this clause be liable to disclose any information which is confidential or which they are not otherwise legally able to disclose.

- 35.2 At any time within the 12 months before any Benchmarking Date, Concessionco shall be entitled to initiate a Benchmarking provided that it shall give the Trust notice in writing that such exercise is being conducted and the provisions of Clause 35.1 shall apply to such Benchmarking.
- 35.3 If Concessionco has not exercised its right pursuant to Clause 35.2 to initiate a Benchmarking, at any time within the 12 months before any Benchmarking Date the Trust may require Concessionco to initiate at Concessionco's expense a Benchmarking exercise in accordance with Clause 35.1 PROVIDED THAT in respect of any such exercise, any change in the Performance Cost calculated in accordance with Clause 35.19 or the Variable Cost calculated in accordance with Clause 35.20 shall take effect on the later of such Benchmarking Date and the date on which the Benchmarking is agreed to be conclusive or Market Testing completed or the date on which any new Service Provider commences provision of Services.
- 35.4 The manner and timing of any Benchmarking and nature of the comparative material to be researched (including the way in which such research is obtained) shall be agreed between the Trust and Concessionco within one month of initiation of such Benchmarking. In the absence of any such agreement (or where Concessionco has failed to institute a Benchmarking within one Month of being required to do so by the Trust pursuant to Clause 35.3) a Benchmarking will not be carried out and a Market Testing shall be undertaken pursuant to Clause 35.9.
- 35.5 The Trust and Concessionco shall (subject to Clause 35.1.3) supply to each other all information in their respective possessions as to the conduct of any Benchmarking within seven (7) days of its conclusion with a view to reaching agreement as to whether such exercise has produced a conclusive result in relation to all or any of the Services in question.
- 35.6 Within 14 (fourteen) days after such exchange of information the Trust and Concessionco shall meet with a view to agreeing (in their absolute discretion) whether such exercise has been so conclusive.
- 35.7
- 35.7.1 In relation to such of the Services for which the parties agree that the result of the exercise has been conclusive such result shall become final and binding on the parties and adjustments shall be made to the Performance Cost as shown in Table 1 of Schedule 20 and the Variable Cost in accordance with Clauses 35.15 to 35.20.
- 35.7.2 If the Benchmarking determines that the Trust is paying a fair market price pursuant to Clause 35.1.2 this Agreement shall continue upon the payment terms existing prior to the Benchmarking
- 35.8 For the avoidance of doubt the Regulations shall be deemed to apply in respect of the conduct of any Benchmarking exercise.

### **Market Testing**

- 35.9 In relation to any Hotel Service where the parties do not agree (in their absolute discretion) by a date which is 4 months after the Trust or Concessionco gives notice of its requirement for a Benchmarking that the result of the Benchmarking has been conclusive, Concessionco shall

carry out a Market Testing in accordance with the terms of this Agreement and Schedule 14. In carrying out a Market Testing, Concessionco shall apply both to itself and to relevant tenderers appropriate standards of transparency and probity (in particular in respect of confidentiality and to ensure fair dealing) which are no less onerous than those which would apply to the Trust in similar circumstances and shall comply with all reasonable requests of the Trust for information in connection with the said Market Testing.

- 35.10 No potential Service Provider may be invited to take part in such exercise unless such potential Service Provider shall first have been approved in accordance with Clause 53 and by the Senior Lenders pursuant to the Direct Agreement and PROVIDED THAT the then current Service Provider shall always be entitled so to participate unless the Trust shall have reasonable grounds for excluding such Service Provider.
- 35.11 Any Market Testing exercise undertaken pursuant to 35.9 shall be carried out at Concessionco's expense PROVIDED THAT Concessionco shall not be liable for any additional expenses or costs incurred as a result of the Trust acting unreasonably.
- 35.12 The Market Testing specified in this Clause shall unless otherwise agreed take place separately in respect of each Hotel Service and shall be conducted in accordance with all appropriate Law and the procedures contained in Schedule 14 (to the extent that such procedures comply with Law). The Market Testing shall be a transparent, arms' length competitive tendering exercise which shall comprise the obtaining of bids from service providers of equivalent capability to the relevant Service Provider to provide the relevant Service or Services to the standards set out in this Agreement (and any additions, substitutions, or amendments thereto) and the Service Specification Arrangements disregarding the Mark-up and assuming the imposition on the new Services Provider of pension obligations and contractual obligations and liabilities not materially more onerous than those in the relevant Services Contract in the form entered into on the date of this Agreement to determine that the price payable by the Trust in respect of the Services is a fair market price.
- 35.13 For the avoidance of doubt any Market Testing exercise shall provide that the Regulations are deemed to apply and will be deemed to apply if there is a change of Service Provider.
- 35.14 In the event that more than one tender is received for the provision of any Service, the award of the contract to provide such Service shall be made by reference to criteria proposed by Concessionco and approved by the Trust (such approval not to be unreasonably or vexatiously withheld) and the Senior Lenders pursuant to the Direct Agreement and where:
- (a) the only application in respect of any Service is received from the current Service Provider; or
  - (b) no applications in respect of any Service are received;
- the current Service Provider or at the option of Concessionco, Concessionco, shall be reappointed to provide such Service and:
- (i) in the circumstances set out in 35.14 (a) above, an adjustment shall be made pursuant to Clauses 35.15 to 35.20; or

- (ii) in the circumstances set out in 35.14(b) above any adjustment pursuant to Clauses 35.15 to 35.20 shall be determined by the Disputes Resolution Procedure.

## **Payments**

35.15 Following the conclusion of a Benchmarking or Market Testing, adjustments shall be made:

- (a) to the Performance Cost and Variable Cost to show the revised cost for the Services; and
- (b) to the Performance Element in accordance with Clause 35.19 or the Base Annual Volume Element in accordance with Clause 35.20. The resulting adjustment to the Total Payment shall be reflected in the Financial Model in accordance with Schedule 22, which shall be amended in accordance with Clause 86 to reflect such change.

35.16 Where any Benchmarking or Market Testing results in any change in the Performance Cost or the Variable Cost such change shall, subject to Clause 35.3, take effect from the relevant Benchmarking Date.

35.17 Subject to Clause 35.3, where such Benchmarking or Market Testing has not been completed by the relevant Benchmarking Date, a balancing payment will be made by the appropriate party within 5 Business Days of the conclusion of such exercise. The balancing payment will be of an amount representing any change in the Performance Cost or the Variable Cost from the date between the Benchmarking Date and the date upon which such change comes into operation.

35.18 Subject to Clause 35.15 where a Market Testing results in the appointment of a new Service Provider, without prejudice to the change in the Performance Cost or the Variable Cost taking effect on the relevant Benchmarking Date (or the date on which the new Service Provider commences provision of the Service), the change in identity of the relevant Service Provider shall take place on the later of the relevant Benchmarking Date and the date on which the Market Testing is completed.

35.19 Where any Benchmarking or Market Testing gives rise to a change in the Performance Cost, the Performance Element shall be calculated by adding the Mark-up to the new Performance Cost.

35.20 Where any Benchmarking or Market Testing gives rise to a change in the Variable Cost the following items shall be recalculated:

35.20.1 the Variable Fee shall be adjusted by adding the Mark-up to the new Variable Cost; and

35.20.2 the Base Annual Volume Element shall be calculated by multiplying the new Variable Fee by the Base Case Activity Projections and the sum arrived at shall be the Base Annual Volume Element.

36. **STAFF**

36.1 Concessionco shall be obliged at all times to use its best endeavours to:

36.1.1 employ or procure the provision by the Service Providers of suitably qualified, trained and competent staff in the performance of the Works and the Services (it being acknowledged for the purposes only of this Clause that the Employees shall be deemed to fulfil the criteria required by this clause as at the Services Commencement Date); and

36.1.2 ensure or procure that the Service Providers ensure that a sufficient reserve of staff including trained staff is available to provide the Services to the standards required by this Agreement and the Service Specification Arrangements during staff holidays or absence due to sickness, voluntary absence or any other reason.

36.2 Concessionco and/or the Service Provider(s) shall employ in and about the provision of the Services only such persons as are careful, skilled and experienced in their particular trades and callings and procure that where specific professional and technical qualifications are specified in any Service Specification Arrangements, such qualifications shall be held by all relevant staff.

36.3 Without prejudice to Clause 36.1, Concessionco shall ensure or shall procure that every person employed in and about the provision of the Services is at all times properly and sufficiently trained and instructed with regard to:

36.3.1 the task or tasks that person has to perform;

36.3.2 all relevant provisions of this Agreement and the relevant Service Specification Arrangement;

36.3.3 all relevant rules, procedures and standards of the Trust;

36.3.4 all relevant rules and procedures concerning health and safety at work;

36.3.5 fire risks and fire precautions;

36.3.6 relevant provisions of the national patients' charter and of any patients' charter specific to the Hospital which may be in force from time to time; and

36.3.7 the need for those working in a National Health Service environment to observe the highest standards of personal hygiene, courtesy and consideration.

36.4 Concessionco shall comply and shall procure that the Service Providers comply with the Trust's Occupational Health Policy.

36.5 Concessionco shall in respect of all persons employed or seeking to be employed in and about the provision of the Services comply or procure compliance with every relevant Law.

36.6 Save as expressly provided in this Agreement, as between the Trust and Concessionco, Concessionco shall be entirely responsible for the employment and conditions of service of the employees of Concessionco and the Service Providers.

37. **SUPERVISION OF STAFF**

- 37.1 In respect of each of or all of the Services Concessionco shall appoint or procure the appointment of a Service Manager.
- 37.2 Notices, information, instructions or other communications in relation to the day to day provision of Services may be given or made to the relevant Service Manager.
- 37.3 Concessionco shall give notice in writing to the relevant Trust Representative of the identity of the Service Managers and of any subsequently appointed Service Managers within seven Business Days of such appointment. Until such notice shall have been given the Trust shall be entitled to treat as Service Manager the person last duly notified to the relevant Trust Representative as being the Service Managers.
- 37.4 Concessionco shall ensure that any Service Manager or a competent deputy duly authorised to act on his behalf is on duty or available by telephone at all times when the Services or any part of the Services are being provided.
- 37.5 Concessionco shall inform the Trust Representative of the identity of any person authorised to act for any period as deputy for any Service Manager under Clause 37.4 as soon as reasonably practicable and in any event before the start of that period.
- 37.6 Each Service Manager or his deputy shall consult with the Trust Representative and such other of the Trust's management, clinical or nursing staff as may from time to time be specified by such Trust Representative as often as may reasonably be necessary for the efficient provision of the Services in accordance with the terms of this Agreement and the Service Specification Arrangements.
- 37.7 Concessionco shall provide or procure the provision of a sufficient complement of supervisory staff in addition to each Service Manager, to ensure that the staff engaged in and about the provision of the Services at the Hospital or on the Trust's Premises at all times are adequately supervised and properly perform their duties.
- 37.8 Concessionco shall require and shall procure that the Service Provider(s) require that the staff engaged in and about the provision of the Services carry out their duties and behave while on the Trust's Premises in a quiet and orderly manner.
- 37.8.1 Concessionco shall prohibit and shall procure that the Service Providers prohibit their respective staff from smoking while on the Trust's Premises or on adjoining land owned by the Trust except in such areas (if any) as the Trust may from time to time at its absolute discretion designate.
- 37.8.2 Concessionco acknowledges the Trust's intention to prohibit smoking on all land or premises owned by the Trust from 1 January 2000 and undertakes that it will make or will procure suitable reference to be made to this intention in advertisements and other recruitment material for employees to be engaged in the provision of the Services.
- 37.9 Concessionco shall procure that the Service Provider(s) shall require staff engaged in and about provision of the Services at all times while on the Trust's Premises to be properly and presentably dressed in appropriate uniforms of workwear and specialised or protective

workwear where appropriate to a standard not inferior to that of the Trust's own staff engaged on reasonably comparable duties, such uniform or specialised or protective workwear to be provided by, and at the sole cost of, Concessionco.

37.10 Concessionco shall require and shall provide (or shall procure provision and such requirement) that staff engaged in and about the provision of the Services wear at all times when on the Trust's Premises an identification badge in such form as may be agreed with or, in default of such agreement, specified by the Trust Representative.

## 38. **EMPLOYMENT**

38.1 The parties acknowledge that each of the employees employed by the Trust immediately before the Services Commencement Date in the provision of services equivalent to the Services will (to the extent that the Regulations as a matter of law require) transfer to Concessionco or to the Service Providers as the law may determine from the Trust pursuant to the Regulations on the Services Commencement Date which shall be the "time of transfer" under the Regulations.

38.2 If it is determined by a court or tribunal or as a result of a change of law that the Regulations do not apply at or immediately before the Services Commencement Date the Trust and Concessionco shall use their respective reasonable endeavours to ensure that Concessionco or another Service Provider are able to use in the provision of the Services from the Services Commencement Date those employees of the Trust whose employment would have transferred to Concessionco or another Service Provider had the Regulations applied and shall co-operate generally with a view to securing in a timely and economical manner that such employees shall come to be employed by other Service Providers provided that the Service Provider shall not be obliged to offer employment to any employee or former employee of the Trust who does not match the provisions of the agreed staff profiles in Schedule 13.

38.3 NOT USED.

## 38.4 Indemnities

38.4.1 The Trust shall indemnify and keep indemnified Concessionco against all actions, proceedings, claims, damages, demands, fines, penalties, expenses, legal remedies, compensation, court or tribunal orders, awards, costs and all other liabilities whatsoever in any way connected with or arising from or relating to any claim or other recourse by any trade union, employee representatives or staff association in respect of all or any of the Employees or any other employee or former employee of the Trust arising from or connected with any failure by the Trust to comply with its legal obligations to such trade unions, employee representatives or staff associations on or prior to the Services Commencement Date.

38.4.2 Concessionco shall indemnify and keep indemnified the Trust against all actions, proceedings, claims, damages, demands, fines, penalties, expenses, legal remedies, compensation, court or tribunal orders, awards, costs and all other liabilities whatsoever in any way connected with or arising from or relating to any claim or other recourse by any trade union, employee representatives or staff association in respect of all or any of the Employees or any other employee of the Trust arising from or connected with any failure by Concessionco or any other Service Provider to comply

with its legal obligations to such trade unions, employee representative or staff associations on or after the Services Commencement Date.

38.4.3 The Trust shall indemnify and keep indemnified Concessionco against all actions, proceedings, claims, damages, demands, fines, penalties, expenses, legal remedies, compensation, court or tribunal orders, awards, costs and other liabilities whatsoever (otherwise than any of the said matters arising from or in any way connected with any Equal Pay Ruling as defined in Clause 38.5.1) relating to any claim by any of the Employees or any other employee or former employee of the Trust made against Concessionco or any other Service Provider at any time which results or resulted from some act, event, matter or omission or circumstance which occurred or commenced prior to the Services Commencement Date provided always that any such claim is notified by Concessionco to the Trust Representative no later than 2 years from the Services Commencement Date and provided that this indemnity shall not apply to the extent that the claim is based on or related to the acts or omissions of Concessionco or any Service Provider or any breach by Concessionco of the terms of this Agreement.

38.4.4 Concessionco shall for Phase 2 indemnify and keep indemnified the Trust against all actions, proceedings, claims, damages, demands, fines, penalties, expenses, legal remedies, compensation, court or tribunal orders, awards, costs and other liabilities whatsoever relating to any claim by any of the Employees or any other employee of Concessionco or any other Service Provider made against the Trust at any time which results or resulted from some act, event matter or omission or circumstance which occurred or commenced on or after the Services Commencement Date provided that this indemnity shall not apply to the extent that the claim is based upon or related to the acts or omissions of the Trust or any breach by the Trust of the terms of this Agreement.

## 38.5

38.5.1 For the purposes of this Clause 38.5 “Equal Pay Ruling” means (1) any claim brought by any employee engaged in providing the Services (or their equivalent before the Services Commencement Date) against the Trust or Concessionco or the Service Providers under the Equal Pay Act 1970 or the Equal Pay Directive (Council Directive 75/117/EEC) and the Equal Treatment Directive (Council Directive 76/207/EEC) (“the Legislation”) which shall have been determined by an industrial tribunal or the settling or compromising of which the Trust shall have consented to in accordance with sub-clause 38.5.5 and or (2) any alteration to salaries and payscales prescribed by the Whitley Agreements in order to settle, address or compromise threatened or extant claims under the Legislation against National Health Service employers (to include NHS Trusts, Regional Health Authorities, District Health Authorities, Special Health Authorities and Family Health Services Authorities) and/or employers engaged as at the date of this Agreement or subsequently in the provision of services to National Health Service employers.

38.5.2 The Trust shall subject to the remainder of Clause 38.5 indemnify Concessionco and keep Concessionco indemnified to the extent provided in this sub-Clause but not further or otherwise against costs, claims, damages, awards of interest, expenses and



liabilities which arise out of or in connection with an Equal Pay Ruling and which accrue in respect of service by any Estates Maintenance Services Employee during the Period of Liability irrespective of when the Equal Pay Ruling is made, implemented or effected namely:

- (i) in the Agreed Proportion of the Eligible Employment Costs of implementing in respect of the Employee any Equal Pay Ruling (whether any Employee was an applicant to the industrial tribunal or not) where payment of such Eligible Employment Costs is required by an Equal Pay Ruling and is referable to a period before the date on which pursuant to that Equal Pay Ruling any equality clause or alteration in terms and conditions of employment or any other alteration in salary and/or benefits becomes effective; and
- (ii) in the Agreed Proportion of the Eligible Employment Costs which are attributable to the Employee (whether the Employee was an applicant to the industrial tribunal or not) because of the insertion of any equality clause or alteration in terms and conditions of employment or any other alteration in salary and/or benefits provided, awarded or granted to any Employee in consequence of an Equal Pay Ruling and which would not have been incurred but for that Equal Pay Ruling.

38.5.2A Subject to the remainder of Clause 38.5 the Trust shall indemnify Concessionco and keep Concessionco indemnified to the following extent but not further or otherwise in respect of an Equal Pay Ruling in relation to the service of any Hotel Services Employee during the Hotel Services Period of Liability irrespective of when the Equal Pay Ruling is made, implemented or effected (save as expressly herein provided) namely:

- (i) the reasonable and proper legal costs so far as not payable by any other party to the proceedings in pursuing an appeal with the written consent of the Trust from Industrial Tribunal to the Employment Appeal Tribunal or any higher Court but not to include any costs incurred in relation to proceedings in the Industrial Tribunal; and
  - (ii) the amount of any award made by way of or as part of an Equal Pay Ruling to which effect is given by way of an Advance Letter or required to be implemented by an Equal Pay Ruling received after the Services Commencement Date implementing an Ancillary Staffs Increase to the extent that it is referable to service during a period of service which is before the date on which the Advance Letter requires the award to be implemented and which is before the end of the Hotel Services Period of Liability and, for the avoidance of doubt:
- (a) Concessionco and the Hotel Services Provider shall be fully indemnified by the Trust in respect of any retrospective award relating to any period prior to Services Commencement Date; and

(b) the Trust shall not be liable hereunder to the extent that it pays a sum calculated by reference to the same element of an Equal Pay Ruling under Clause 33.7.

(iii) “Hotel Services Period of Liability” means the period from the Services Commencement Date until the first Benchmarking Date save where any Advance Letter gives any retrospective Equal Pay Ruling for any period prior to the Services Commencement Date in which event such period shall begin on the date from which such Equal Pay Ruling is effected by the Advance Letter or the start of the period to which the retrospective ruling applies in accordance with 38.5.2A(ii) above.

38.5.3 For the purposes of this Clause:

“Eligible Employment Costs” means only:

1. any change to the rate at which holiday pay is paid, or change in an Employee’s holiday entitlement;
2. any change to the rate at which sick pay is paid;
3. any change to the level of overtime payments;
4. any change to salary (including increased national insurance contributions);
5. any increases in employer’s contribution to pension provision required by virtue of an increase to pensionable salary;
6. any change to the level of allowances;
7. any change to the hours of employment;
8. the reasonable and proper legal costs so far as not payable by any other party to the proceedings in pursuing an appeal with the written consent of the Trust to the Employment Appeal Tribunal or any higher Court but not to include any costs incurred in relation to proceedings in the Industrial Tribunal or below.
9. any retrospective lump sum award in respect of the matters 1-7 above.

“Period of Liability” means in respect of Estates Maintenance Employees the period which begins on the Services Commencement Date and ends 30 months after such date.

“Agreed Proportion” means:

1. in respect of the matters at 38.5.2(i): 100%; and
2. in respect of the matters at 38.5.2(ii): 50%.

38.5.4 Concessionco shall notify the Trust forthwith of any actual or threatened claim application or other matter whatsoever of which it or any Service Provider may

become aware which may result in a claim being made under the indemnity contained in this clause.

- 38.5.5 Concessionco shall comply with the reasonable requirements of the Trust with regard to the handling of such claim application or other matter as is referred to in sub-clause 38.5.4 and shall not settle or compromise any legal proceedings or fail to pursue any available rights of appeal without the written consent of the Trust (such consent not to be unreasonably withheld or delayed) and shall impose like obligations to those set out in this sub-clause upon the Service Providers.
- 38.6 Save only as provided in Clauses 38.5, 38.7 and 38.8, all salaries, benefits, pensions contributions and other emoluments, tax and national insurance payments, contributions to retirement benefit schemes and bonus and commission arrangements including for the avoidance of doubt any back-dated pay award relating to the Employees shall be borne by the Trust to the extent that they relate to the period prior to the Services Commencement Date and by Concessionco from the Services Commencement Date thereafter and all necessary apportionments shall be made. Each party shall indemnify and keep indemnified the other for the duration of the Contract Period in respect of any breach of this Clause 38.6.
- 38.7 In relation to entitlement to holiday pay for the Employees the following shall apply:
- 38.7.1 Employees' current annual entitlement to holiday pay shall be apportioned proportionately between the periods of current holiday year prior to and from the Services Commencement Date;
- 38.7.2 where an Employee has taken more than his proportionate holiday prior to the Services Commencement Date Concessionco shall not be obliged to make any reimbursement in respect thereof to the Trust;
- 38.7.3 where an Employee has taken less than his proportionate holiday prior to the Services Commencement Date, Concessionco shall bear the cost of such entitlement arising thereafter in full without recourse to any reimbursement from the Trust;
- 38.7.4 provided always that the Trust shall indemnify Concessionco for any accrued holiday of the Employees from previous holiday years which the Employees have not taken by the Services Commencement Date; and
- 38.7.5 provided always that the Trust shall be liable for any claims relating to Frozen Annual Holiday Pay Entitlement (save only that the Trust shall only be liable for any such claims in relation to Employees employed in the provision of the Estates Maintenance Services to the extent that they exceed the aggregate of £20,000 subject to the RPI Adjustment on 1 April each Year).
- 38.8 Where a Service Provider other than Concessionco undertakes recruitment for a post which may come to be filled by a New Appointee or considers a New Appointee for a post or any New Appointee or Employee is employed by any such Service Provider:

- 38.8.1 Concessionco will procure that such Service Provider complies with the provisions of this Clause 38.8 as if any references in this Clause to any obligation of Concessionco were read as referring to an obligation of such Service Provider;
- 38.8.2 Concessionco shall (save where it would be a criminal offence or otherwise unlawful so to do) in conducting the recruitment for any post which may come to be filled by a New Appointee:
- (a) indicate to all prospective applicants for employment in such a post that it and/or the Trust is exempted from the Rehabilitation of Offenders Act 1974 (the “1974 Act”) and that consequently they are required to disclose all convictions for a criminal offence whether or not such conviction would otherwise be regarded by the 1974 Act as spent and that any failure to disclose such a conviction would result in dismissal or other disciplinary action by Concessionco;
  - (b) require all applicants for employment in such a post to complete an application form in which they are required to disclose all such convictions and to consent to such details being made available to the Trust;
  - (c) in the event that such applicant declines so to consent not employ such applicant;
  - (d) before appointing a person to any such post take up two references (which shall comply with the Trust’s policies from time to time concerning references) and not appoint a person unless Concessionco (acting reasonably and prudently) shall have concluded that the references demonstrate that the person is suitable to be employed on hospital premises;
  - (e) where such a post is likely or is considered by the Trust (acting reasonably) to be likely to involve “substantial opportunities for access, especially in unsupervised circumstances, to children under the age of eighteen” (as those words are defined in HSG(94)43 or any replacement thereof) forthwith give details of all applicants for employment in such a post to the Trust (such details to include but not be limited to the name, address, date of birth and any change of name of such applicant) and the Trust shall within 21 days of the giving of such notice inform Concessionco whether Concessionco is entitled to employ such applicant in such post, the decision of the Trust to be final and binding.
- 38.8.3 Before a prospective New Appointee who has disclosed such a criminal conviction is appointed as a New Appointee, Concessionco shall subject to any Law to the contrary:
- (a) notify the Trust of the name of the prospective New Appointee and of any criminal convictions disclosed by the prospective New Appointee;
  - (b) take up references from suitable referees for the prospective New Appointee in terms which ask the referees to address the suitability of the prospective New Appointee for employment in a hospital;

- (c) upon request by the Trust made within five (5) Business Days of notification to the Trust under Clause 38.8.4(a) supply the Trust with copies of the prospective New Appointee's application for employment, any notes of any interview with him and any references in respect of him; and
- (d) in the case of a prospective New Appointee with a criminal conviction obtain the prior consent of the Trust to the appointment.

38.8.4 Concessionco shall notify the Trust:

- (a) of any conviction for any criminal offence of any New Appointee (whether committed before or after the appointment of the New Appointee by Concessionco) which comes to the attention of Concessionco after such appointment; and
- (b) of any conviction for any criminal offence of any of the Employees which is notified to Concessionco on or after the Services Commencement Date (other than those convictions notified to Concessionco by the Trust).

38.8.5 The Trust may require Concessionco forthwith to remove from the Trust's Premises and not allow to return without the Trust's prior written consent to the provision of the Services:

- (a) any New Appointee who is or has been convicted of a criminal offence as a result of which the Trust reasonably considers that it is necessary to so remove him to ensure the safety and well being of patients, staff and other people in the Hospital or that such conviction may be detrimental to the operation of the Hospital unless the conviction was known to the Trust at the time of the person's appointment and the Trust consented thereto;
- (b) any of the Employees who while employed by Concessionco is convicted of a criminal offence and as a result the Trust reasonably considers that it is necessary to so remove him to ensure the safety and well being of patients, staff and other people in the Hospital or that such conviction may be detrimental to the operation of the Hospital; and
- (c) any New Appointee or any of the Employees if the Trust shall consider having regard inter alia to the need to ensure the safety and well-being of patients, staff and other people in the Hospital that the conduct or alleged conduct of the New Appointee or Employee concerned is detrimental to the operation of the Hospital.

38.8.6 DELETED.

38.9 No material change to Schedule 13 shall be made by Concessionco between the date of execution of this Agreement and the Services Commencement Date save for those which may be necessitated by the operation of Clause 17 or 18, in which event the approval of the Trust (acting reasonably) shall be required and it is agreed that in determining whether to give such approval the Trust may without limitation have regard to the obligations of the Trust referable

to Schedule 13 and may require reasonable amendments to those obligations as a condition of giving such approval.

38.10 The Trust undertakes to Concessionco to use its reasonable endeavours to secure that those Employees who transfer (whether directly or via Concessionco) to the Estates Maintenance Provider pursuant to the Regulations shall comply in all material respects with the Estates Maintenance Provider staff profile specified at Schedule 13 (“the Estates Maintenance Provider Staff Profile”).

38.10A Concessionco shall pay the sum of £50,000 to the Trust on the Services Commencement Date, such payment being intended to assist the Trust in respect of obligations pursuant to Clause 38.12A.

38.11 The Trust undertakes with Concessionco that in so far as the Employees whose employment transfers (whether directly or via Concessionco) to the Estates Maintenance Provider upon the Services Commencement Date pursuant to the Regulations exceeds 14 the Trust will indemnify Concessionco from and against only:

- (i) any and all Payroll Costs attributable to the said excess (other than those relating to employers’ liability claims) from the Services Commencement Date until the effective date of termination of their employment by Concessionco or other Service Provider or the first anniversary of the Services Commencement Date whichever shall be the earlier; and
- (ii) any Redundancy Payment, compensation for unfair dismissal and (where applicable) payment in lieu of notice arising on the termination of employment of any Employee attributable to the dismissal of any such Employee as the Service Provider or Concessionco may determine to eliminate the said excess where the effective date of termination of employment of the Employees concerned by Concessionco or any other Service Provider is not later than the first anniversary of the Services Commencement Date.

38.12A

38.12A.1 If the Hotel Services Employees fail to comply in all material respects with the Hotel Services Provider’s Staff Profile by sub-division of the Hotel Services (save that for the purposes of this Clause the Domestic Service and the Linen and Laundry Service shall be treated as a single sub-division of the Hotel Services) the Trust shall indemnify Concessionco in the following circumstances in respect of the following amounts:

- (a) if the Managers in each Service who transfer fail to so comply any and all Payroll Costs and Redundancy Payment and where applicable any payment in lieu of notice;
- (b) if the Cooking Supervisors and the Portering Supervisors and Security and Car Parking Supervisors and Portering Operatives and Security and Car

Parking Operatives fail to so comply any and all Payroll Costs and Redundancy Payment and where applicable any payment in lieu of notice;

- (c) which Concessionco or the Hotel Services Provider shall incur in respect of any Hotel Services Employee the termination of whose employment the Hotel Services Provider shall reasonably consider is necessary to secure that the Hotel Services Provider Staff Profile is more nearly complied with, provided that liability pursuant to this Clause in respect of Payroll Costs shall cease nine months after the Services Commencement Date and no liability in respect of Redundancy Payments shall accrue unless the effective date of termination of any Hotel Services Employee occurs on or before the date nine months after Services Commencement Date.

38.12A.2 If those Hotel Services Employees in categories identified in Schedule 13 as Domestic/Linen & Laundry Operatives or Supervisors or as Catering Operatives together exceed 113 whole time equivalent the Trust shall indemnify Concessionco against the Redundancy Payments which Concessionco shall incur in respect of the termination of employment of any such Hotel Services Employee that the Hotel Services Provider reasonably considers necessary to eliminate the said excess provided that no liability under this Clause shall accrue unless the effective date of termination of the employment of such Hotel Services Employee occurs on or before the date 12 months after the Services Commencement Date further provided for the avoidance of doubt that if notwithstanding anything else in Table 3 of Schedule 13 the whole time equivalent of the Hotel Service Employees listed there does not exceed 113 the Trust shall be under no liability under this Clause 38.12A.2.

38.12A.3 Concessionco shall not be entitled to make a claim pursuant to the indemnities contained in Clause 38.12A unless the aggregate liability incurred exceeds £5,000, subject to the RPI Adjustment.

38.12 The Trust shall supply and make available to Concessionco and the Hotel Services Provider those of the employees of the Trust engaged in the provision of services equivalent to the Hotel Services (who the Trust reasonably considers will be Hotel Services Employees) as required by the Hotel Services Provider to undertake such training that may be agreed (such agreement not to be unreasonably withheld) between the Hotel Services Provider and the Trust prior to Services Commencement Date, at such dates and times to be agreed between the Trust and the Hotel Services Provider, both parties acting reasonably. The cost of the provision of such training will be borne by the Hotel Services Provider. The Trust shall bear the cost of making available such employees for such training. The Trust undertakes that it will instruct such employees to attend and participate properly in such training.

38.13 The Trust shall supply and make available to Concessionco and the Estates Maintenance Service Provider those of the employees of the Trust engaged in the provision of services equivalent to the Estates Maintenance Services (who the Trust reasonably considers will be Estates Maintenance Services Employees) as required by the Estates Maintenance Provider to undertake such training that may be agreed (such agreement not to be unreasonably withheld) between the Estates Maintenance Provider and the Trust for familiarisation prior to the Services

Commencement Date in the operation and maintenance of the plant and equipment utilised by the Estates Maintenance Service Provider in the Estates Maintenance Services. The cost of the provision of such training will be borne by the Estates Maintenance Service Provider. The Trust shall bear the cost of making available such employees for such training. The Trust undertakes that it will instruct such employees to attend and participate properly in such training.

38.14 The Trust and Concessionco agree that insofar as the Regulations or the operation of this Agreement and Clause 38.2 have the effect of transferring pursuant to this Agreement any Employee or any other employee of the Trust to any Service Provider other than Concessionco or in respect of any employees of the Trust who are employed by the Service Providers pursuant to Clause 38.2:

- (a) Concessionco may undertake to indemnify such Service Provider in respect of such Employee or employee any such indemnity to be subject to the same conditions (including but not limited to those in Clauses 9.2, 9.3 and 10.2 and in the same terms (*mutatis mutandis*) as those entered into by the Trust in favour of Concessionco under this Clause 38; and
- (b) Subject to Clauses 9.2, 9.3 and 10.2 if and to the extent that Concessionco shall incur any liability to any Service Provider in respect of any indemnity referred to in paragraph (a) above, it shall be indemnified by the Trust in respect of such liability pursuant to the indemnities given by the Trust in this Clause 38 as if liability were originally incurred by Concessionco.

38.15 At any time during Phase 2 upon reasonable notice (or where the request is occasioned by the termination of a Service Specification Arrangement pursuant to Clause 58.2 forthwith) and in any event upon the day which shall be two months before the Contract Period shall expire by effluxion of time, and on a day which is no later than ten Business Days before the expiry of the Contract Period by the effluxion of time, Concessionco shall supply to the Trust full, complete and accurate information as to the identity and terms and conditions of employment of all employees then currently employed by Concessionco or any other Service Provider in the business of providing the Services or any of the Services and shall warrant that such information is true, accurate and complete when given.

38.16 Concessionco undertakes to the Trust that it will not and it will procure that other Service Providers will not other than in the ordinary course of business or as a result of changes to terms and conditions resulting from the Whitley Agreements or any increase in salaries required to comply with any legislation relating to the minimum wage vary the conditions of employment of any employees whose employment may be transferred to the Trust or to a Trust Contractor following termination of this Agreement or any Service Specification Arrangement after the Trust shall have served notice to terminate this Agreement or any Service Specification Arrangement for any reason or where this Agreement is due to expire by effluxion of time within the last six months of the Contract Period provided that for the avoidance of doubt nothing in this undertaking shall limit the right of Concessionco or any other Service Provider to give effect to any pre-existing contractual obligations to any employee.



38.17 If following the first change of Service Provider for any Service where such change shall have been required by the Trust or shall have followed any Market Testing exercise the Regulations do not operate so as to transfer employees previously engaged in the provision of such Service to Concessionco or any replacement Service Provider or back to the Trust in respect of such Service any sum of money which Concessionco shall be obliged to reimburse to any such former Service Provider to compensate for any Redundancy Payment or payment in lieu of notice in so far only as an employee's entitlement to such payments has accrued by virtue of a period of service prior to the Services Commencement Date shall be treated as a Deemed Trust Variation for the purposes of Clause 18.

38.18 **Pensions**

38.18.1 For the purposes of this Clause and, where applicable, Clause 33.33 the following expressions shall have the following meanings ascribed to them:

**“GAD”**

means the Government Actuary's Department or any Fellow of the Institute of Actuaries (or of the Faculty of Actuaries in Scotland) employed by the Government Actuary's Department;

**“NHS Regulations”**

means the National Health Service Pension Scheme Regulations 1995 (as amended or replaced from time to time);

**“NHS Scheme”**

means the National Health Service Superannuation Scheme governed by the NHS Regulations;

**“Pensionable Employees”**

means those Employees who immediately before the Services Commencement Date were members of the NHS Scheme and those Employees who are eligible to join the NHS Scheme but who have not elected to do so;

**“Pension Scheme”**

means any retirement benefit scheme (or schemes) nominated or established by Concessionco or a Service Provider on or before the Services Commencement Date :-

- (a) which is approved or capable of approval under Chapter 1 of Part XIV of the Income and Corporation Taxes Act 1988;
- (b) which exists for such period as there are Pensionable Employees employed by Concessionco or a Service Provider;
- (c) of which membership is offered to all Pensionable Employees with effect from the Services Commencement Date on the basis that Pensionable Employees who join are entitled to benefits in respect of service from the Services

Commencement Date which are broadly comparable to those payable to and in respect of such Pensionable Employees under the NHS Scheme (as certified by the GAD Actuary) as at the Effective Date and where such offer of membership is in the form of an announcement to Pensionable Employees which is approved by the Trust (acting reasonably) prior to its issue to Pensionable Employees;

- (d) which provides benefits for such period as there are Pensionable Employees employed by Concessionco or a Service Provider in respect of service from the Services Commencement Date for Pensionable Employees who elect to join whether or not they elect to transfer their accrued benefits under the NHS Scheme to the Pension Scheme which are broadly comparable to those payable under the NHS Scheme as at the Effective Date (and GAD certification shall be conclusive evidence that the benefits under the Pension Scheme are so broadly comparable as at the Effective Date); and
- (e) which provides benefits in respect of service before the Services Commencement Date for Pensionable Employees who transfer their accrued benefits under the NHS Scheme (as calculated in accordance with NHS Regulations) which in the joint opinion of the actuary to the Pension Scheme and the GAD Actuary offer reasonable value on an individual basis in respect of each such Pensionable Employee's transfer payment.

38.18.2 In the event that there is an amendment to the NHS Regulations coming into effect after the date of this Agreement and before the Services Commencement Date or at the discretion of the Trust where there is an amendment to the NHS Regulations coming into effect on or after the Services Commencement Date and in either case the amendment results in an increase or addition to the benefits to be provided to or in respect of Pensionable Employees under the NHS Scheme or (on the assumption that the Pension Scheme has been established) which would have been provided to or in respect of the Pensionable Employees had they remained in the NHS Scheme and not transferred to the Pension Scheme ("a New Benefit Change") then the following shall apply :-

- (a) on or as soon as practicable after Services Commencement Date or if later the date of the New Benefit Change the Trust will notify Concessionco of any New Benefit Change and particulars of the same;
- (b) with effect from the Services Commencement Date or such later date as the New Benefit Change is to take effect in the NHS Scheme, on the assumption that the Pension Scheme has been established, Concessionco undertakes to procure that subject to the Performance Element being adjusted as set out in paragraph (c) below the Pensionable Employees are provided with benefits which are broadly equivalent to the New Benefit Change;
- (c) the cost to Concessionco or the Service Provider of providing benefits which are broadly equivalent to the New Benefit Change for the Pensionable Employees shall be agreed by Concessionco and the Trust (and in default of agreement by the date 30 days after the Services Commencement Date or the effective date of

the New Benefit Change the provisos of Clause 38.18.3 shall apply) and the agreed costs shall be borne by the Trust as an adjustment to the Performance Element;

- (d) on the assumption that the Pension Scheme has been or will be established before the Services Commencement Date the Trust may require, as a result of a New Benefit Change, a further certificate of broad comparability from GAD as at the Services Commencement Date or, if later, the effective date of the New Benefit Change, taking into account the New Benefit Change.

38.18.3 In the event of Concessionco and the Trust being unable to agree on any actuarial aspects of this Clause 38.18 or Clause 33.33 or in the event of GAD ceasing to exist, then the subject of such dispute may at the option of Concessionco or the Trust be referred to an independent actuary to be agreed between Concessionco and the Trust or in default of agreement within seven days of the first nomination of such actuary by one party to another, to an independent actuary appointed by the President for the time being of the Institute of Actuaries at the written request of either Concessionco or the Trust so that :-

- (a) his decision shall be final and binding on the parties in the absence of manifest error ; and
- (b) the cost of such an actuary shall be borne equally by Concessionco and the Trust.

In the event of a dispute arising in connection with a non-actuarial issue the provisions of Clauses 40 and 41 shall apply.

### 38.19 **Collective Agreement**

38.19.1 Concessionco agrees that it will comply and will procure that all other Service Providers will comply fully and in all respects with any and all collective agreements as set out in Schedule 8 relating to employment of the Employees entered into by the Trust prior to the Services Commencement Date and remaining in force at the Services Commencement Date.

38.19.2 Concessionco undertakes to indemnify and keep indemnified the Trust against all or any liability arising from any failure to comply with the obligation set out in 38.19.1.

38.19.3 The Trust recognises the unions set out in Appendix 1 to the Union Recognition Agreement set out in Schedule 8 under the terms and for the purposes stated in an agreement dated 1 August 1995 a copy of which is annexed at Schedule 8 and Concessionco agrees that it shall and shall procure that all other Service Providers shall continue to recognise all such unions in respect of all such employees and any new employees employed by Concessionco or other Service Providers respectively for the purposes of this Agreement as if the agreement at Schedule 8 had been made by such unions with Concessionco or other Service Providers and that it shall not and shall procure that all other Service Providers shall not take any steps to terminate the

said agreement or de-recognise the union without the written consent of the Trust which shall not be unreasonably withheld or delayed.

39. **INSURANCE**

- 39.1 During the Contract Period or part thereof as relevant Concessionco shall maintain or cause to be maintained the insurance policies listed in Part A of Schedule 9, save in relation to Uninsurable Risks.
- 39.2 The insurance policies listed in Part A of Schedule 9 shall be maintained in the joint names of the insured parties named therein.
- 39.3 Concessionco agrees that during the Contract Period it will maintain or cause to be maintained insurance policies and for such amounts of cover and for such periods as are more particularly set out in Part A of Schedule 9 (or such greater amount, period or scope of cover as the Trust may reasonably require by notice in writing to Concessionco, such notice to be treated as a Confirmed Variation Instruction pursuant to the provisions of Clause 18 and payment for such Variation, without prejudice to the generality of Clause 18, to be made by lump sum payments by the Trust in all circumstances and to include increased premium costs and increased costs of compliance with policy conditions) provided that Concessionco shall not be obliged to maintain any policy which would put it in breach of Schedule 8 of the Senior Debt Agreement.
- 39.4 Wherever there is a risk that under the terms of the policies listed in Part A of Schedule 9 claims may be made after the end of the Contract Period but relating to circumstances arising during the Contract Period and in order for a claim to be made under such policies, such policy is required to be in force at the time the claim is made, the said policies shall include cover in respect of such claims to extend for six (6) years after the end of the Contract Period.
- 39.5 Concessionco shall upon written request of the Trust at any time produce to the Trust such evidence as the Trust may reasonably require that the insurance policies referred to above are in full force and effect.
- 39.6 Each of the parties agrees that subject to Clause 10.3 of the Direct Agreement:
- 39.6.1 in the event of the Works or the Hospital suffering any damage or loss (and such damage being covered by the Construction All Risks or Property All Risks insurances set out in paragraphs 1.1 and 2.1 of Part A of Schedule 9 during Phase 1 or Phase 2) the parties agree that the proceeds of any insurance claim in respect thereof will be paid out as soon as is practicable after receipt of such proceeds from the relevant insurer in repairing, replacing, reinstating or recovering or otherwise remedying the items so damaged (whether such items constitute the whole or part only of the Works or the Hospital) in respect of which such claim shall have been paid or if such repair, reinstatement, renewal or remedy shall have been performed by either party the parties agree that the proceeds of such claim shall be paid over to that party as soon as is reasonably practicable;
- 39.6.2 it shall not knowingly do or fail to do any act or thing which may cause any policy of insurance effected by the other party to be avoided in whole or part or the premiums payable in respect thereof to be increased; and

- 39.6.3 it shall be under a duty to mitigate its losses with respect to any event which gives, or may give, rise to any insurance claim under the insurances taken out pursuant to this Clause 39 or Schedule 9.
- 39.7 Where the Trust has issued a notice pursuant to Clause 39.3, the Trust and Concessionco shall consult fully with each other in devising and implementing a cost effective insurance programme in relation to Phase 2. With respect to all the insurances referred to in Part B.2 of Schedule 9, Concessionco shall, prior to each date on which it delivers its notice to the Trust pursuant to Clause 39.13, approach the insurance market and use all reasonable endeavours to obtain value for money from reputable insurers within the market for such insurances.
- 39.7.1 Concessionco shall ensure that the insurances referred to in Part A of Schedule 9 shall:
- (a) be effected by Concessionco on the terms as set out in this Clause 39 and Part A of Schedule 9 to the extent that such do not become Uninsurable Risks;
  - (b) include provision for self insurance by way of deductible no higher than those specified in Part A of Schedule 9 with such other exclusions normal to that type of policy;
  - (c) in so far as they relate to damage to the Hospital, cover the Hospital to at least reinstatement as new value, increased from time to time as necessary to maintain such reinstatement as new value;
  - (d) be placed with insurers who are approved by the Trust acting reasonably;
  - (e) in respect of delay in start-up or business interruption, be increased from time to time to such amounts to adequately cover the losses likely to flow from such events as outlined in Part A of Schedule 9;
  - (f) be increased from time to time to such amounts as would be effected by a reasonable and prudent operator of a hospital (save in relation to provision of clinical services) of the size of and with characteristics comparable to the Project which does not self insure (except by means of minimum deductibles required by insurers generally);
  - (g) be endorsed to the effect that the Insurers therein agree to waive all subrogation rights which they may have or may acquire against any party named as a joint insured.
- 39.7.2 Concessionco shall procure that no reductions in limits or coverage (including those resulting from extensions) or increases in deductibles, exclusions or exceptions or other material amendments to policy terms shall be made, otherwise than in accordance with this Clause 39 and Part A of Schedule 9, without the written consent of the Trust (not to be unreasonably withheld or delayed).

## **Additional coverages - Insurances by Law, Project Contracts and Other Agreements**

39.8 Concessionco shall from time to time effect and maintain in full force those insurances which Concessionco is required to have by the terms of any contract to which it is from time to time a party.

### **Non-avoidance of Coverage**

39.9 Concessionco and the Trust shall not at any time do (or omit to do) or so far as either is able permit or allow others to do (or omit to do) anything (including, without limitation, failure to disclose any fact) whereby any insurance taken out under Schedule 9 may be rendered void or voidable or suspended, impaired or defeated in whole or in part.

### **Disclosure**

39.10

39.10.1 Each party shall ensure that disclosure of the following is made to those insurers providing the insurance cover which is required to be taken out and maintained by it pursuant to this Agreement:

- (a) all information which it acting in accordance with good insurance practice reasonably believes that insurers would require in their analysis of the relevant risk;
- (b) all information which insurers specifically request to be disclosed; and
- (c) all other information which it acting in accordance with good industry practice in good faith could reasonably consider to be material to the relevant insurance cover;

which shall include making available to insurers copies of all relevant Project Documents.

### **Insurance and Risk Management**

39.10.2 In relation to those insurances to be taken out and maintained by Concessionco, Concessionco shall establish procedures for:

- (a) obtaining and maintaining on behalf of all the insureds under the policies defined in Part A of Schedule 9 the insurances that are required to be taken out pursuant thereto;
- (b) ensuring that full, complete and accurate disclosure and representation of all facts that may be material is made to insurers on a regular and on-going basis;
- (c) taking such steps as may reasonably be requisite and necessary to maintain the insurances; and

- (d) ensuring the prompt notification of incidents to insurers and the investigation of and preparation of reports to the insurers and their loss adjusters on any incident likely to give rise to a claim under the insurances.

Concessionco shall provide to the Trust such information as may be relevant (whether written or otherwise) which the Trust may reasonably require from time to time in order to satisfy itself that Concessionco is complying with its obligations under this Clause 39.10.

### **Other Insured Parties**

39.11 Concessionco shall use its best endeavours to procure that the Building Contractor and its subcontractors, any Service Provider and any other contractors or consultants engaged on the Project disclose to Concessionco in a timely manner all information which is material in relation to the insurances established and maintained pursuant to this Clause 39 and Part A of Schedule 9 on which those persons are respectively named as insureds until the expiry of those insurances and Concessionco shall forward all information received from those persons relevant to any of the insurances to the relevant insurers.

### **Disputed Claims**

39.12 If the insurers dispute any claim made under any of the insurances required to be taken out pursuant to this Clause 39 or Schedule 9 Concessionco and the Trust shall take such steps as are reasonably necessary to preserve the claim.

### **Renewal/Review of Amount and Scope of Insurances and Premia**

39.13

39.13.1 Subject to Schedule 8 of the Senior Debt Agreement not later than the date falling 2 months (or such other period as the Trust and Concessionco may agree) prior to the commencement, renewal or expiry date in respect of each insurance required to be taken out pursuant to Part A of Schedule 9, deliver to the Trust and its insurance adviser a notice stating Concessionco's proposals as to:

- (a) the changes (if any) to the insurance in the risks or liabilities to be insured;
- (b) the insured amounts (as new) of all assets required to be insured;
- (c) the insured amounts in respect of all other risks required to be insured;
- (d) the amount of the deductibles applicable;
- (e) scope of cover; and
- (f) any change of insurers or brokers;

in each case, for the period of twelve Months (or such other period as may be agreed between Concessionco and the Trust) following the relevant renewal, expiry date or commencement date together with any other information relating thereto reasonably required by the Trust.

- 39.13.2 The Trust shall, upon receipt of the proposals for renewal or amendment or any other matter for which the Trust's consent is required, undertake to advise Concessionco within 15 Business Days as to whether or not it agrees with such proposals or notices, the only ground for refusal being that such proposal does not comply with Part A of Schedule 9 or this Clause 39 and where there is such ground, not to be unreasonably delayed or withheld. If no such response is given by the Trust within 15 Business Days, Concessionco shall send a notice in writing to the Trust stating that this response has not been received. If no response is received from the Trust within a further 10 Business Days, then Concessionco's proposals will be deemed to have been accepted by the Trust. In the event that the Trust does not agree with such proposals the matter shall be referred to the Disputes Resolution Procedure.
- 39.14 At no time during the Contract Period shall Concessionco store, install or use any equipment at the Trust Premises (including the Hospital) (whether or not such equipment shall be comprised within the Equipment or be in replacement or substitution for any of the Equipment or be new equipment supplied, installed and/or used by Concessionco) the installation, operation and use of which is not fully covered by insurances effected in accordance with this Clause 39 and Schedule 9 without the prior written consent of the Trust such consent not to be unreasonably withheld or delayed.

#### **Default**

- 39.15 If Concessionco is in default of any of its obligations to maintain or cause to be maintained insurance policies pursuant to this Clause 39 the Trust shall be entitled, after giving notice to Concessionco and Concessionco fails to respond or to remedy the default, to put in place such insurance as is required to secure the insurance cover pursuant to such obligations and the Trust shall be entitled to claim from Concessionco such costs and expenses as are reasonably incurred in connection therewith which would not have been borne by the Trust were it not for such default.

#### **Insured Liability**

- 39.16 The liability of one party to the other for any default, neglect, act or omission pursuant to this Agreement shall not be relieved by virtue of any insurance maintained in respect of the events giving rise to such liability.

#### **Trust Obligations**

- 39.16.1 The Trust shall during the Contract Period establish and maintain such insurance policies as it shall be required to establish and maintain pursuant to any Law or any direction of the Department of Health, National Health Service Executive or any equivalent body and in the absence of any such Law or mandatory guidelines or instructions the Trust shall make such arrangement in respect of insurance which a reasonably prudent owner or manager of a general hospital of similar size to the Hospital would make.
- 39.16.2 The Trust shall during the Contract Period either (at the option of the Trust) remain a member of the Clinical Negligence Scheme for NHS Trusts or establish and maintain such other equivalent arrangements (whether such equivalent arrangements shall



comprise an insurance policy or not) in respect of clinical negligence as may be required pursuant to any Law or any mandatory guidelines or instructions of the Department of Health, National Health Service Executive or any equivalent body and in the absence of any such Law or mandatory guidelines or instructions the Trust shall make such arrangements in respect of clinical negligence which a reasonably prudent NHS Trust owning and managing a general hospital of similar size to the Hospital would make.

- 39.16.3 The Trust shall during the Contract Period provide to Concessionco in writing such information which Concessionco may reasonably require from time to time in order to
- (a) enable it to comply with its obligations under Clauses 39.1 to 39.16; and
  - (b) satisfy itself that the Trust is complying with its obligations under this Clause 39.16.
- 39.16.4 Notwithstanding anything whatsoever contained in Clauses 39.16.1, 39.16.2, and 39.16.3 the Trust shall effect and maintain or cause to be effected and maintained those insurances as are and for such periods as are more particularly set out in Part B.1 of Schedule 9 (“the Trust Insurances”) on terms, conditions and with insurers to be approved by Concessionco (such approval not to be unreasonably withheld or such withholding to be deemed to be unreasonable where such terms and conditions reflect arrangements which a reasonably prudent owner or manager of a general hospital of similar size to the Hospital would make).
- 39.16.5 The Trust Insurances shall be effected on an annually renewable basis or for such longer periods as may be agreed.
- 39.16.6 The Trust’s Employers’ Liability Insurance shall be endorsed to the effect that the Insurers therein agree to waive all subrogation rights which they have or may acquire against Concessionco, the Building Contractor, the Service Providers and or any person which Concessionco may reasonably request including the Creditors and/or their Agents and their respective directors, officers and employees.
- 39.16.7 The Trust shall provide copy policies of each Trust Insurance relating to activities carried out in connection with this Agreement and any other satisfactory evidence of insurance which Concessionco may at any time reasonably request.
- 39.16.8 The Trust undertakes to review each Trust Insurance relating to activities carried out in connection with this Agreement from time to time and increase the sum insured in relation to the replacement value of the Insured property or the limits of liability to the extent that a reasonably prudent owner or manager of a general hospital of similar size to the Hospital would do. Concessionco shall have no liability to pay premium in respect of any Trust Insurance.
- 39.16.9 Concessionco shall maintain, on behalf of the Trust, the insurances set out in Part B2 of Schedule 9 by means, where appropriate, of extensions to the insurances taken out under Part A In respect each of those insurances referred to in Part B.2 of Schedule 9, it is agreed and acknowledged that the Trust shall reimburse Concessionco in full for

the premium payments made by Concessionco in respect of such insurances, such payments to be made in addition to the Total Payment by way of a lump sum within 7 Business Days of receipt by the Trust of appropriate written evidence that such premium payments have been made by Concessionco.

39.16.10 In respect each of those insurances set out in Part A of Schedule 9 (excluding those referred to in Part B.2) it is agreed and acknowledged that where Concessionco can demonstrate that the premium for any such insurance has increased as a result of any act or omission of the Trust in relation to any prior claim made by the Trust under the relevant insurance policy, such additional premium shall be reimbursed in full by the Trust to Concessionco.

#### 40. **DISPUTES**

Subject to any express provisions elsewhere in this Agreement regarding the settlement of specific disputes by any other method, all and any Disputes shall be resolved exclusively in accordance with Clauses 40 and 41.

#### **Negotiations**

- 40.1 Subject to Clauses 41.2.2 and 41.4 where, pursuant to Clause 41.2, a Dispute would but for Clause 41.1 be subject to Adjudication (but not otherwise) the party initiating the process for resolving the Dispute (“the Initiating Party”) will use reasonable endeavours to resolve the same promptly through negotiations as set out in Clauses 40.2 to 40.6 prior to and as a condition of the service of an Adjudication Notice.
- 40.2 The Initiating Party shall serve on the other Party (the “Responding Party”) a notice (the “Notice to Negotiate”) giving brief particulars of the Dispute, convening a meeting in Halifax or London within the period referred to in Clause 40.4 and providing not less than two alternative times at two alternative venues therefor. The Responding Party shall select one of the time and venue combinations offered in the Notice to Negotiate as the time and place for a meeting. Each Party shall be represented at such meeting by one senior representative and the Parties agree to the presence of a representative of each of the Building Contractor, Relevant Consultants and/or the relevant Service Provider as appropriate, providing such parties consent to being present. The Parties may agree to further or other meetings prior to any commencement of Adjudication.
- 40.3 Each of the nominated representatives attending the negotiation meeting pursuant to Clause 40.2 shall have the authority from the Party they are representing to reach an agreement for the settlement of the relevant Dispute.
- 40.4 Following service of a Notice to Negotiate there will elapse a period of three Business Days during Phase 1 or seven Business Days during Phase 2 prior to the accrual of the Initiating Party’s right to commence Adjudication and during which no Adjudication Notice may be served. The time periods set out in this clause are subject to increase or decrease by agreement of the Parties.
- 40.5 The content of any negotiations and all and any documents produced for the purposes thereof shall be confidential, without prejudice and shall not be disclosed in any Adjudication or any

subsequent court proceedings commenced pursuant to Clause 41, save where the negotiation has resulted in a written agreement signed by the Parties resolving the Dispute.

40.6 If, following expiry of the relevant period set out in Clause 40.4 or as otherwise agreed by the Parties, the negotiating meeting has not taken place or the Parties have not reached agreement as to the resolution of the Dispute then either of the Parties may immediately refer the Dispute to Adjudication pursuant to Clause 41.

#### 41. **ADJUDICATION**

41.1 Subject to Clauses 41.2.2 and 41.4 any Adjudication Notice is invalid unless a Notice to Negotiate has been served pursuant to Clause 40.2 and the relevant time period referred to in Clause 40.4 has expired.

#### 41.2

41.2.1 Following the expiry of the period referred to in Clause 41.1 any Party may, subject to Clause 41.2.8, refer a Dispute to Adjudication by serving an Adjudication Notice pursuant to paragraph 3(i) of the Adjudication Rules. In respect of a Dispute arising in Phase 1, the Adjudicator shall be the person identified in Schedule 4 to be appointed or any necessary replacement appointed pursuant to the Adjudication Rules. During Phase 2, the Adjudicator shall continue to be the party so appointed at the expiry of Phase 1 unless and until either party objects, in which event he shall be replaced by agreement or, failing agreement, under the Adjudication Rules.

41.2.2 If the Dispute to be referred to Adjudication under this Agreement raises issues which are substantially the same as or connected with issues raised in a dispute between Concessionco and the Building Contractor under the Construction Contract or between Concessionco and a Service Provider under one of the Services Contracts (a “Related Dispute”):

- (a) the Dispute may be referred at the option of Concessionco and with the consent of the Trust to the adjudicator appointed under the said contract to determine the Related Dispute, provided always that any party to that Related Dispute gives their consent. Such adjudication shall determine both the Related Dispute and the Dispute and be deemed to constitute Adjudication pursuant to this Agreement; or
- (b) the Related Dispute may be referred at the option of Concessionco to the Adjudicator appointed under this Agreement and in accordance with this Clause 41, in which case Concessionco shall exercise its rights pursuant to the Building Contract or relevant Service Contract to procure the referral of such Related Dispute to the said Adjudicator;

and in either case the provisions of Clauses 40.1 to 40.6 and 41.1 shall not apply and an Adjudication Notice may be served at any time.

**PROVIDED ALWAYS THAT** no determination of any dispute between Concessionco and the Building Contractor under the Construction Contract or between

any Service Provider and Concessionco under the Services Contracts shall have any binding influence or effect on any of the rights or obligations contained in this Agreement.

- 41.2.3 In the event of any disagreement between the parties as to whether any Dispute is referable to the Adjudicator appointed pursuant to this Agreement or to any adjudicator appointed to determine any Related Dispute, and in relation to any other disagreement over jurisdiction or procedure relating to any Adjudication, the parties agree to accept as final and binding a ruling on the disagreement made pursuant to paragraph 12 of the Adjudication Rules by any Adjudicator appointed under this Agreement.
- 41.2.4 If the amount payable by one Party to the other as a result of the Adjudicator's decision is not paid within the time specified by the Adjudicator in his award or, if no time is so specified, within a reasonable time, interest shall accrue on that amount at the Default Contract Rate and the whole of such amount shall be treated as a liquidated debt for all the purposes of Clause 70.
- 41.2.5 The Parties agree that decisions of any Adjudicator shall be binding upon them unless and until the Dispute is finally determined by legal proceedings or by agreement between the Parties and agree to abide by and give immediate effect to the said decisions.
- 41.2.6 After the Adjudicator (or as applicable an adjudicator appointed under another contract) has given his decision on a Dispute or a Related Dispute, any Party may refer the Dispute, and/or Concessionco may refer the Related Dispute, to any competent court for final determination. In determining the Dispute or Related Dispute, the court shall not be bound in any way by the decision or any of the findings of the Adjudicator or such adjudicator, and will have jurisdiction to rule on any issues which were not decided upon by the Adjudicator or said adjudicator and shall have power to open up, review, revise and/or disregard the decision of any Adjudicator or adjudicator and any certificate, opinion, account, requisition or notice of any Party or their representatives or the Independent Certifier and to determine all matters in dispute.
- 41.2.7 If the maximum amount at issue in a Dispute is £75,000 or less (inclusive of interest up to the date of the Adjudicator's award, but exclusive of any costs of the Adjudication) then subject to Clause 41.2.10 the Parties agree that the Adjudicator's decision is final and binding upon the Parties and agree not to refer the Dispute to the courts except in relation to any point of law or in the event of fraud or manifest error on the face of the Adjudicator's award, in which event either party may within 30 Days of the Adjudicator's award or discovery of the fraud refer the matter for determination by any competent court.
- 41.2.8 If the maximum amount at issue in a Dispute is greater than £75,000 then a prior negotiation of the Dispute pursuant to Clause 40.2 to 40.6 of this Agreement and, subject to Clause 41.4, Adjudication pursuant to Clause 41 is not mandatory and either Party may immediately refer the Dispute for determination by any competent court.

- 41.2.9 Save where an alternative method is stipulated elsewhere in the Agreement, any Adjudicator or court to which a Dispute has been referred by a Party shall have jurisdiction to determine as a preliminary issue the maximum amounts in Dispute for the sole purpose of applying Clauses 41.2.7 and 41.2.8. The Parties shall accept as final and binding, and shall not challenge, the initial assumption of jurisdiction over the Dispute by such Adjudicator or court in consequence of such preliminary determination, without prejudice to their rights under Clause 41.2.6 in relation to any substantive decision made by any Adjudicator. The term Dispute shall for these purposes include any dispute or difference between the Parties as to the maximum amount in dispute and the consequent jurisdiction of any Adjudicator or court.
- 41.2.10 Where there are parallel or sequential Disputes each concerning substantially the same or recurring issues of law and fact (for example Disputes arising in successive months concerning adjustments to an Element of the Total Payment made on the same basis) the maximum amount of the said Disputes shall be aggregated for the purpose of applying the thresholds set out in Clause 41.2.7 and 41.2.8 and the amount deemed at issue in a Dispute at any time shall be the whole of any such aggregated amount.
- 41.2.11 Subject to the jurisdiction of the English Courts to order consolidation, where a Dispute has been referred for determination to the English Courts, the Parties hereby consent to the consolidation of any action with any actions commenced pursuant to the Building Contract or any Services Contract in relation to any Related Dispute thereunder (as defined in Clause 41.2.2) and undertake to each other to take such further steps as may be necessary to procure such consolidation.
- 41.3 The amounts specified in Clause 41.2 shall, on the first day of April in each Year, be adjusted by the RPI Adjustment in the preceding year, such adjustments to take effect from such date.
- 41.4 Where as a result of the application of Clause 41.2.2 or otherwise any Adjudication carried out pursuant to this Clause 41 is subject to the provisions of the Housing, Grants and Regeneration Act 1996 (the "HGRA") the parties shall use their best endeavours to take and cause any Adjudicator to take all necessary steps to ensure the full compliance by such Adjudication with the provisions of the HGRA and shall be deemed to have agreed such amendments to this Agreement (including the Adjudication Rules) as shall be necessary to achieve such compliance, including abrogation of Clauses 40.1 to 40.6, 41.1 and 41.2.8. Concessionco shall exercise and notify any applicable option under Clause 41.2.2 as soon as practicable after a Related Dispute has arisen.

## 42. **CONFIDENTIALITY**

### **Disclosure**

- 42.1 Subject to Clause 42.2, if Concessionco or the Trust (the "Disclosing Party") is required to disclose to any person any Confidential Information by Law or is required or requested by any guidance under the provisions of the National Patients' Charter, or by any governmental or regulatory authority in accordance with whose requests or requirements it is the general practice of persons to whom the request or requirement is to comply then the Trust or, as the case may be, Concessionco shall be deemed to have given its consent to such disclosure.

Concessionco shall inform the Trust and the Trust shall inform Concessionco, in either case in writing, of the requirement for disclosure as soon as reasonably possible after it becomes aware of it and, if possible, before any Confidential Information is disclosed. Each party agrees to assist and co-operate in any appropriate action which the other party may decide to take in accordance with this Clause and to take reasonable and appropriate steps to preserve the confidentiality of information of a commercially sensitive nature.

Nothing in this Clause shall give Concessionco the right to disclose any information relating to individual patients' medical records or conditions without the prior written consent of the Trust.

42.2 Notwithstanding Clause 42.1, the Trust shall not disclose any confidential information of Concessionco of a technically, commercially or financially sensitive nature save to the extent that it is required to do so by Law provided always that any disclosure by the Trust made in accordance with Clause 42.4 shall not constitute a breach of this Clause 42.2.

42.3 Concessionco shall maintain and shall procure that Service Providers maintain security safeguards no less than those used by the Trust at the date hereof in relation to any information of a confidential nature relating to patients which each respectively receives as a result of the performance of the Works or Services.

42.4 Save as required without limitation:

- (i) by any Law or rules of professional practice; or
- (ii) as ordered by a Court of competent jurisdiction; or
- (iii) as reasonably required for the appropriate performance of the obligations or the exercise of rights contained in this Agreement or any other Project Document; or
- (iv) to instruct advisers fully or to provide information to the Creditors and potential Creditors (and their respective advisers) (provided that the parties shall use their reasonable endeavours to impose on those who receive such information like obligations mutatis mutandis);
- (v) by (in the case of Concessionco) the requirements of the Stock Exchange or the Securities and Futures Authority or (in the case of the Trust) the NHS Executive or HM Treasury or by any other relevant regulatory authority; or
- (vi) by Clause 42.1,

each of Concessionco and the Trust and their respective employees and agents as the case may be undertakes to the other to treat as confidential all information which may be derived from or obtained in the course of or prior to the execution of this Agreement or which may come into its possession or the possession of any of its employees, servants, agents or sub-contractors and if so required shall use its reasonable endeavours to procure that such persons shall enter into a confidentiality undertaking in a form acceptable to Concessionco or the Trust as the case may be.

Each of Concessionco and the Trust undertakes to use all reasonable precautions and endeavours to ensure that all such information is treated as confidential by it, its employees, servants, agents or sub-contractors and by any other parties to whom disclosure is permitted pursuant to this Clause 42.4. The undertakings of the Trust and Concessionco shall not extend to any information which:

- 42.4.2 can be shown by one of the parties to have been in its lawful possession or lawfully available prior to the date of disclosure by the other party; or
- 42.4.3 becomes available to the public other than as a result of an impropriety or breach of a legal obligation of confidence by any person, including but not limited to the parties to this Agreement.

42.5 The provisions of this Clause shall survive the termination of this Agreement.

### 43. **COMPLIANCE WITH TRUST AND OTHER PROCEDURES**

43.1 The Trust has disclosed the policies and procedures listed in Schedule 10 to Concessionco and Concessionco is aware of such policies and procedures and subject to Clause 43.1A shall, insofar as is reasonably practicable, perform and procure performance of the Services in a manner consistent with compliance with such policies and procedures.

43.1A Where any part of a policy or procedure shall have effect as a matter of contract between the Employees and Concessionco pursuant to the Regulations nothing in Clause 43.1 shall restrict Concessionco's ability to vary that part where the Regulations would not prevent Concessionco from doing so.

43.2 Concessionco shall subject to Clause 43.3 during and throughout the Contract Period:

- 43.2.1 comply and/or procure compliance by the Service Provider with the Trust's standing orders and financial instructions where relevant;
- 43.2.2 comply and procure compliance by the Service Providers in relation to their respective employees with all the policies and procedures of the Trust in relation to the Trust's employees concerning occupational health, health and safety at work, suitability of references and similar matters applied at the date hereof (and as changed from time to time and which changes have been notified in writing to Concessionco);
- 43.2.3 comply and procure that Service Providers comply with all the policies and procedures of the Trust applied at the date hereof (and as changed from time to time) concerning infection control, the handling of major incidents and the minimising of clinical risks which have been notified in writing to Concessionco;
- 43.2.4 comply with the Hospital's complaints procedure as applied at the date hereof (and as changed from time to time and as notified in writing to Concessionco);
- 43.2.5 perform its obligations under this Agreement so as to enable the Trust to comply with all the applicable provisions of the national Patients' Charter and of any Patients' Charter specific to the Hospital applied at the date hereof (and as changed from time to time to the extent that the same are notified in writing to Concessionco but only

insofar as Concessionco's obligations under this Clause 43.2.5 are consistent with Concessionco's other obligations under this Agreement); and

- 43.2.6 comply and procure that Services Providers comply with any policies and procedures of the Trust which come into effect after the Effective Date and which the Trust produces to conform to any NHS Requirement.
- 43.3 Any change, amendment or variation in any of the requirements, policies and procedures specified in Clauses 43.1 and 43.2.1 to 43.2.6 shall (save either where the Trust has given notice to Concessionco not to comply or perform in accordance with such change, amendment or variation or where the variation is effected by Concessionco pursuant to Clause 43.1A) constitute a Deemed Variation within Clause 18 save to the extent that the same is required only to comply with a Change in Law which is not a Trust Change in Law.
- 43.4 The parties will co-operate in good faith to agree an appropriate crisis management procedure by the date which is 4 Months before the New Build Completion Date.

#### 44. **CONCESSIONCO'S INFORMATION TECHNOLOGY**

- 44.1 Concessionco undertakes to install in accordance with Clause 13.2, the Concessionco IT System.
- 44.2 The Trust and Concessionco shall each investigate at the request of the other party the possibility of interfaces between their respective IT Systems for the purpose of either Concessionco being able to electronically access information of a type which is strictly necessary to assist it to provide the Services more efficiently or which the Trust requires to monitor the performance by Concessionco of the Services provided that:
- 44.2.1 the Trust shall be entitled to refuse any request for an interface on the grounds of patient confidentiality and/or that the elements of the Trust's IT System in question are not yet Millennium Compliant;
- 44.2.2 any interfaces developed by the Trust to the Trust's IT System shall only permit Concessionco to access data which Concessionco reasonably believes is strictly necessary for the purposes of assisting Concessionco to provide the Services more efficiently and that such access can be given in a way which does not prejudice the security of or give Concessionco access to any other data stored on the Trust's IT System;
- 44.2.3 any interfaces to the Trust's IT System shall be developed on the basis of menu style access or such other style of access as the parties may agree to the data referred to in Clause 44.2.2 above;
- 44.2.4 the party requesting the interface:
- (a) pays all reasonable costs incurred by the other party in investigating and developing the interface in question;



- (b) makes available to the party developing the interface and information about those elements of its own IT System which are reasonably required by the other party for the purposes of developing the interface in question;
  - 44.2.5 each party will indemnify the other against all damage losses and claims which arise out of any damage or degradation it causes to the IT System of the other party by reason of the operation of the interface or if it gains access to any data of the other party via the interface which is outside the scope of that to which access is granted pursuant to this Clause 44.2;
  - 44.2.6 all rights of each party to access the IT system of the other party via any interface or otherwise shall terminate automatically upon termination of the Agreement or, as appropriate, a Service Specification Arrangement.
  - 44.2.7 Each party will be liable for any loss or damage (excluding any consequential losses) suffered by the other party as a result of any corruption of the Network Infrastructure arising out of the use of the Network Infrastructure by the party in question.
- 44.3
- 44.3.1 Concessionco will install and maintain (and the Trust will give reasonable assistance in the installation and maintenance of) a firewall or other security devices between the Trust's IT System and Concessionco's IT System (and any data stored therein or thereby) which prevents unauthorised access to the Trust's IT System (and any data held thereon or thereby) by virtue of the Trust's IT System and Concessionco's IT System utilising the same Network Infrastructure;
  - 44.3.2 In addition Concessionco will take necessary measures to prevent unauthorised access to the Trust's IT System (and any data held therein or thereby) and the Trust will take necessary measures to prevent unauthorised access to the Concessionco IT (and any data held therein or thereby).
- 44.4 The Trust and Concessionco may from time to time, by agreement acquire rights to use Shared Software. In such event, the costs of the same should be divided equally by the parties provided always that:
- 44.4.1 Any licence taken out by one party shall permit use of the Shared Software by the other party for the purposes of the intended shared use;
  - 44.4.2 any licence taken out by Concessionco shall permit the continued use of the Shared Software by the Trust following the termination or expiration of this Agreement to the extent that Concessionco is able by the exercise of reasonable endeavours to secure such permission.
- 44.5 Upon any termination of this Agreement, the Trust shall have the right to require Concessionco:
- 44.5.1 to deliver up to the Trust off-line storage and security copies of the Trust Data to the extent such data can be recovered without compromise to Concessionco Data subject

- to the Trust reimbursing Concessionco for the cost of the media on which the Trust's Data is stored;
- 44.5.2 to dump on to magnetic media or other suitable media all or any of the Trust's Data stored on Concessionco IT System and to deliver up such media to the Trust subject to the Trust paying a reasonable charge for such dumping and reimbursing Concessionco for the cost of such magnetic media or other suitable media;
- 44.5.3 to erase all or any of the Trust's Data (to the extent that the same can be erased by Concessionco without erasing Concessionco's Data) then in Concessionco's possession from the Concessionco IT System;
- 44.5.4 to make and deliver up to the Trust such print-outs of the Trust's Data as the Trust may require subject to the Trust paying a reasonable charge for such print-outs.
- 44.6 If upon any termination of this Agreement the Trust shall require Concessionco to deliver up the Trust's Data on magnetic media then Concessionco shall:
- 44.6.1 deliver up the Trust's Data on industry compatible magnetic media as specified by the Trust; and
- 44.6.2 supply to the Trust free of charge all information necessary to enable such magnetic media to be read on another computer.
- 44.6.3 Concessionco undertakes, on termination of this Agreement, to remove Concessionco's IT System from the Hospital PROVIDED THAT:
- 44.7 Concessionco shall remove Concessionco's IT System at such times and in such a manner as may be reasonably directed by the Trust so as to cause minimum avoidable disruption to the efficient operation of the Hospital;
- 44.7.1 Concessionco shall only remove Concessionco's IT System after carrying out all or any steps required of it by the Trust in accordance with Clauses 44.5 and 44.6; and
- 44.7.2 Concessionco shall make good any physical damage to the Hospital caused by the removal of Concessionco's IT System.
- 44.8 Save as provided in any agreements that the Trust may have with third parties with respect to the Trust's IT System or other interests of third parties with respect to the Trust's IT System Concessionco further warrants that it has all the rights necessary to perform its obligations under this Agreement and that, so far as Concessionco is aware having made reasonable enquiry, no third party has, or is entitled to claim, any intellectual property right or interest which is inconsistent with any undertaking of Concessionco made in this Agreement.
- 44.9 If Concessionco receives written notice from the Trust of any breach of the warranty contained in Clause 44.8 then, without prejudice to the Trust's other rights and remedies, Concessionco shall, at its own expense and within a reasonable time after receiving such notice, repair or, at its option, replace any Concessionco IT System (and any data contained therein or thereby) or such parts of it as give rise to such breach or otherwise remedy such breach and shall take any other steps necessary to comply with those warranties.

44.10 Concessionco will institute and keep in place a system for safeguarding Concessionco's IT System (and any data contained therein or thereby) and will at its own expense make regular back-up copies of all data contained in or by Concessionco's IT System and Concessionco shall put in place appropriate disaster recovery arrangements which permit continuation of the Services using alternative computer equipment in the event of a disaster rendering Concessionco's IT System inoperable or inaccessible. Such disaster recovery arrangements shall provide for continuation of the Services within 48 hours, where necessary, from a remote site.

44.11 Concessionco and the Trust shall each ensure that in circumstances where the IT System of one interfaces with the IT System of the other all software used in conjunction with any such IT System shall have been virus and bug checked and any virus or bug removed before such use commences and that it shall where required and subject to Clause 44.2.1, be Millennium Compliant and each party shall indemnify the other from and against any and all loss or liability suffered by the other as a result of any breach of this obligation.

44.12 The Trust undertakes to compensate Concessionco for its reasonable costs, losses and expenses incurred as a result of:

- (a) any damage to third party property real or personal; and
- (b) injury to persons, including injury resulting in death,

arising out of or resulting from any failure, breakdown or malfunction of any of the Trust IT System whether or not such damage or loss arises from any breach by the Trust of any terms of this Agreement; except insofar as such damage or injury shall be due to any act, default or omission of Concessionco, its employees, agents, servants or sub-contractors and subject to Concessionco taking all reasonable steps to mitigate such costs, losses and expenses.

#### 45. **WARRANTIES**

45.1 The Trust warrants and undertakes to Concessionco that:

45.1.1 the Warranties and undertakings set out in Schedule 11 are, respectively, true and accurate and have been and are being complied with (where appropriate), in all respects; and

45.1.2 subject to the provisions of this Clause 45 the Trust hereby undertakes to indemnify and hold harmless Concessionco from and against any and all losses, costs, liabilities and expenses incurred by Concessionco as a result of any breach of the Warranty or undertaking given by this Clause 45.

45.2 Subject to this Clause 45 the rights and remedies of Concessionco in respect of any breach of any of the Warranties shall not be affected by the termination of this Agreement, by any investigation made by or on behalf of Concessionco into the affairs of the Trust, by Concessionco failing to exercise or delaying the exercise of any of its rights or remedies or without limit by any other event or matter whatsoever except a specific and duly authorised waiver or release.

- 45.3 No action based upon any allegation of breach of Warranty shall in any event be commenced later than:
- 45.3.1 in respect of any of the Warranties given in Paragraphs 1, 2 and 6 of Schedule 11, three years from the Services Commencement Date; and
  - 45.3.2 in respect of any of the Warranties or undertakings given in Paragraphs 3, 4 and 5 of Schedule 11, three years after the end of the financial year in which the breach is alleged to have occurred.
- 45.4 Each of the Warranties is a separate and independent warranty and without prejudice to any other warranty.
- 45.5 No claim or claims may be brought alleging any breach of Warranty by the Trust unless the value of any such claim or the total value in aggregate of such claims exceeds £30,000 when the whole and not merely the excess shall be payable.

46. **LIABILITIES AND REMEDIES**

- 46.1 Save to the extent included in:
- 46.1.1 any deduction from or adjustment or other variation of any element of the Total Payment expressly permitted by this Agreement; or
  - 46.1.2 any payment which one party (whether by indemnity or otherwise) is by the express terms of this Agreement made liable to pay to the other, including any Compensation payable by the Trust to Concessionco pursuant to Clause 55;
- neither party shall be liable to the other for any loss of profit, loss of revenue, loss of use, loss of contract, loss of goodwill or any other economic loss.
- 46.2 The rights of the parties expressly provided by this Agreement to terminate this Agreement or any Service Specification Arrangement and in relation to the calculation and paying of any amounts payable in consequence of any such termination are exclusive and are in place of (and not cumulative with) all other rights of termination or payment consequential thereon, whether express or implied, arising by common law, (including without limitation any rights in tort which shall include without limitation actions brought in negligence and/or nuisance) in equity, by statute or otherwise howsoever.
- 46.3 The rights and remedies provided for the Trust by Clause 33 and any other indemnities or rights or remedies conferred by the express provisions of this Agreement (including, without limitation, those in Clauses 9, 31, 32A, 58 and 60) in relation to any failure by Concessionco to provide the Services in accordance with this Agreement and/or in respect of Unavailability are exclusive and are in place of (and not cumulative with) all other rights or remedies in respect of such failure or Unavailability, whether arising by common law (including without limitation any rights in tort which shall include without limitation actions brought in negligence and/or nuisance), in equity, by statute or otherwise howsoever. Accordingly, the Trust hereby waives to the fullest extent possible all such other rights in respect of such failure or Unavailability, and releases Concessionco, the Service Providers and any of their respective subcontractors,

officers, employees and agents to the same extent from all duties, liabilities, responsibilities or obligations arising in relation to the same.

46.4 Save as otherwise expressly provided in this Agreement or for any remedy which Concessionco may have against the Trust for breach of this Agreement by this Trust or otherwise in law or in equity, any financial consequences, cost, expense or liability suffered or incurred by Concessionco which arises out of or from any aspect of performance of the Works or Services shall, as between Concessionco and the Trust, be Concessionco's sole and entire responsibility.

47. **STOCKS**

47.1 The Trust shall sell with full title guarantee and Concessionco shall purchase such stocks of materials and consumable equipment used by the Trust at the Trust's Premises for purposes equivalent to the performance of the Services prior to the Services Commencement Date as may be agreed in writing between the parties prior to the Services Commencement Date. The Parties shall use reasonable endeavours to reach such agreement.

47.2 Any amounts agreed under Clause 47.1 shall (to the extent agreed) be paid to the Trust within twenty eight (28) Days of the later of:

- (a) Services Commencement Date; and
- (b) their being agreed; and
- (c) (as to any balance) within twenty eight (28) Days of the amount being determined.

47.3 The Trust shall be liable for the payment of all sums in respect of items included in the stocks and equipment as at the Services Commencement Date whether such sums are due and payable prior to or after the Services Commencement Date.

47.4 Any consumables required in the performance of the Services at any time after the Services Commencement Date shall be provided and paid for by Concessionco.

47.5 The risk and property to such stocks and consumables shall pass to Concessionco on the physical delivery of the same to Concessionco.

48. **NUMBER NOT USED**

49. **NUMBER NOT USED**

50. **NUMBER NOT USED**

51. **REFINANCING**

51.1 If Concessionco wishes to enter into a Refinancing, it will no later than 30 days prior to the Refinancing Date deliver to the Trust a Refinancing Notice. Receipt of a Refinancing Notice shall require the Trust, by no later than the Refinancing Date, duly to execute and deliver all such documents and other items relating to such Refinancing as Concessionco may reasonably require including a direct agreement substantially in the form of the Direct Agreement, provided that the Trust shall not be required to enter into any such documents which would

materially increase the Trust's obligations or exposure or prejudice its rights save in respect of any increase in the Trust's obligations on a termination of this Agreement as contemplated by the provisions of this Agreement.

- 51.2 If the Refinancing Date occurs during a Trust Uplift Period the Refinancing Notice will be in the form, at the option of Concessionco, of a Trust Share Refinancing Notice or a Refinancing Notification. In all other circumstances the Refinancing Notice will be in the form of an Exempt Refinancing Notice.
- 51.3 Within 5 Business Days of a Refinancing Notice, the Trust shall notify Concessionco whether or not (if the Refinancing Notice is a Trust Share Refinancing Notice) it agrees the Uplift Share and Schedule 20 Adjustments and (in any case) it agrees the Model Adjustments identified therein. If the Trust does so agree, with effect from the Refinancing Date (only if the Refinancing Notice is a Trust Uplift Refinancing Notice) the Total Payment shall be adjusted by the Uplift Share (in any case), the Model Adjustments (only if the Refinancing Notice is a Trust Share Refinancing Notice) and Schedule 20 Adjustments. If the Trust does not so agree, the Refinancing may still proceed but the Uplift Share, the Model Adjustments and Schedule 20 Adjustments (as the case may be) shall be referred to the Disputes Resolution Procedure.

## 52. **CHANGE OF LAW**

- 52.1 Save as otherwise expressly provided in this Agreement (and in particular subject to Clause 52.2) Concessionco shall procure at its own expense and without any compensation from the Trust in respect thereof that at all times:
- 52.1.1 the Works comply with Law; and
- 52.1.2 the Services are performed to comply with Law.
- 52.2 In the event only of any Trust Change in Law Concessionco may (subject to Clause 52.3) serve a Change in Law Notice on the Trust setting out in reasonable detail the effect of any such Trust Change in Law on the Works, the Services or the Hospital (as the case may be).
- 52.3 Concessionco shall not be entitled to serve a Change in Law Notice in respect of any Trust Change in Law which was reasonably foreseeable on the date of execution of this Agreement on the basis only of draft Bills published in Government Green Papers or White Papers or other Government Departmental Consultation Papers, Bills, draft statutory instruments or draft instruments or proposals in the Official Journal of the European Communities in each case published before the date of execution of this Agreement, provided that all the aforementioned have been published in substantially the same form as such Trust Change in Law as implemented.
- 52.4 Upon receipt by the Trust of a Change in Law Notice, any variation or changes to the Works, the Services or the Hospital which are necessary as a result of the Trust Change in Law shall, subject to Clause 52.5, take effect as a Trust Variation to which the provisions of Clauses 18 and 24 shall apply, provided that Concessionco shall be obliged to implement the same and the Trust shall have no right to amend or withdraw the same, and for the purposes of Clause 18.4, the receipt by the Trust of the Change in Law Notice shall be treated as if it were a written notice from the Trust for the purposes of Clause 18.4.

52.5 If as a result of a Trust Change in Law, the parties having followed the procedure (so far as applicable) set out in Clause 18, Concessionco proposes any increase in the price charged by it (a) in consideration for the provision of any Hotel Service in excess of 7.5% per annum or (b) in the aggregate in excess of 7.5% per annum of the total of the Performance Element and Volume Element charged for all the Hotel Services, the Trust shall be entitled to require Concessionco to carry out a Benchmarking exercise or Market Testing exercise (as appropriate) in accordance with Clause 35 in respect of its increased charges for (a) that Hotel Service or (b) all or any of the Hotel Services as appropriate and the price determined as a result of such exercise shall be effective from the date at which the relevant Variation is implemented.

**53. CHANGE OF BUILDING CONTRACTOR OR SERVICE PROVIDER**

53.1 Subject to Clause 53.2 below, Concessionco shall not be entitled to replace the Building Contractor or any Service Provider nor include any Service Provider or proposed Service Provider (excepting the current Service Providers) in a Market Testing at any time during the Contract Period, except with the prior written consent of the Trust and of the Creditors pursuant to the Direct Agreement, such consent not to be unreasonably or vexatiously withheld or delayed.

53.2 The Trust must give Consent to a replacement Service Provider or Building Contractor if the proposed Service provider or Building Contractor;

- (a) has the legal capacity power or authorisation to become a party to and perform the obligations of the Service Provider under the Services Contract or Building Contractor under the Construction Contract;
- (b) has the technical competence, financial standing and resources to perform the obligations of the Service Provider or Building Contractor under the Project Documents; and
- (c) would not by reason of its employment materially adversely affect the reputation of the Trust or is not patently unsuitable to be involved with the operation of an NHS Hospital, in each case on reasonable objective criteria.

**54. ENVIRONMENTAL LIABILITIES**

54.1 Concessionco shall be entirely responsible for the safe and lawful transportation within the Trust's Premises of all clinical and non-clinical waste (including Sharps contained in the correct receptacles ) arising from any activities carried out on the Trust's Premises during the Contract Period and the placing of them into correct receptacles for collection by YW Enterprise Limited or Calderdale Borough Council (or their successors) (as appropriate) and the Trust shall have no liability in respect thereof save that (without prejudice to Clause 8) Concessionco shall not be responsible for:

54.2 the disposal of clinical waste and Sharps into the correct receptacles within the Hospital by the Trust and its employees and agents which shall be the responsibility of the Trust and the Trust hereby indemnifies Concessionco against any claim loss or injury arising from such incorrect disposal or any transportation away from the Trust's Premises of any clinical or non-clinical waste.

- 54.3 without prejudice to the Trust's obligations to indemnify Concessionco pursuant to Clause 54.2 Concessionco shall be responsible for the safe and lawful disposal of clinical waste and Sharps safely and lawfully into the correct receptacles within the Hospital by its employees (or the employees of Service Providers) where such disposal is necessary in order for Concessionco to provide the Services in accordance with this Agreement.
- 54.4 Each party undertakes to the other that, in discharging its responsibilities under Clause 54.1 it shall:
- 54.4.1 comply in all respects with all Environmental Requirements including where appropriate the keeping of Records;
  - 54.4.2 comply in all respects with all Environmental Permits;
  - 54.4.3 notify the other party as soon as is reasonably practicable upon receipt of any communication or notification from any regulatory authority alleging a breach of or non-compliance with Environmental Requirements or Environmental Permits and thereafter keep the other party informed in writing of all progress made in remedying the alleged breach or non-compliance to the satisfaction of the regulatory authorities; and
  - 54.4.4 supply to the other party copies of all environmental reports and audits prepared by for or on behalf of the first party in relation to the obligations contained in this Clause 54.4.

**55. FORCE MAJEURE, RELIEF EVENTS, UNINSURABLE RISKS AND COMPENSATION EVENTS**

**Relief**

- 55.1 Concessionco shall not be in default of or liable for breach or delay in performance of its obligations hereunder or, save as expressly provided in this Clause 55, be liable to the Trust for any losses or damages whatsoever arising out of the prevention, hindrance or delay of the performance of any of Concessionco's obligations to the extent that the performance of such is prevented or hindered by:
- (a) the occurrence of any Force Majeure Event;
  - (b) the occurrence of any Relief Event;
  - (c) the occurrence of any Trust Default;
  - (d) the presence of any Concessionco Latent Defect, Trust Defect or Trust Refurbishment Works Defect or any damage, repair or preventative maintenance consequent upon or disruption caused by such defect to the extent that such damage is not caused by Concessionco acting in breach of this Agreement;
  - (e) the occurrence of any Compensation Event; or
  - (f) the occurrence of any Uninsurable Risk;



- (g) or the effects of any such event

save where due to any deliberate or negligent act or omission of Concessionco.

The Trust shall be similarly relieved of its obligations to the extent prevented or hindered from performing or meeting the same by any Force Majeure Event, SAVE THAT the Trust shall not be relieved by reason of any Force Majeure Event from any payment obligation save as provided by this Clause 55 and to the extent that it is prevented by the event from transmitting such payment to Concessionco and then only for as long as such prevention subsists. Interest at the Non Default Contract Rate shall be payable from the due to the actual date of any payment so prevented.

### **Compensation**

55.2 Without prejudice to Clause 55.4, Concessionco shall be entitled to claim and the Trust shall be liable to pay to Concessionco Compensation in accordance with Clause 55.4 following:

- (a) the occurrence of any Trust Default;
- (b) the occurrence of any Force Majeure Event;
- (c) the occurrence of any Compensation Event;
- (d) the presence of any Concessionco Latent Defect, Trust Defect or Trust Refurbishment Works Defect or any damage, repair or preventative maintenance consequent upon or disruption caused by such Concessionco Latent Defect to the extent that such damage is not caused by Concessionco acting in breach of this Agreement; or
- (e) the occurrence of any Uninsurable Risk;

or the effects of any such event.

55.3 If Concessionco makes a claim for Compensation, Concessionco shall, without prejudice to the Trust's obligation to pay Compensation in full, take all reasonable and appropriate steps to mitigate as far as possible the extent to which it incurs any loss or expense and in particular shall:

- (a) use all reasonable endeavours to recover any and all sums which may be recoverable by Concessionco from insurers pursuant to Clause 39 or otherwise from any third party as soon as is reasonably practicable and
- (b) give credit to the Trust for such sums recovered by Concessionco from insurers or other third parties.

55.4 In the event that Concessionco believes that it is entitled to Compensation the following procedure shall apply:

55.5 Concessionco shall notify the Trust in writing as soon as it has become aware that an event as referred to in Clause 55.2 has occurred;

- (a) Concessionco shall as soon as reasonably practicable thereafter notify to the Trust Representative its estimate of the amount of the Compensation due or to be become due pursuant to this Clause 55 and Schedule 1. The Trust Representative shall consider whether such Compensation is due consequent upon the occurrence of the said event. The amount of such Compensation shall be calculated as a daily amount for any ongoing loss or damage and on a lump sum basis for any other amounts, as and when incurred. Concessionco shall submit in support of its application such information as the Trust Representative may reasonably request in order to decide the matter in question. The Trust Representative shall within 5 Business Days of receipt of notice under this Clause notify Concessionco in writing whether or not it agrees that Compensation is payable in accordance with this Clause and, if so, the amount that it considers is then payable;
- (b) If the Trust Representative agrees that Compensation is payable the Trust Representative shall, acting reasonably, make a provisional assessment of the amount of such Compensation within 5 Business Days of receipt of the notice referred to in Clause 55.5(a) which it shall notify to Concessionco and pay within 5 Business Days of such notification PROVIDED THAT Concessionco may, if it does not agree with such assessment, or if the Trust Representative does not agree that any Compensation is payable, refer the matter to the Disputes Resolution Procedure, whereupon the Trust shall make and/or continue to make payment of amounts as provisionally assessed until the Dispute is determined by the Disputes Resolution Procedure.

55.5.2 NOT USED.

55.5.3 In the event of any Dispute as to Compensation which would, if determined adversely to Concessionco, lead to a reduction in the Total Payment or any element thereof, then for the avoidance of doubt, Clause 70 shall apply.

55.5.4 Any amounts of Compensation that the Trust is obliged to pay to Concessionco pursuant to this Clause 55 which are in addition to the Total Payment shall be added to or included in an invoice issued pursuant to Clause 87.

55.5.5 Where a Force Majeure Event or Relief Event prevents, hinders or delays the performance of the Works or Services or any part thereof by Concessionco, Concessionco and the Trust shall each use all reasonable endeavours to restore such performance, provided that this obligation does not (subject to Clause 39.6) extend to the incurring by either party of expenditure in the re-instatement or repair of the Works or the Hospital.

## **Termination**

55.6 Where, as a result of any Force Majeure Event, if the performance of the whole or a substantial part of the Works or Services cannot be restored pursuant to Clause 55.5.5 either party shall have the right to terminate this Agreement by notice in writing to the other to take immediate effect:

- (a) at any time after six months from the date of commencement of any such event during which period such event continues; or
- (b) if such performance is prevented for twelve (12) Months or more in aggregate in any period of twenty-four (24) Months as a result of any such event.

### **Performance of Services**

55.7 To the extent that Concessionco is prevented, hindered or delayed in performing any of the Services as a result of:

- (a) the occurrence of any Force Majeure Event;
- (b) the occurrence of any Relief Event; or
- (c) the occurrence of any Uninsurable Risk;

or the effects of any such event the Trust shall pay a fair and reasonable sum for such Services which may be provided, in addition to any Compensation payable, such amount to be paid pursuant to the procedures set out in Clause 33 and included in the Total Adjustments for the Invoice Month in question and provided always that such amounts shall not include any double payment of any element of the Total Payment.

55.8 No failure to earn Points by reason of:

- (a) the occurrence of any Relief Event;
- (b) the occurrence of any Force Majeure Event;
- (c) the presence of any Concessionco Latent Defect, Trust Defect or Trust Refurbishment Works Defect or any damage, repair or preventative maintenance consequent upon or disruption caused by such defect;
- (d) the occurrence of any Trust Default;
- (e) the occurrence of any Compensation Event; or
- (f) the occurrence of any Uninsurable Risk;

or the effects of any such event shall be taken into account at any time in determining whether or not a Termination Indicator has accrued.

### **Uninsurable Risks**

55.9

55.9.1 Concessionco shall give to the Trust the maximum practicable prior notice in writing of the cancellation or expiry of any policy of insurance leading to the creation of any potential Uninsurable Risk. Such notice shall specify:

- (a) the particular risk which has caused the unavailability of insurance or increase in premium price, as the case may be;

- (b) where applicable, the old and new premium for the relevant policy and the premium with and without the Uninsurable Risk; and
- (c) any proposal from Concessionco to mitigate any such premium increase.

55.9.2 If the Parties agree that the particular risk which is the subject of notice as referred to in clause 55.9.1 is or will become an Uninsurable Risk, the provisions of clause 55.9.3 shall apply. If the parties are unable to so agree within 7 days of such notice the matter shall be referred to the Disputes Resolution Procedure at the option of either party.

55.9.3 Once the parties have agreed or it has been determined that the particular risk is or will become an Uninsurable Risk, the Trust may within a further 14 days either:

- (a) pay as part of the Availability Element any premium in excess of a reasonable commercial rate attributable to the Uninsurable Risk and necessary to render the same insured on terms set out in Schedule 9; or
- (b) agree with Concessionco such alternative arrangements in respect of such Uninsured Risk as may be mutually acceptable to both parties;

failing which the relevant risk shall be deemed to have been an Uninsurable Risk as from the date of expiry or cancellation of cover as aforesaid.

55.9.4 If in respect of the relevant Uninsured Risk the Trust does not pay any necessary additional premium or agree alternative arrangements pursuant to Clause 55.9.3(a) or (b) respectively then either party may thereafter at any time terminate this Agreement and Clause 68 shall apply, provided that the Trust's right to terminate under this Clause 55.9.4 shall arise only where the Uninsured Risk exposes it to a significant risk of substantial loss, damage or liability which would otherwise have been insured but for the unavailability of insurance as aforesaid.

55.9.5 If at any time the Trust considers that an Uninsurable Risk has again become insurable in the London insurance market at reasonable commercial rates from reputable insurers on the terms required by this Agreement it shall serve notice in writing to that effect on Concessionco. If, within 7 days of such notice, the parties have agreed that the said risk is so insurable, or if failing such agreement it is determined by the Dispute Resolution Procedure that it is so insurable, Concessionco shall again be obliged to insure the same and the provisions of Clauses 55.9.1 to 55.9.4 above, together with any arrangements made pursuant to Clauses 55.9.3 above, shall cease to apply.

## 56. **EXTENSION OF CONTRACT PERIOD**

56.1 The parties shall meet as soon as reasonably practicable after the occurrence of a Force Majeure Event, Uninsurable Risk or Relief Event and shall use all reasonable endeavours to agree such extension (if any) to the Early Termination Dates, End Date and Contract Period as may be reasonable and appropriate in all the circumstances in order to place Concessionco, so far as practicable, in the same economic position in which it would have been but for such

occurrence, taking into consideration any Compensation or insurance proceeds received by Concessionco in respect of the relevant event. If the parties fail to agree either party may refer the Dispute to the Disputes Resolution Procedure.

56.2 If Concessionco is unable during Phase 2 to perform the Services or any of them as a result of a Force Majeure Event or Relief Event , the Trust shall be entitled during such period to perform or procure the performance of any of the Services so affected itself (any other party employed by the Trust being deemed to be a Trust Contractor) to the standard required by this Agreement and the Service Specification Arrangements provided that the Trust shall give all reasonable assistance to enable Concessionco to resume provision of the Services following the cessation of the Force Majeure Event or Relief Event and that the Trust shall reimburse Concessionco for all costs reasonably incurred by Concessionco arising from any failure by the Trust or any Trust Contractor to perform the Services to the standard required by this Agreement and the Service Specification Arrangements.

57. **CORRUPT GIFTS AND PAYMENTS OF COMMISSION**

57.1 Concessionco shall not do, and warrants that in entering this Agreement it has not done, any of the following (hereafter “prohibited acts”):

- (a) offer, give or agree to give to any servant of the Trust any gift or consideration of any kind as an inducement or reward:
  - (i) for doing or not doing any act in relation to the obtaining or performance of this or any other contract with the Trust; or
  - (ii) for showing or not showing favour or disfavour to any person in relation to this or any other contract with the Trust; or
- (b) enter into this or any other contract with the Trust in connection with which commission has been paid or has been agreed to be paid by him or on his behalf, or to his knowledge, unless before this Agreement is made particulars of any such commission and of the terms and conditions of any such agreement for the payment thereof have been disclosed in writing to the Trust.

57.2 If Concessionco, any Sponsor or any sub-contractor of Concessionco or any of its or their employees or agents (or anyone acting on its or their behalf) does any of the prohibited acts or commits any offence under the Prevention of Corruption Acts 1889-1916 with or without the knowledge of Concessionco in relation to this or any other contract with the Trust, the Trust shall be entitled:

- (a) to terminate this Agreement in accordance with Clause 60, whereupon Clauses 66.8 and 66.12 shall apply; or
- (b) to require Concessionco to procure the termination of a sub-contract where the prohibited act is that of a sub-contractor; and
- (c) to require Concessionco to procure the dismissal of an employee (whether his own or that of a sub-contractor) where the prohibited act is that of such employee; and

- (d) to recover from Concessionco the amount or value of any such gift, consideration or commission.

57.3 In exercising its rights or remedies under this condition, the Trust shall:

- (a) act in a reasonable and proportionate manner having regard to such matters as the gravity of, and the identity of the person performing, the prohibited act; and
- (b) give all due consideration, where appropriate, to action other than termination of this Agreement, (including (without being limited to) the actions set out in Clauses 57.2(b) to (d)).

## 58. **TERMINATION OF INDIVIDUAL SERVICE SPECIFICATION ARRANGEMENTS**

58.1 The Trust shall be entitled, subject to the provisions of Clause 58.2, by 30 (thirty) Days notice in writing to Concessionco to terminate (with effect from expiry of such notice) a Service Specification Arrangement in the event that:

58.1.1 the Trust serves a Service Provider Termination Notice pursuant to and in accordance with Clause 33.22 on three (3) or more separate occasions in any Benchmarking Period; or

58.1.2 the Trust serves a Service Provider Termination Notice pursuant to and in accordance with Clause 33.22 and Concessionco fails to carry out such termination and procure a replacement Service Provider (in accordance with Clause 53) within 180 days of receipt of such notice provided that there shall be added to such period of 180 days any period during which the Trust has unreasonably withheld or delayed its consent pursuant to Clause 53 and PROVIDED FURTHER THAT Concessionco shall always have the option to undertake the Services itself pursuant to Clause 33.22.3.

58.2 The Trust shall have no right to terminate the Estates Maintenance Service Specification Arrangement.

## 59. **CONSEQUENCES OF GIVING NOTICE OF TERMINATION OF INDIVIDUAL SERVICE SPECIFICATION ARRANGEMENTS**

59.1 Upon the termination of any Service Specification Arrangement pursuant to Clause 58:

59.1.1 to the extent such data is not required to perform remaining Services, Concessionco shall make available to the Trust for collection all data of a confidential nature relating to any patient or patients or the Trust which it holds in connection with such Service and where such data is so required, Concessionco shall share such data with the Trust and/or any Trust Contractor to the extent required to enable the Trust and/or Trust Contractor to continue to provide any Service referred to in Clause 58;

59.1.2 all payments or repayments due to either party shall be made within seven (7) Business Days of the effective date of such termination; and

59.1.3 the Trust shall permit the Service Provider or its employees, agents or sub-contractors as appropriate by prior appointment to access the Hospital and the Trust's Premises for a period of forty two (42) days from the effective date of such termination to allow

that Service Provider to remove any of its goods, chattels or moveable equipment PROVIDED THAT when such prior appointment is made the Service Provider shall provide the Trust with a list of all such goods, chattels and equipment which it proposes to remove.

59.2 If, following receipt of a list pursuant to Clause 59.1.3, the Trust wishes to purchase any of such goods, chattels or moveable equipment or for any reason does not agree that such items should be removed, the Trust and Concessionco shall negotiate in good faith for a period of 14 days, and failing agreement at the end of such period the matter shall be referred to the Disputes Resolution Procedure save that Concessionco shall not be obliged to contravene any legal right of any third party in respect of the items in question.

59.3 subject to Clause 59.1.3 the agents and employees of any Service Provider engaged directly in the provision of the Service in question shall vacate the Trust's Premises and the Hospital as soon as reasonably practicable save to the extent that the employees of the Service Provider transfer to a new Service Provider.

59.4

59.4.1 Concessionco and the Trust acknowledge that upon termination of any Service Specification Arrangement pursuant to Clause 58, there may be a relevant transfer pursuant to the Regulations of the employees wholly or mainly engaged in the provision of the Services in respect of the Service Specification Arrangement as at the date of termination of the Service Specification Arrangement ("the Returning Employees") which shall be the date of the relevant transfer for the purposes of the Regulations ("the Return Date") from the Service Providers or Concessionco to the Trust or a Trust Contractor and pursuant to the Regulations the contracts of employment between the Service Provider and the Returning Employees may have effect after the Return Date as if originally made between the Trust, the Trust Contractor and the Returning Employees.

59.4.2 Concessionco shall or shall procure that the Returning Employees are notified of the relevant transfer referred to in 59.4 as soon as is reasonably practicable after service by the Trust of notice pursuant to Clause 58. Furthermore, irrespective of whether or not there may be at law a relevant transfer of the Returning Employees to the Trust or a Trust Contractor pursuant to the Regulations solely as a result of notice served pursuant to Clause 58:

(a) the Trust shall or shall procure that any Trust Contractor shall employ or offer to employ each of those whom the Trust (acting reasonably) considers would be likely to be the Returning Employees, such offer to be in writing and open for acceptance by those to whom the offer is addressed for a period which is not less than 14 days expiring on the day immediately preceding the Return Date. Any employee who refuses such an offer of employment shall not be a Returning Employee for the purposes of Clause 59.4.3;

- (b) the Trust and Concessionco shall use their respective reasonable endeavours to facilitate an orderly handover and continuity in the provision of the Service in question;

with the intent that the Regulations shall apply.

- 59.4.3 In relation to any employees or former employees employed at any time in the provision of services pursuant to any Service Specification Arrangement terminated pursuant to Clause 58, Concessionco undertakes to the Trust that it will indemnify the Trust from and against any liabilities in relation to such employees or former employees arising from their contracts of employment for claims arising prior to the effective date of termination of any Service Specification Arrangement or as a consequence thereof (which in relation to any of the Employees shall relate only to claims which have arisen after the Services Commencement Date) relating to the period from the Services Commencement Date to the Return Date in like terms (mutatis mutandis) to the indemnities given to Concessionco by the Trust pursuant to Clause 38 in Clause 38.4.1 and 38.4.3 (subject in the case of 38.4.1 to an exclusion in relation to allegations of non-consultation or failure to supply information in respect of which there shall have been insufficient time and in respect of 38.4.3 with the deletion of the text in parentheses), and that it will agree to like provisions (mutatis mutandis) relating to apportionment to those in Clause 38.6 so that references to the Services Commencement Date are deemed to be references to the Return Date and the Trust undertakes to Concessionco that it will indemnify Concessionco in like terms (mutatis mutandis) to the indemnities given to the Trust by Concessionco pursuant to Clause 38.4.2 and 38.4.4 so that references to the Services Commencement Date are deemed to be references to the Return Date.
- 59.4.4 Concessionco may undertake to indemnify the relevant Service Provider in respect of such employees such indemnity to be subject to the same conditions and same terms (mutatis mutandis) as those entered into by the Trust under Clause 59.4 and subject as aforesaid if Concessionco shall incur any liability to any Service Provider in respect of such indemnity Concessionco shall be indemnified by the Trust in respect of such liability pursuant to the indemnity given by the Trust under Clause 59.4 as if liability were originally incurred by Concessionco.
- 59.4.5 The Trust may undertake to indemnify the relevant Trust Contractor in respect of such employees or former employees as are referred to in Clause 59.4.3 such indemnity to be subject to the same conditions and same terms (mutatis mutandis) as those entered into by Concessionco under Clause 59.4 and subject as aforesaid if the Trust shall incur any liability to any Trust Contractor in respect of any such indemnity the Trust shall be indemnified by Concessionco in respect of such liability pursuant to the indemnity given by Concessionco under Clause 59.4 as if liability were originally incurred by the Trust.

## 60. **TERMINATION OF WHOLE AGREEMENT BY DEFAULT OF CONCESSIONCO**

- 60.1 Subject to the Direct Agreement, the Trust may at any time by twenty-eight (28) Days' notice in writing terminate this Agreement on the occurrence of any of the following events:



- 60.1.1 if Concessionco abandons the Works for a period of sixty (60) consecutive days otherwise than as a result of a Force Majeure Event, Relief Event or Trust Default or the effects thereof;
- 60.1.2 if Concessionco has failed to achieve Completion of the Works by a date twelve (12) months after the latest Completion Date for any Section of the Works; or
- 60.1.3 if two or more Service Specification Arrangements have been terminated pursuant to Clause 58 in any twelve month period.
- 60.1.4 if the Trust has served a Service Provider Termination Notice pursuant to and in accordance with Clause 33.22 in relation to the Estates Maintenance Service Provider on four or more occasions in any period of 10 Years;
- 60.1.5 if, during Phase 2, Concessionco is in material breach of this Agreement where such breach has or will have a materially adverse effect on the ability of the Trust to provide all, or substantially all, of the Clinical Services at the Hospital and such breach, if capable of remedy, has not been remedied within sixty (60) Days of the receipt by Concessionco of a written notice giving full details of the breach complained of.

For the purposes of this Clause 60.1.5 a breach shall be treated as “irremediable” if it is as a matter of fact not capable of remedy by Concessionco provided that, where the breach would otherwise be treated as irremediable by reason only of the fact that it has occurred and the breach constitutes the occurrence of a particular default or series of defaults, such breach shall be deemed to be capable of remedy and to have been remedied if within 60 Days:

- (a) the matter or matters giving rise to and the effects of the default or defaults have been duly corrected (to the extent appropriate in respect of the default in question);
- (b) all reasonable steps have been taken to prevent a recurrence of the default or defaults; and
- (c) the Trust receives a written undertaking from Concessionco that such default will not recur.

and where the default is a failure or omission to carry out a particular act, the carrying out of that act during such period of 60 Days, in addition to compliance with paragraphs (a), (b) and (c) above shall be deemed to be a remedy for the failure. Reasonable steps to prevent recurrence of the default or defaults shall, where appropriate, include taking steps which are reasonable in all the circumstances to replace the defaulting Service Provider provided always that such replacement occurs in due course.

- 60.1.6 if, as a result of any breach by Concessionco of its obligations under this Agreement:
  - (a) 100% of all Category A areas are Unavailable for a continuous period of 3 Months; or

(b) 75% or more of all Category A, B and C areas are Unavailable for a continuous period of 6 months.

60.1.7 the Trust shall be so entitled pursuant to Clause 57.2(a), having regard to Clause 57.3.

60.1.8 if Concessionco is in breach of any undertaking given pursuant to paragraph (c) of Clause 60.1.5.

60.1A The Trust may give written notice terminating this Agreement at any time following the determination of the Security Trustee pursuant to the Direct Agreement that the Final Reinstatement Plan (as defined in the Direct Agreement) shall not be adopted. For these purposes "Security Trustee" shall have the meaning set forth in the Direct Agreement.

60.2 The Trust agrees that it will not take any steps to terminate this Agreement and waives any other rights of termination it may have save as expressly provided for in Clauses 55, 57, 60, 62, 63 and 64.

## 61. **TERMINATION OF WHOLE AGREEMENT BY DEFAULT OF TRUST**

61.1 Concessionco may at any time terminate this Agreement by notice in writing if:

61.1.1 any sum or sums due and payable by the Trust to Concessionco in excess of an aggregate of £200,000 (subject to adjustment each year on 1 April in accordance with the RPI Adjustment) remain unpaid at midnight at the end of any Day on which such sum or sums were due; and

(i) Concessionco has issued a written warning to the Trust's Director of Finance or in his absence his Deputy that such sums remain unpaid and that it intends to invoke the provisions of this Clause 61 if such sums remain unpaid; and

(ii) such sum remains unpaid at midnight at the end of the Day which is 21 days from the date of the issue of such warning;

61.1.2 the circumstances set out in Clauses 12.2 or 13.1.10(ii) occur;

61.1.3 the Trust is in material breach of its obligation to grant access to the Site and/or the Trust's Premises and any such breach is not remedied within 28 days after written notice received by the Trust identifying any such breach and Concessionco's requirements for remedy of the same;

61.1.4 the Trust fails or ceases to provide all its Clinical Services for a continuous period of six (6) months provided that such failure or cessation does not arise as a result of any act or omission of Concessionco or to any circumstances beyond the control of the Trust.

61.1.5 a Discriminatory Bill passes a Second Reading in the first House into which it is introduced to Parliament. For the purposes of this Clause 61 a Discriminatory Bill is a Bill introduced by the Government or which receives the support of the Government at its Second Reading in the first House into which it is introduced to Parliament or is

otherwise passed by either House of Parliament at its Second Reading, which if passed would:

- (a) amend or repeal the National Health Service and Community Care Act 1990, the National Health Service (Residual Liabilities) Act 1996, the National Health Service Act 1997, the Health and Medicines Act 1988 or the National Health Service (Private Finance) Act 1997 in any case in whole or part; and
- (b) either;
  - (i) has the effect of removing from the Trust any material obligation under any of the Project Documents or its ability or any power to make or fund any payment when due from it under this Agreement (including on termination); or
  - (ii) has the effect of removing from the Secretary of State any power or obligation to procure the performance of any such obligation or the making of any such payment as is referred to in paragraph (a) above; or
  - (iii) has the effect of removing from the Secretary of State his legal capacity (or duty) to exercise his powers and discretions and perform his duties in the manner described in the Secretary of State's Letter; and

such power, obligation or ability is not transferred to or does not otherwise become exercisable by any other person with whom Concessionco and the Creditors are able to enter into arrangements which are in all material respects as satisfactory as those previously in place; and

the effect as is referred to in sub-paragraphs (i), (ii) or (iii) has (or can reasonably be expected to have over the remainder of the Contract Period) a material effect upon the creditworthiness of the Trust;

61.1.6 the Secretary of State, or any other minister or any other person to whom the Secretary of State or such minister has delegated any of his functions, makes a statement (a "Repudiating Statement") to the effect that or acts in a way to indicate that:

- (a) the Secretary of State will not observe, or exercise his duties and powers in a manner materially consistent with the Secretary of State's Letter; or
- (b) the Secretary of State intends to act (including by way of exercise of his duties or powers) in a manner which is materially inconsistent with the Secretary of State's Letter;

provided that Concessionco has taken active steps to seek clarification of the relevant action or statement and the Secretary of State or the relevant other person (as the case may be) has not, having been given an opportunity (which is reasonable in all the circumstances), by way of notice in writing from Concessionco (acting reasonably) and/or the Trust (acting reasonably) that such statement is considered to have the effect outlined above, to do so, withdrawn the statement or revoked the action; or

if the Secretary of State is otherwise prevented from acting in a manner consistent with the Secretary of State's Letter.

61.1.7 HM Government or any other Competent Authority sequestering, requisitioning, expropriating or otherwise seizing the Hospital or any material part thereof, which, for the avoidance of doubt shall not include any circumstances arising on the occurrence of a Force Majeure Event or the Trust exercising its rights pursuant to Clause 31.1.

61.2 Without prejudice to Clause 52 if either:

- (a) any Change of Law first having legal effect after the date of this Agreement; or
- (b) subject to Clause 13.1.10 any action of any Competent Authority which shall include the decision of a court (not the subject of appeal) (except where such action or decision arises as a result of any act, neglect, negligence or breach of any obligation by Concessionco, its officers, employees, agents or sub-contractors)

renders the performance or exercise by Concessionco of any of its material rights or obligations hereunder unenforceable, void, impossible, unlawful or illegal (and not merely more expensive)

Concessionco shall forthwith give notice thereof to the Trust whereafter the parties will meet in good faith and use reasonable endeavours to agree as to any variation of this Agreement necessary to render the performance or, as the case may be, exercise of such rights or obligations possible, lawful and legal. In the event that no such agreement is reached between the parties within 20 Business Days following the date of such notice, Concessionco may terminate this Agreement. From the date of Concessionco's notice until any agreement or termination pursuant to this Clause, Concessionco shall not be liable to the Trust for failure to perform any such material obligation.

In the event of a dispute between the parties as to:

- (i) whether the events referred to in Clause 61.2.(a) or (b) will render any rights or obligations of Concessionco unenforceable, void, impossible, unlawful or illegal; or
- (ii) whether the rights or obligations so affected are material.

either party may refer such matter to the Disputes Resolution Procedure

## 62. **TERMINATION OF WHOLE AGREEMENT BY INSOLVENCY**

62.1 Subject to the Direct Agreement, the Trust may terminate this Agreement by notice in writing on the occurrence of any one of the following events: if a proposal for a voluntary arrangement within Part 1 of the Insolvency Act 1986 or any other composition, scheme or arrangement with (or assignment for the benefit of) its creditors including any compromise or arrangement under Section 425 of the Companies Act, is made by Concessionco or if it shall be unable to pay its debts (where such debts in aggregate exceed £50,000 (indexed by the RPI Adjustment on each 1 April)) as they fall due provided that Section 123(2) of the Insolvency Act 1986 shall

not be applied in determining whether Concessionco is unable to pay its debts and in each case such circumstance continues for a period of 7 days after its occurrence or if a trustee, receiver, administrative receiver, administrator, liquidator or provisional liquidator or similar officeholder is appointed in respect of all or any part of Concessionco's business or assets and is not discharged within 42 days (provided that any such proceeding or enforcement process which is not material in the context of the performance of Concessionco's obligations under the Agreement shall be ignored for the purposes of this Clause 62) or if a resolution of Concessionco is passed or a petition is presented and not withdrawn or discharged within 42 days for the winding up of Concessionco or for the making of an administration order (otherwise, in each case, than for the purpose of a bona fide amalgamation or reconstruction) and upon such termination the provisions of Clause 66 shall apply.

**63. TERMINATION OF WHOLE AGREEMENT BY NO DEFAULT**

63.1 This Agreement shall terminate forthwith upon the mutual agreement of the parties in writing with the approval of the Senior Lenders and Mezzanine Lenders and on the terms set out in any such agreement.

63.2 This Agreement shall terminate by effluxion of time at the end of the Contract Period unless the parties hereto agree to extend the Contract Period and to this end the parties shall consult with one another at least 36 months but no more than 48 months before the expiry of the Contract Period with a view to extending the Contract Period or entering into a new agreement for the provision of the Services; and

63.2.1 at least 12 but no more than 15 months prior to the end of the Contract Period the parties shall meet at the written request of the Trust or if the Trust should fail to make such request the written request of Concessionco to discuss the arrangements for the vacation of the Hospital by Concessionco and for the provision of the Services following termination of this Agreement by way of expiry of the Contract Period;

63.2.2 to the extent that the Services will be provided by a party other than Concessionco after expiry of the Contract Period Concessionco shall give all reasonable co-operation (without being required to incur any substantive expense) to such other party and to the Trust in this regard and shall in the last 12 months of the Contract Period provide such other party with all reasonable access to the Hospital and with all information relating to the Services (save for any information as Concessionco may reasonably regard as commercially sensitive) as such other party may reasonably require.

63.3 This Agreement shall terminate in the circumstances provided for pursuant to the provisions of Clauses 13.1.10(i), 55.6, or 55.9.

**64. OPTION TO TERMINATE**

64.1.1 The Trust may terminate this Agreement and the Underlease (but without terminating the Lease) with effect on any Early Termination Date provided that:

- (a) it shall have given Concessionco written notice of its intention to terminate not less than 2 Years specifying that it is a notice pursuant to Clause 64.1.1(subject to Clause 64.4) prior to the relevant Early Termination Date;

(b) the Trust may exercise such option to terminate only if the Board of Directors of the Trust has passed a resolution to discontinue the provision of clinical services at the Trust's Premises; and

(c) upon the expiry of any such notice to terminate this Agreement the Underlease shall also terminate but the Lease shall (subject to Clause 64.2 and to the terms and conditions thereof) remain in full force and effect; and

64.1.2 The service by the Trust of the notice pursuant to Clause 64.1.1 shall impose an obligation on the Trust to deliver up to Concessionco on the relevant Early Termination Date vacant possession of the Trust Premises on the date of service of such notice free from any interest of any other person.

64.2 If the Trust wishes to terminate this Agreement and also to terminate the Lease with effect on any Early Termination Date the Trust shall serve a written notice to Concessionco (subject to Clause 64.4) not less than 2 years prior to the relevant Early Termination Date specifying that it is a notice pursuant to Clause 64.2. On the relevant Early Termination Date, and subject to Clause 64.4, Concessionco shall give vacant possession of the Premises then comprised within the Lease and shall deliver to the Trust the Lease and a duly executed transfer to the Trust of Concessionco's interest under the Lease and the Land Certificate in respect thereof (or the Charge Certificate(s) in respect thereof and duly executed forms of release of any changes created by it).

64.3 If the Trust shall serve notice of termination pursuant to Clause 64.2 both the Underlease and the Lease shall, subject to Clause 64.4, terminate upon the relevant Early Termination Date and the Trust shall pay to Concessionco on the relevant Early Termination Date by way of compensation a sum calculated in accordance with the following formula:

$$T = K \times \frac{AP_1 + AP_2 + AP_3}{3} \times \frac{IPN_1 + IPN_2 + IPN_3}{3 \times IPN_{(Base)}}$$

where :-

T is the early termination compensation payment

K is 2.25 for termination at the first Early Termination Date; 1.50 for termination at the second Early Termination Date; and 0.75 for termination at the third Early Termination Date

AP<sub>1</sub> is the total of the actual availability payment during the year immediately preceding the relevant Early Termination Date being the Availability Element less the Availability Deduction.

- AP<sub>2</sub> is the total of actual availability payment during the year prior to AP<sub>1</sub>, being the Availability Element less the Availability Deduction.
- AP<sub>3</sub> is the total of actual availability payment during the year prior AP<sub>2</sub> being the Availability Element less the Availability Deduction.
- IPN<sub>1</sub> is the total of the actual Inpatient Night activity levels during the year immediately preceding the relevant Early Termination Date
- IPN<sub>2</sub> is the total of the actual Inpatient Night activity levels during the year prior to IPN<sub>1</sub>
- IPN<sub>3</sub> is the total of the actual Inpatient Night activity levels during the year prior to IPN<sub>2</sub>
- IPN<sub>(Base)</sub> is the annual Inpatient Nights activity levels forecast in Schedule 12 as the date of this Agreement.

64.3.1 If the Trust shall not have served upon Concessionco any notice pursuant to Clause 64.1.1 or 64.2 prior to the date which is two years before any Relevant Early Termination Date then this Agreement shall continue unless terminated on any subsequent Early Termination Date pursuant to Clause 64.1.1 or 64.2 and the amount of the Availability Element shall be varied with effect from the relevant Early Termination Date so as to reflect a sum sufficient to provide for Concessionco over the remainder of the Contract Period:

- (i) Concessionco's proper and reasonable cost in making the Hospital available in respect of administration costs, directors' remuneration, computer maintenance and professional fees;
- (ii) depreciation in accordance with Concessionco's depreciation policy as disclosed to the Trust prior to the date of this Agreement such policy to be in accordance with generally accepted accounting principles;
- (iii) the costs to be incurred by Concessionco in continuing to secure the necessary insurance in relation to the Project under Clause 39 and Schedule 9;
- (iv) the reasonable costs (including any finance costs associated therewith) of replacement and/or renewal of the Hospital based on a price to apply throughout the remainder of the Contract Period (the obligations in relation thereto to remain obligations pursuant to the Estates and Maintenance Service Specification Arrangement);
- (v) an amount sufficient to maintain, together with the return derived from the Variable Fee and the Performance Element, a reasonable return upon any equity investment in Concessionco as at the next Early Termination Date taking into account the obligations that Concessionco will have at that date under this Agreement;

- (vi) amounts sufficient to enable Concessionco to continue to make repayments of interest and principal and comply with all ratios, covenants and other provisions of any amended or replacement Debt Agreements; and
- (vii) any other reasonable and appropriate costs to Concessionco required to fulfil its obligations under this Agreement for the remainder of the Contract Period.

64.3.2 The Performance Element and the Base Annual Value Element shall for the avoidance of doubt be paid and computed in accordance with Clauses 33 and 35 hereof.

64.4

- (a) At least three years before any Early Termination Date the Trust may serve written notice on Concessionco that it wishes to establish either or both of (i) the amount of compensation pursuant to Clause 64.3 and/or (ii) the Availability Element pursuant to Clause 64.3.1. The Trust and Concessionco shall then negotiate to agree such compensation and/or the amount of such Availability Element and the compensation or the amount of the Availability Element so agreed shall, if a notice is subsequently served pursuant to Clause 64.2 be the compensation payable pursuant to Clause 64.3 or (if no such notice is served) the Availability Element with effect from the relevant Early Termination Date.
- (b) If the parties are unable to agree the amount of compensation or the Availability Element as referred to in (a) above, either party may refer the matter to the Disputes Resolution Procedure at any time prior to the date which is two years and three months before the relevant Early Termination Date.
- (c) If the determination of the amount of compensation or the Availability Element as referred to in (a) above has been referred to the Disputes Resolution Procedure, the Trust may serve notice pursuant to Clauses 64.1.1 or 64.2 at any time within three months after such determination provided that the date on which the Concession Agreement and/or the Lease (as the case may be) shall terminate is the later of 12 months after the date of such notice or the relevant Early Termination Date.

In the event that the Disputes Resolution Procedure has not determined the amount of compensation or the Availability Element prior to the relevant Early Termination Date this Agreement shall continue until expiry of notice served by the Trust pursuant to 64.4(c) above and the payments, payment adjustments, terminations of this Agreement and/or the Lease and other arrangements contemplated by this Clause 64 shall take effect and be made at the expiry of the said notice. Pending such expiry, the Trust shall continue to make to Concessionco such payments as Concessionco has proposed in good faith pursuant to Clause 64.3.1, with any such payments being set off in full against sums which are determined to be due from the Trust to Concessionco as at and from the original relevant Early Termination Date and the restrictions in Clause 70 shall not apply to such set off.



65. **SURVIVORSHIP**

Termination of this Agreement shall not prejudice or affect any right of action or remedy which shall have accrued to the date of termination or shall thereafter accrue to either party under this Agreement. There shall remain in full force and effect notwithstanding termination of this Agreement all Clauses and Schedules necessary to give effect to the intention of the parties including without limitation Clauses 10, 30, 38, 40 to 42, 46, 59 and 66 to 69.

66. **CONSEQUENCES OF TERMINATION OF WHOLE AGREEMENT BY DEFAULT OR INSOLVENCY OF CONCESSIONCO**

**PRIOR TO COMPLETION OF THE NEW BUILD WORKS**

66.1 If the Trust elects by notice in writing to terminate this Agreement by reason of any default by Concessionco pursuant to Clause 60 or Clause 62 prior to Completion of the New Build Works, then the Trust will pay to Concessionco but without prejudice to Clauses 66.11 and 72 and subject to the Direct Agreement an amount equal to the lower of (A-B) and (C-B) where:

A = Total Funding Costs

B = Cost to Complete

C = The greatest of Senior Lender Liabilities, Adjusted Lender Liabilities (less Original Mezzanine Lender Liabilities) (all as at the date of termination) and Cost Build Up

provided that if (C-B) is lower than (A-B) and B is greater than C, Concessionco will pay to the Trust an amount equal to the difference between B and C provided always that the Trust shall use its best efforts to mitigate the Cost to Complete.

66.2 If the parties do not agree the amount of the Cost to Complete within 10 Business Days of the date of termination, then Concessionco shall serve a notice on the Trust requiring the Trust to carry out properly a competitive tendering process (for completion of the Works pursuant to and in accordance with the requirements of this Agreement and in the Timescale) as soon as reasonably practicable following notification from Concessionco and in accordance with all applicable Laws. The cost quoted by the lowest qualifying tender to carry out such Works shall constitute that element of the Cost to Complete.

66.3 If such competitive tendering process is not commenced by the Trust within 10 Days of notice from Concessionco or no qualifying tender is received within 4 months of the date of termination of this Agreement, the Cost to Complete shall be ascertained by no later than the day falling 5 months after the date of termination of this Agreement above by a duly qualified and certified Quantity Surveyor selected by the parties and approved by the Senior Lenders or in the absence of agreement within 5 Business Days of the expiration of 4 months of the date of termination of this Agreement nominated by the Senior Lenders pursuant to the Direct Agreement. The Quantity Surveyor shall act as an independent expert and his costs shall be added to and included in the costs so certified by him and paid for by the Trust.

66.4 Any sums payable by the Trust to Concessionco pursuant to Clause 66.1 shall be, at the option of the Trust (to be exercised within 10 days of agreement or determination of the amount

payable under Clause 66.1), paid either as a lump sum within 60 days of the date on which such sum is ascertained or in 28 equal quarterly instalments commencing on the next Accounting Date (each such instalment being due and payable by the Trust on each Subsequent Accounting Date), together (in each case) with interest accruing between the date of termination and the date of payment on the outstanding amount of such sum from time to time (after as well as before judgment) at the Non-Default Contract Rate, such interest to be paid at the time of payment of each instalment. If any such instalment is not paid when due pursuant to this Clause 66.4, interest at the Default Contract Rate shall be payable pursuant to Clause 87.2 and, if any instalment is not paid by the Trust within 5 Business Days of receipt by the Trust of a written notice by Concessionco after such instalment has become due, Concessionco shall have the right to accelerate all outstanding instalments which shall immediately become due and payable and if not then paid in full (together with interest thereon in accordance with this Clause 66.4) shall also attract interest at the Default Contract Rate pursuant to Clause 87.2 in addition to the interest determined pursuant to this Clause 66.4.

- 66.5 If the Trust has elected to pay by instalments pursuant to Clauses 66.4, 66.9 or 66.12 and the circumstances referred to in Clauses 61.1.5 or 61.1.6 occur, Concessionco shall have the right to accelerate all outstanding instalments which (to the extent not already due and payable) shall immediately become due and payable and if not then paid in full (together with interest thereon in accordance with Clauses 66.4, 66.9 or 66.12 (as the case may be)) shall also attract interest at the Default Contract Rate pursuant to Clause 87.2 in addition to the interest determined pursuant to Clauses 66.4, 66.9 or 66.12 (as the case may be).
- 66.6 Any sum payable by Concessionco to the Trust pursuant to this Clause 66 shall be paid as a lump sum immediately upon ascertainment of the same and if not paid when due interest shall be payable pursuant to Clause 87.2 at the Default Contract Rate.

#### **Post Completion of the New Build Works**

- 66.7 Upon termination of the Agreement pursuant to Clause 60 or 62 if the law shall determine that there is a relevant transfer pursuant to the Regulations of those of the employees wholly or mainly engaged in the provision of the Services as at the date of termination of the Agreement (“the Returning Employees”) (such date being termed “the Return Date”), the provisions of Clauses 66.7.1 to 66.7.5 shall have effect.
- 66.7.1 Concessionco shall or shall procure that all wages, salaries and other benefits of the Returning Employees and other employees or former employees (who had been engaged in the provision of the Services) and all PAYE tax deductions and national insurance contributions relating thereto in respect of the employment of the Returning Employees and such other employees or former employees of Concessionco or the outgoing Service Provider up to and including the Return Date are satisfied.
- 66.7.2 Concessionco shall indemnify and keep indemnified the Trust against all costs, claims, expenses, demands and other liabilities which arise out of or in connection with the employment of the Returning Employees and other employees or former employees of Concessionco or the outgoing Services Provider engaged in the provision of the Services in respect of the period from the Services Commencement Date up to and including the Return Date, and in respect of any claims or other recourse by any trade

union, employee representatives or staff association arising from or connected with any failure by Concessionco or any Service Provider to comply with its legal obligations to such trade unions, employee representatives or staff associations on, prior or subsequent to the Return Date, save for any claims that result directly from the acts or omissions of the Trust.

- 66.7.3 The Trust shall indemnify and keep indemnified Concessionco against all costs, claims, expenses, demands and other liabilities which arise out of or in connection with the employment of the Returning Employees in respect of the period commencing upon the Return Date and thereafter and in respect of any claims or other recourse by any trade union, employee representatives or staff association arising from or connected with any failure by the Trust to comply with its legal obligations to such trade unions, employee representatives or staff associations on, prior or subsequent to the Return Date, save for any claims that result directly from the acts or omissions of Concessionco or any Service Provider.
- 66.7.4 The Trust may undertake to indemnify such Trust Contractor in respect of the Returning Employees and other employees and former employees of Concessionco or the outgoing Services Provider such indemnity to be subject to the same conditions and same terms (*mutatis mutandis*) as those entered into by Concessionco under Clause 66 and subject as aforesaid if the Trust shall incur any liability to any Trust Contractor in respect of any such indemnity the Trust shall be indemnified by Concessionco in respect of such liability pursuant to the indemnity given by Concessionco under this Clause 66.7 as if liability were originally incurred by the Trust.
- 66.7.5 Concessionco may undertake to indemnify and keep indemnified any Service Provider in respect of such employees such indemnity to be subject to the same conditions and terms (*mutatis mutandis*) as those entered into by the Trust under this Clause 66.7 and subject as aforesaid if Concessionco shall incur any liability to any Service Provider in respect of such indemnity Concessionco shall be indemnified by the Trust in respect of such liability pursuant to the indemnity given by the Trust under this Clause 66.7 as if such liability were originally incurred by Concessionco.
- 66.8 If the Trust terminates this Agreement by reason of default by Concessionco on or after Completion of the New Build Works but prior to the next Early Termination Date pursuant to Clause 60 or 62, as appropriate, then the Trust shall without prejudice to Clauses 66.1 to 66.6, 66.11 and 72 and subject to the Direct Agreement be obliged (unless it exercises its option under Clause 66.9) to pay to Concessionco within 90 days of the date of such termination a lump sum equal to the lesser of:
- (a) the amount of the Capped Lender Liabilities as at the date of termination of this Agreement; and
  - (b) the amount of the Maximum Compensation Amount (as defined below) as at the date of termination of this Agreement

together with interest thereon at the Non-Default Contract Rate from the date of termination to the date of payment.

Where the “Maximum Compensation Amount” equals:

$A + B - C$

where:

A = the aggregate of the Net Present Value of each amount of the Availability Element due on or after the date of termination of this Agreement (after deducting therefrom those elements comprised in such payment to cover the costs of Building Refurbishment and insurance all as shown in the availability fee schedule of the Financial Model) (on the assumption that there are no deductions made for Unavailability and that such amount is adjusted by the Projected RPI Adjustment on the first day of each Year) until the next Early Termination Date together with the Net Present Value of the amount that would be payable pursuant to Clause 64.3 assuming 100% Availability and Inpatient Nights as forecast as at the date of termination in the Financial Model;

B =  $(D + E) \times F$

Where

D = the aggregate of the Net Present Value of each amount of the Performance Element which was forecast (as at the date of termination) in the Financial Model to be payable from the date of termination until the next Early Termination Date assuming that maximum performance levels had been achieved;

E = the aggregate of the Net Present Value of each amount of the Variable Cost multiplied by the Base Case Activity Projections assuming that occupancy of the Hospital is 85% which was forecast (as at the date of termination) in the Financial Model to be payable from the date of termination of this Agreement until the next Early Termination Date;

F = the Mark-up;

C = the Net Present Value of each aggregate of the following amounts which shall, for the avoidance of doubt, exclude any consequential losses and be incurred to the period from the date of termination of this Agreement:

- (a) any reasonable professional fees or reasonable administrative costs incurred or anticipated to be incurred by the Trust as a direct result of termination by the Trust of this Agreement in the process of reprocurring the Services during the period until the third anniversary of the date of termination;

- (b) any additional interest or reasonable financing charges directly incurred or anticipated to be directly incurred by the Trust as a direct result of termination of this Agreement in the process of reprocurring the Services (but excluding the costs of any borrowing incurred to pay any amounts due under this Clause 66.8) during the period until the third anniversary of the date of termination of this Agreement;
- (c) any costs reasonably and properly incurred or anticipated to be incurred in reinstating, refurbishing or repairing the Hospital to the condition in which it should be assuming as at the date of termination that there had been full compliance by Concessionco of all of its obligations under this Agreement including full compliance with the Outcome Standards in Schedule 2;
- (d) the additional costs (if any) (but without double-counting any amounts already taken into account under paragraphs (a), (b) or (c)) reasonably and properly incurred or anticipated to be incurred by the Trust until the next Benchmarking Date in providing or procuring the provision of replacement Services (including for the avoidance of doubt the Estates Maintenance Service) excluding Building Refurbishment in the case of the Estates Maintenance Service;

**PROVIDED FURTHER THAT** the Trust shall be under a duty to mitigate such amounts and that no costs or liabilities of the Trust shall be taken into account more than once.

**PROVIDED THAT**

- 66.9 The amount of the payment specified in Clause 66.8 may, at the option of the Trust, be paid in equal Monthly instalments commencing on the Business Day falling 15 days after agreement or determination of the sum payable pursuant to Clause 66.8 (the "Instalment Date") together with interest on the outstanding amount of such sum from time (after as well as before judgment) fully amortising on the Final Maturity Date of the relevant Debt Agreement. Interest shall be calculated annually on the outstanding balance (after deducting the amount of principal paid on each Instalment Date) and shall be payable Monthly in arrears. The amount of interest payable on an Instalment Date shall be calculated on the immediately preceding Instalment Date. The amount of interest to be paid on the first Instalment Date shall be calculated on the fifth Business Day prior to the first Instalment Date.
- 66.10 If any instalment due under Clause 66.9 is not paid when due pursuant to Clause 66.9, interest at the Default Contract Rate shall be payable pursuant to Clause 87.2 and if any instalment is not paid by the Trust within 5 Business Days of receipt by the Trust of a written notice by Concessionco after such instalment has become due, Concessionco shall accelerate all outstanding instalments which shall immediately become due and payable and if not then paid shall also attract interest at the Default Contract Rate pursuant to Clause 87.2 in addition to the interest determined pursuant to this Clause 66.

66.11 For the avoidance of doubt the provisions of this Clause 66 shall remain in full force and effect after expiry of this Agreement for whatsoever reason.

66.12 Where the Trust is entitled to and elects to terminate this Agreement pursuant to Clause 57.2(a), the Trust shall in any event pay to Concessionco an amount equal to Lender Liabilities to be payable at the option of the Trust either in a lump sum within 60 days of termination or by 28 equal quarterly instalments commencing on the next Accounting Date (each Instalment being due and payable by the Trust on each Subsequent Accounting Date) together (in each case) with interest accruing between the date of termination and the date of payment on the outstanding amount of such sum from time to time (after as well before judgment), at the Non-Default Contract Rate together with interest at the Default Contract Rate on late payment pursuant to Clause 66.4 and acceleration as set out in Clauses 66.4 and 66.5.

**67. CONSEQUENCES OF TERMINATION OF WHOLE AGREEMENT BY DEFAULT OF TRUST**

67.1 Without prejudice to Clause 65, if Concessionco shall exercise its right to terminate this Agreement pursuant to Clause 61 or Clause 13.1.10(ii) Concessionco shall be entitled to no payment or compensation in respect of such termination (without prejudice to Clauses 67.2 and 72) in excess of an amount comprising the aggregate of the following amounts:

67.1.1 Lender Liabilities as at the date of termination;

67.1.2 subject to compliance by Concessionco with Clause 67.3 all costs and/or expenses to Concessionco as a result of Concessionco and/or any Service Provider to Concessionco making employees formerly engaged in the provision of the Services hereunder Redundant or any other liabilities (other than those referred to in Clause 67.1.5 below) which Concessionco may incur to any third party directly as a result of such termination including without limitation any Redundancy Payments, Payroll Costs and where applicable payments in lieu of notice and any early retirement pension or other payment arising as a result of termination by reason of redundancy provided that Concessionco shall and shall procure that any such Service Provider shall fully and effectively take any steps reasonably appropriate to mitigate its losses in respect of such costs or expenses and Concessionco shall give credit to the Trust for any and all credits, benefits or advantages which it shall have secured as a result of such termination in the taking of any such account and including any moneys loaned in connection with any changes or variations hereunder; and

67.1.3 in respect of Redundancy Payments Concessionco's duty to mitigate as provided for in Clause 67.1.2 shall mean offering or procuring that any Service Provider offers, if available, suitable alternative employment (pursuant to Section 139 of the Employment Rights Act) and using all reasonable endeavours to redeploy employees where reasonably practicable.

67.1.4 a sum in respect of the value of Concessionco's goodwill in the Project which shall be such sum as shall represent :

(a) the fair market value of the total share capital in Concessionco being the aggregate of the Class Amounts in respect of each Class plus the outstanding Junior Debt; OR

- (b) (if higher) the Trust Default NPV.
- 67.1.5 any amounts reasonably due pursuant to bona fide written agreements, to the Building Contractor the Service Providers or any arms length third parties specifically in connection with the Project and as a result of the early termination of this Agreement.
- 67.1.6 In Clauses 67.1.4 and 67.1.5:
- (a) The Share Amount will be calculated as at the Business Day immediately preceding the date on which the Trust event of default occurs (the “Valuation Date”). The calculation of the Share Amount will depend on whether the Share has been admitted to the Official List of the London Stock Exchange (a “Listed Share”) or has not been so admitted (an “Unlisted Share”);
  - (b) the amount payable in respect of each Unlisted Share will be the fair market value of the Unlisted Share. The fair market value of any Unlisted Share will be calculated on the basis:
    - (i) of fair market value as between a willing vendor and a willing purchaser (taking into account, inter alia, all rights, liabilities and obligations of Concessionco on the Valuation Date, the values ascribed to similar companies whose equity share capital has been admitted to the Official list of the London Stock Exchange, the value of Concessionco’s assets, the values ascribed to Unlisted Shares on previous transactions and the values ascribed to similar companies which have been sold in similar circumstances); and
    - (ii) that the willing purchaser would be given all the information in the possession of Concessionco and its shareholders relating to the Project and its prospects including but not limited to previous dealings in such Unlisted Shares; and that the Trust event of default had not occurred and Concessionco was a going concern.
  - (c) Concessionco shall request a leading firm of accountants or a merchant bank nominated by the Trust and Concessionco or in the absence of agreement between them on the application of one or other of them by the President of the Institute of Chartered Accountants in England and Wales to act as valuer and determine and report the fair market value of any Unlisted Share taking into account the matters specifically referred to in (b). The valuer shall act at the cost and expense of the Trust as experts and not as arbitrators and its determination shall be final. In acting as expert the valuer shall be required to take into account written submissions by either the Trust or Concessionco as to the matters referred to in (b) above or any other matters and shall be entitled to take and rely upon such advice and opinions from others as to any matter which it considers relevant (and the cost of so doing shall be borne by the Trust) and in acting as experts and in relying upon such advice it shall not be liable save in the case of wilful default.
  - (d) The valuation of the Listed Shares will be determined as follows:

- (i) the amount payable in respect of each Listed Share will be the amount by which the average of the middle market quotations of the Listed Share on the London Stock Exchange, ascertained by reference to the London Stock Exchange's Daily Official List, on the last dealing day for each of the 12 months immediately preceding the last Business Day before the date on which the Trust event of default occurs exceeds the average middle market quotation (if any) (and if none, such middle market quotation will be deemed to be nil) on each of the 60 Business Days immediately succeeding the date on which the Trust event of default occurs; and
- (ii) in determining the amount payable in respect of any Listed Share, there will be a reasonable adjustment to the middle market quotations for the Listed Share to take account of any capitalisation of profits or reserves by Concessionco, any consolidation or sub-division in respect of any Shares or any rights issues or capital distribution made by Concessionco.

67.1.7 Concessionco's reasonably incurred costs of termination including costs or fees paid or payable to any administrative receiver or other insolvency manager who may be appointed in respect of Concessionco's affairs whether by Concessionco or by any lender to Concessionco together with interest on any such sums at the Non-Default Contract Rate.

67.2 The amount of any such payment shall be paid by the Trust to Concessionco no later than 90 days from the effective date of such termination (being the expiry of the notice of termination) together with interest accrued in respect of Lender Liabilities thereon at the Non Default Contract Rate and at the Default Contract Rate for all other sums from the effective date of termination until the date of payment such interest to be paid separately and in any event within fourteen days after the end of each Month following the date of such termination.

67.3

67.3.1 Concessionco and the Trust contemplate that upon termination of the Agreement pursuant to Clause 61 there may be a relevant transfer pursuant to the Regulations of the employees wholly or mainly engaged in the provision of the Services as at the date of the termination of the Agreement ("the Returning Employees") which shall be the date of the relevant transfer for the purposes of the Regulations ("the Return Date") from the Service Providers to the Trust or a Trust Contractor such that the contracts of employment of the Returning Employees may have effect after the Return Date as if originally made between the Trust or the Trust Contractor and the Returning Employees.

67.3.2 Concessionco shall or shall procure that the Returning Employees are notified of the relevant transfer referred to in paragraph 67.3.1 as soon as is reasonably practicable after service by Concessionco of notice pursuant to Clause 61. Furthermore, irrespective of whether or not there may be at law a relevant transfer of the Returning Employees to the Trust or a Trust Contractor pursuant to the Regulations as a result of notice served under Clause 61:



- (a) The Trust shall or shall procure that any Trust Contractor shall employ or offer to employ each of those whom the Trust (acting reasonably) considers would be likely to be the Returning Employees, such offer to be in writing open for acceptance by those to whom the offer is addressed for a period which is not less than 14 days expiring on the date immediately preceding the Return Date. (If any employee refuses such offer of employment he or she shall not be a Returning Employee for the purposes of Clause 67.3.4 to 67.3.7);
- (b) The Trust and Concessionco shall use their respective reasonable endeavours to facilitate an orderly handover and continuity in the provision of services;

with the intent that the Regulations shall apply.

- 67.3.3 Concessionco shall or shall procure that all wages, salaries and other benefits of the Returning Employees and all PAYE tax deductions and national insurance contributions relating thereto in respect of the employment of the Returning Employees up to and including the Return Date are satisfied.
- 67.3.4 Concessionco shall indemnify and keep indemnified the Trust against all costs, claims, expenses, demands and other liabilities which arise out of or in connection with the employment of the Returning Employees and other employees or former employees who have been engaged in the provision of Services up to and including the Return Date and in respect of any claims or other recourse by any trade unions, employee representatives or staff association arising from or connected with any failure by Concessionco or any Service Provider to comply with its legal obligations to such trade union, employee representatives or staff associations on, prior or subsequent to the Return Date, save for any claims that result directly from the acts or omissions of the Trust.
- 67.3.5 The Trust shall indemnify and keep indemnified Concessionco against all costs, claims, expenses, demands and other liabilities which arise out of or in connection with the employment of the Returning Employees in respect of the period commencing upon the Return Date and thereafter and in respect of any claims or other recourse by any trade union, employee representatives or staff association arising from or connected with any failure by the Trust to comply with its legal obligations to such trade unions, employee representatives or staff associations on, prior or subsequent to the Return Date, save for any claims that result directly from the acts or omissions of Concessionco or any Service Provider.
- 67.3.6 The Trust may undertake to indemnify such Trust Contractor in respect of such Returning Employees and other employees or former employees such indemnity to be subject to the same conditions and same terms (mutatis mutandis) as those entered into by Concessionco under Clause 67 and subject as aforesaid if the Trust shall incur any liability to any Trust Contractor in respect of any such indemnity the Trust shall be indemnified by Concessionco in respect of such liability pursuant to the indemnity given by Concessionco under this Clause 67.3 as if liability were originally incurred by the Trust.

67.3.7 Concessionco may undertake to indemnify and keep indemnified any Service Provider in respect of such employees such indemnity to be subject to the same conditions and terms (mutatis mutandis) as those entered into by the Trust under Clause 67.3 and subject as aforesaid if Concessionco shall incur any liability to any Service Provider in respect of such liability pursuant to the indemnity given by the Trust under Clause 67.3 as if such liability were originally incurred by Concessionco.

68. **CONSEQUENCES OF TERMINATION OF WHOLE AGREEMENT BY NO DEFAULT**

68.1 NOT USED.

68.2

68.2.1 The Trust shall, if termination of this Agreement occurs pursuant to Clause 55.6, 55.9 (Force Majeure or Uninsurable Risk) from the effective date of such termination, be entitled either:

- (a) to enter into an agreement with any other party for that party to provide the Services; or
- (b) to provide the Services itself.

68.2.2 If the Agreement is terminated pursuant to Clauses 55.6, 55.9 or 13.1.10(i), then the Trust shall within 90 days from the date of such termination pay to Concessionco the aggregate of the following:

- (a) Lender Liabilities as at the date of termination;
- (b) the nominal value of any Junior Debt committed as at the Effective Date to be outstanding as at the date of termination of this Agreement or if less the actual amount of any Junior Debt outstanding at such date of termination;
- (c) the nominal value of the paid up issued share capital of Concessionco committed as at the Effective Date to be paid up and issued at the date of termination of this Agreement;
- (d) in the case only of termination pursuant to Clause 55.6 (Force Majeure), any amounts reasonably due to the Building Contractor, the Service Providers or any arms length third parties specifically in connection with the Project pursuant to bona fide written agreements and as a result of the early termination of this Agreement which, for the avoidance of doubt, shall include any and all Redundancy Payments to employees who were engaged in the provision of the Services prior to termination pursuant to Clause 55.6.

together in each case with interest thereon calculated at the Non-Default Contract Rate from such effective date of termination until the due date of payment thereof and at the Default Contract Rate thereafter.

68.3

- 68.3.1 If on termination of the Agreement pursuant to Clause 55.6 or Clause 55.9 the Trust will continue to require a workforce to assist in provision of services equivalent to the Services or some of them it shall serve a notice (“an Employee Transfer Notice”). Such notice shall identify those of the employees wholly or mainly engaged in the provision of the Services whom the Trust (acting reasonably) considers it will require to assist in the provision of services equivalent to the Services or some of them (“the Returning Employees”) as at the date of termination of the Agreement (“the Return Date”). Concessionco and the Trust acknowledge that where an Employee Transfer Notice is served pursuant to this Clause 68.3.1 there may be a relevant transfer pursuant to the Regulations of the Returning Employees at the Return Date which shall be the date of the relevant transfer for the purposes of the Regulations from the Service Providers or Concessionco to the Trust or a Trust Contractor and pursuant to the Regulations the contracts of employment between Concessionco or the Service Provider and the Returning Employees may have effect after the Return Date as if originally made between the Trust or a Trust Contractor and the Returning Employees.
- 68.3.2 Where the Trust has served an Employee Transfer Notice:
- (a) Concessionco shall or shall procure that the Returning Employees are notified of the relevant transfer as soon as is reasonably practicable thereafter
  - (b) The Trust and Concessionco shall use their respective reasonable endeavours to facilitate an orderly handover and continuity in the provision of services to the intent that where an Employee Transfer Notice has been served the Regulations shall apply where the law permits.
  - (c) the Trust shall or shall procure that its successor or any Trust Contractor shall employ or offer to employ the Returning Employees, such offer to be in writing and open for acceptance by the Returning Employees (where practicable) for a period which is not less than 14 days expiring on the day immediately preceding the Return Date. (If any employee refuses such offer of employment he or she shall not be a Returning Employee for the purposes of Clause 68.3.4);
- 68.3.3 Concessionco shall procure that all wages, salaries and other benefits of the Returning Employees and all PAYE tax deductions and national insurance contributions relating thereto in respect of the employment of the Returning Employees up to and including the Return Date are satisfied.
- 68.3.4 The Trust shall indemnify and keep indemnified Concessionco against all costs, claims, expenses, demands and other liabilities which arise out of or in connection with the employment of the Returning Employees by the Trust its successor or any Trust Contractor in respect of the period commencing upon the Return Date and thereafter, save for any claims that result directly from the acts or omissions of Concessionco and in respect of any claims or other recourse by any trade union, employee representatives or staff association arising from or connected with any failure by the Trust to comply with its legal obligations to such trade unions, employee

representatives or staff associations on or prior or subsequent to the Return Date or any Service Provider.

- 68.3.5 Concessionco shall indemnify and keep indemnified the Trust against all costs, claims, expenses, demands and liabilities which arise out of or in connection with the employment of the Returning Employees in respect of the period from Services Commencement Date up to and including the Return Date and in respect of any claims or other recourse by any trade union, employee representatives, or staff association arising from or connected with any failure by Concessionco or any Service Provider to comply with its legal obligations to such trade union, employee representatives or staff association on, prior or subsequent to the Return Date, save for any claims that result from or relate to the acts or omissions of the Trust.
- 68.3.6 Concessionco may undertake to indemnify such Service Provider in respect of the Returning Employees such indemnity to be subject to the same conditions and same terms (*mutatis mutandis*) as those entered into by the Trust pursuant to the provisions of this clause above and subject as aforesaid if Concessionco shall incur any liability to any Service Provider in respect of any such indemnity Concessionco shall be indemnified by the Trust in respect of such liability pursuant to the indemnity given by the Trust by virtue of this clause if that liability were originally incurred by Concessionco.
- 68.3.7 The Trust may undertake to indemnify any Trust Contractor in respect of such employees such indemnity to be subject to the same conditions and same terms (*mutatis mutandis*) as those entered into by Concessionco under Clause 68.3 and subject as aforesaid if the Trust shall incur any liability to any Trust Contractor in respect of any such indemnity the Trust shall be indemnified by Concessionco in respect of such liability pursuant to the indemnity given by Concessionco under this clause if liability were originally incurred by the Trust.
- 68.3.8 Upon termination of the Agreement pursuant to Clause 63 or 64, if the law shall determine that there is a relevant transfer pursuant to the Regulations of those of the employees wholly or mainly engaged in the provision of the Services as at the date of termination of the Agreement the provisions of Clauses 68.3.3 to 68.3.7 shall be applied *mutatis mutandis*.

**69. CONSEQUENCES OF TERMINATION OF WHOLE AGREEMENT FOR WHATEVER REASON**

- 69.1A On termination of the Agreement for whatever reason the following provisions of this Clause shall have effect.
- 69.1 Concessionco and the Trust shall each make available to the other for collection all data of a confidential nature other than where subject to legal professional privilege relating to the business of the other.
- 69.2 Except where otherwise specified in this Agreement all payments or repayments whatsoever due to either party shall be made within 90 days of the effective date of such termination.

69.3 The Trust shall permit Concessionco or its agents, employees or subcontractors as appropriate by prior appointment access to the Hospital and the Trust's Premises for a period of 42 Days from the effective date of such termination to allow Concessionco or its agents, employees or sub-contractors to remove any of its goods, chattels and without limit other moveable equipment provided always that all the provisions of Clause 59.2 and 59.3 shall apply to this Clause 69.3.

69.4 Subject to Clause 69.3, Concessionco, its servants, agents, employees and sub-contractors engaged directly in the performance of the Works or Services shall vacate the Trust's Premises and the Hospital as soon as reasonably practicable save that in the event this Agreement shall expire by effluxion of time such period shall be seven (7) days from the effective date of the termination of this Agreement.

**70. PAYMENT ADJUSTMENT AND SET OFF**

70.1 All amounts invoiced to the Trust by Concessionco shall be paid in full. The Trust shall not be entitled to assert or apply any credit, contractual payment adjustment (whether under Clause 33 or otherwise), abatement, set-off or counterclaim or other withholding of payment of any such amount in whole or in part save to the extent that:

70.1.1 such amounts have been agreed in writing by Concessionco; or

70.1.2 the Trust shall first have obtained an award from an Adjudicator which is not sought to be overturned by Concessionco in court proceedings as provided by Clause 41.2.6 within 20 Business Days of the Adjudicator's award or, where Clause 41.2.8 applies, shall first have obtained a judgment or order from a court of competent jurisdiction, and such award or judgment is for the payment of such amounts by Concessionco to the Trust, in which case the Trust may (save as hereinafter provided) withhold such amount from Concessionco by way of set off against any moneys due from the Trust to Concessionco under this Agreement. PROVIDED THAT the Trust shall not be entitled to exercise such rights of set-off unless and until, in the event that this Agreement has been terminated pursuant to and in accordance with the terms hereof, Lenders Liabilities have been paid out in full.

70.2 Where the Adjudication Rules apply to the resolution of any dispute Rule 28 of the Adjudication Rules shall prevail.

**71. NOT USED**

**72. TAX GROSS UP**

72.1 Where:

(a) a lump sum payment is made by the Trust to Concessionco in a single amount or in instalments on termination pursuant to Clauses 66, 67 or 68 as appropriate of this Agreement; and

(b) Concessionco has or will have an increased tax liability by reason of such payment (taking into account any tax liability which would have been paid by

Concessionco had Concessionco continued to receive the Availability Element rather than the lump sum payment or instalments pursuant to above),

then the amount of such payment shall be increased to the extent necessary to ensure that after taking into account such increased tax liability (such tax liability being determined on the assumption that (so far as not required by applicable legislation to do otherwise) Concessionco fully utilises any tax reliefs (other than the surrender of group relief by a Shareholder pursuant to Chapter IV of Part X of the Income and Corporation Taxes Act 1988) which are available to it to offset all or part of the relevant increased tax liability but to the extent only that to so utilise any relief would not result in Concessionco becoming liable to make an actual payment of taxation in the accounting period in which the termination payment is made) Concessionco receives a net sum equal to the net amount which it would otherwise have received pursuant to such Clause in the absence of any such increased liability to tax. Concessionco shall provide to the Trust such evidence as the Trust may reasonably require regarding the existence or extent of such increased liability to tax.

72.2 All sums payable by the Trust in instalments or by way of monthly payments pursuant to Clause 66 shall be paid free and clear of all deductions or withholding whatsoever for or on account of taxation save only as required by law. If any such deduction or withholding is required by law, the Trust shall be obliged to pay to Concessionco such sums as will after such deduction or withholding has been made leave Concessionco with the same amount it would have been entitled to receive in the absence of any such deduction or withholding.

72.3 If:

- (a) the Trust makes a payment of an increased amount to Concessionco pursuant to Clause 72.1 (for the purposes of this Clause 72.3, a "Tax Payment"); and
- (b) Concessionco receives or obtains a refund of tax or obtains and uses a credit against any tax which it is able to identify as attributable to that Tax Payment (for the purposes of this Clause 72, a "Tax Credit"),

then, if it can reasonably do so without any adverse consequences for Concessionco, Concessionco shall reimburse the Trust such proportion of that Tax Credit as will leave Concessionco (after that reimbursement) in no better or worse position in respect of its tax liabilities than it would have been in if no Tax Payment had been required. Concessionco shall give the Trust access to such information as the Trust may reasonably require in relation to its tax affairs and computations in order to allow the Trust to verify the amount of the Tax Credit.

### 73. ASSIGNMENT AND SUB CONTRACTING

73.1 Subject to Clause 73.4, neither party shall, without the prior written consent of the other, assign all or any benefit, right or interest under this Agreement or any of the Project Documents.

73.2 The provisions of Clause 73.1 do not apply:

- (a) to the assignment of the benefit of any of the Project Documents by way of security only in accordance with any of the Debt Agreements; or

- (b) to the assignment, novation or other transfer of any of the Project Documents in accordance with the provisions of the Direct Agreement.

73.3 Subject to Clause 53, either party shall be entitled (with the prior approval of the other party such approval not to be unreasonably withheld or delayed) to sub-contract any of its obligations under this Agreement PROVIDED THAT subcontracting by Concessionco to the Building Contractor, Estates Maintenance Service Provider and Hotel Services Provider at the date hereof shall be deemed to be so approved. For the avoidance of doubt no assignment, transfer or sub-contracting of any of Concessionco's obligations under this Clause 73 shall reduce, suspend or vary any of Concessionco's obligations under this Agreement (including the Schedules).

73.4 This Agreement and any other written agreement between Concessionco and the Trust shall be binding on and shall enure to the benefits of Concessionco and the Trust and their respective successors and permitted assigns. In the case of the Trust, its successors shall include any person to which the Secretary of State for Health, in exercising his statutory powers to transfer property, rights and liabilities of the Trust upon the Trust ceasing to exist, transfers the property, rights and obligations of the Trust under such agreements.

73.5 Pursuant to the exercise of his statutory powers, the Secretary of State shall be entitled to transfer the benefit and/or burden of this Agreement and any other Project Document to which the Trust is a party to:

- (a) the Secretary of State for Health;
- (b) a National Health Service Trust;
- (c) a Health Authority;
- (d) a Special Health Authority; or
- (e) any successor body to the persons listed in Clauses (a) to (d) above covered by the National Health Service (Residual Liabilities) Act 1996

defined terms used in this Clause 73.5 bearing the meanings ascribed to them in the said Act.

#### 74. **RTPA**

No term or condition of this Agreement or of any agreement or arrangement of which it forms part, by virtue of which the agreement constituted by all of the foregoing is subject to registration under the Restrictive Trade Practices Act 1976 shall take effect until the day after particulars of such agreement have been furnished to the Director General of Fair Trading pursuant to Section 24 of the Restrictive Trade Practices Act 1976. Notwithstanding Clause 42, the Trust agrees that any decision as to whether or not to furnish particulars of this Agreement or any such agreement or arrangement may be made and implemented at the sole discretion of Concessionco, all costs associated with such furnishing and any further procedures under the aforementioned Act being for the account of Concessionco.

75. **INVALIDITY**

The invalidity, illegality or unenforceability in whole or in part of any of the terms and conditions of this Agreement shall not affect the validity, legality and enforceability of the remaining terms and conditions of this Agreement.

76. **VAT**

All sums or other consideration referable to a supply chargeable to VAT made by either party to the other under this Agreement shall be exclusive of VAT and the relevant parties shall upon demand and against the delivery by the other party of a duly issued VAT invoice pay to the other VAT at the rate for the time being and from the time properly chargeable and referable to a supply made to it under this Agreement.

77. **RACIAL AND SEXUAL DISCRIMINATION**

Concessionco shall not unlawfully discriminate within the meaning and scope of the provisions of the Race Relations Act 1976, the Sex Discrimination Act 1975 or the Disability Discrimination Act 1995 or any statutory modification or re-enactment thereof relating to discrimination in employment and shall not breach any Law relating to discrimination in employment.

78. **VARIATIONS**

No variation, change, modification, suspension or reduction of any of the terms and conditions of this Agreement shall be valid unless made in accordance with the terms of this Agreement or agreed in writing (with express reference to this Clause 78) by the parties hereto.

79. **WAIVER**

The failure of either party at any time to enforce any provisions of this Agreement shall in no way affect its right thereafter to require complete performance by either party of all its obligations under this Agreement nor shall the waiver of any breach of any provision be taken or held to be a waiver of any past or subsequent breach of any such provision or to be a waiver of the provision itself.

80. **ENTIRE AGREEMENT**

80.1 All the documents referred to herein (together with any document referred to in any other document referred to herein) contain the entire Agreement between the parties.

80.2 Each party acknowledges to the other that it has not entered into this Agreement in reliance upon any statement, warranty or representation given by the other (whether express or implied by statute or otherwise) except as expressly provided herein.

81. **PROPER LAW & JURISDICTION**

This Agreement shall be governed by and construed and interpreted in accordance with English law and the parties hereby submit to the non-exclusive jurisdiction of the English Courts.



82. **PUBLICITY**

Neither party shall, save as required by law or regulation, issue any press release in relation to the provisions contemplated by this Agreement without the prior consent of the other (such consent not to be unreasonably withheld or delayed).

83. **NOTICES**

Subject to Clause 33.34, any notice or other document to be given or issued under this Agreement shall be in writing and shall be deemed duly given:

83.1 if sent by registered post or facsimile transmission (provided that confirmation of receipt is obtained by the Sender):

83.1.1 if to Concessionco to Catalyst Healthcare (Calderdale) PLC at Liscartan House, 127 Sloane Street, London, SW1 (facsimile No. 0171 730 0524) marked for the attention of the Chief Executive;

83.1.2 if to the Trust to Calderdale Healthcare NHS Trust at Royal Halifax Infirmary, Free School Lane, Halifax, West Yorkshire HX1 2YP (facsimile No. 01422 353164) marked for the attention of the Chief Executive;

or to such other address as such party may by notice in writing to the other substitute therefor; and

83.2 when in the ordinary course of the means of transmission it would first be received by the addressee before 5.30pm on any Business Day.

84. **NO PARTNERSHIP**

Nothing in this Agreement shall be construed as establishing or implying a partnership between the parties or, save where expressly authorised by the relevant party shall be deemed to constitute either of the parties as the agent of the other or to allow either party to hold itself out as acting on behalf of the other.

85. **NO PRIVITY**

Subject to the terms of the Direct Agreement, no provision in this Agreement confers or is intended to confer upon any third party, including without limitation any sub-contractor, supplier or consultant to Concessionco, any affiliate of or lender to Concessionco, any benefit or right enforceable at the option of that third party against the Trust.

86. **FINANCIAL MODEL**

86.1 On the execution of this Agreement, a copy of the Financial Model shall be lodged by Concessionco (after verification of the identity and contents of the Financial Model on behalf of the Trust) with the Custodian in accordance with the terms of the Custody Agreement.

86.2 On each occasion that the Financial Model requires changes pursuant to this Agreement the parties shall procure that such revisions are carried out in accordance with Schedule 22 and lodged in duplicate with the Custodian in accordance with the Custody Agreement.

87. **GENERAL INVOICING, DEFAULT INTEREST AND ADJUSTMENTS**

87.1 Except as otherwise provided for expressly in this Agreement, any sums due from either party pursuant to the terms of this contract shall be payable within 15 Business Days of the issue by the other party of an invoice requesting payment of such sum or sums.

87.2 In the event that a payment is not made by the due date referred to in Clause 87.1, or any other date upon which sums are expressed to fall due in accordance with this Agreement, interest shall, unless otherwise specified in this Agreement, accrue on a daily basis at the Default Contract Rate from the date on which payment was due until the date upon which such payment is made.

87.3 In relation to any amounts, payments, figures, sums, caps or any other rights or obligations which are calculated or assessed by reference to a Year, to the extent that such is not specifically provided for in this Agreement including in Clause 33.30.1, the amounts, payments, figures, rights or obligations shall be adjusted pro rata to reflect the periods:

- (a) from the Services Commencement Date to the following 31<sup>st</sup> March; and
- (b) in the last year of Phase 2 (whether by way of expiry or other termination) from 1 April to the date of expiry or other termination of this Agreement.

87.4 In relation to any amounts, payments, figures, sums, caps or any other rights or obligations which are calculated or assessed by reference to a Month, to the extent that such is not specifically provided for in this Agreement, the amounts, payments, figures, rights or obligations shall be adjusted pro rata to reflect any part months.

87.5 In the event that Concessionco, for the purposes of complying with any VAT Law, is required to obtain from the Trust a separate VAT invoice in respect of any sums due from Concessionco to the Trust, including any sums included in the Total Adjustments, a separate VAT invoice shall be issued by the Trust in relation to such amounts, PROVIDED THAT any such invoice shall not in itself require or oblige the Trust to pay or allow to Concessionco any sum which it is not otherwise obliged by this Agreement to so pay or allow.

Executed as a Deed by )  
CALDERDALE HEALTHCARE )  
NHS TRUST acting by: )

\_\_\_\_\_  
Vice Chairman

\_\_\_\_\_  
Chief Executive

\_\_\_\_\_  
Secretary to the Trust Board

Executed as a Deed by )  
CATALYST HEALTHCARE )  
(CALDERDALE) PLC acting by: )

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Director

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Director/Secretary

**SCHEDULE 1**  
**COMPENSATION EVENTS**

**PART A - FORCE MAJEURE/UNINSURABLE RISK**

1.1 In the event that Concessionco is entitled to claim Compensation pursuant to Clause 55.2 as a consequence of the occurrence of:

- (a) any Force Majeure Event; or
- (b) an Uninsurable Risk;

such compensation shall be calculated in accordance with paragraphs 1.2 and 1.3 in all cases such that there is no double counting or double recovery.

1.2 **Compensation - Phase 1**

During Phase 1, Compensation shall comprise the reimbursement of:

- (i) any amounts (including without limitation, principal, interest and payments under the Swap) payable by Concessionco to the Creditors during any period during which the Services Commencement Date is delayed as a consequence of the occurrence of such Force Majeure Event or Uninsurable Risk;
- (ii) any additional amounts payable by Concessionco to the Creditors arising during and/or incurred in consequence of such period of delay; and
- (iii) any part of the Availability Element which would otherwise be payable but for such delay and which Concessionco would have applied towards payments to the Creditors falling due following the Services Commencement Date or in otherwise complying with its obligations under the Debt Agreements.

1.3 **Compensation - Phase 2**

During Phase 2, Compensation shall, in respect of those Units which would, but for Clause 33.9(e), be rendered Unavailable as a result of such Force Majeure Event or Uninsurable Risk, comprise the amount of the Availability Element which would have been payable pursuant to Clause 33 had such event not occurred

**PART B - TRUST DEFAULT**

2.1 In the event that Concessionco is entitled to claim Compensation pursuant to Clause 55.2 as a consequence of the occurrence of any Trust Default such Compensation shall be calculated in accordance with paragraph 2.2 below in all cases such that there is no double counting or recovery.

- 2.2 Compensation shall comprise any loss, cost and/or expense including without limitation any amounts listed in paragraphs 1.2 and 1.3, incurred in consequence of or arising during such Trust Default or Trust Refurbishment Works Defect by Concessionco or the Building Contractor or any Service Provider together with the payment of each element of the Total Payment at a rate based upon performance that would have been achieved but for the Trust Default during any delay to the Services Commencement Date or subsequent interruption of Concessionco's performance during Phase 2 (which amount shall not include any double payment of any element of the Total Payment).

### **PART C - COMPENSATION EVENTS**

- 3.1 In the event that Concessionco is entitled to claim Compensation pursuant to Clause 55.2 as a consequence of the occurrence of any Compensation Event such Compensation shall be calculated in accordance with paragraphs 3.2 and 3.3 in all cases such that there is no double counting or double recovery.
- 3.2 Compensation for Compensation Events (other than the discovery of Contaminated Land and/or Hazardous Substances) shall comprise:
- (a) during Phase 1:
    - (i) any amounts (including without limitation, principal, interest and payments under the Swap) payable by Concessionco to the Creditors during any period during which the Services Commencement Date is delayed as a consequence of the occurrence of such Compensation Event;
    - (ii) additional amounts payable by Concessionco to the Creditors arising during and/or incurred in consequence of such period of delay; and
    - (iii) any part of the Availability Element which would otherwise be payable but for such delay and which Concessionco would have applied towards payments to the Creditors falling due following the Services Commencement Date or in otherwise complying with its obligations under the Debt Agreements.
  - (b) during Phase 2, Compensation shall in respect of those Units which would, but for Clause 33.9(e), be rendered Unavailable as a result of such Compensation Event, comprise the amount of the Availability Element which would have been payable pursuant to Clause 33 had such event not occurred.
  - (c) in Phases 1 and 2 any costs unavoidably incurred by Concessionco, the Building Contractor or the Service Providers as a direct consequence of (or which, if incurred in any event, would have been reimbursed by any element of the Total Payment but for the occurrence of such Compensation Event) and which shall include amounts payable in respect of standing time of employees, plant or equipment, but shall exclude loss of profit and provided always that such amount shall not include any double payment of any element of the Total Payment.

PROVIDED THAT:

- (i) in respect of Concessionco Latent Defects and Trust Defects, Compensation shall include in any event the sums referred to in Clause 22.1.1 to the extent only that such sums are not recovered under (i) above;
  - (ii) in relation to Concessionco Latent Defects, the Compensation payable pursuant to paragraphs 3.2(c) above and Clause 22.1.1 shall be subject to the Concessionco Latent Defect Cap.
- 3.3 Compensation shall comprise in relation to the discovery of Contaminated Land or Hazardous Substances the costs of isolating, removing and/or dealing with the same (including the costs of dealing with any public sector or other body empowered to give instructions or be consulted in relation to such discovery) to the extent arising during Phase 1 only.
- 3.4 In respect of the circumstances described in Clause 13.1.5, Compensation shall include, in addition to the matters described in paragraph 3.2 above, all costs of delay or disruption to the Works or Services (including inflation, demobilisation and remobilisation) but shall not include any costs, fees and expenses incurred in connection with any Appeal Proceedings which for the avoidance of doubt shall be shared on the basis set out in Clause 13.1.2(a).

**SCHEDULE 2**

**SERVICE SPECIFICATION ARRANGEMENTS**

See separate document(s) signed on behalf of the parties by way of identification.

**SCHEDULE 3**

**LEASES AND AGREEMENTS FOR LEASE**

See separate document(s) signed on behalf of the parties by way of identification.



**SCHEDULE 4**

**PROJECT DEFINITION**

See separate document(s) signed on behalf of the parties by way of identification.

**SCHEDULE 5**

**COLLATERAL WARRANTIES**

See separate document(s) signed on behalf of the parties by way of identification.

**SCHEDULE 6**

**DESIGN AND BUILD CONTRACT**

See separate document(s) signed on behalf of the parties by way of identification.

**SCHEDULE 7**

**NOT USED**

**SCHEDULE 8**

**UNION RECOGNITION AGREEMENT**

See separate document(s) signed on behalf of the parties by way of identification.

**SCHEDULE 9**

**INSURANCE**

See separate document(s) signed on behalf of the parties by way of identification.

**SCHEDULE 10**

**LIST OF TRUST PROCEDURES**

See separate document(s) signed on behalf of the parties by way of identification.

**SCHEDULE 11**

**TRUST WARRANTIES**

See separate document(s) signed on behalf of the parties by way of identification.



**SCHEDULE 12**

**BASE CASE ACTIVITY PROJECTIONS**

See separate document(s) signed on behalf of the parties by way of identification.

**SCHEDULE 13**

**PROVISIONAL STAFF OF PROJECTIONS**

See separate document(s) signed on behalf of the parties by way of identification.

**SCHEDULE 14**

**MARKET TESTING**

See separate document(s) signed on behalf of the parties by way of identification.

**SCHEDULE 15**

**NOT USED**

**SCHEDULE 16**

**OUTLINE COMMISSIONING SCHEDULE**

See separate document(s) signed on behalf of the parties by way of identification.

**SCHEDULE 17**

**NOT USED**

**SCHEDULE 18**

**FORM OF NOTICE OF UNAVAILABILITY AND AVAILABILITY AREAS**

See separate document(s) signed on behalf of the parties by way of identification.

**SCHEDULE 19**

**FORM OF LETTER FROM SECRETARY OF STATE**

See separate document(s) signed on behalf of the parties by way of identification.



**SCHEDULE 20**  
**YEAR 1 PAYMENT**

See separate document(s) signed on behalf of the parties by way of identification.

**SCHEDULE 21**

**PROVISION OF INFORMATION**

See separate document(s) signed on behalf of the parties by way of identification.

**SCHEDULE 22**

**FINANCIAL MODEL, PROTOCOL AND CUSTODY AGREEMENT, DATA BOOK/INSTRUCTIONS**

See separate document(s) signed on behalf of the parties by way of identification.

**SCHEDULE 23**

**PROFORMA INVOICE**

See separate document(s) signed on behalf of the parties by way of identification.

**SCHEDULE 24**

**ADJUDICATOR APPOINTMENT AND ADJUDICATION RULES**

See separate document(s) signed on behalf of the parties by way of identification.

**SCHEDULE 25**

**PERMITS AND CONSENTS**

See separate document(s) signed on behalf of the parties by way of identification.

**SCHEDULE 26**

**SECRETARY OF STATE'S CERTIFICATE**

See separate document(s) signed on behalf of the parties by way of identification.

**SCHEDULE 27**

**FORM OF LETTERS OF SUPPORT**

See separate document(s) signed on behalf of the parties by way of identification.



**SCHEDULE 28**

**FORM OF NOTICE OF NON-PERFORMANCE**

See separate document(s) signed on behalf of the parties by way of identification.

**SCHEDULE 29**

**FORM OF APPOINTMENT IN RESPECT OF OSCAR FABER GROUP LIMITED, RTKL (UK) LIMITED  
AND THE INDEPENDENT CERTIFIER**

See separate document(s) signed on behalf of the parties by way of identification.