

DATED [ ] 20[ ]

COMMUNITY HEALTH PARTNERSHIPS / [ ]

and

[ ]

LAND RETAINED AGREEMENT

for the development of the site of the  
[ ] Hospital and provision of services

## NHS LIFT Standard Form Land Retained Agreement

### IMPORTANT NOTICE

This is an update to the Land Retained Agreement ("**LRA**") based on the third version of the Department of Health [and Social Care](#)'s standard form of project agreement the intention of which is to minimise the time and costs of dealing with legal issues relating to (as amended) LIFT. Community Health Partnerships ("**CHP**"), NHS England ("**NHSE**") and the Department of Health [and Social Care](#) expect the standard form contract to be used substantially un-amended. A certain degree of customisation of the LRA will be necessary to reflect the individual features of various schemes. However project specific justification must be given to any such customisation and consent for such customisation will be required from the relevant approving bodies.

In the context of the current economic climate and the steps being taken by HM Treasury to review operational PFI contracts, there are a number of aspects of the LRA which have been reviewed to ensure [that](#) they comply with current HM Treasury guidance and still deliver value for money for the public sector.

In particular, we have taken the opportunity to consider where the LRA requires updating:

- ~~☐ (to include "standard" and "specialist" scheme drafting alternatives (as per LPA v5.1));~~
- ~~☐ for legislative updates (such as TUPE and Pensions);~~
- ~~☐ to reflect new PF2 principles (for example lifecycle fund sharing); and~~
- ~~☐ to improve value for money and best practice in the LIFT Market. [to ensure off balance sheet assessment under current accounting guidance.](#)~~

Users of the standard form should be aware of the following points:

- 1 The standard form contract should be used in conjunction with the Guidance issued by CHP and the Department of Health [and Social Care](#) from time to time.
- 2 This notice and the footnotes should be removed as appropriate before finalisation of the document for execution and/or submission for approval.
- 3 Should you have any questions on the draft you are asked to contact [property@communityhealthpartnerships.co.uk](mailto:property@communityhealthpartnerships.co.uk).

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**THIS AGREEMENT** is made the [ ] 20[ ]

**BETWEEN:**

- (1) **COMMUNITY HEALTH PARTNERSHIPS** of Skipton House, 80 London Road, London SE1 6LH ("**CHP**"); and
- (2) [ ] **LIMITED** (registered under number [ ]) whose registered office is [ ] ("**Project Co**").

**WHEREAS:**

- A. The Department of Health, pursuant to the Health and Social Care Act 2001, committed to introducing new solutions to the investment needs of community based services. Partnerships UK and the Department of Health set up Community Health Partnerships (formerly Partnerships for Health Limited) for the purposes of enabling supporting and investing in local health economies, through the setting up of Local Improvement Finance Trusts to deliver improved facilities and services. [ ] is the Local Improvement Finance Trust for the local health economy of [ ].
- B. Project Co has agreed to develop the Facilities by carrying out the Works on the Site in accordance with the CHP Construction Requirements and the Project Co Proposals.
- C. The Project has been approved by Community Health Partnerships [and NHS England's Project Appraisal Unit on behalf of the Secretary of State and by HM Treasury<sup>1</sup>].
- D. The Agreement is entered into under the Government's NHS LIFT initiative on principles similar to the Government's Private Finance Initiative (the "**PFI**")<sup>2</sup>.
- E. The Agreement is excluded from the application of Part II of the Housing Grants, Construction and Regeneration Act 1996 by operation of the Construction Contracts (England and Wales) Exclusion Order 1998.

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

**Part A: PRELIMINARY**

**1 INTERPRETATION**

This Agreement shall be interpreted according to the provisions of Schedule 1 (*Definitions and Interpretation*).

**2 EXECUTION AND DELIVERY OF DOCUMENTS<sup>3</sup>**

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<sup>1</sup> The reference to HM Treasury should be deleted for projects with a capital value of less than £100 million

<sup>2</sup> The reference to PFI principles has been retained in order for the LRA to fall outside of the application of the Housing Grants Construction and Regeneration Act 1996 by operation of the Construction Contracts (England and Wales) Exclusion Order 1998.

<sup>3</sup> The standard form assumes that contract signature and financial close will be simultaneous. If there are project specific reasons why a condition or event cannot be satisfied until after contract signature, the Agreement will need to be amended accordingly. In those circumstances, any conditions precedent ("CPs") should be limited as far as possible to items of real project significance that cannot be satisfied prior to signature. This approach is necessary to minimise the risk of a party terminating the Agreement for failure to satisfy a trivial or insignificant CP.

If financial close and contract signature are not simultaneous, owing to the existence of any CPs, the parties will need to agree how risks relating to interest rate fluctuations between contract signature and financial close are to

2.1 On or prior to execution of this Agreement:

2.1.1 Project Co shall deliver to CHP the documents referred to in Part 1 of Schedule 2 (*Completion Documents*) (unless the requirement to deliver any such document is waived by CHP by written notice to Project Co); and

2.1.2 CHP shall deliver to Project Co the documents referred to in Part 2 of Schedule 2 (*Completion Documents*) (unless the requirement to deliver any such document is waived by Project Co by written notice to CHP).

### 3 COMMENCEMENT AND DURATION

This Agreement shall commence on the date of execution of this Agreement and Project Co's right and obligation to carry out the Project Operations shall terminate automatically on the expiry of the Project Term unless and to the extent previously terminated in accordance with the provisions of this Agreement.

### 4 PROJECT DOCUMENTS<sup>4</sup>

#### Ancillary Documents

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

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

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

4.1.3 in any material respect depart from its obligations (or waive or allow to lapse any rights it may have in a material respect), or procure that others in any material respect depart from their obligations (or waive or allow to lapse any rights they may have in a material respect), under any Ancillary Document;<sup>5</sup> or

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be allocated. If any risks in this regard are to be borne by CHP, the Agreement must contain express provisions requiring CHP's chief executive to confirm his approval of the interest rate (and any impact on the pricing provisions). This should be a further condition to satisfaction of the CPs to ensure that any pricing adjustments are within CHP's affordability parameters.

The definition of Project Term would also require review to consider whether it will need to be amended, to commence on financial close and not the date of signature of the Agreement.

<sup>4</sup> These provisions do not give CHP any real control over changes to the funding agreements after contract signature. This approach gives Project Co and its funders comfort that they have flexibility to deal with cost overruns etc, but has been adopted on the basis that:

compensation for Project Co default: will be based on a market value of the unexpired term

compensation for non Project Co default: will be limited so that repayment of outstanding debt is calculated by reference to an agreed schedule

appropriate limits have been placed on hedging agreements (for example, by allowing only those agreements that comply with an agreed hedging policy to be included within the definition of outstanding debt)

compensation on termination which includes amounts relating to equity will be limited on the relevant basis referred to in the Department of Health [and Social Care](#) Guidance.

This is necessary to give CHP comfort in relation to the level of its potential exposure. If compensation is to be calculated on a different basis (bearing in mind DoH Guidance) these provisions will need to be reviewed accordingly.

<sup>5</sup> The Independent Tester Contract is dealt with in Clause 20 and Schedule 15. This envisages that the independent tester will have obligations jointly to CHP and Project Co. If, in exceptional cases, these obligations are owed to Project Co alone, this Clause should be extended to cover the Independent Tester Contract.

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

unless the proposed course of action (and any relevant documentation) has been submitted to CHP's Representative for review under Schedule 10 (*Review Procedure*) and there has been no objection in accordance with paragraph 3.2 of Schedule 10 (*Review Procedure*) within twenty (20) Business Days of receipt by CHP's Representative of the submission of the proposed course of action (and any relevant documentation), or such shorter period as may be agreed by the parties and, in the circumstances specified in Clause 4.1.1, Project Co has complied with Clause 50 (*Assignment, Sub-contracting and Changes in Control*).

### **Changes to Funding Agreements**

- 4.2 Subject to Clause 4.3, Project Co shall be free, at any time, to enter into, terminate, amend, waive its rights and generally deal with its Funding Agreements on such terms and conditions as it sees fit provided that (at the time such action is contemplated and effected) the same will not materially and adversely affect the ability of Project Co to perform its obligations under the Project Documents or this Agreement.
- 4.3 No amendment, waiver or exercise of a right under any Funding Agreement or Ancillary Document shall have the effect of increasing CHP's liabilities on early termination of this Agreement unless:
- 4.3.1 Project Co has obtained the prior written consent of CHP to such increased liability for the purposes of this Clause 4.3<sup>6</sup>; or
- 4.3.2 it is an Additional Permitted Borrowing.
- 4.4 Not used.
- 4.5 Without prejudice to Clause 4.2 (*Changes to Funding Agreements*), Project Co shall liaise with CHP in accordance with the Liaison Procedure, and shall use all reasonable endeavours to provide CHP with a copy of the relevant agreement in settled draft form, not less than ten (10) Business Days before it enters into any Funding Agreement (other than the Initial Funding Agreements).

### **Delivery**

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

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<sup>6</sup> This should not be given unless the Additional Permitted Borrowing Limit has been reached.

## 5 THE PROJECT OPERATIONS

### Scope

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

### General standards<sup>7</sup>

- 5.2 <sup>8</sup>Project Co shall at its own cost be solely responsible for procuring that the Project Operations are at all times performed:
- 5.2.1 in so far as not in conflict with an express obligation of Project Co under this Agreement, or where in relation to a matter there is no express obligation or standard imposed on Project Co under this Agreement, in accordance with Good Industry Practice;
  - 5.2.2 in a manner consistent with the Quality Plans;
  - 5.2.3 in a manner that is not likely to be injurious to health or to cause damage to property;
  - 5.2.4 in a manner consistent with CHP [and its Tenants/Licencees] discharging its statutory duties and other functions undertaken by it as the same may be notified to Project Co from time to time;
  - 5.2.5 in compliance with all Law and Consents (including without limitation the giving of notices and the obtaining of any such Consents) and so as not to prejudice the renewal of any such Consents; and
  - 5.2.6 except to the extent expressly stated to the contrary in CHP's Construction Requirements or the Service Level Specifications, in compliance with all applicable NHS Requirements.

### CHP's Undertaking

- 5.3 CHP undertakes to Project Co that it shall:
- 5.3.1 subject to the provisions of this Agreement, comply with all Laws, NHS Requirements and Consents applicable to it which relate to the Project Operations;
  - 5.3.2 not wilfully impede Project Co in the performance of its obligations under this Agreement (having regard always to the interactive nature of the

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<sup>7</sup> [In framing development and service obligations CHP must ensure compliance with "Guidelines for Implementing Controls Assurance in the NHS" and HSC 1999/123. CHP should note that this standard form does not impose any specific obligation on Project Co in relation to IM&T. CHP to consider whether provisions of that nature would be appropriate on a project specific basis and if so include their requirements in their output specifications.]

<sup>8</sup> The document is construed as a whole and therefore it is unnecessary to refer specifically to any exceptions. Wording which appeared in the previous version of the document has therefore been removed.

activities of CHP and of Project Co and to CHP [and its Tenant's/Licencee's] use of the Facilities to provide the Clinical Services and any other operations or activities carried out by CHP [and its Tenant's/Licencee's] on or at the Site for the purposes contemplated by this Agreement or any other of CHP's [and its Tenant's/Licencee's] statutory functions);

5.3.3 inform Project Co as soon as reasonably practicable if at any time it becomes unable to meet any of its financial obligations and in such case inform, and keep Project Co informed, of any course of action to remedy the situation recommended or required by the Secretary of State or other competent authority;

5.3.4 to the extent permitted by Law, supply to Project Co within sixty (60) Business Days of their publication, a copy of CHP's Annual Report and Accounts;

provided that, to avoid doubt nothing in this Clause 5.3 shall in any way fetter the discretion of CHP in fulfilling its statutory functions.

#### **Co-operation**

5.4 Each party agrees to co-operate, at its own expense, with the other party in the fulfilment of the purposes and intent of this Agreement. To avoid doubt, neither party shall be under any obligation to perform any of the other's obligations under this Agreement.

5.5 Without prejudice to the generality of Clause 5.4 (*Co-operation*), the parties shall liaise with a view to ensuring that sufficient consideration is given to NHS requirements relating to customer service and satisfaction, including the "Choice Framework 2014/15" (as amended from time to time) which provides guidance in respect of patient choices/rights relating to health care.

## PART B: GENERAL PROVISIONS

### 6 GENERAL OBLIGATIONS AND RESPONSIBILITIES OF PROJECT CO

#### Other business

- 6.1 Project Co shall not engage in any business or activity other than the business or activities related to, and conducted for, the purpose of the Project Operations<sup>9</sup>.

#### Project Co Parties

- 6.2 Subject to the provisions of Clause 42.1.7 (*Relief Events*), Project Co shall not be relieved or excused of any responsibility, liability or obligation under this Agreement by the appointment of any Project Co Party. Project Co shall, as between itself and CHP, be responsible for the selection, pricing, performance, acts, defaults, omissions, breaches and negligence of all Project Co Parties. All references in this Agreement to any act, default, omission, breach or negligence of Project Co shall be construed accordingly to include any such act, default, omission, breach or negligence of a Project Co Party.

#### Safety

- 6.3 Project Co shall throughout the progress of the Works and the conduct of the other Project Operations have full regard for the safety of all persons on the Site (whether lawfully or not) and shall keep the Site, the Works and the Facilities in an orderly state, appropriate in accordance with Good Industry Practice, to avoid danger to such persons. Project Co shall take such measures including fencing of the Site where appropriate as are reasonable in accordance with Good Industry Practice to prevent access onto the Site and/or the Facilities of any persons or creatures not entitled to be there.

### 7 WARRANTIES<sup>10</sup>

[CHP to include project specific provisions]

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<sup>9</sup> This standard form does not envisage that third party revenue generation activities will form part of the Project. This Clause (and the Agreement generally) will need to be amended as appropriate to provide for any other activities to be carried out as part of the Project e.g. additional income generation activities to be conducted on Site.

<sup>10</sup> Any warranties to be given by CHP must be justified on a project specific basis (it is expected that such circumstances will be limited for example, where CHP is the only source of the information and Project Co has no means of obtaining or verifying that information itself). Increasingly the private sector is requiring warranties as to the accuracy of certificates of title and replies to enquiries. These are not considered to be necessary in transactions such as these where there is no security being granted over the property. To the extent that a problem with title arises then Project Co's remedy is either through a Delay/Compensation Event or an Excusing Cause. If a warranty is required then CHP should consider qualifying it to the best of CHP's knowledge, belief and information. CHP should note that the standard form assumes that CHP will not warrant information disclosed to Project Co (referred to as Disclosed Data) and expressly excludes liability in this regard. A breach of warranty should give rise to a claim for damages or a price variation mechanism could be introduced to the Agreement. Breach should not give rise to a right for Project Co to terminate.

The DoH has not included warranties from either party as to capacity and authority due to the limited legal benefit that they provide (i.e. possibly acting as evidence to support an action for negligent misstatement) and taking account of the narrow grounds on which a company might lack capacity under Section 39 of the Companies Act 2006. CHP's power to enter into the agreement is derived from statute and it would therefore be inappropriate for it to give warranties as to capacity and authority. If there are reasons for concern over Project Co's capacity or authority, the requirement for such warranties should be considered as they may (in addition to the point made above) have the practical benefit of focussing the mind of Project Co (and their legal advisers) on the point.

## 8 INDEMNITIES AND LIABILITY

### Project Co indemnities to CHP

- 8.1 Project Co shall indemnify and keep CHP indemnified at all times from and against all Direct Losses sustained by CHP in consequence of:
- 8.1.1 any claim for, or in respect of, the death and/or personal injury of any employee of, or person engaged by, Project Co or any Project Co Party notwithstanding any act or omission of CHP or any CHP Party<sup>11</sup> provided that any claim against CHP or any CHP Party for clinical, medical or professional negligence shall be excluded;
  - 8.1.2 any claim for, or in respect of, the death and/or personal injury of any third party (other than a person referred to in Clause 8.2.1 (*CHP Party employees*)) arising out of, or in the course of, the Project Operations, save to the extent caused (or contributed to) by any Unreasonable Act by CHP or any CHP Party, breach of any express provision of this Agreement by CHP or any CHP Party or any deliberate act or omission of CHP or any CHP Party;<sup>12</sup>
  - 8.1.3 any physical loss of or damage to CHP Assets arising by reason of any act or omission of Project Co or any Project Co Party, save to the extent that such loss or damage arises out of the breach of any express provision of this Agreement by CHP or any CHP Party or any deliberate act or omission of CHP or any CHP Party<sup>13</sup>; and
  - 8.1.4 any loss of or damage to property or assets of any third party arising by reason of any act or omission of Project Co or any Project Co Party, save to the extent that such loss or damage arises out of the breach of any express provision of this Agreement by CHP or any CHP Party or any deliberate act or omission of CHP or any CHP Party<sup>14</sup>.

### CHP indemnities to Project Co<sup>15</sup>

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<sup>11</sup> This mirrors the indemnity given by CHP in relation to its employees in Clause 8.2.1. Project Co should manage the risks covered by the indemnity (and the fact that there is no carve out for causation) by putting appropriate insurance cover in place (which it is required by law to do), which contains satisfactory non-vitiating provisions (see Clause 36.4.4(a)).

<sup>12</sup> Deliberate acts or omissions do not include acts or omissions which are within the contemplation of the parties or provided for in this Agreement (see paragraph 10 of Part 2 of Schedule 1 (*Definitions and Interpretation*)).

<sup>13</sup> The carve out from the indemnity for CHP acts and omissions does not include physical damage caused by Project Co as a result of "negligent" acts or omissions of CHP as Project Co should insure against that risk. CHP should not act as insurers of last resort in those circumstances.

<sup>14</sup> See previous footnote

<sup>15</sup> CHP liability for CHP or CHP Party acts or omissions (or limits on Project Co liability to the extent that the relevant category of acts or omissions were caused by CHP or a CHP Party) does not extend to acts and omissions of patients and visitors. Project Co should price, and run its business, on the basis that patients and visitors will use the Facilities. These provisions should be reviewed on a project specific basis. It has often been suggested that mental health facilities are more risky in this regard, but that is not necessarily the case. The majority of mental health schemes do not have a high forensic content and particularly in the case of facilities for the elderly mentally ill patient group, the risk profile is much lower than in many types of other in-patient and day care facility in the health or other markets. Mental Health [CHP Trusts](#) should inform bidders of the patient mix and bidders should produce designs which take this information into account. Project Co's design and choice of materials, etc. should reflect the intended use and occupation of the building.

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

8.2.1 any claim for, or in respect of, the death and/or personal injury of any employee of, or person engaged by, CHP or any CHP Party notwithstanding any act or omission of Project Co or any Project Co Party<sup>16</sup>;

8.2.2 any claim for, or in respect of, the death and/or personal injury of any third party (other than a person referred to in Clause 8.1.1 (*Project Co and Project Co Party employees*)) arising by reason of any act or omission of CHP or any CHP Party in the course of the provision of the Clinical Services, any Unreasonable Act by CHP or any CHP Party, breach of any express provision of this Agreement by CHP or any CHP Party or any deliberate act or omission of CHP or any CHP Party, save to the extent caused (or contributed to) by any act or omission of Project Co or any Project Co Party;

8.2.3 any physical damage to any part of the Facilities or any assets or other property of Project Co or any Project Co Party arising by reason of any breach of any express provision of this Agreement by CHP or any CHP Party or any deliberate act or omission of CHP or any CHP Party, save to the extent caused (or contributed to) by any act or omission of Project Co or any Project Co Party<sup>17</sup>; and

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

Provided that in the case of Clause 8.2.3 and 8.2.4 there shall be excluded from the indemnity given by CHP any liability for the occurrence of risks against which and to the extent to which Project Co is bound to insure under this Agreement<sup>18</sup>.

### Conduct of claims

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

8.3.1 if the Beneficiary receives any notice, demand, letter or other document concerning any claim for which it appears that the Beneficiary is, or may become entitled to, indemnification under this Agreement, the Beneficiary shall give notice in writing to the Indemnifier as soon as reasonably

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<sup>16</sup> See footnote to Clause 8.1.1.

<sup>17</sup> CHP indemnities relating to physical damage in paragraphs (c) and (d) do not cover physical damage caused by negligent acts or omissions. Project Co should insure against that risk. CHP should not act as insurers of last resort in those circumstances.

<sup>18</sup> An indemnity has not been included in relation to CHP breach. Project Co has its express rights under the agreement (for example, Delay Event and Excusing Causes) and its rights to sue for breach of contract in order to recover any additional loss.

practicable and in any event within twenty (20) Business Days of receipt of the same;

8.3.2 subject to Clauses 8.3.3, 8.3.4 and 8.3.5 below, on the giving of a notice by the Beneficiary pursuant to Clause 8.3.1 above, where it appears that the Beneficiary is or may be entitled to indemnification from the Indemnifier in respect of all (but not part only) of the liability arising out of the claim, the Indemnifier shall (subject to providing the Beneficiary with a secured indemnity to its reasonable satisfaction against all costs and expenses that it may incur by reason of such action) be entitled to dispute the claim in the name of the Beneficiary at the Indemnifier's own expense and take conduct of any defence, dispute, compromise, or appeal of the claim and of any incidental negotiations. The Beneficiary shall give the Indemnifier all reasonable co-operation, access and assistance for the purposes of considering and resisting such claim;

8.3.3 with respect to any claim conducted by the Indemnifier pursuant to Clause 8.3.2 above:

- (a) the Indemnifier shall keep the Beneficiary fully informed and consult with it about material elements of the conduct of the claim;
- (b) the Indemnifier shall not bring the name of the Beneficiary into disrepute; and
- (c) the Indemnifier shall not pay or settle such claims without the prior consent of the Beneficiary, such consent not to be unreasonably withheld or delayed;

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

- (a) the Indemnifier is not entitled to take conduct of the claim in accordance with Clause 8.3.2 above; or
- (b) the Indemnifier fails to notify the Beneficiary of its intention to take conduct of the relevant claim within twenty (20) Business Days of the notice from the Beneficiary under Clause 8.3.1 above or notifies the Beneficiary that it does not intend to take conduct of the claim; or
- (c) the Indemnifier fails to comply in any material respect with the provisions of Clause 8.3.3 above;

8.3.5 the Beneficiary shall be free at any time to give notice to the Indemnifier that it is retaining or taking over (as the case may be) the conduct of any defence, dispute, compromise or appeal of any claim (or of any incidental negotiations) to which Clause 8.3.2 above applies. On receipt of such notice the Indemnifier shall promptly take all steps necessary to transfer the conduct of such claim to the Beneficiary, and shall provide to the Beneficiary all reasonable co-operation, access and assistance for the purposes of considering and resisting such claim. If the Beneficiary gives any notice pursuant to this Clause 8.3.5, then the Indemnifier shall be

released from any liability under its indemnity under Clause 8.1 or Clause 8.2 (as the case may be) and, without prejudice to any accrued liabilities, any liability under its indemnity given pursuant to Clause 8.3.2 in respect of such claim;

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

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

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

8.3.7 any person taking any of the steps contemplated by Clauses 8.3.1 to 8.3.5 shall comply with the requirements of any insurer who may have an obligation to provide an indemnity in respect of any liability arising under this Agreement.

#### **Mitigation - indemnity claims**

8.4 To avoid doubt the provisions of Clause 67 (*Mitigation*) apply to any indemnity given under this Agreement and any such indemnity shall not apply to the extent that such part or parts of Direct Losses could have been reduced or avoided by the Beneficiary complying with the provisions of such Clause.

#### **Taxation**

8.5 If any payment by one party under an indemnity in this Agreement is subject to income tax or corporation tax (or any tax replacing them) in the hands of the recipient, the recipient may demand in writing to the party making the payment that the payment shall be increased by such amount as would ensure that, after taking into account any such tax payable in respect of such additional amount, the recipient receives and retains a net sum equal to the amount it would have otherwise received had the payment not been subject to such tax. In relation to any such additional amount payable to Project Co, Project Co and CHP shall have the same rights and obligations as would apply to a Relevant Tax Liability under Clause 48.7.3 and Clauses 48.6 to 48.11 (inclusive) shall apply mutatis mutandis to the payment of the additional amount. The party making the payment shall pay such additional amount within ten (10) Business Days of receipt of such demand.

## Excusing Causes

- 8.6 If an Excusing Cause interferes adversely with, or causes a failure of, the performance of the Project Operations and/or causes the occurrence of a Performance Failure and provided that the effect of such Excusing Cause is claimed within ten (10) Business Days of the date on which Project Co became aware (or ought reasonably to have become so aware) of the occurrence of the Excusing Cause, then (subject to Clauses 8.8 (*Insured exposure*) and 8.9 (*Mitigation*)) to the extent such failure or interference or occurrence of a Performance Failure arises as a result of such Excusing Cause:
- 8.6.1 such failure by Project Co to perform, and any poor performance of, any affected Service shall not constitute a breach of the provisions of this Agreement by Project Co;
  - 8.6.2 such interference shall be taken account of in measuring the performance of any affected Service in accordance with the Performance Monitoring System, which shall be operated as though the relevant Service had been performed free from such adverse interference; and
  - 8.6.3 any such Performance Failure shall be deemed not to have occurred,
- so that Project Co shall be entitled to payment under this Agreement as if there had been no such interference with the Project Operations.
- 8.7 For the purpose of Clause 8.6, an Excusing Cause means<sup>19</sup> :
- 8.7.1 any breach of any express provision of this Agreement by CHP or any CHP Party (unless, and to the extent, caused or contributed to by Project Co or any Project Co Party);
  - 8.7.2 any deliberate act or omission of CHP or of any CHP Party or any failure by CHP or CHP Party (having regard always to the interactive nature of the activities of CHP and of Project Co) to take reasonable steps to carry out its activities in a manner which minimises undue interference with Project Co's performance of the Project Operations, save where (and to the extent):
    - (a) caused or contributed to by Project Co or any Project Co Party;
    - (b) CHP or CHP Party is acting in accordance with a recommendation or instruction of Project Co or any Project Co Party;
    - (c) any such act or omission giving rise to such failure was within the contemplation of the parties or was otherwise provided for in this Agreement;
    - (d) the consequences of any such deliberate act or omission or other acts or omissions giving rise to such failure would have been

<sup>19</sup>

It has been suggested on occasion that where Project Co is providing Hard FM and not Soft FM services, additional protections for Project Co or obligations on CHP should be inserted. The Departmental policy is that this should not be done: the provisions of Clause 8.7 are wide enough to address legitimate concerns from Project Co. If there are express project specific issues, these should be notified specifically to CHP in the context of Clause 8.7.

prevented by the proper performance of Project Co's obligations under this Agreement; or

(e) [the same arises from an act of CHP or a CHP Party compliant with the Contractor's Site Rules<sup>20</sup>.]

- 8.7.3 the outbreak or the effects of any outbreak of any Medical Contamination unless and to the extent that the effects of such outbreak are caused (or contributed to) by any failure of Project Co or any Project Co Party to comply with procedures (or CHP instructions) relating to control of infection or to take all reasonable steps to mitigate the effect of such Medical Contamination;
- 8.7.4 the implementation of any action taken by CHP or any CHP Party, or any suspension of Project Co's obligation to deliver any or any part of the Services or the compliance by Project Co with instructions given by CHP, in each case in the circumstances referred to in Clauses 29.7 to 29.9 (inclusive);
- 8.7.5 the carrying out of any Small Works in accordance with the terms of this Agreement during the period of time agreed between CHP and Project Co;
- 8.7.6 not used
- 8.7.7 the carrying out of planned preventative maintenance in accordance with the Schedule of Programmed Maintenance; or
- 8.7.8 the occurrence of the circumstances described in Clause 15.3.

Where in this Clause 8.7 a cause is said to be an Excusing Cause save to the extent that some other cause operates, the relevant financial effects of the said cause shall be apportioned between CHP or CHP Party on the one hand, and Project Co on the other, by reference to the respective influence of each cause<sup>21</sup>.

### **Insured exposure**

- 8.8 Without prejudice to Clause 36 (*Insurance*), Project Co shall not be entitled to any payment which would not have been due under this Agreement but for Clause 8.6 (*Excusing Causes*) to the extent that Project Co is or should be able to recover under any policy of insurance required to be maintained by Project Co or any Project Co Party in accordance with this Agreement (whether or not such insurance has in fact been effected or, if effected, has been vitiated as a result of any act or omission of Project Co (or any Project Co Party), including but not limited to non disclosure or under insurance) or any other policy of insurance which Project Co has taken out and maintained.

### **Mitigation of Excusing Cause**

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<sup>20</sup> For inclusion in phased projects.

<sup>21</sup> In schemes which include phased working, it is possible that Delay Events affecting construction work may also have an impact on service delivery. For this reason, it may be necessary to include additional excusing causes on a project specific basis, although CHP should take care not to do so automatically (for example, Relief Events do not give relief from deductions for service failure in any circumstances, even though they are classified as Delay Events).

- 8.9 Project Co shall take all reasonable steps to mitigate the consequences of an Excusing Cause on Project Co's ability to perform its obligations under this Agreement. To the extent that Project Co does not take such steps, Project Co shall not be entitled to, and shall not receive, the relief specified in Clause 8.6 (*Excusing Causes*).
- 8.10 To avoid doubt, Clause 8.7.2 (*Acts of CHP*) shall not impose a general obligation on CHP to take (or to procure that any CHP Party takes) such steps and shall apply (and be construed) solely for the purpose of establishing whether an Excusing Cause has occurred.

## 9 LIMITS ON LIABILITY

### Exclusions

- 9.1 The indemnities under this Agreement shall not apply and (without prejudice to CHP's rights under the Payment Mechanism) there shall be no right to claim damages for breach of this Agreement, in tort or on any other basis whatsoever to the extent that any loss claimed by either party is for loss of profits, loss of use, loss of production, loss of business or loss of business opportunity or is a claim for consequential loss or for indirect loss of any nature ("Indirect Losses") suffered or allegedly suffered by either party. CHP agrees that, notwithstanding the foregoing, any losses of Project Co arising under the Construction Contract and the Service Contracts as originally executed (or as amended in accordance with and subject to Clause 4.1 (*Ancillary Documents*)) which are not Indirect Losses shall not be excluded from such a claim solely by reason of this Clause<sup>22</sup>.
- 9.2 CHP shall not be liable in tort to Project Co or any Project Co Party in respect of any negligent act or omission of CHP or any CHP Party relating to or in connection with this Agreement and Project Co shall procure that no Project Co Party shall bring such a claim against CHP. Project Co has accepted this on the basis that it and each Project Co Party will cover the risk of negligent acts or omissions by insurance or in such other manner as it (or they) may think fit.

### Sole remedy

- 9.3 Subject to:
- 9.3.1 any other express right of CHP pursuant to this Agreement and/or the Strategic Partnering Agreement; and
  - 9.3.2 CHP's right to claim, on or after termination of this Agreement, the amount of its reasonable costs, losses, damages and expenses suffered or incurred by it as a result of rectifying or mitigating the effects of any breach of this Agreement by Project Co save to the extent that the same has already been recovered by CHP pursuant to this Agreement or has been taken into account to reduce any compensation payable by CHP pursuant to Clause 48 (*Compensation on Termination*),

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<sup>22</sup> As a matter of good practice, CHP should review the relevant subcontracts to ensure that they contain mirror provisions excluding the right to claim Indirect Losses.

the sole remedy of CHP in respect of a failure to provide the Services in accordance with this Agreement shall be the operation of the Payment Mechanism<sup>23</sup>.

- 9.4 Nothing in Clause 9.3 shall prevent or restrict the right of CHP to seek injunctive relief or a decree of specific performance or other discretionary remedies of the court.
- 9.5 Notwithstanding any other provision of this Agreement, neither party shall be entitled to recover compensation or make a claim under this Agreement, the Licences, or any other agreement in relation to the Project in respect of any loss that it has incurred (or any failure of the other party) to the extent that it has already been compensated in respect of that loss or failure pursuant to this Agreement, the Licences or otherwise.

## 10 CHP'S DATA

### No liability

- 10.1 Subject to Clause 7 (*Warranties*) CHP shall not be liable to Project Co for and Project Co shall not seek to recover from CHP (or from any CHP Party) any damages, losses, costs, liabilities or expenses which may arise (whether in contract, tort or otherwise) from the adoption, use or application of the Disclosed Data by, or on behalf of, Project Co, the Independent Tester or any Project Co Party.

### No warranty

- 10.2 Subject to Clause 7 (*Warranties*) CHP gives no warranty or undertaking of whatever nature in respect of the Disclosed Data and, specifically (but without limitation), CHP does not warrant that the Disclosed Data represents all of the information in its possession or power (either during the conduct of the tender process for the Project or at the time of execution of this Agreement) relevant or material to or in connection with the Project or the obligations of Project Co under this Agreement or under any of the Project Documents. Also, subject to Clause 7 (*Warranties*) CHP shall not be liable to Project Co in respect of any failure to disclose or make available to Project Co (whether before, on or after the execution of this Agreement) any information, documents or data, nor any failure to review or to update the Disclosed Data, nor any failure to inform Project Co (whether before, on or after execution of this Agreement) of any inaccuracy, error, omission, defects or inadequacy in the Disclosed Data.

### Project Co investigation

- 10.3 Without prejudice to its rights and remedies under Clause 7 (*Warranties*) Project Co acknowledges and confirms that:
- 10.3.1 it has conducted its own analysis and review of the Disclosed Data and has, before the execution of this Agreement, satisfied itself as to the accuracy, completeness and fitness for purpose of any such Disclosed Data upon which it places reliance; and
- 10.3.2

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<sup>23</sup>

CHP should note that the effect of the sole remedy provisions contained in this standard form is that, to the extent the Payment Mechanism does not take account of a particular service failure, CHP will not be able to recover any loss or damages from Project Co. Project Co's lenders will be unwilling to accept a general right to sue for breach of contract if a service failure is not caught. The standard form payment mechanism in Schedule 18 and the standard output specifications published by CHP are designed to be as all encompassing as possible, but CHP will need to ensure that this remains the case in the final version of the contract. See also footnote to Clause 29.6.2.

10.3.3 it shall not be entitled to and shall not (and shall procure that no Project Co Party shall) make any claim against CHP or any CHP Party whether in contract, tort or otherwise including, without limitation, any claim in damages, for extensions of time or for additional payments under this Agreement on the grounds:

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

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

## 11 REPRESENTATIVES

### Representatives of CHP

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

- 11.5.1 in any way relieve or absolve Project Co from, modify, or act as a waiver or estoppel of, any liability, responsibility, obligation or duty under this Agreement; or
- 11.5.2 in the absence of an express order or authorisation under Schedule 22 (*Variation Procedure*), constitute or authorise a Variation.
- 11.6 Except as previously notified in writing before such act by CHP to Project Co, Project Co and Project Co's Representative shall be entitled to treat any act of CHP's Representative which is authorised by this Agreement as being expressly authorised by CHP and Project Co and Project Co's Representative shall not be required to determine whether an express authority has in fact been given.

### **Representative of Project Co**

- 11.7 Project Co's Representative shall be [insert the name of the Project Co Representative] or such other person appointed pursuant to this Clause. Project Co's Representative shall have full authority to act on behalf of Project Co for all purposes of this Agreement. Except as previously notified in writing before such act by Project Co to CHP, CHP and CHP's Representative shall be entitled to treat any act of Project Co's Representative in connection with this Agreement as being expressly authorised by Project Co and CHP and CHP's Representative shall not be required to determine whether any express authority has in fact been given.
- 11.8 Project Co may by notice to CHP change Project Co's Representative. Where Project Co wishes to do so it shall by written notice to CHP propose a substitute for approval, taking account of the need for liaison and continuity in respect of the Project. Such appointment shall be subject to the approval of CHP (not to be unreasonably withheld or delayed).
- 11.9 Project Co's key Works personnel are identified in Schedule 4 (*Key Works Personnel*). Project Co shall, as far as it is within Project Co's control, ensure that such persons retain their involvement in the Works and, in particular, will not, for the duration of the Works require or request any of them to be involved in any other project on behalf of Project Co or any of the Shareholders or its or their Associated Companies if, in the reasonable opinion of CHP, this would adversely affect the Project<sup>24</sup>.

## **12 LIAISON**

### **Liaison Committee**

- 12.1 CHP and Project Co shall establish and maintain throughout the Project Term a joint liaison committee (the "Liaison Committee"), consisting of three (3) representatives of CHP (one of whom shall be appointed Chairman) and three (3) representatives of Project Co which shall have the functions described below.

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<sup>24</sup> The purpose of Clause 11.9 is to ensure continuity from CHP's perspective of the individuals within the Project Co management structure during the construction phase. The Clause is intended to address only individuals working for Project Co and not to extend to the Contractors' employees, which is an issue for Project Co to manage. The extent and identity of Project Co's key Works personnel will need to be addressed on a project specific basis, in the light of the actual management structure proposed by Project Co. In particular, the standard form assumes that Project Co will have a key link person to act as intermediary between Project Co and CHP. If this is not the case, CHP should consider extending the rights set out in Clause 11.9 down to the contractors' personnel.

- 12.2 The functions of the Liaison Committee shall be:
- 12.2.1 to provide a means for the joint review of issues relating to all day to day aspects of the performance of this Agreement;
  - 12.2.2 to provide a forum for joint strategic discussion, considering actual and anticipated changes in the market and business of CHP, and possible variations of this Agreement to reflect those changes or for the more efficient performance of this Agreement; and
  - 12.2.3 in certain circumstances, pursuant to Schedule 26 (*Dispute Resolution Procedure*), to provide a means of resolving disputes or disagreements between the parties amicably.
- 12.3 The role of the Liaison Committee is to make recommendations to the parties, which they may accept or reject at their complete discretion. Neither the Liaison Committee itself, nor its members acting in that capacity, shall have any authority to vary any of the provisions of this Agreement or to make any decision which is binding on the parties (save as expressly provided in Schedule 26 (*Dispute Resolution Procedure*)). Neither party shall rely on any act or omission of the Liaison Committee, or any member of the Liaison Committee acting in that capacity, so as to give rise to any waiver or personal bar in respect of any right, benefit or obligation of either party.
- 12.4 The parties shall appoint and remove their representatives on the Liaison Committee by written notice delivered to the other at any time. A representative on the Liaison Committee may appoint and remove an alternate (who may be another representative of that party) in the same manner. If a representative is unavailable (and the other party's representatives may rely on the alternate's statement that the representative is unavailable) his alternate shall have the same rights and powers as the representative.

### **Procedures and practices**

- 12.5 Subject to the provisions of this Agreement, the members of the Liaison Committee may adopt such procedures and practices for the conduct of the activities of the Liaison Committee as they consider appropriate from time to time and:
- 12.5.1 may invite to any meeting of the Liaison Committee such other persons as its members may agree (in accordance with Clause 12.6); and
  - 12.5.2 receive and review a report from any person agreed by its members.
- 12.6 Recommendations and other decisions of the Liaison Committee must have the affirmative vote of all those voting on the matter, which must include not less than one (1) representative of CHP and not less than one (1) representative of Project Co.
- 12.7 Each member of the Liaison Committee shall have one (1) vote. The Chairman shall not have a right to a casting vote.
- 12.8 The Liaison Committee shall meet at least once each quarter (unless otherwise agreed by its members) and from time to time as necessary.
- 12.9 Any member of the Liaison Committee may convene a meeting of the Liaison Committee at any time.

- 12.10 Except where agreed by the Parties, meetings of the Liaison Committee shall be convened on not less than ten (10) Business Days' notice (identifying the agenda items to be discussed at the meeting) provided that in emergencies a meeting may be called at any time on such notice as may be reasonable in the circumstances.
- 12.11 Where the Liaison Committee decides it is appropriate, meetings may also be held by telephone or another form of telecommunication, by which each participant can hear and speak to all other participants at the same time.
- 12.12 Minutes of all recommendations (including those made by telephone or other form of telecommunication) and meetings of the Liaison Committee shall be kept by Project Co and copies circulated promptly to the parties, normally within five (5) Business Days of the making of the recommendation or the holding of the meeting. A full set of minutes shall be open to inspection by either party at any time, upon request.

### **13 DISASTER PLAN**

- 13.1 The parties shall comply with the provisions of the Disaster Plan<sup>25</sup>.
- 13.2 The parties shall liaise with each other in accordance with the Liaison Procedure in order periodically to review and update the Disaster Plan.

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<sup>25</sup>

This is not the same as [CHP's](#) Major Incident Plan. It is intended to deal with how services will continue to be provided following the occurrence of some form of emergency or disaster at CHP's site, as well as in the aftermath of events outside the site where use of CHP's facilities are required. It may be beneficial for the Disaster Plan to address issues such as Temporary Alternative Accommodation (see Schedule 18).

## PART C: LAND ISSUES

### 14 NATURE OF LAND INTERESTS<sup>26</sup>

#### Access during Construction

14.1 From the date of issue of the Certificate of Commencement until the Actual Completion Date or (if earlier) the Termination Date, CHP grants a licence to Project Co and the Project Co Parties to:

14.1.1 exercise the Ancillary Rights; and

14.1.2 enter upon the Site,

in each case solely for the purposes of implementing the Works and carrying out Project Co's Pre-Completion Commissioning.

#### Access following Construction

14.2 After the occurrence of the Actual Completion Date CHP grants licence to Project Co and Project Co Parties to enter upon the Facilities solely for the purposes of:

14.2.1 the carrying out of Project Operations (other than those Project Operations which Project Co is licensed to carry out pursuant to Clause 14.1); and

14.2.2 the remedying of Defects and the carrying out of Snagging Matters,

such licence to terminate on the Expiry Date or (if earlier) the Termination Date.

14.3 The Licences shall not operate or be deemed to operate as a demise of the Facilities or the Site or any part of the Facilities or the Site and Project Co shall not have or be entitled to exclusive possession or any estate right title or interest in the Site or the Facilities but shall occupy the Site as a licensee only.

14.4 The Licences are personal to Project Co and the Project Co Parties and are granted only in so far as such rights are capable of being granted by CHP whether as a result of any restriction in the Title Deeds or otherwise.

14.5 Project Co shall procure that:

14.5.1 all Project Operations carried out at the Site by or on behalf of Project Co (whether before, during or after the completion of the Works) shall be carried out in a manner which does not breach any provisions of the Title Deeds; and

<sup>26</sup>

This standard form is drafted on the basis that the Site has been selected by CHP. If the Site is to be selected by Project Co then these provisions will need to be reviewed and amended as appropriate. Clause 14 is now drafted on the basis of a licence arrangement rather than a lease in accordance with the composite trade model (CHP should refer to DoH published guidance on the use of composite trade tax treatment). If Project Co is to enjoy sole occupation of any areas, such areas may need to be leased, rather than licensed, to Project Co. This will mean that the parties can obtain a court order excluding security of tenure provisions in respect of the lease. [CHP's legal advisers should confirm that the wording is appropriate in the project specific case. The parties are advised to refer to the PFU guidance on "Tax Treatment for Construction Costs of NHS Schemes (Composite Trader)" which is to be found on the DoH website.]

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

## 15 THE SITE<sup>2728</sup>

15.1 The condition of the Site shall be the sole responsibility of Project Co. Accordingly (without prejudice to any other obligation of Project Co under this Agreement), Project Co shall be deemed to have:

15.1.1 carried out a Ground Physical and Geophysical Investigation and to have inspected and examined the Site and its surroundings and (where applicable) any existing structures or works on, over or under the Site;

15.1.2 satisfied itself as to the nature of the Site Conditions, the ground and the subsoil, the form and nature of the Site, the loadbearing and other relevant properties of the Site, the risk of injury or damage to property affecting the Site, the nature of the materials (whether natural or otherwise) to be excavated and the nature of the design, work and materials necessary for the execution of the Works;

15.1.3 satisfied itself as to the adequacy of the rights of access to and through the Site and any accommodation it may require for the purposes of fulfilling its obligations under this Agreement (such as additional land or buildings outside the Site);

15.1.4 satisfied itself as to the possibility of interference by persons of any description whatsoever (other than CHP), with access to or use of, or rights in respect of, the Site, with particular regard to the owners of any land adjacent to the Site; and

15.1.5 satisfied itself as to the precautions, times and methods of working necessary to prevent any nuisance or interference, whether public or private, being caused to any third parties.

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<sup>27</sup> This standard form assumes that Project Co is able to make any necessary investigation. To the extent that it is not practical for Project Co to investigate areas of the Site (for example, due to CHP occupation of facilities on Site), then Clause 15.3 will provide relief. CHP should bear any additional costs arising out of unforeseen conditions in areas which Project Co cannot investigate and which cannot be reasonably identified by Project Co. Areas of the Site to which this carve out applies should be clearly identified in the Agreement.

<sup>28</sup> CHP should consider whether or not there is a significant risk of asbestos on their site and an up to date asbestos register should be supplied to Lift Co at the earliest stage possible. CHP should ensure that where there is a significant risk of asbestos on site that drafting is issued reflecting the principles of Clauses 15.3 and 15.4 in relation to other Contamination. CHP may wish to consider if it requires any drafting to address how any discovered asbestos is dealt with upon discovery (for example, how it is removed, when it may remain, and who removes).

The risk of asbestos on a site should be considered on a case by case basis and only where there is a significant known risk of asbestos remaining on a site should CHP take any risk in this area. The risk that CHP should take, if any, in relation to asbestos should mirror the risk allocation for site contamination, namely the same principles as set out in footnote 29 will be applied to a site which is known to contain significant amounts of asbestos. It should be clear that Project Co are responsible for any known contamination and contamination disclosed on the asbestos register and areas capable of survey, whether this be for removal or treatment in accordance with legislation. Such treatment should be in accordance with current legislation. This should be programmed into the construction programme. There should be a process for undertaking additional surveys required on a project specific basis. CHP will take responsibility for dealing with asbestos which is discovered under an existing facility during construction which was incapable of survey.

- 15.2 To avoid doubt, Project Co accepts full responsibility for all matters referred to in Clause 15.1 and[; **subject to Clause 7 (Warranties)**], Project Co shall:
- 15.2.1 not be entitled to make any claim against CHP of any nature whatsoever save, if applicable, as expressly provided in Clause 41 (*Delay Events*)), on any grounds including (without limitation) the fact that incorrect or insufficient information on any matter relating to the Site was given to it by any person, whether or not a CHP Party; and
  - 15.2.2 be responsible for, and hold CHP harmless from, cleaning up (if appropriate) and otherwise dealing with any Contamination at the Site so that it shall at all times comply with its obligations under this Agreement including (without limitation) complying with, at its own cost, any applicable Laws and any Consents, orders, notices or directions of any regulatory body (whether made against CHP or Project Co)<sup>29</sup>.

**[Special provisions relating to responsibility for Ground Conditions and Contamination**

- 15.3 To the extent that unforeseen ground conditions and/or Contamination exist in any parts of the Site which are under existing buildings as at Financial Close and which it is not practical for Project Co to investigate or survey, Project Co shall not be responsible for them, unless they were discovered by the Ground Physical and Geophysical Investigation and accordingly identified in Part 3 of Schedule 8 (*Construction Matters*) or unless they should reasonably have been discoverable if the Ground Physical and Geophysical Investigation had been properly carried out. If Project Co is not responsible for such ground conditions and/or Contamination under this Clause 15.3 then CHP shall be so responsible. The areas to which this Clause 15.3 applies are as follows:

**[ ]**

- 15.4 Where pursuant to Clause 15.3 CHP is responsible for any of the matters referred to then the following provisions shall apply:
- 15.4.1 where any such matter arises during the Construction Phase it shall be deemed to be a Compensation Event for the purposes of this Agreement and any work which is required or instructed to be done in consequence of it shall be deemed to be a Qualifying Variation;
  - 15.4.2 where any such matter arises during the Operational Term it shall, for the avoidance of doubt, be deemed to be an Excusing Cause for the purposes of Clause 8.7;
  - 15.4.3 further where any such matter arises during the Operational Term and any work or change to the Services is required or instructed to be done in consequence of it, it shall be deemed to be a Qualifying Variation; and
  - 15.4.4 **where any such matter is Contamination (whether during the Construction Phase or the Operational Term) CHP shall further hold Project Co harmless from cleaning up and otherwise dealing with the Contamination**

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<sup>29</sup> See previous footnote.

and shall indemnify Project Co in respect of all Direct Losses incurred by Project Co resulting from such Contamination.]

## 16 CONSENTS AND PLANNING APPROVAL<sup>30</sup>

16.1 Project Co shall be responsible for:

16.1.1 obtaining all Consents which may be required for the performance of the Project Operations; and

16.1.2 implementing each Consent within the period of its validity in accordance with its terms.

16.2 [CHP to include any project specific provisions relating to planning agreements etc. NB: costs associated with such agreements should be for the account of Project Co.]

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<sup>30</sup> The standard form assumes that, in line with DoH guidance, detailed planning permission will have been obtained, and the judicial review period expired, prior to contract signature.

## PART D: DESIGN AND CONSTRUCTION

### 17 THE DESIGN, CONSTRUCTION AND COMMISSIONING PROCESS

#### Overall Responsibility

17.1 Project Co shall carry out the Works:

17.1.1 so as to procure satisfaction of CHP's Construction Requirements<sup>31</sup>;

17.1.2 in accordance with Project Co's Proposals; and

17.1.3 in accordance with the terms of this Agreement.

To avoid doubt, the obligations in Clauses 17.1.1, 17.1.2 and 17.1.3 are independent obligations. In particular

17.1.4 the fact that Project Co has complied with Project Co's Proposals shall not be a defence to an allegation that Project Co has not satisfied CHP's Construction Requirements; and

17.1.5 the fact that Project Co has satisfied CHP's Construction Requirements shall not be a defence to an allegation that Project Co has failed to comply with Project Co's Proposals.

#### Design responsibility

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

#### Thermal and energy efficiency<sup>32</sup>

17.3 For the purposes of this Clause 17.3 an "average year figure" means the latest 20 year annual average Heating Degree Day figure available at the date which is two (2) years following the Actual Completion Date, calculated to a base of 18.5 degrees Celsius, as published by ~~DH Estates and Facilities~~<sup>33</sup> for the [ ] area. During the period of two (2) years following the Actual Completion Date, the parties shall monitor the actual energy consumption at the Facilities in accordance with the procedure set out in Part 7 of Schedule 8 (*Construction Matters*), with a view to ~~establishing the Energy Thresholds for the purposes of Schedule 18 (Payment Mechanism) and~~<sup>3334</sup> ascertaining whether and to what extent the thermal and energy efficiency of the Facilities is in excess of ~~[insert target GJ figure to reflect CHP Construction Requirements]~~ Giga Joules/100m<sup>3</sup> per year. If the average Heating Degree Day figure for the two (2) year period referred to above is either greater than 103% or less than 97% of the average year figure, then such monitoring shall continue until the earlier of:

<sup>31</sup> CHP needs to ensure compliance with "Guidelines for Implementing Controls Assurance in the NHS" and HSC 1999/123.

<sup>32</sup> CHP may wish to consider including this more detailed wording.

<sup>33</sup> [Parties to complete with agreed source of heating degree day information.](#)

<sup>3334</sup> Only applicable to specialist schemes which have included energy painshare and gainshare in Schedule 18.

17.3.1 such time as there has been a period of twenty four (24) consecutive calendar months the Heating Degree Day figure for such period, when averaged is neither greater than 103% nor less than 97% of the average year figure; and

17.3.2 the date five (5) years after the Actual Completion Date.

If as a result of such monitoring there is any indication that the thermal and energy efficiency of the Facilities causes energy use exceeding [insert target] Giga Joules per 100m<sup>3</sup> per year, the parties shall investigate the matter to determine the cause of such failure either in the manner agreed between them or in such manner as may be determined in accordance with Schedule 26 (*Dispute Resolution Procedure*).

17.3A Project Co shall, ~~at its own cost~~ install equipment to record and monitor energy consumption in the Facilities. Such equipment must be suitable to enable a detailed monitoring of the energy trends and consumption to allow analysis of the data collected to enable various matters, including:

17.3A.1 comparisons to be made with the declared energy targets; and

17.3A.1 early warning of deviations from norms and malfunctions.

17.3B All information gathered in accordance with Clause 17.3A shall be secured so that it is not lost or degraded as a result of any equipment or service malfunctions. In addition, such information shall be secured from any adjustment, modification or loss from any other source.

17.4 If following any investigation pursuant to Clause 17.3, it is agreed between the parties or determined in accordance with Schedule 26 (*Dispute Resolution Procedure*) that such failure arises as a consequence of the design and construction of the Facilities by Project Co failing to achieve a thermal and energy efficiency of equal to or less than [insert target] Giga Joules per 100m<sup>3</sup> per year then, to the extent that such failure arises as a consequence of the design and/or construction of the Facilities by Project Co, Project Co shall compensate CHP for any costs, losses or expenses incurred by CHP as a result of such failure, during the period of monitoring referred to in Clause 17.3 above, and CHP, acting reasonably, shall require that Project Co shall at its own expense procure that such additional work or other remedial work is carried out to remedy the relevant defect, or otherwise compensate CHP in a manner approved by CHP (such approval not to be unreasonably withheld or delayed). Where the solution selected by CHP is compensation:

17.4.1 CHP should not as a consequence face any additional liability upon early termination of this Agreement and the provisions of Schedule 23 shall be amended as necessary to achieve this; and

17.4.2 such compensation shall be a sum equal to the cost to CHP of procuring the excess energy predicted to be consumed by it as a result of the relevant defect until the end of the Project Term, taking into consideration the likely future cost of energy sources, as determined by an appropriately qualified representative of [CIBSE], provided that the cost of such opinion shall be borne by Project Co. The lump sum compensation payment shall be calculated at a discount rate of 3.5% real.

## NHS Construction Projects - Corporate Identity and Signage<sup>3435</sup>

- 17.5 The parties acknowledge that CHP may, from time to time, be required to procure the erection of hoarding, site boards, plaques and/or other signage in connection with the Project:
- 17.5.1 Where requested by CHP acting reasonably, Project Co shall procure the erection and maintenance of such hoarding, site boards, plaques and/or other signage as CHP may require.
- 17.5.2 The size, design, information disclosed, position and materials used in connection with such hoarding, site boards, plaques or other signage shall be approved by CHP, such approval not to be unreasonably withheld.
- 17.5.3 For the purposes of this Clause 17.5, CHP shall be deemed to be acting reasonably where any proposals made by it and/or any approvals exercised by it conform with any relevant guidance issued to NHS organisations by the Department of Health and Social Care (or any successor Department) in relation to such matters whether by Health Service Circular or otherwise.

### CHP design approval

- 17.6 CHP confirms that, as at the date of this Agreement, it has reviewed such of Project Co's Proposals as have been initialled by CHP and that, subject to any qualifications and/or comments notified by CHP to Project Co in writing and set out in [ ]<sup>3536</sup> such proposals satisfy CHP's requirements in respect of Clinical Functionality, so far as can reasonably be determined given the level of detail of Design Data which has been disclosed to CHP<sup>3637</sup>.
- 17.7 Project Co shall develop and finalise the design and specification of the Works and CHP shall review the Reviewable Design Data in accordance with Schedule 10 (*Review Procedure*) and the provisions of this Clause:
- 17.7.1 Project Co shall submit the Reviewable Design Data and the design of any Variations developed in accordance with the procedure set out in Schedule 22 (*Variation Procedure*) to CHP's Representative for review under Schedule 10 (*Review Procedure*). Project Co shall not commence or permit the commencement of construction of the part or parts of the Facilities to which such Reviewable Design Data relates until it has submitted the appropriate Reviewable Design Data and either it is confirmed by CHP's Representative that Project Co is entitled to proceed with construction in accordance with paragraph 3.3 of Schedule 10 (*Review Procedure*) or Project Co is disputing the status of such Reviewable Design Data pursuant to paragraph 4.3 of Schedule 10 (*Review Procedure*). **[If Project Co commences or permits the**

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<sup>3435</sup> Reference should be made to the NHS Brand Guidelines published in 2014. There are a number of guidelines for each specific NHS organisation. This issue should also be addressed in the context of CHP's Construction Requirements.

<sup>3536</sup> Specify where qualifications are set out. CHP must have right to notify Project Co of its comments

<sup>3637</sup> It is vital that CHP review the final version of Project Co's Proposals shortly before contract signature in order to ensure that Project Co's Proposals satisfy CHP's requirements for Clinical Functionality and that it is therefore happy to give its sign off to them.

commencement of construction during such a dispute and it is subsequently determined in accordance with Schedule 26 (*Dispute Resolution Procedure*) that Project Co was not entitled to proceed with construction in accordance with paragraph 4 of Schedule 10 (*Review Procedure*) then Project Co shall forthwith, at its own cost, undo, remove from the Site and replace (in a manner complying with this Agreement) any parts of the works which it has been determined Project Co was not entitled to construct<sup>3738</sup>;

- 17.7.2 with effect from the date at which any item of Reviewable Design Data is or becomes an Approved RDD Item in accordance with Schedule 10 (*Review Procedure*), such Approved RDD Item shall for the purposes of this Agreement be deemed to have satisfied the requirements of CHP in the manner and to the extent set out in Appendix 1, Table A of Schedule 10 (*Review Procedure*);
- 17.7.3 Project Co shall allow CHP's Representative, at any time, a reasonable opportunity to view any items of Design Data, which shall be made available to CHP's Representative as soon as practicable following receipt of any written request from CHP's Representative; and
- 17.7.4 Project Co shall procure that the Contractor establishes and maintains a computerised design database which Project Co and CHP's Representative may access remotely by computer to view drawings comprised within the Design Data (including Reviewable Design Data) and electronically store and/or print copies of such Design Data. In the event of CHP's Representative being unable to access such design database, Project Co shall procure that it is made available for inspection by CHP's Representative, or any other person authorised by CHP's Representative.

### **Rectification of Project Co's Proposals**

- 17.8 Without prejudice to Clause 17.1, if it should be found that Project Co's Proposals do not fulfil CHP's Construction Requirements, Project Co shall at its own expense amend Project Co's Proposals and rectify the Works or any part affected. Such amendment and rectification shall have the effect that:
  - 17.8.1 Project Co's Proposals shall satisfy CHP's Construction Requirements; and
  - 17.8.2 following the amendment or rectification, the structural, mechanical and electrical performance of the Facilities will be of an equivalent standard of performance to that set out in Project Co's Proposals prior to their amendment or rectification (for the purpose of this comparison disregarding the fault which required the amendment or rectification to be made).

## **18 RIGHT OF ACCESS OF CHP'S REPRESENTATIVE**

### **Access to Site**

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<sup>3738</sup> CHP to consider including this wording where Design Development Protocol complied with. It is not, however, mandatory, particularly in cases where there have been difficulties in reaching agreement on design issues.

18.1 Project Co shall procure that:

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

(a) view the Works at the Site on reasonable prior notice appropriate to the circumstances, provided that the notice procedures in this Clause 18.1.1(a) shall not apply to the right of access for CHP's Representative and his staff and visitors to the office and other facilities provided at the Site for his use; and

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

18.1.2 CHP's Representative shall have such rights of access to the Site in an emergency as he (acting reasonably) considers suitable in the circumstances; and

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

### **Increased monitoring**

18.2 If, following any viewing, visit or inspection made pursuant to Clause 18.1.1 (*Access to Site*), it is discovered that there are defects in the Works or that Project Co has failed to comply with CHP's Construction Requirements or Project Co's Proposals, CHP's Representative may (without prejudice to any other right or remedy available to CHP) by notice to Project Co increase the level of monitoring of Project Co until such time as Project Co shall have demonstrated to the satisfaction of CHP that it is capable of performing and will perform all its obligations to CHP under this Agreement. Project Co shall compensate CHP for any reasonable additional costs incurred as a result of such increased monitoring.

### **Right to Open Up**

18.3 Subject to Clause 18.4, CHP's Representative shall have the right at any time prior to the Actual Completion Date to request Project Co to open up and inspect any part or parts of the Works where CHP's Representative reasonably believes that such part or parts of the Works is or are defective and Project Co shall comply with such request.

- 18.4 Prior to exercising his right pursuant to Clause 18.3 above, CHP's Representative shall notify Project Co of his intention to exercise such right, setting out detailed reasons.
- 18.5 If, following the exercise by CHP's Representative of his right pursuant to Clause 18.3, the inspection shows that the relevant part or parts of the Works are not defective any delay caused to the Works by the exercise of such rights shall, subject to (and in accordance with) the provisions of Clause 41 (*Delay Events*), be treated as a Delay Event.
- 18.6 If, following the exercise by CHP's Representative of his right pursuant to Clause 18.3, the inspection shows that the relevant part or parts of the Works is or are defective, Project Co shall rectify and make good such defect(s) and any consequence of such rectification and/or making good defect(s) shall be carried out by Project Co at no cost to CHP and Project Co shall not be entitled to any extension of time in relation to such rectification and making good of the Works.
- 18.7 If, following the exercise by CHP's Representative of his right pursuant to Clause 18.3, CHP's Representative is of the opinion that the inspection shows that the relevant part or parts of the Works is or are defective and Project Co does not agree with such opinion, the matter shall be determined in accordance with Schedule 26 (*Dispute Resolution Procedure*).
- 18.8 Without prejudice to the rights of CHP's Representative pursuant to this Clause 18 the parties acknowledge that the exercise of such rights shall not in any way affect the obligations of Project Co under this Agreement save as expressly set out in this Clause 18.

### **Safety during Construction**

- 18.9 The provisions of Part 2 of Schedule 8 (*Construction Matters*) shall apply to matters of safety.

## **19 PROGRAMME AND DATES FOR COMPLETION**

### **Dates for Completion**

- 19.1 Project Co shall complete the Works by the Completion Date. Without prejudice to Clauses 44 (*Project Co Events of Default*), 46 (*Non-Default Termination*), 47 (*Effect of Termination*) and 48 (*Compensation on Termination*), CHP shall not be entitled to claim liquidated or general damages in respect of any delay which elapses between the Completion Date and the Actual Completion Date<sup>3839</sup>.

### **The Programme**

- 19.2 Any Programme submitted in accordance with the provisions set out below shall be prepared in accordance with Good Industry Practice and shall be in sufficient detail so as to enable CHP's Representative to monitor the progress including all commissioning activities and likely future progress of the Works.

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<sup>3839</sup>

The standard form does not impose liquidated (i.e. pre quantified) damages for late completion. Provisions of that nature should only be inserted if there are project specific reasons for requiring them and CHP can demonstrate that Project Co pricing this risk represents value for money (see DoH Guidance). Liability for general damages for late completion has been excluded on the same basis.

- 19.3 The initial Programme is set out at Schedule 9 (*The Programme*). Any change to the Programme shall only be made in accordance with this Clause and Schedule 10 (*Review Procedure*). Project Co shall promptly submit to CHP's Representative a copy of any version of the Programme varied in accordance with this Clause and Schedule 10 (*Review Procedure*).
- 19.4 If it appears to CHP's Representative at any time that the actual progress of the Works has significantly fallen behind the Programme, then CHP's Representative shall be entitled to require Project Co to submit to CHP's Representative a report identifying the reasons for the delay and, unless the event causing the delay is still subsisting and it is not possible to predict with any certainty when the delay might come to an end, require Project Co (at CHP's option):
- 19.4.1 to produce and submit to CHP's Representative in accordance with Schedule 10 (*Review Procedure*) a revised Programme showing the manner and the periods in which the Works will be carried out to ensure completion; and/or
- 19.4.2 to produce and submit to CHP's Representative in accordance with Schedule 10 (*Review Procedure*) a revised Programme showing the steps which are to be taken to eliminate or reduce the delay.

#### **Notification of early completion**

- 19.5 Project Co shall notify CHP's Representative if at any time the actual progress of the Works is significantly ahead of the Programme so that Project Co anticipates that the Actual Completion Date [a Phase Actual Completion Date] will be earlier than the Completion Date [relevant Phase Completion Date]. CHP's Representative shall be entitled to require Project Co to produce and submit to CHP's Representative, in accordance with Schedule 10 (*Review Procedure*), a revised Programme showing the manner and the periods in which the Works will be carried out and what the revised date for completion would be to enable the parties to consider (at their absolute discretion):
- 19.5.1 whether to agree an earlier date for completion; and
- 19.5.2 what modifications (if any) will be required to the Agreement in order to accommodate such earlier date for completion<sup>3940</sup>.

## **20 INDEPENDENT TESTER<sup>4041</sup>**

### **Appointment**

- 20.1 The parties have prior to the date of this Agreement, in compliance with all Law relating to procurement which is applicable to either party, appointed a suitably

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<sup>3940</sup> Provision for notification of early completion has been included to enable the parties (at their discretion) to consider early occupation by CHP of the Facilities. The consequential amendments required as a result of agreeing to that option would have to be considered and agreed on a project specific basis at the time. (For example, dealing with knock on effect on commissioning programmes, phasing, equipment procurement, payment etc).

<sup>4041</sup> The contract at Schedule 15 is provided as a template. It is intended to provide a common starting-point for projects.

qualified and experienced consultant to act as the Independent Tester for the purposes of this Agreement upon the terms of the Independent Tester Contract<sup>4142</sup>.

### **Changes to terms of appointment**

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

### **Co-Operation**

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

### **Replacement**

- 20.5 In the event of the Independent Tester's appointment being terminated otherwise than for full performance, the parties shall liaise and co-operate with each other in order to appoint, in accordance with this Clause, a replacement consultant to act as the Independent Tester as soon as reasonably practicable. The identity of any such replacement shall be as agreed by the parties and the terms of his appointment shall, unless otherwise agreed, be as set out in the Independent Tester Contract.
- 20.6 In the event the parties fail to agree the identity and/or terms of a replacement Independent Tester in accordance with Clause 20.5, within ten (10) Business Days of the original Independent Tester's appointment being terminated, then such disagreement shall be referred for resolution in accordance with Schedule 26 (*Dispute Resolution Procedure*).

## **21 EQUIPMENT**

- 21.1 *Careful consideration will need to be given to the parties' respective responsibilities for the procurement, installation, maintenance and renewal of large fixed items of*

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<sup>4142</sup>

The standard form assumes, and it is expected to be the standard position, that the Independent Tester will be appointed jointly by the parties. In rare cases where this is not appropriate, this Clause (and the template contract at Schedule 15) should be amended as appropriate. For example it may be necessary to require that Project Co procures that the Independent Tester maintains adequate professional indemnity insurance.

medical equipment, particularly where they need to be built into the facility, or if they will impact on the design of the facility. CHP should develop an equipment strategy early in the procurement process, and include risk transfer assumptions at Stage 1<sup>42/43</sup> Approval under the SPA New Projects Approval Process.

Parties to consider including drafting on a project specific basis to cover decant and decommissioning obligations on Project Co in phased projects.

Note the drafting assumes that Project Co will be responsible for Category A Equipment (essentially Group 1 fixtures and fittings). CHP will be responsible for supply and replacement of Category B Equipment, but will require Project Co to install and commission and facilitate the decommissioning of such items, as they require wiring or plumbing into the building. CHP will be fully responsible for Category C Equipment, which are Group 3 and 4 loose furniture and fittings.

21.1.1 The responsibilities for each category of equipment are set out in the table below:

| Category | Group             | Supply     | Initial Approval Process | Installation and Commissioning | Maintain & Repair | Replacement Approval Process | Replacement Supply and installation | Facilitate decommissioning | Decommissioning | Disposal   |
|----------|-------------------|------------|--------------------------|--------------------------------|-------------------|------------------------------|-------------------------------------|----------------------------|-----------------|------------|
| A        | Group 1 & 2       | Project Co | Reviewable Design Data   | Project Co                     | Project Co        | Review Procedure             | Project Co                          | N/A                        | Project Co      | Project Co |
| B        | Group 2 Equipment | CHP        | CHP                      | Project Co                     | CHP               | CHP                          | CHP                                 | Project Co                 | Landlord / CHP  | CHP        |
| C        | Group 2, 3 & 4    | CHP        | CHP                      | CHP                            | CHP               | CHP                          | CHP                                 | N/A                        | CHP             | CHP        |

21.1.2 The quantities of each item of equipment shall be established by reference to the Room Data Sheets set out in Schedule 8 Part 4 (Project Co's Proposals).

## 21.2 Selection, Supply, Installation and Commissioning of Equipment

### 21.2.1 Category A Equipment

- (a) Project Co shall procure the Category A Equipment in accordance with CHP's Construction Requirements and Project Co's Proposals.
- (b) Project Co shall Supply, Install and Commission Category A Equipment as part of the Works prior to the Actual Completion Date.

<sup>42/43</sup>

The equipment strategy should include an equipment responsibility matrix setting out each parties' responsibilities for supply, installation and commissioning, maintenance and replacement for equipment.

### 21.2.2 Category B Equipment

- (a) CHP shall deliver to Project Co and Project Co will Install and, where applicable, Commission, Category B Equipment prior to the Actual Completion Date and in accordance with the Final Commissioning Programme.
- (b) Project Co shall make available an appropriate storage area where CHP can arrange for the delivery and temporary storage of Category B Equipment. The storage area shall be located within the Site and be secure, and Category B Equipment within it shall be insured by Project Co. Upon delivery of the items, CHP shall confirm that the order reflects that which has been ordered and issued to Project Co for Installation within the Facilities. Project Co shall be responsible for all equipment within the storage area until it is required for Installation by Project Co.
- (c) For the avoidance of doubt any failure by CHP and/or any CHP Party to deliver any items of Category B Equipment in accordance with paragraph (a) above will not constitute or be interpreted as a breach of this Agreement, an Excusing Cause (pursuant to Clause 8.7), a Delay Event (pursuant to Clause 41) and/or a Compensation Event (pursuant to Clause 41) and will not delay the production of the Certificate of Practical Completion (pursuant to Clause 22).
- (d) Notwithstanding Clause 21.2.2(a), Project Co shall remain under an obligation to Install and Commission the Category B Equipment within **[ten (10)]** Business Days where such delivery takes place after the Certificate of Practical Completion, and any failure to comply shall give rise to a right for CHP to Install and Commission such Category B Equipment at Project Co's expense.
- (e) Where CHP has not provided sufficient requirements for environmental conditions, space and service installations to Project Co for items of Category B Equipment, the 1:50 drawings and Room Data Sheets approved via the Reviewable Design Data process shall be deemed as CHP acceptance that the environmental conditions, space and services installations are suitable for the CHP supplied items of Category B Equipment.

### 21.2.3 Category C Equipment

- (a) CHP shall be responsible for the purchase and/or transfer from existing buildings and Installation and Commissioning of Category C Equipment after the Actual Completion Date.
- (b) Where CHP has not provided sufficient requirements to Project Co for items of Category C Equipment, the 1:50 drawings and Room Data Sheets approved via the Reviewable Design Data process shall be deemed as CHP acceptance that the environmental conditions, space and services installations are suitable for CHP supplied items, provided Project Co has demonstrated having included a reasonable space allowance (where relevant) in order

to accommodate each item of Category C Equipment listed for that room/area.

#### 21.2.4 [Service Equipment

Project Co shall Supply, Install, Commission, Maintain, Repair and Replace all Service Equipment in accordance with CHP's Requirements, Service Level Specifications and Project Co Proposals and Method Statements throughout the Project Term.]

### 21.3 Maintenance, Repair and Replacement of Equipment

#### 21.3.1 Category A Equipment

- (a) Project Co shall Maintain (such term having the meaning given in Clause 13.28 below), Repair, Replace, Decommission and Dispose of Category A Equipment throughout the Term of the Agreement.

#### 21.3.2 Category B and C Equipment

- (a) Project Co shall not be responsible for the Maintenance, Repair, or Replacement of Category B or C Equipment. It is expected that Project Co will work proactively (at no extra cost) with CHP to support the unhindered and timely management of any associated installation and commissioning of replacement Category B or C Equipment throughout the Term.

### 21.4 Definitions

For the purposes of Clause 21 the following definitions shall apply:

#### **"Category A Equipment"**

means items identified as Category A Equipment in Part [x] of the Project Co's Proposals;

#### **"Category B Equipment"**

means items identified as Category B Equipment in Part [x] of the Project Co's Proposals;

#### **"Category C Equipment"**

means items identified as Category C Equipment in Part [x] of the Project Co's Proposals;

#### **"Commission" or "Commissioning"**

means the bringing into use of a piece of equipment (using all due skill and attention and having due regard to the suppliers' or manufacturers' instructions) such that it will satisfy the completion tests as set out in Schedule 12 (Commissioning) and Schedule 15 (Independent Tester Contract);

#### **"Decommissioning"**

means the withdrawal of an item of equipment by Project Co or CHP from use within the Facilities during the Operational Term, which shall include its disconnection from all building services, dismantling as appropriate, general making safe, making all necessary arrangements in respect of the building to enable the equipment to be removed from the Facilities, and removal to an appropriate on Site storage area until its collection or Disposal;

**“Disposal”**

means the disposal of equipment off Site in a manner compliant with all Law, Consents, Good Industry Practice and NHS Requirements;

**"Equipment Responsibility Matrix" “ERM”**

means the matrix set out at Clause 21.1 above;

**"Install" or "Installation"**

means the assembly, placing and/or fixing in place of a piece of equipment using all due skill and attention and having due regard to the suppliers' or manufacturers' instructions, CHP Construction Requirements, Project Co's Proposals, Room Data Sheets and operational requirements of CHP;

**"Maintenance" or “Maintain”**

means in the context of this Clause 21 only, the maintenance of equipment in accordance with the manufacturer's instructions to ensure that the equipment continues to function correctly;

**"Repair"**

means any repair works to equipment undertaken by Project Co, whether planned or unplanned, to enable the equipment to continue to satisfy the standards set out in CHP Construction Requirements, and Service Specifications;

**"Replace” or “Replacement"**

means the replacement of an item of equipment as necessary to satisfy the standards set out in CHP's Requirements and Service Specifications;

**["Service Equipment"**

means equipment, materials, stock, consumables, items, utensils, apparatus, plant, fixtures required to comply with Project Co's obligations in Schedule 14 or otherwise necessary to enable the proper and satisfactory provision of the Services and the Availability of the Facilities;]

**"Supply"**

means the procurement, purchase, finance and delivery to the Facilities of an item of equipment;

**"Transfer"**

means the transfer of equipment from CHP's (or a CHP Party's) existing estate into the Facilities;

**22 PRE-COMPLETION COMMISSIONING AND COMPLETION**<sup>4344 4445</sup><sup>4344</sup>

The standard form envisages the following sequence of events:

- Final Commissioning Programme ("FCP") agreed
- Project Co commissioning needed in order to achieve Practical Completion
- CHP to carry out its commissioning activities scheduled to take place prior to completion (if any)
- Project Co to carry out completion tests in accordance with FCP
- Visual inspection by CHP and Independent Tester
- Certificate of Practical Completion and snagging list issued
- Commencement of appropriate percentage of the unitary charge see Clause 35.1
- Project Co post completion commissioning activities in accordance with FCP
- CHP post completion commissioning (including, for example, installation of its equipment and decant to new site) in accordance with FCP.

<sup>4445</sup>

Where completion of the Works is carried out in phases, phasing drafting will need to be incorporated throughout the LPA including the commissioning provisions.

**[Standard scheme commissioning drafting]<sup>4546</sup>**

- 22.1 Not less than [ ] months before the Completion Date Project Co shall prepare a programme for commissioning of all aspects of the Works for approval by CHP (such approval not to be unreasonably withheld or delayed). Such programme shall distinguish any commissioning that CHP will itself carry out. **[The Final Commissioning Programme shall be consistent with the Outline Commissioning Programme set out in Schedule 7 Part 2. The Final Commissioning Programme shall then replace the Outline Commissioning Programme.]<sup>4647</sup>**
- 22.2 Once approved, Project Co without prejudice to the provisions of Clause 20 shall carry out any commissioning in accordance with the approved programme.
- 22.3 Project Co shall allow access to the Site at reasonable times to enable CHP to carry out any commissioning of the Works for which it is responsible (if any). **[CHP shall comply with the Final Commissioning Programme.]**
- 22.4 **[The Final Commissioning Programme shall (amongst other things) set out:**
- 22.4.1 the equipment to be supplied by CHP and installed by Project Co;
  - 22.4.2 the equipment which will be supplied and installed by CHP;
  - 22.4.3 the extent, timing and conditions upon which CHP will be permitted early access to carry out CHP's Commissioning.]
- 22.5 Project Co shall give to CHP's Representative and the Independent Tester not less than five (5) Business Days' notice of the date or dates on which any tests are to be carried out as part of the commissioning of the Works.
- 22.6 The Independent Tester shall confirm to Project Co and CHP's Representative once any commissioning required as part of CHP's Requirements or Project Co's Proposals has been carried out to his reasonable satisfaction. If and to the extent that such commissioning is required as part of the completion of the Works, such confirmation will be given by the issue of a certificate in accordance with Clause 22.12.

OR

**[22A SPECIALIST SCHEME COMMISSIONING DRAFTING]**

**Final Commissioning Programme<sup>4748</sup>**

- 22.1A Not less than [ ] months before the Completion Date CHP shall provide Project Co with a draft of the Final Commissioning Programme as jointly developed by CHP and Project Co in accordance with the provisions of Clauses 22.2 and 22.3. Project Co shall provide CHP with comments on the draft Final Commissioning Programme

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<sup>4546</sup> It is envisaged that all commissioning will be completed before completion of the building works given the relatively straight forward nature of the proposed projects. CHP's Commissioning is likely to entail installation of any equipment it is not happy to allow Project Co to move, provide or install (if any).

<sup>4647</sup> Standard scheme drafting may be modified to include for the Final Commissioning Programme where CHP is required to provide or install equipment before the Actual Completion Date.

<sup>4748</sup> Project Specific.

submitted to it no later than [ ] months before the Completion Date. The parties shall, within [ ] Business Days of receipt by CHP of Project Co's comments agree the terms of the Final Commissioning Programme provided that CHP may by prior notice to Project Co change the scope and time of CHP's Commissioning and reimburse Project Co its reasonable costs incurred as a result of such change in scope or time. If the parties are unable to agree the Final Commissioning Programme or the change in scope or time of CHP's Commissioning [ ] months before the Completion Date the matter shall be referred for determination in accordance with Schedule 26 (*Dispute Resolution Procedure*).

22.1A<sup>4849</sup> [The final Commissioning Programme relating to the relevant Phase shall be prepared in accordance with the requirements of the Completion Process. Before the date specified by the Completion Process for each Phase CHP shall provide Project Co with a draft of the Final Commissioning Programme relating to the relevant Phase as jointly developed by CHP and Project Co in accordance with the provisions of Clauses 22.2 and 22.3. Project Co shall provide CHP with comments on the draft Final Commissioning Programme for each relevant Phase submitted to it within the period stated in the Completion Process. The parties shall, within [ ] Business Days of receipt by CHP of Project Co's comments agree the terms of the Final Commissioning Programme for the relevant Phase provided that CHP may by prior notice to Project Co change the scope and time of CHP's Commissioning and reimburse Project Co its reasonable costs incurred as a result of such change in scope or time. If the parties are unable to agree the Final Commissioning Programme for each relevant Phase or the change in scope or time of CHP's Commissioning by the date specified in the Completion Process for the relevant Phase the matter shall be referred for determination in accordance with Schedule 26 (*Dispute Resolution Procedure*).]

22.7 The Final Commissioning Programme [for each Phase] shall be in accordance with the Outline Commissioning Programme and shall impose no greater or more onerous obligations on CHP than those set out in the Outline Commissioning Programme (unless otherwise agreed by CHP in its absolute discretion). The Final Commissioning Programme shall then replace the Outline Commissioning Programme [as it relates to that Phase].

22.8 The Final Commissioning Programme shall describe the steps necessary, the party responsible for taking each of such steps and the timing and sequence of each of such steps to ensure [insofar as relevant for each Phase of the Works]:

22.8.1 that Project Co's Pre-Completion Commissioning and CHP's Commissioning<sup>4950</sup> will not delay the Actual Completion Date [Phase Actual Completion Date] from occurring by the Completion Date [Phase Completion Date]; and

22.8.2 that Project Co's Post Completion Commissioning and CHP's Post Completion Commissioning is completed by the Commissioning End Date.

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<sup>4849</sup> Alternative Clause 22.1 for multi-phased projects.

<sup>4950</sup> The standard form assumes that each of CHP and Project Co will undertake inspection and commissioning activities both prior to and after completion. Parties need to consider which commissioning activities have to occur before and which after completion (and, in each case, by whom) on a project specific basis. The standard form envisages that the FCP will set out all requirements and obligations in relation to the development, nature, principles and performance of the completion tests to be performed to enable certification of completion to take place. This standard form should be amended as necessary to reflect any particular project arrangements.

- 22.9 The parties shall procure that the steps that they are responsible for carrying out and completing pursuant to the Final Commissioning Programme include, **[in the case of Project Co's activities, the activities described at paragraph [ ] of CHP's Construction Requirements<sup>5051</sup>.]**
- 22.10 **[In accordance with the Completion Process]** Project Co shall notify the Independent Tester and CHP's Representative of the date when Project Co (acting reasonably) considers that **[any Phase of]** the Works will be complete in accordance with CHP's Construction Requirements **[the Completion Criteria]** and this Agreement not less than **[ ]** months prior to such anticipated completion. Such notification shall trigger the activities of the Independent Tester under this Clause.
- 22.11 The parties each undertake to co-operate with the Independent Tester to ensure that the Independent Tester is familiar with all necessary aspects of the Project for the purposes of its role as described in this Clause.

### **Commissioning prior to Completion Date**

22.12 Project Co shall:

- 22.12.1 undertake Project Co's Pre-Completion Commissioning in accordance with the Final Commissioning Programme; and
- 22.12.2 permit CHP to undertake CHP's Commissioning including **[permitting specialist contractors engaged by CHP to deliver and install equipment]** on such dates as agreed between CHP and Project Co, in accordance with the Final Commissioning Programme<sup>5452</sup>.

**[22.7A<sup>5253</sup>The relevant party shall insofar as relevant for each Phase:**

- 22.12.3 **undertake its Pre Completion Commissioning in accordance with the Final Commissioning Programme; and**
- 22.12.4 **permit the other party to undertake its Pre Completion Commissioning including [permitting specialist contractors engaged by CHP to deliver and install equipment] on dates agreed between CHP and Project Co, within the period defined in the Completion Process and in accordance with the Final Commissioning Programme.]**

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

22.14 Project Co shall (or shall procure that the Contractor shall) give CHP access to the Facilities at such times as may be set out in the Final Commissioning Programme to

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<sup>5051</sup> CHP to describe any other core requirements to be complied with in relation to Project Co's commissioning activities.

<sup>5452</sup> Project specific. CHP will need to consider what CHP's commissioning activities will entail. Parties will need to consider when CHP's commissioning activities (including, for example, installing of its own equipment) will be carried out.

<sup>5253</sup> Alternative Clause 22.7 for multi-phased projects.

enable CHP to undertake CHP's Commissioning [within the period defined in the Completion Process and] in accordance with the Final Commissioning Programme for the period prior to completion.

### Pre-Completion inspection

22.15 Project Co shall give the Independent Tester and CHP's Representative not less than [ ] Business Days' notice and not more than [ ] Business Days' notice [the appropriate notice period for that Phase as set out in the Completion Process] of the date upon which Project Co considers that [the relevant Phase of] the Works will be complete and the tests on completion [required for the relevant Phase] to be performed in accordance with the Final Commissioning Programme will be carried out. [Following receipt of the notice specified in this Clause 22.10 the] CHP's Representative and the Independent Tester shall be entitled to inspect [the relevant Phase of] the Works on the date or dates reasonably specified by Project Co in accordance with this Clause 22.10, and to attend any of the tests on completion [undertake inspections of any Phase in accordance with the periods specified in the Completion Process]. Project Co shall, if so requested, accompany CHP's Representative and the Independent Tester on any such inspection.

### Pre-Completion matters

22.16 The parties shall procure that the Independent Tester, within [ ] Business Days of any inspection made pursuant to Clause 22.10, notifies Project Co and CHP of any outstanding matters (including, without limitation, the repetition of any of the tests on completion which are required to be carried out and passed in accordance with the Final Commissioning Programme) which are required to be attended to before [the relevant Phase of] the Works can be considered to be complete in accordance with CHP's Construction Requirements and Project Co's Proposals [Completion Criteria<sup>6354</sup>]. Project Co shall attend to such matters and shall, if necessary, give the Independent Tester further notices in accordance with Clause 22.10 (but dealing only with matters raised in the notification under this Clause 22.11) so that the procedures in Clause 22.10 and this Clause 22.11 are repeated as often as may be necessary to ensure that all outstanding matters in relation to the Works are attended to.

### [Phase] Completion certificate

22.17 Pursuant to the terms of the Independent Tester Contract, the parties shall procure that the Independent Tester shall, when he is satisfied that completion [of a Phase] has occurred in accordance with this Agreement [the Completion Criteria], issue a Certificate of Practical Completion [in respect of that Phase] to that effect stating the date upon which, in his opinion, the Actual Completion Date [Phase Actual Completion Date] occurred. Subject to Clause 22.15 (*Snagging*) and 22.16 (*Defects*), the issue of the Certificate of Practical Completion [in respect of a Phase] shall, in the absence of manifest error, bad faith or fraud, be conclusive evidence for the purpose only of ascertaining the [relevant] Payment Commencement Date, that the Actual

<sup>6354</sup>

In multi-phased projects, insert the following wording in substitution for the rest of Clause 22.11: Project Co shall attend to such matters and shall, if necessary, give the Independent Tester [ ] Business Days' notice that a re-inspection in accordance with Clause 22.9 can be undertaken. When undertaking re-inspections the Independent Tester shall only deal with matters raised in the notification under this sub-Clause such that the procedures in Clause 22.9 and this sub-Clause are repeated as often as may be necessary to ensure that all outstanding matters in relation to the Works and/or any Phase are attended to. Within the timescale specified in the Completion Process (or such shorter timescale as reasonably specified by Project Co) the Independent Tester shall undertake a re-inspection of any Phase. Such re-inspection shall only deal with the matters raised in previous inspections in accordance with Clause 22.10 and this Clause 22.11.

Completion Date [Phase Actual Completion Date] has occurred on the date stated in such certificate.

- 22.18 The Independent Tester shall issue the Certificate of Practical Completion [in relation to a Phase] notwithstanding that there are Snagging Matters. Where there are Snagging Matters, the parties shall procure that the Independent Tester shall, within [ ] Business Days of the date of issue of the [relevant] Certificate of Practical Completion, issue a Snagging Notice which shall specify the Snagging Matters and an estimate of the cost of rectifying such Snagging Matters.
- 22.19 Following the issue of a Snagging Notice, Project Co shall, in consultation with CHP's Representative and in such manner as to cause as little disruption as reasonably practicable to CHP's Post Completion Commissioning and CHP's use of the Facilities, rectify all Snagging Matters within [ ] Business Days of the issue of the Snagging Notice.
- 22.19A Within [ ] Business Days of the issue of a Snagging Notice, Project Co shall, in consultation with CHP's Representative, prepare a programme for the rectification of all Snagging Matters listed therein. Such rectification work shall be carried out in such manner as to cause as little disruption as reasonably practicable to CHP's Commissioning and CHP's use of the Facilities.<sup>6455</sup>
- 22.20 If, within [ ] Business Days of the issue of the Snagging Notice Project Co has failed to rectify the Snagging Matters specified in the Snagging Notice CHP may by itself (or engage others to) carry out the works necessary to rectify the Snagging Matters, at the risk and cost of Project Co.
- 22.20A If, within [ ] Business Days of the date specified in the programme for the rectification of all Snagging Matters specified in the Snagging Notice Project Co has failed to rectify all of those Snagging Matters CHP may be itself (or engage others to) carry out the works necessary to rectify the Snagging Matters, at the risk and cost of Project Co<sup>5556</sup>.
- 22.21 The issue of the Certificate of Practical Completion [in respect of a Phase] shall in no way affect the obligations of Project Co under this Agreement including in respect of any Defects.

### As-built specification

- 22.22 As soon as it is available, after the issue of the Certificate of Practical Completion [in relation to a Phase to the extent relating to that Phase], Project Co shall provide to CHP a copy of the as-built building specification, together with all [drawings relating to the Works<sup>6657</sup>].

## 23 POST COMPLETION COMMISSIONING<sup>6758</sup>

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<sup>6455</sup> Alternative Clause 22.14 for multi-phased projects.

<sup>5556</sup> Alternative Clause 22.15 for multi-phased projects.

<sup>6657</sup> To be specified on a project specific basis. Documents might include, for example: the appropriate section of any health and safety file; as-built drawings and maintenance manuals; and results of technical commissioning.

<sup>6758</sup> CHP to consider what commissioning/services start up activities will be carried out by Project Co and what commissioning activities will be carried out by CHP during this period. The Payment Mechanism and Performance Monitoring System may need to be structured so as to reflect the intention of the parties in relation to services start up during this period. The standard Payment Mechanism does not envisage any structuring of this type and may therefore need to be adjusted in project specific cases.

## Commissioning

- 23.1 Project Co and CHP shall, within [ ] Business Days following the Actual Completion Date, [in accordance with the Final Commissioning Programme], respectively undertake and complete Project Co's Post-Completion Commissioning and CHP's Post Completion Commissioning, in accordance with the Final Commissioning Programme [for the relevant Phase]. Both parties shall, at all times, and in particular in the period between the Actual Completion Date and the Commissioning End Date, use reasonable endeavours to assist the other party to ensure compliance with the Final Commissioning Programme.

## Information

- 23.2 Project Co shall ensure that CHP's Representative is provided with all the information he may reasonably require in relation to Project Co's Post-Completion Commissioning and CHP shall ensure that Project Co is provided with all information Project Co may reasonably require in relation to CHP's Post Completion Commissioning.
- 23.3 If CHP's Representative, acting reasonably, makes any comment in relation to the carrying out of Project Co's Post-Completion Commissioning, such comments shall be taken into account by Project Co and if Project Co, acting reasonably, makes any comment in relation to the carrying out of CHP's Post Completion Commissioning, such comment shall be taken into account by CHP.
- 23.4 [On the occurrence of the each Commissioning End Date the Independent Tester shall issue the Commissioning Completion Certificate<sup>5859</sup>.]

## Operational Manuals<sup>5960</sup>

- 23.5 With effect from the Commissioning End Date and throughout the remainder of the Project Term, [Within [ ] Business Days after the completion of any Phase] Project Co shall at all reasonable times make available on the Site to CHP's Representative all operation and maintenance manuals [CHP to list any other manuals required.]

## [Decanting, Decommissioning and Equipment Transfer<sup>6061</sup>

- 23.6 CHP and Project Co shall, as appropriate, undertake any necessary Decanting and Decommissioning activities in accordance with the relevant requirements of the Final Commissioning Programme and Appendix [ ] of Schedule 12 (*Outline Commissioning Programme*), and any Equipment transfer in accordance with Schedule 13 (*Equipment*), such that Project Co is able to perform its obligations in subsequent Phases.]

## 24 FOSSILS AND ANTIQUITIES

### Property

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<sup>5859</sup> This provision may not be necessary. It will depend on the significance of each party's activities during this period and will depend on how step up of payments during this period are structured.

<sup>5960</sup> To be amended on a project specific basis. For example, operational manuals may need to be made available at an earlier date depending on the timing of commissioning activities.

<sup>6061</sup> For multi-phased projects.

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

### **Discovery**

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

- 24.2.1 immediately inform CHP's Representative of such discovery;
- 24.2.2 take all steps not to disturb the object and, if necessary, cease any Works in so far as the carrying out of such Works would endanger the object or prevent or impede its excavation; and
- 24.2.3 take all necessary steps to preserve the object in the same position and condition in which it was found.

### **Action**

24.3 CHP shall procure that CHP's Representative promptly, and in any event within [ ] Business Days, issues an instruction to Project Co specifying what action CHP's Representative requires Project Co to take in relation to such discovery.

24.4 Project Co shall promptly and diligently comply with any instruction issued by CHP's Representative referred to in Clause 24.3 above (except and to the extent that such instruction constitutes a CHP Works Variation pursuant to (Clause 24.6 below in respect of which case the provisions of Schedule 22 (*Variation Procedure*) shall apply), at its own cost.

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

24.6 If any instruction referred to in Clause 24.3 above includes a requirement for Project Co to carry out works (being any work of alteration, addition, demolition or extension or variation in the Facilities) which are not works which would be necessary for the purpose of compliance with Law or any Consents, such works shall be deemed to be a CHP Works Variation and the provisions of Schedule 22 (*Variation Procedure*) shall apply as if such instruction were a Variation Enquiry issued by CHP in accordance with the provisions of Part 1 of Schedule 22 (*Variation Procedure*)<sup>6462</sup>.

## **PART E: QUALITY ASSURANCE**

### **25 QUALITY ASSURANCE**

#### **Quality Plans and Systems**

<sup>6462</sup>

A discovery of fossils and antiquities is treated as a Relief Event entitling Project Co to an extension of time in accordance with Clause 41 (Delay Events) but leaving the financial risks of such discovery with Project Co. If there is a known problem on site the provisions relating to discoveries may need to be reviewed and amended on a project specific basis.

- 25.1 Project Co shall procure that all aspects of the Project Operations are the subject of quality management systems.
- 25.2 The quality management systems referred to in Clause 25.1 above shall be reflected in appropriate quality plans, the standard of which shall be consistent with BS EN ISO 9001 [or 9002 (as the case may be)] or any equivalent standard which is generally recognised as having replaced [it][or either of them].
- 25.3 Without limitation to the generality of Clause 25.2, there shall be:
- 25.3.1 a Design Quality Plan;
  - 25.3.2 a Construction Quality Plan; and
  - 25.3.3 a Services Quality Plan for each Service,
- provided that the Design Quality Plan and the Construction Quality Plan may be incorporated into one document.
- 25.4 Project Co shall procure that the Project Operations are carried out in compliance with the Quality Plans. All Quality Plans shall be submitted to CHP's Representative in accordance with Schedule 10 (*Review Procedure*) and Project Co shall not be entitled to implement or procure the implementation of any Quality Plan unless Project Co is entitled to proceed with such implementation pursuant to Schedule 10 (*Review Procedure*).
- 25.5 Project Co shall implement the quality management systems referred to in Clause 25.1 and shall procure that:
- 25.5.1 the Contractor implements the Design Quality Plan;
  - 25.5.2 the Contractor implements the Construction Quality Plan;
  - 25.5.3 each Service Provider implements the relevant Services Quality Plan for each Service being provided by that Service Provider.
- 25.6 Where any aspect of the Project Operations is performed by more than one contractor or subcontractor, then the provisions of this Clause 25 (in so far as relevant or appropriate to the activities to be performed by such contractor or subcontractor) shall apply in respect of each of such contractors or subcontractors, and references in this Clause 25 to the "Contractor" or the "Service Provider" shall be construed accordingly. To avoid doubt, this Clause shall not be construed as requiring subcontractors of the Contractor or the Service Provider to have their own quality plans but only to comply with the Design Quality Plan and the Construction Quality Plan or the relevant aspects of the Services Quality Plan (as the case may be).
- 25.7 Project Co shall from time to time submit to CHP's Representative in accordance with Schedule 10 (*Review Procedure*) any changes to any of the Quality Plans required for such Quality Plan to continue to comply with the requirements set out in Clause 25.2. CHP's Representative may raise comments on any such proposed change only on the grounds set out in paragraph 4.5 of Schedule 10 (*Review Procedure*).

- 25.8 In the event that any ambiguity, uncertainty, dispute or discrepancy arises in relation to the nature and scope of Project Co's obligations under this Clause, wherever possible, the provisions of this Clause shall be interpreted and construed in such a manner as to resolve the apparent ambiguity, uncertainty, dispute or discrepancy so that all the provisions of this Clause may be given meaning and effect but, if such interpretation or construction is not possible, the provisions of this Clause shall be given meaning and effect in the following order of precedence (in descending order):
- 25.8.1 the provisions and standards referred to in Clause 25.2;
  - 25.8.2 the Quality Plans referred to in Clause 25.3;
  - 25.8.3 CHP's Construction Requirements and/or CHP's Service Level Specifications (as the case may be);
  - 25.8.4 Project Co's Proposals and/or the Method Statements (as the case may be);
  - 25.8.5 Project Co's and/or the Contractor's and/or any Service Provider's quality manuals and procedures; and
  - 25.8.6 Good Industry Practice.
- 25.9 If there is no objection under Schedule 10 (*Review Procedure*) to a change to any Quality Plan proposed pursuant to Clause 25.7, the Quality Plan shall be amended to incorporate such change.

### **Quality Manuals and Procedures**

- 25.10 If any Quality Plan refers to, relies on or incorporates any quality manual or procedure, then such quality manual or procedure or the relevant parts of it shall be submitted to CHP's Representative at the time that the relevant Quality Plan or part of (or change to) a Quality Plan is submitted in accordance with Schedule 10 (*Review Procedure*), and the contents of such quality manual or procedure shall be taken into account in the consideration of the relevant Quality Plan or part of (or change to) a Quality Plan in accordance with Schedule 10 (*Review Procedure*).

### **Quality Management <sup>6263</sup>**

- 25.11 Project Co shall maintain a quality management system which shall:
- 25.11.1 ensure the effective operation of the quality systems described in this Clause;
  - 25.11.2 cause an audit of the quality systems at regular intervals and the findings of such audit will be reported to CHP's Representative;
  - 25.11.3 require review of all quality systems at intervals agreed with CHP's Representative to ensure their continued suitability and effectiveness;

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<sup>6263</sup> Amendments to reflect the concept that the management system, rather than the quality manager, is important.

25.11.4 require liaison with CHP's Representative on all matters relating to quality management; and

25.11.5 require production of reports and their delivery to Project Co.

### **Quality Monitoring**

25.12 CHP's Representative may carry out audits of Project Co's quality management system (including all relevant Quality Plans and any quality manuals and procedures) to establish that compliance with Clauses 25.1 and 25.3 is being maintained by Project Co. CHP's Representative may carry out such audits at approximate intervals of three (3) months and may carry out other periodic monitoring, spot checks and auditing of Project Co's quality management systems. Project Co shall procure that CHP's Representative shall have a like right in respect of the Contractor and Service Providers. Project Co shall co-operate and shall procure that any Sub Contractor co-operates with CHP's Representative including providing him with all information and documentation which he reasonably requires in connection with his rights under this Clause.

**PART F: INFORMATION TECHNOLOGY**

**26 INFORMATION TECHNOLOGY**

26.1 [CHP to include project specific provisions.]

## PART G: SERVICES

### 27 THE SERVICES

#### General obligations

- 27.1 Throughout the Operational Term, Project Co shall provide (or procure the provision by the Service Providers of) the Services:
- 27.1.1 in accordance with the terms of this Agreement;
  - 27.1.2 in accordance with the Method Statements; and
  - 27.1.3 as an obligation independent from, and in addition to, Clause 27.1.2, in such manner as ensures that the Service Level Specifications are met.

#### Commencement and phase in of Services

- 27.2 [To be drafted on a project specific basis in line with the completion, commissioning, payment and performance provisions developed for the project<sup>6364</sup>.]

#### Project Co Services Changes

- 27.3 Project Co may at any time submit to CHP's Representative in accordance with Schedule 10 (*Review Procedure*) proposals for amendments to or substitution for the Method Statements or any part of them. If there is no comment on such proposed amendment or substitution (on the grounds set out in paragraph 3.7 of Schedule 10 (*Review Procedure*)), then the Method Statements as so amended or substituted shall be the Method Statements for the purposes of this Agreement, subject to any further amendment or substitution to which there has been no comment in accordance with Schedule 10 (*Review Procedure*).
- 27.4 To avoid doubt, an amendment to or substitution for the Method Statements proposed pursuant to Clause 27.3 shall not be a Qualifying Variation entitling Project Co to any payment (or other compensation) or to any relief from the performance of its obligations under this Agreement.

#### No disruption

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

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<sup>6364</sup> Commencement date for Services could be set out here or alternatively in Schedule 14..

## [Security

27.6 CHP shall take all appropriate and reasonable steps in accordance with good estate management practice to keep the Facilities secure whilst they are wholly or substantially vacant, in particular outside of Normal Working Hours (as defined in Appendix 2 of Schedule 10 (*Review Procedure*) and, without prejudice to Clause 36.6, Project Co shall properly secure the Facilities and shall procure that any Project Co Party shall properly secure the Facilities on every occasion when Project Co or any Project Co Party is the last person to leave the Facilities.]

## 28 MAINTENANCE<sup>6465</sup>

### Programmed Maintenance Works

- 28.1 No later than [ ] months prior to the Completion Date Project Co shall submit to CHP's Representative in accordance with Schedule 10 (*Review Procedure*) a Schedule of Programmed Maintenance for the period from the Completion Date to the expiry of that Contract Year.
- 28.2 Not later than [ ] months prior to the commencement of each subsequent anniversary of the Contract Year Project Co shall submit to CHP's Representative in accordance with Schedule 10 (*Review Procedure*) a Schedule of Programmed Maintenance for the next succeeding Contract Year [for the period from the commencement of Services in respect of that Phase to the expiry of the Contract Year in which such date falls].
- 28.3 Each Schedule of Programmed Maintenance shall contain the following information (the "Programmed Maintenance Information"):
- 28.3.1 details of the proposed start and end dates for each period of Programmed Maintenance, the works to be carried out and the proposed hours of work; and
  - 28.3.2 details of any effect of the Programmed Maintenance on the delivery of any of the Services and/or the activities of CHP.
- 28.4 Not later than [ ] Business Days prior to the commencement of any quarter (being a three month period commencing on 1 April, 1 July, 1 October or 1 January<sup>6566</sup>), Project Co may submit to CHP's Representative for approval in accordance with paragraph 1.3 of Schedule 10 (*Review Procedure*) a revision to the Schedule of Programmed Maintenance for the Contract Year in which the relevant quarter falls showing the effect of the proposed changes to the Programmed Maintenance Information. If CHP's Representative does not raise comments on such proposed revision in

<sup>6465</sup>

There are no deductions during periods when planned preventative maintenance is taking place in accordance with the agreed Schedule of Programmed Maintenance – see Clause 8.7.7. CHP must ensure that risk in relation to maintenance and replacement lies with Project Co and will need to:

- develop their output specifications (in sufficient detail) and Payment Mechanism
  - consider the grounds for objection in paragraph 3(h) of the Review Procedure
- in the light of this requirement (and CHP's output requirements). Although Schedule 24 (Handback Procedure) deals with the handback of the asset on expiry, CHP may wish to reserve the right to carry out periodic surveys to ensure that regular maintenance is in fact carried out. CHP should not get involved in the micromanagement of planned maintenance but should have the ability to ensure that any significant deterioration in the facility is avoided. Alternatively, this may already be achieved via the deductions in the Payment Mechanism.

<sup>6566</sup>

Project specific – periods may vary from project to project.

accordance with Schedule 10 (*Review Procedure*), the Schedule of Programmed Maintenance as revised shall become the Schedule of Programmed Maintenance in respect of that quarter.

- 28.5 Where CHP's Representative raises comments in respect of any Programmed Maintenance periods and/or hours of work shown in a Schedule of Programmed Maintenance in accordance with paragraph 4.7 of Schedule 10 (*Review Procedure*), he shall indicate whether, and if so when, the Programmed Maintenance can be re-scheduled and Project Co shall amend the relevant Schedule of Programmed Maintenance accordingly.

### **Programmed and Unprogrammed Maintenance**

- 28.6 Project Co shall not carry out any Programmed Maintenance or Unprogrammed Maintenance Works save:

28.6.1 in accordance with a Schedule of Programmed Maintenance to which no objection has been made under Schedule 10 (*Review Procedure*) or, where comment has been raised in respect of the Programmed Maintenance periods and/or time, the Schedule of Programmed Maintenance has been amended pursuant to Clause 28.5;

28.6.2 in accordance with the procedures set out in Clause 28.8; or

28.6.3 in an emergency or in the case of an Unavailability Event, in accordance with Clause 28.9.

- 28.7 Notwithstanding that there has been no objection to a Schedule of Programmed Maintenance, CHP's Representative may, at any time, require Project Co to accelerate or defer any Programmed Maintenance by giving written notice to Project Co, (unless otherwise agreed) not less than twenty (20) Business Days prior to the scheduled date for carrying out such Programmed Maintenance, which notice shall set out the time and/or periods at or during which CHP requires the Programmed Maintenance to be performed. Project Co shall notify CHP of the amount of any additional reasonable costs which it will incur as a direct consequence of such acceleration or deferment (the "Estimated Increased Maintenance Costs"). CHP shall, within a further period of ten (10) Business Days following receipt by CHP of notification of the amount of the Estimated Increased Maintenance Costs, at CHP's option, either confirm or withdraw its request to accelerate or defer the Schedule of Programmed Maintenance. If CHP does not respond within this ten (10) Business Day period, the request shall be deemed to have been confirmed. CHP shall reimburse Project Co the direct and reasonable costs actually incurred by Project Co as a consequence of such acceleration or deferment up to, but not exceeding, the amount of the Estimated Increased Maintenance Costs.

- 28.8 If, in circumstances other than an emergency or an Unavailability Event, the need arises for Maintenance Works (excluding any works of a de minimis nature in respect of which the parties have agreed this Clause shall not apply [and excluding works carried out for the purpose of Rectification, which shall take place in accordance with the provisions of Schedule 18]), which are not scheduled to be carried out as part of the Programmed Maintenance ("Unprogrammed Maintenance Work"), Project Co shall not carry out any Unprogrammed Maintenance Work unless and until CHP's Representative has approved the proposed commencement date, the proposed hours of work and estimated duration of the requisite Unprogrammed Maintenance

Works in accordance with the provisions of paragraph 3.8 of Schedule 10 (*Review Procedure*). Nothing in this Clause 28.8 (including any approval of CHP pursuant to Schedule 10 (*Review Procedure*)) shall prevent CHP from making any deductions from the Service Payments pursuant to the Payment Mechanism<sup>6667</sup>.

- 28.9 If, as a result of an emergency or an Unavailability Event, the need arises for Unprogrammed Maintenance Works, Project Co may carry out such Unprogrammed Maintenance Works provided that Project Co shall notify CHP's Representative as soon as possible (and in any event within [ ] Business Days of the occurrence of the emergency) of the extent of the necessary Unprogrammed Maintenance Works and the reasons for them. Project Co shall take all reasonable steps to minimise the duration of such Unprogrammed Maintenance Works. Nothing in this Clause 28.9 shall prevent CHP from making any deductions from the Service Payments pursuant to the Payment Mechanism.
- 28.10 Where Programmed Maintenance scheduled to be carried out in accordance with the Schedule of Programmed Maintenance has been deferred by CHP's Representative under Clause 28.7, Project Co shall not be treated as having failed to perform the [indicate the relevant facilities service<sup>6768</sup>] on account of the condition of the Facilities or any part of them from the time the Programmed Maintenance was scheduled to have been completed until the time the deferred Programmed Maintenance was scheduled to have been completed, but not afterwards, provided always, to avoid doubt, that Project Co shall not be relieved from the consequences of any failure to maintain the Facilities in respect of any period prior to the period for performing the particular work according to the Schedule of Programmed Maintenance.

#### **5 Year Maintenance Plan**<sup>6869</sup>

- 28.11 Project Co shall deliver to CHP's Representative not less than [ ] Business Days prior to the commencement of each Contract Year the latest version of the 5 Year Maintenance Plan for the [indicate the relevant facilities service].
- 28.12 CHP shall have a right to inspect the Facilities and the Maintenance Works to ensure that the Facilities are being maintained in accordance with the Service Level Specifications and that the Facilities comply with CHP's Construction Requirements and Project Co's Proposals and the Service Level Specifications to the extent applicable as at the date of such inspection throughout the Project Term subject to any Variations made pursuant to Schedule 22. CHP may appoint an independent third party for the purposes of carrying out any such inspection and shall make known the findings to Project Co and the Funders. The parties shall then meet to discuss any implications of such findings and any steps that are necessary to remedy any failure to comply with such obligations. Project Co shall (subject to Clause 40 (*Variation Procedure*)) take into account such discussions in the next Schedule of Programmed Maintenance so that any failure to comply with such obligations shall be remedied.

## **28A LIFECYCLE PROFILE AND LIFECYCLE SPEND**

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<sup>6667</sup> CHP will need to consider this provision in the light of how unplanned maintenance will in fact be carried out by Project Co. For example, if maintenance personnel are to be present full time on the Site, it may be more appropriate not to require advance notification, but to reserve a right to defer or reschedule any work if it is actually carried out at an inconvenient time.

<sup>6768</sup> The name of the affected Hard FM service (or any soft service affected because of the condition of the relevant part of the Facilities) should be inserted.

<sup>6869</sup> The need for and the terms of a 5 year maintenance plan should be assessed on a project specific basis.

- 28A.1 Project Co shall keep detailed records of the replacement and renewal of Lifecycle Assets and Lifecycle Spend. [On request by CHP, and in any event not more than once in each year], Project Co shall deliver to CHP a proposed Lifecycle Schedule, together with a report on any differences between the Lifecycle Profile and Lifecycle Spend for the previous year and a prediction of any differences between the Lifecycle Profile and the Lifecycle Spend for the following year.
- 28A.2 Project Co shall upon written request permit CHP to inspect any part of the Facility and/or access to all Project Co's records, receipts, invoices, reports, drawings, technical specifications and performance logs relating to any Lifecycle Asset and Lifecycle Spend. Project Co shall provide all reasonable co-operation and assistance to CHP to allow it access to such documents and information and shall in a bona fide manner respond promptly to all reasonable requests for further documents and information made by CHP in respect of any Lifecycle Asset and the condition of the same and Lifecycle Spend.
- 28A.3 Project Co agrees that sums reserved for the replacement or renewal of Lifecycle Assets (the "Lifecycle Fund") shall be held by Project Co, and Project Co shall not be permitted to subcontract the holding of the Lifecycle Fund to the Service Provider.
- 28A.4 Project Co shall include the Lifecycle Schedule as part of the Schedule of Programmed Maintenance.

## 29 MONITORING OF PERFORMANCE

### Monitoring

- 29.1 In carrying out the Project Operations, Project Co shall, and shall procure that all Project Co Parties and any other persons for whom it is responsible shall, comply with the provisions of Schedule 14 (*Service Requirements*).
- 29.2 Project Co shall be responsible for monitoring its performance of this Agreement during the Operational Term, in the manner and at the frequencies set out in Schedule 14 (*Service Requirements*). Project Co shall provide CHP's Representative with relevant particulars of any aspects of its performance which fail to meet the requirements of this Agreement (unless otherwise notified in writing by CHP). CHP may at all reasonable times observe, inspect and satisfy itself as to the adequacy of the monitoring procedures (including without limitation carrying out sample checks).

### Service Failure Points

- 29.3 CHP may, by notice to Project Co, award Service Failure Points in respect of a Service in accordance with Schedule 14 (*Service Requirements*), depending on the performance of that Service in any month as measured in accordance with Schedule 14 (*Service Requirements*). Service Failure Points which are agreed, or determined, to have been awarded in circumstances where such award was not justified shall be deemed to have been cancelled.

### Warning Notices

- 29.4 Without prejudice to CHP's rights under Clause 44 (*Project Co Events of Default*) and any other express rights under this Agreement, if at any time Project Co has:
- 29.4.1 committed any material breach of its obligations under this Agreement; or

29.4.2 in relation to any Service, accrued more than the number of Service Failure Points in any one month rolling period listed against that Service in [specify where in Performance Monitoring this is set out],

then CHP may give written notice (a "Warning Notice") to Project Co setting out the matter or matters giving rise to such notice and containing a reminder to Project Co of the implications of such notice. Any such notice shall state on its face that it is a "Warning Notice".

29.5 Without prejudice to CHP's rights under Clause 44 (*Project Co Events of Default*) and to any other express rights under this Agreement, if Project Co receives [ ] ~~efor~~ more Warning Notices in any [ ] period in respect of any Service, CHP may by notice to Project Co increase the level of its monitoring of Project Co or (at CHP's option) of Project Co's monitoring of its own performance of its obligations under this Agreement, in respect of the relevant Service, in which case, the following provisions shall apply until such time as Project Co shall have demonstrated to the reasonable satisfaction of CHP that it will perform (and is capable of performing) its obligations under this Agreement:

29.5.1 any such notice to Project Co shall specify in reasonable detail the additional measures to be taken by CHP or by Project Co (as the case may be) in monitoring the performance of Project Co;

29.5.2 if Project Co (acting reasonably) objects to any of the specified measures on the grounds that they are excessive it shall notify CHP in writing within two (2) Business Days of the receipt of the notice of the measures objected to (and of any changes necessary in order to prevent prejudice to Project Co's performance of its obligations under this Agreement);

29.5.3 the measures to be taken by CHP and Project Co (as the case may be) shall be agreed between the parties or, in the absence of agreement within three (3) Business Days of CHP's receipt of Project Co's objection, determined pursuant to Schedule 26 (*Dispute Resolution Procedure*); and

29.5.4 Project Co shall bear its own costs and indemnify and keep indemnified CHP at all times from and against all reasonable costs and expenses (if any) incurred by or on behalf of CHP in relation to such increased level of monitoring (including an appropriate sum in respect of general staff costs and overheads).

## CHP's remedial rights

- 29.6 The provisions of Clauses 29.7 to 29.12 (inclusive) shall apply ~~[where CHP is not already exercising its rights of self-help in accordance with paragraph 8 of Part C of Schedule 18 (Payment Mechanism)]~~<sup>69</sup> if:
- 29.6.1 CHP, acting reasonably, considers that a breach by Project Co of any obligation under this Agreement:
    - (a) may create an immediate and serious threat to the health or safety of any user of the Facilities; or
    - (b) may result in a material interruption in the provision of one or more of the Services; or
    - (c) is prejudicial to the ability of CHP to provide Clinical Services to a material degree; or
  - 29.6.2 Project Co has, in relation to any Service, accrued more than the number of Service Failure Points in any one month rolling period (to avoid doubt comprising the then previous thirty (30) days) listed against that Service in ~~[specify where in Performance Monitoring this is set out]~~; or<sup>70</sup>
  - 29.6.3 Project Co is not in breach of its obligations as described in Clauses 29.6.1 and 29.6.2, but CHP considers the circumstances constitute an emergency<sup>71</sup>.
- 29.7 In any of the circumstances set out in Clause 29.6, CHP, acting reasonably, may (without prejudice to its rights under Clause 44 (*Project Co Events of Default*) or any other express rights under this Agreement) either:
- 29.7.1 if it considers that there is sufficient time and that it is likely that Project Co will be willing and able to provide assistance, require Project Co by written notice to take such steps as CHP considers necessary or expedient to mitigate or rectify such state of affairs and Project Co shall use its best endeavours to comply with CHP's requirements as soon as reasonably practicable; or
  - 29.7.2 if it considers there is not sufficient time, or that Project Co is not likely to be willing and able to take the necessary steps, take such steps as it considers to be appropriate (either itself or by engaging others to take any such steps) to ensure performance of the relevant Services to the standards required by this Agreement (or as close as possible to those

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<sup>69</sup> ~~Include drafting for standard schemes.~~

<sup>70</sup> This is intended to cover a situation where very poor performance in any service is provided over a relatively short time period requiring CHP to step in to such service. The standard form contains sole remedy provisions. This provision gives CHP an additional right to step in and rectify the problem itself if a sufficient number of Service Failure Points have been accumulated. This should be seen as a "last resort" mechanism for CHP and the threshold should be set accordingly.

<sup>71</sup> The term "emergency" is used here in a broad sense and is intended to cover extraordinary clinical circumstances or "major incidents" where, in exceptional situations, the scope or nature of the assistance required from Project Co will be beyond that envisaged in CHP's Service Level Specifications. In such a situation, CHP must be free to take action (albeit at its own cost) to ensure that its clinical services can be provided

standards as the circumstances permit and, in any event, in accordance with Good Industry Practice).

29.8 If:

29.8.1 Project Co does not confirm, within ten (10) Business Days of a notice served pursuant to Clause 29.7.1 (or such shorter period as is appropriate in the case of an emergency), that it is willing to take such steps as are referred to in Clause 29.7.1; or

29.8.2 Project Co fails to take the steps notified to it by CHP pursuant to Clause 29.7.1 within such time as CHP, acting reasonably, shall think fit,

then (without prejudice to Clause 29.7.2) CHP, acting reasonably, may itself take or engage others to take such steps as it considers appropriate.

29.9 Where CHP considers it to be necessary or expedient to do so, the steps which CHP may take pursuant to this Clause shall include the partial or total suspension of the right and obligation of Project Co to provide the relevant Services to CHP but only for so long as the circumstances referred to in Clause 29.6 subsist or, in the circumstances set out in Clause 29.6.2, until such time as Project Co shall have demonstrated to the reasonable satisfaction of CHP that it will perform (and is capable of performing) its obligations in respect of the relevant Services to the required standard.

29.10 If CHP either takes steps itself or requires Project Co to take steps in accordance with this Clause as a result of the circumstance referred to in Clause 29.6.3:

29.10.1 CHP shall indemnify and keep indemnified Project Co at all times from and against all additional direct reasonable costs, losses, expenses or damages suffered or incurred in relation to undertaking such steps over and above those that would otherwise have been incurred in the proper performance of Project Co's obligations under this Agreement; and

29.10.2 any costs incurred by CHP in taking such steps or requiring Project Co to take such steps shall be borne by CHP.

29.11 To the extent that the parties shall agree, or it shall be determined in accordance with Schedule 26 (*Dispute Resolution Procedure*), that CHP was not reasonable in requiring Project Co to take such steps (or in taking such steps itself) as are referred to in this Clause 29, then CHP shall indemnify and keep indemnified Project Co at all times from and against any costs, losses, expenses or damages (over and above those that would otherwise have been incurred by Project Co in the proper performance of its obligations under this Agreement) that are directly and reasonably incurred by Project Co in complying with those requirements of CHP as are agreed or determined not to be reasonable. To avoid doubt, it is acknowledged that Project Co has no right to require determination before taking any such action that CHP may specify; only subsequently may it refer any dispute for resolution to determine if CHP was reasonable in requiring Project Co to take such steps.

29.12 Subject to Clauses 29.10 and 29.11:

29.12.1 any costs or expenses incurred by Project Co in taking such steps as are required by CHP pursuant to Clause 29.7.1 shall be borne by Project Co;

29.12.2 Project Co shall reimburse CHP for all reasonable costs, losses, expenses or damages incurred by it in relation to taking the steps, or engaging others to take the steps, referred to in Clauses 29.7 and 29.8; and

29.12.3 CHP shall be entitled to deduct any such amount from any amount payable to Project Co under the provisions of this Agreement<sup>72</sup>.

**29A** CHP may undertake a review of the services in accordance with the process and provisions set out in Schedule 16 (Services Review).

## **30 TUPE AND EMPLOYMENT MATTERS**

### **Employee Transfer**

30.1 The provisions of Schedule 34 (*Transfers of Employment and Pensions*) shall apply in relation to any transfers of staff to Project Co or any Service Provider and the pensions requirements of any staff transferring to Project Co or any Service Provider pursuant to or necessitated by this Agreement.

30.2 The provisions of Schedule 34A (*Transfer of Employment on Expiry or Termination*) shall apply in relation to any transfer of staff on expiry or termination of this Agreement.

## **31 NOT USED**

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<sup>72</sup>

Where CHP itself takes remedial action under Clause 29.6.1 or 29.6.2 and Clause 29.7.2 CHP shall continue to pay the service payment in respect of those services which are affected by the “step-in” as if there were no continuing default on the part of Project Co (including a stay on the accrual of any Service Failure Points). To the extent that services are not affected by CHP “step-in”, the payment mechanism shall operate as normal. The costs of CHP “step-in” will be deducted in accordance with Clause 29.12. Step-in by CHP under Clause 29.6.3 is dealt with in Clause 29.10.

## 32 SITE SECURITY AND PERSONNEL ISSUES

### Access

- 32.1 CHP shall have the right to refuse admittance to, or order the removal from, the Facilities<sup>73</sup> of any person employed by (or acting on behalf of) Project Co, any Project Co Party or any sub-contractor whose presence, in the reasonable opinion of CHP, is likely to have a material adverse effect on the performance by CHP of the Clinical Services or who is not a fit and proper person to be in the Facilities.
- 32.2 Action taken under Clause 32.1 shall forthwith be confirmed in writing by CHP to Project Co and, to avoid doubt, shall not relieve Project Co of any of its obligations under this Agreement.
- 32.3 If and when so directed in writing by CHP, Project Co shall within twenty (20) Business Days provide a list of the names and addresses of all persons it expects may require admission in connection with this Agreement, to any premises occupied by CHP, specifying the capacities in which those persons are concerned with this Agreement and giving such other particulars as CHP may reasonably require.
- 32.4 The decision of CHP as to whether any person is to be refused admission shall be final and conclusive.

### CHP Policies

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<sup>73</sup>

The standard form assumes that the Project is a stand-alone development and not part of a larger hospital site. Accordingly, CHP should refer to any other relevant areas (e.g. existing premises from which CHP operates) as necessary on a project specific basis.

- 32.5 Project Co shall, and shall procure that all Project Co Parties shall, comply at all times with CHP Policies<sup>74 75</sup>.
- 32.6 CHP shall notify Project Co of any proposed change to CHP Policies as soon as practicable (and, in any event, prior to such change taking effect) and consult with Project Co. Subject to Clause 32.7, such change shall take effect as a Variation in accordance with Schedule 22 (*Variation Procedure*).
- 32.7 CHP may, at its sole option, notify Project Co that Project Co shall not be obliged to comply with any change to any CHP Policy and that Project Co should continue to comply with the relevant CHP Policy prior to any change in which case such change shall not take effect as a Variation in accordance with Schedule 22 (*Variation Procedure*).

### **Resources and training**

32.8 Project Co shall procure that:

32.8.1 there shall at all times be a sufficient number of staff (including all relevant grades of supervisory staff) engaged in the provision of the Services with the requisite level of skill and experience. To avoid doubt, this obligation shall include ensuring that there are sufficient staff to cover periods of holiday, sickness, other absence, and anticipated and actual peaks in demand for each of the Services; and

32.8.2 all staff receive such training and supervision as is necessary to ensure the proper performance of this Agreement and compliance with all health and safety rules, procedures and requirements

provided that Project Co shall not be in breach of its obligations under this Clause 32.8 to the extent that such breach is caused or contributed to by CHP failing to comply with its obligations under Clause 32.9.

32.9 CHP agrees to permit and arrange for any person who in the event that he or she remains in the employment of CHP as at the Relevant Service Transfer Date shall be a CHP Employee, prior to the Relevant Service Transfer Date, to receive training and to make familiarisation visits to the Facilities (all as reasonably requested by Project Co and in such manner as to ensure that there is no material adverse effect on the operations of CHP as a result of the same).

### **Convictions and disciplinary action**

32.10 Subject to Clause 32.11 below, before Project Co or any Supply Chain Member engages or employs any person in the provision of the Project Operations, or in any activity related to, or connected with the provision of Project Operations (other than

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<sup>74</sup> The standard form assumes that CHP Policies will include:

- instructions or directives from the Department of Health [and Social Care](#) relating to policies to be observed by CHP
- any relevant rules, regulations and requirements of CHP relating to the conduct of staff (including those in respect of security arrangements).

<sup>75</sup> CHP should consider the impact of the Equality Act 2010 and, specifically, whether CHP Policies should include an obligation on all sub-contractors of CHP (including Project Co) to comply with the requirements of the Equality Act 2010 and CHP's equality and diversity policies as if it were CHP.

Transferring Employees of CHP), Project Co must and must ensure that any Supply Chain Member must, at its own cost comply with (without limitation) the following guidance:

- 32.10.1 NHS Employment Check Standards; and
  - 32.10.2 Other checks as required by the DBS or which are to be undertaken in accordance with current and future national guidelines and policies.
- 32.11 Project Co or any Supply Chain Member may engage a person in an Enhanced DBS Position or a Standard DBS Position (as applicable) pending the receipt of the Standard DBS Check or Enhanced DBS Check or Enhanced DBS & Barred List Check (as appropriate) with the agreement of CHP and subject to any additional requirements of CHP for that engagement pending the receipt of the Standard DBS Check or Enhanced DBS Check or Enhanced DBS & Barred List Check (as appropriate).
- 32.12 Project Co shall procure that CHP is kept advised at all times of any person employed or engaged by Project Co or any Service Provider in the provision of any of the Services who, subsequent to his/her commencement of such employment or engagement, receives a conviction of which Project Co or a Service Provider becomes aware or whose previous convictions become known to Project Co or a Service Provider.
- 32.13 CHP's Representative (acting reasonably) may instruct Project Co to procure that appropriate disciplinary action is taken against any employee of Project Co or any Sub-Contractor (in accordance with the terms and conditions of employment of the employee concerned) who misconducts himself or is incompetent or negligent in his duties or whose presence or conduct on the Site or at work is otherwise considered by CHP's Representative (acting reasonably) to be undesirable. CHP shall co-operate with any such disciplinary proceedings and shall be advised in writing by Project Co of the outcome.
- 32.14 Project Co shall procure that there are set up and maintained, by it and by all Service Providers, personnel policies and procedures covering all relevant matters (including discipline, grievance, equal opportunities and health and safety). Project Co shall procure that the terms and the implementation of such policies and procedures comply with Law and Good Industry Practice and that they are published in written form and that copies of them (and any revisions and amendments to them) are forthwith issued to CHP<sup>76</sup>.

## **Management**

32.15 Not used.

32.16 Project Co shall provide, and shall procure that all Service Providers provide, to CHP upon request details of their respective management organisations.

## **Lists and Records**

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<sup>76</sup>

CHP should note that the procedures in Clause 32.14 will be governed by Data Protection [law](#) [Legislation](#). To the extent that CHP envisage receiving information concerning Project Co employees, the Agreement will need to oblige Project Co to include a relevant clause in the contract of employment of the relevant employees.

32.17 Project Co shall procure that CHP's Representative shall at all reasonable times have access to all material details in respect of all employees of Project Co or any Service Provider engaged in the provision of the Services including numbers and categories of staff employed to perform the Services and including in respect of each such employee:

32.17.1 details of qualifications; and

32.17.2 details of training undertaken by the employee.

### **Health Requirements**

32.18 Not used.

32.19 Not used.

32.20 Not used.

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

## **33 STOCKS, CONSUMABLES, MATERIALS AND EQUIPMENT**

### **Standards**

33.1 All goods, equipment, consumables and materials which are to be used in the provision of the Services shall be of satisfactory quality.

33.2 Project Co shall ensure that the goods, equipment, consumables and materials used by it or any Sub-Contractor in connection with the provision of any of the Services (each as a distinct and separate obligation) are:

33.2.1 maintained in a safe, serviceable and clean condition in accordance with Good Industry Practice;

33.2.2 of the type specified in the Service Level Specifications and/or the Method Statements (where appropriate); and

33.2.3 in compliance with any relevant rules, regulations, codes of practice and/or British or European Standards,

and shall, as soon as practicable after receiving a request from CHP's Representative, supply to CHP's Representative evidence to demonstrate its compliance with this Clause 33.2.

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

#### **Hazardous substances and materials**

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

33.4.1 material damage to the Facilities;

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

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

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

- 33.5 Save for articles or things commonly used or generated in hospitals, Project Co shall not bring in or on to (or keep or maintain in or on) the Facilities any hazardous materials or equipment without the prior written consent of CHP and unless Project Co has complied with all relevant Law.

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

33.6.1 procure that all hazardous materials and equipment used or stored on the Site shall be kept in accordance with Good Industry Practice, properly and securely labelled and stored, under appropriate supervision and used only by appropriately trained and competent staff; and

33.6.2 use all practicable and reasonable means to:

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

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

(c) prevent the unlawful generation, accumulation or migration of any hazardous substance at or from the Facilities; and

(d) prevent any environmental claims arising or any circumstances arising likely to result in any environmental claims,

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

- 33.7 [CHP to include project specific provisions for any sale of existing stocks and materials to Project Co.]

**34 VALUE OR MARKET TESTING**

The provisions of Schedule 17 (*Market Testing Procedure*) shall apply to Market Testing of the Market Tested Services.

## PART H: PAYMENT AND FINANCIAL MATTERS

### 35 PAYMENT

#### Service Payments

35.1 Subject to Clause 35A below, Project Co shall not be entitled to receive any Service Payments until the Payment Commencement Date. Subject to the provisions of this Agreement, CHP shall pay Project Co the Service Payments in respect of each Contract Month following the Payment Commencement Date in accordance with the provisions of this Clause 35 and Schedule 18 (*Payment Mechanism*)<sup>77</sup>.

### 35A CAPITAL WORKS PAYMENT

35A.1 CHP may pay the Capital Works Payment to Project Co no later than the later of:

35A.1.1 the twentieth (20th) Business Day following the Actual Completion Date; and

35A.1.2 the twentieth (20th) Business Day following receipt by CHP of a VAT invoice from Project Co for the Capital Works Payment

such payment to be made by direct transfer into Project Co's [specify account details] and CHP shall give Project Co prior written notification of such payment.

35A.2 Where Clause 35A.1 applies:

35A.2.1 the provisions of paragraph 2 Part B of Schedule 18 shall apply; and

35A.2.2 the provisions of paragraph 2A of Part B of Schedule 18 shall not apply.

35A.3 Where CHP either:

35A.3.1 notifies Project Co in writing that it does not intend to make the Capital Works Payment; or

35A.3.2 does not pay the Capital Works Payment into Project Co's bank account in accordance with Clause 35A.1 above in accordance with Clause 35.3,

then Clause 35A.4 shall apply.

35A.4 Where Clause 35A.3 applies:

35A.4.1 the provisions of clause 35A.1, [36.xA] 15A and paragraph 2 Part B of Schedule 18 shall not apply;

35A.4.2 the provisions of paragraph 2A Part B of Schedule 18 shall apply; and

<sup>83</sup>

Practical completion of the Works triggers commencement of payment of the unitary charge. The payment mechanism should be structured so that payment of a relevant percentage of the unitary charge commences on Practical Completion; with build up of the payment being linked to completion of each phase of Post Completion service commissioning (so that an increase in payments is triggered by completion of each phase until full payment is reached). The basic principle is that CHP only pay for what they, in fact, receive.

35A.4.3 the formula in paragraph 5.1 Part C of Schedule 18 shall be amended to state as follows:

$$D = Dn \times AW \times DP.$$

35A.4.4 paragraph 5.1.8 Part C of Schedule 18 shall not apply.]

### Invoicing and payment arrangements

35.2 Not later than the Delivery Date, Project Co is required to deliver to CHP a Performance Monitoring Report and a Payment Notice. The Performance Monitoring Report shall contain the following information in respect of the Contract Month just ended:

35.2.1 a summary of all Performance Failures affecting CHP;

35.2.2 the Functional Areas affected by such Performance Failures and the Performance Failure Rectification Times (if any);

35.2.3 a detailed description of all Unavailability Events affecting CHP;

35.2.4 the duration of any Unavailability Event affecting CHP in hours, with the time and date it commenced and the time and date it ceased and the number of days over which the Unavailability Event occurred; and

35.2.5 the deductions calculated in accordance with paragraph 5 of Part C of Schedule 18 to be made by CHP in respect of Unavailability Events [and the deductions calculated in accordance with paragraph 3 of Part C of Schedule 18 to be made by CHP in respect of Performance Failures]<sup>78</sup>.

35.3 The Payment Notice to be delivered to CHP shall contain the following information:

35.3.1 the Service Payment claimed by Project Co for the current Contract Month;

35.3.2 a summary of Pass Through Costs for the current Contract Month;

35.3.3 a summary of the Utilities Costs [excluding Energy] claimed by Project Co for the Contract Month just ended;<sup>79</sup><sup>78</sup>

35.3.4 the total deductions calculated in accordance with paragraph 5 of Part C [and paragraph 3 of Part C] of Schedule 18 for the Contract Month just ended;

35.3.5 any other amount due and payable from one party to the other under this Agreement, evidence of which has been supplied to Project Co in accordance with paragraph 8A.3.3 of Part C of Schedule 18 during the Contract Month just ended;

35.3.6 any VAT payable in respect of any of the above amounts; and

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<sup>78</sup> ~~Deductions for Performance Failures will only apply in the case of specialist schemes.~~

<sup>79</sup><sup>78</sup> This will need to be aligned with which party is responsible for purchase of Energy. See the relevant provisions of Schedule 18 and, in particular, the footnote to the definition of "Utilities".

- 35.3.7 any adjustments to reflect previous overpayments and/or underpayments (each adjustment stated separately).
- 35.4 If the Payment Notice shows a net amount owing by CHP to Project Co it shall be accompanied by an invoice from Project Co to CHP in respect of such amount.
- 35.5 If CHP does not dispute the Payment Notice or the invoice and the Payment Notice has been delivered by the Delivery Date it shall pay the Service Payment for the relevant Contract Month on or before the relevant Payment Date in accordance with Clause 35.10.
- 35.6 Subject to Clause 35.2.6 and 35.2.7, the Payment Date for an invoice shall be the last Business Day of the Contract Month in which the invoice is delivered.
- 35.7 In the event that the whole or any part of the Payment Notice is disputed payment shall be made in accordance with Clause 35.4.
- 35.8 In the event that Project Co fails to deliver any Payment Notice by the Delivery Date the invoice accompanying that Payment Notice shall fall due for payment (subject always to Clause 35.2.6) as many days after the Payment Date as the Payment Notice was delivered after the Delivery Date.
- 35.9 If any Payment Notice shows a net amount owing by Project Co to CHP CHP shall issue an invoice to Project Co in respect of such amount promptly following its receipt of such Payment Notice and Project Co shall pay to CHP the amount shown by such invoice not later than the fifteenth (15<sup>th</sup>) Business Day after it has received it.

### **Manner of payment**

- 35.10 All payments under this Agreement shall be made in pounds sterling by [electronic transfer of funds for value on the day in question<sup>807g</sup>] to the bank account of Project Co (in the case of payments due to Project Co) or CHP (in the case of payments due to CHP) (located in the United Kingdom) specified in the relevant invoice, quoting the invoice number against which payment is made.

### **Disputes**

- 35.11 If either party (acting in good faith) disputes all or any part of the Service Payments calculated in accordance with Clause 35.2 to 35.9 (inclusive) (*Invoicing*), the undisputed amount of the Service Payment shall be paid by CHP in accordance with Clause 35.2 to 35.9 (inclusive) (*Invoicing*) and the provisions of this Clause 35.11 shall apply. The parties shall use all reasonable endeavours to resolve the dispute in question within [ ] Business Days of the dispute arising. If they fail so to resolve it, either party may refer the matter to the Fast Track Dispute Resolution Procedure. Following resolution of the dispute, any amount agreed or determined to have been payable shall be paid forthwith by CHP to Project Co, together with interest on such amount calculated in accordance with Clause 35.12 (*Late Payment*).

### **Late Payments**

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<sup>807g</sup> Project Co to specify

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

#### **Set-Off**

35.13 Whenever any sum of money shall be agreed, or determined, as due and payable by Project Co to CHP, such sum may at CHP's discretion be deducted from or applied to reduce the amount of any sum then due, or which at any time afterwards may become due, to Project Co from CHP under this Agreement provided that CHP has given Project Co not less than [ ] Business Days' notice of its intention to deduct or apply such sum.

35.14 Whenever any sum of money shall be agreed, or determined, as due and payable by CHP to Project Co, such sum may at Project Co's discretion be deducted from or applied to reduce the amount of any sum then due, or which at any time afterwards may become due, from Project Co to CHP under this Agreement provided that Project Co has given CHP not less than [ ] Business Days' notice of its intention to deduct or apply such sum.

#### **VAT**

35.15 The provisions of Clause 53 (*Taxation*) shall apply.

### **36 INSURANCE<sup>8480</sup>**

#### **Project Co Insurances**

36.1 Project Co shall, at its own cost, procure that the insurances, details of which are set out in Part 1 of Schedule 21 (*Insurance Requirements*), are taken out prior to the commencement of the Works and are maintained for the periods specified in Part 1 of Schedule 21 (*Insurance Requirements*).

36.2 Project Co shall, at its own cost, procure that the insurances, details of which are set out in Part 2 of Schedule 21 (*Insurance Requirements*), are taken out prior to the Actual Completion Date and are maintained for the periods specified in Part 2 of Schedule 21 (*Insurance Requirements*).

36.3 Without prejudice to the other provisions of this Clause, Project Co shall, at all relevant times, at its own cost, effect and maintain in full force those insurances which it is required to effect by any applicable Law.

36.4 All Insurances [referred to in Clauses 36.1 and 36.2](#) shall:

36.4.1 be maintained in the names of the parties specified in Schedule 21 (*Insurance Requirements*) and shall be composite policies of insurance (and not joint) unless stated otherwise in any case in Schedule 21 (*Insurance Requirements*);

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<sup>8480</sup> Project Co to specify

- 36.4.2 be placed with insurers who are acceptable to CHP (such acceptance not to be unreasonably withheld or delayed);
- 36.4.3 provide that they shall continue in effect and unaltered for the benefit of the insured parties for at least sixty (60) Business Days or ~~twenty~~ (20) Business Days for policies referred to in paragraph 3 of Part 1 of Schedule 21 (Insurance Requirements) after written notice by registered mail or fax of any cancellation, change, modification or lapse by reason of non payment of premiums or instalment or otherwise has been received by the insured parties,<sup>8281</sup>
- 36.4.4 not used
- 36.4.5 in respect of any policy of insurance which insures the rights of more than one party, contain a provision that:
- (a) no claim of any of the insured under the policy shall be defeated, prejudiced or otherwise affected by any act or omission on the part of any other insured and shall insure the interests of each insured regardless of any act or omission on the part of any other insured party; and
  - (b) operates, save for limits of liability and/or amount, in the same manner as if there were a separate policy with and covering each insured and be without right of contribution from any other insurance which is carried by an insured;
- 36.4.6 insofar as they relate to damage to assets (including the Facilities), cover the same for the full reinstatement value; and
- 36.4.7 comply with the relevant provisions of Schedule 21 (Insurance Requirements).

#### Subrogation and Vitiating

36.5 Project Co shall:

- 36.5.1 procure that all policies of insurance to be effected by it pursuant to this Clause 36 other than those in paragraph 2 of Part 2 of Schedule 21 (Insurance Requirements) shall contain a provision to the effect that the insurers have agreed to waive all rights of subrogation against CHP (and all CHP Parties other than subcontractors of CHP who are not subcontractors performing medical or other similar services) save to the extent that CHP has vitiated the policy by a deliberate act or omission; and
- 36.5.2 where Project Co is obliged to effect insurance under this Clause 36, other than those in paragraph 2 of Part 2 of Schedule 21 (Insurance Requirements), not bring any claim or action against CHP (or any CHP Party other than a subcontractor who is not performing medical or similar services) in respect of any loss or damage in circumstances where Project Co could recover such loss or damage under such insurance (whether or not such insurance has in fact been effected or, if effected, has been

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<sup>8281</sup> (d) deleted and (c) amended on the basis that the Broker's letter of undertaking includes an obligation on the part of the Broker to notify CHP in similar terms to (d). See Schedule 21

vitiating as a result of any act or omission of Project Co (or any Project Co Party), including but not limited to non disclosure or under insurance),

provided that, to avoid doubt, this Clause 36.5 shall not by itself prevent Project Co from claiming against CHP (or any CHP Party) for any loss or damage not covered because of the level of deductibles under such insurance permitted by this Agreement or to the extent such loss or damage exceeds the maximum of such insurance required by this Agreement.

- 36.6 Neither party shall take any action or fail to take any reasonable action or (in so far as it is reasonably within its power) permit or allow others to take or fail to take any action (including failure to disclose any fact) as a result of which any of the Insurances may be rendered void, voidable, unenforceable or suspended or impaired in whole or in part or which may otherwise render any sum paid out under any relevant policy repayable in whole or in part.

#### Evidence of Project Co Insurance

- 36.7 Project Co shall use reasonable endeavours to obtain the best value insurance available in the European insurance market for the Insurances taking into account the reasonable commercial considerations of a company in a similar position to that of Project Co.
- 36.8 Not less than twenty (20) Business Days prior to the expiry or amendment of any relevant insurance policy, Project Co shall submit to CHP evidence of the steps it has taken pursuant to Clause 36.7 a request for approval from CHP of the insurer and the principal terms and conditions of such insurance policy (and any revision to such terms and conditions or change in identity of such insurer), such approval not to be unreasonably withheld or delayed.
- 36.9 Project Co shall supply CHP with copies of every policy of Insurance (or such other evidence of Insurances as may be reasonably required) as soon as it is available, together with evidence of payment of the premiums. If Project Co defaults in insuring or continuing to maintain the Insurances, CHP may insure against any risk in respect of which such default has occurred and recover any premiums from Project Co as a debt.

#### Acceptance and compliance

- 36.10 The supply to CHP of any draft insurance policy or certificate of insurance or other evidence of compliance with this Clause 36 shall not imply acceptance by CHP that the extent of insurance cover is sufficient and its terms are satisfactory; or in respect of any risks not insured against, that the same were Uninsurable Risks.
- 36.11 Neither failure to comply nor full compliance with the insurance provisions of this Agreement shall relieve Project Co of its liabilities and obligations under this Agreement.
- 36.12 ~~Not used.~~ Project Co shall ensure that its brokers give CHP a letter of undertaking in the agreed form as set out in Schedule 21 Part 4.

#### Application of Proceeds

36.13 All insurance proceeds received by Project Co under the insurances referred to in paragraph 1 of Part 1 and paragraph 1 of Part 2 of Schedule 21 (Insurance Requirements) shall be paid into an insurance proceeds account in the names of Project Co and CHP and shall be held on trust for the purposes of and shall be applied in accordance with this Agreement.

36.13A Subject to the provisions of the Funders' Direct Agreement and Clause 36.14, Project Co shall apply any proceeds of any policies of Insurance:

36.13A.1 in the case of third party legal liability or employers' liability insurance, in satisfaction of the claim, demand, proceeding or liability in respect of which such proceeds are payable; and

36.13A.2 in the case of any other insurance, so as to ensure the performance by Project Co of its obligations under this Agreement, including where necessary the reinstatement, restoration or replacement of the facilities, assets, materials or goods affected by the event giving rise to the insurance claim and consequent payment of proceeds.

36.13B Where reinstatement monies are required to be released from an insurance proceeds account Project Co shall obtain CHP's consent. CHP shall give its consent to the release of monies from the insurance proceeds account within one (1) Business Day of a request from Project Co (such consent not to be unreasonably withheld).

36.13C If the proceeds of any insurance claim are insufficient to cover the settlement of such claims, Project Co will make good any deficiency forthwith.

#### Damage or Destruction

36.14 In the event of damage to, or destruction of, any part of the Facilities:

36.14.1 if CHP serves written notice that it does not wish the Facilities to be reinstated and this Agreement to continue Project Co shall notify the matter to the Strategic Partnering Board. If CHP serves notice pursuant to this Clause 36.14.1 this Agreement shall automatically terminate and CHP shall pay compensation to Project Co in accordance with Clause 48.3 (Compensation on Termination). Any relevant insurance proceeds shall first be applied towards such compensation payment and any balance shall be paid to CHP.

36.14.2 Project Co shall take all reasonable steps to mitigate the effects of any risks or claims covered by this Clause 36 (including without limitation minimising the amount of any costs and expenses which might result).

36.14.3 if CHP does not serve written notice on Project Co in accordance with Clause 36.14.1 within [ ] Business Days of the damage to or destruction of the Facilities, then Project Co shall deliver to CHP a plan for the carrying out of the works necessary to reinstate or replace the damaged or destroyed Facilities. As soon as reasonably practicable and in any event within [ ] Business Days of delivery of this plan by Project Co, the parties will meet and use reasonable endeavours to agree the terms and timetable proposed by Project Co for reinstatement and/or replacement

and, in the absence of agreement, the dispute will be resolved in accordance with Clause 56 (Dispute Resolution).<sup>8382</sup>

### Uninsurable Risks

#### 36.15

- 36.15.1 Either party shall notify the other promptly on becoming aware of an Uninsurable Risk.
- 36.15.2 Not used.
- 36.15.3 In the event that either party serves notice pursuant to Clause 36.15.1:
- (a) Project Co may serve written notice on CHP to terminate this Agreement not less than twelve (12) months from the date of the notification under Clause 36.15.1 and on expiry of such notice subject to Clause 36.15.6 this Agreement shall determine without prejudice to the rights and remedies of either party in respect of any antecedent and subsisting claim or breach of covenant; or
  - (b) if Project Co is able to secure insurance in respect of the Uninsurable Risk within the worldwide insurance market with a reputable insurer of good standing (regardless of the terms of such insurance) Project Co may take out and maintain such insurance and shall then serve written notice on CHP stating that the risk shall cease to be considered an Uninsurable Risk. To the extent, if any, that the cost of insuring the Uninsurable Risk is an Insurance Cost, Project Co may require CHP to pay the premium in respect of such insurance and in such event CHP shall make no objection to the full amount of such premium being included in the next Service Payment invoice due to be served under this Agreement (except insofar as CHP has already paid the amount of such premium) and the provisions of Clause 36.5 shall apply on the basis that the level of deductibles under the insurance taken out and maintained by Project Co pursuant to this Clause (ii) is permitted by this Agreement, PROVIDED ALWAYS that if CHP is a Public Sector Body then it may serve notice on Project Co pursuant to Clause 36.15.6.
- 36.15.4 If Project Co has served notice in accordance with Clause 36.15.3(a) and the Facilities are subsequently damaged or destroyed so as to render the Facilities unfit for occupation and use Project Co or CHP may terminate this Agreement forthwith by service of written notice upon the other and the provisions of Clause 46.1 (Non-Default Termination – Force Majeure) shall apply as though the period of six (6) months referred to therein had expired.
- 36.15.5 Where Project Co has not served notice pursuant to Clause 36.15.3(a):
- (a) where there is an Uninsurable Risk, Project Co shall approach the insurance market on a regular basis and in any event at intervals of

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<sup>8382</sup>

CHP may wish to insert more detailed drafting in relation to the reinstatement plan on a project specific basis.

not less than six (6) months to establish whether the relevant risk remains an Uninsurable Risk; and

- (b) where a risk which was previously an Uninsurable Risk ceases to be so, and Project Co has become aware that this is the case, Project Co shall forthwith take out and maintain insurance in accordance with the requirements of this Agreement in respect of the risk and the provisions of this Clause 36.15 (Uninsurable Risks) shall no longer apply to the risk.

36.15.6 In the event that :

- (a) not used;
- (b) the proviso to Clause 36.15.3(b) applies; or
- (c) whilst the risk remains an Uninsurable Risk or in a case where Project Co has served notice under Clause 36.15.3(a) and such notice has not expired,

then CHP, provided it is a Public Sector Body, may serve written notice on Project Co that it elects to bear the risk which has become an Uninsurable Risk in respect of the Facilities on the same terms as it was previously insured and such notice shall have the effect of suspending any notice period then operative pursuant to Clause 36.15.3(a) or (as the case may be) of relieving CHP from any obligation to pay the premium referred to in Clause 36.15.3(b). In the event that CHP so elects and there occurs damage to the Facilities, or a third party claim is made against Project Co as the case may be, CHP shall bear the costs of reinstatement, or liability for the third party claim as the case may be, in the same manner and to the same extent as the insurer had the relevant risk continued to be insurable. To the extent that Project Co had previously maintained insurance for business interruption and it became unavailable concurrently with the relevant risk becoming an Uninsurable Risk, CHP shall also bear the cost of income lost because of damage to the Facilities in the same manner as the insurer had such insurance continued to be available (and subject to the same level of deductibles), but only to the extent necessary to allow Project Co to meet its obligations in respect of servicing its senior debt during the resultant period of Unavailability.

36.15.7 CHP may by sixty (60) Business Days' written notice served on Project Co cease to bear liability for the Uninsurable Risk in respect of which it shall have served notice pursuant to Clause 36.15.6 whereupon Project Co shall have the right to serve written notice on CHP to terminate this Agreement on expiry of a period equal to that between the date CHP served its notice under Clause 36.15.6 and the date twelve (12) months from the notice served in Clause 36.15.1 provided that for the avoidance of doubt CHP shall be liable for claims relating to events occurring prior to the expiry of the sixty (60) Business Days' notice period notwithstanding that such claims are made after the expiry of the sixty (60) Business Days' notice period, and the provisions of Clause 46.1 (Non-Default Termination – Force Majeure) shall apply as though the period of six (6) months referred to therein had expired.

- 36.15.8 At any time during the subsistence of an Uninsurable Risk in respect of paragraph 2 of Part 2 of Schedule 21:
- (a) not used;
  - (b) for the purposes of Schedule 18 each Functional Area shall be deemed to have suffered an Unavailability Event for such period that CHP is excluded from the Facilities;
  - (c) Project Co shall take such steps as are necessary in accordance with Good Industry Practice to make the Facilities comply with the Safety Condition
- 36.15.9 Project Co is not required to insure against a risk for so long as such risk is an Uninsurable Risk.

Without prejudice to the provisions of Clause 8, CHP shall comply with any reasonable requirements of Project Co in relation to the notification and management of claims under the insurances described in Part 2 of Schedule 21 (*Insurances*).

#### 36.15A

##### 36.15A.1 Subject to clause 35A.3:

- (a) Subject to the deduction set out at Clause 36.15A.1(b) and to the extent that there are funds remaining following the deduction set out at clause 36.15A.1(b) CHP shall be entitled to receive the Unreceived Benefit payable from the monies that otherwise would have been paid to Project Co pursuant to Clause 36.16
- (b) Project Co and CHP acknowledge that the amount of any monies payable to Project Co pursuant to Clause 36.16 shall first be applied to satisfy any amounts then outstanding (including any breakage costs actually and reasonably incurred in exercising the right of sale and the [Early Repayment Fee] to be made pursuant to and in accordance with Clause [ ] of the Facilities Agreement) and due pursuant to the terms of the Facilities Agreement.
- (c) Project Co undertakes to pay to CHP the sum due pursuant to 36.15A.1 in full within twenty-eight (28) Business Days of receipt by Project Co of any monies pursuant to Clause 36.16.<sup>83</sup>

#### **[CHP election not to reinstate**

36.16 In the event that the Facilities are destroyed or substantially destroyed, CHP may, at its option, serve a Viability Statement on Project Co within [ ] Business Days of:

36.16.1 completion of the Economic Reinstatement Test; or

36.16.2 if the Funders' Direct Agreement has ceased to apply, agreement or determination of the extent of the damage; or

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<sup>83</sup> Drafting to be considered where a Capital Works Payment has been made by CHP.

36.16.3 receipt by CHP of the Original Reinstatement Plan.

If CHP exercises this right, this Agreement shall automatically terminate and CHP shall pay compensation to Project Co in accordance with Clause 48.3 (*Compensation on Termination*). Any relevant insurance proceeds shall first be applied towards such compensation payment and any balance shall be paid to CHP.

36.17 Project Co shall take all reasonable steps to mitigate the effects of any risks or claims covered by this Clause 36 (including without limitation minimising the amount of any costs and expenses which might result).

36.18 Nothing in this Agreement shall oblige Project Co to take out and/or maintain insurance in respect of a risk which is not an Uninsurable Risk but for which after the date of this Agreement:

36.18.1 insurance is not available within the worldwide insurance market with reputable insurers of good standing in respect of that risk; or

36.18.2 the insurance premium payable for insuring such risk is at such a level that the risk is not generally being insured against in the worldwide insurance market with reputable insurers of good standing by contractors in the United Kingdom;

provided that nothing in this Clause 36.18 will relieve Project Co of any of its other obligations in respect of such risk in this Agreement. For the avoidance of doubt, Project Co shall not be entitled to any payment or indemnity from CHP on the occurrence of such a risk.]

### **~~{Insurance Premium Increase Risk Sharing Mechanism~~**

~~36.19A In respect of increases in insurance premia the provisions of Part [4] of Schedule 21 shall apply.~~

#### *Risk management*

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

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

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

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

36.20 Without prejudice to the provisions of Clause 36.16, the parties shall notify one another, and in Project Co's case the relevant insurer, of any circumstances which may give rise to a claim of a value equal to or in excess of [ ] thousand pounds (£[ ],000) (Indexed) (as defined in Schedule 21) under the Insurances within five (5) Business Days of becoming aware of the same (or earlier, if so requested by the

terms of the relevant insurance policy). If any insurer disputes any such claim, Project Co shall provide CHP with full details of any disputed claim and the parties shall liaise with one another to ensure that the relevant claim is preserved or pursued.

*Unavailability of Terms or Conditions*

36.21 If, upon the renewal of any insurance which Project Co is required to maintain or to procure the maintenance of pursuant to this Agreement:

36.21.1 any Insurance Term is not available to Project Co in the worldwide insurance market with reputable insurers of good standing; and/or

36.21.2 the insurance premium payable for insurance incorporating such Insurance Term is such that the Insurance Term is not generally being incorporated in insurance procured in the worldwide insurance market with reputable insurers of good standing by contractors in the United Kingdom,

(other than, in each case, by reason of one or more actions of Project Co and/or any subcontractor of Project Co) then Clause 36.22 shall apply.

36.22 If it is agreed or determined that Clause 36.21 applies then CHP shall waive Project Co's obligations in Clause 36 and/or Schedule 21 in respect of that particular Insurance Term and Project Co shall not be considered in breach of its obligations regarding the maintenance of insurance pursuant to this Agreement as a result of the failure to maintain insurance incorporating such Insurance Term for as long as the relevant circumstances described in Clause 36.21 continue to apply to such Insurance Term.

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

36.24 Project Co shall notify CHP as soon as reasonably practicable and in any event within five days of becoming aware that Clause 36.21.1 and/or Clause 36.21.2 are likely to apply or (on expiry of the relevant insurance then in place) do apply in respect of an Insurance Term (irrespective of the reason for the same). Project Co shall provide CHP with such information as CHP reasonably requests regarding the unavailability of the Insurance Term and the parties shall meet to discuss the means by which such unavailability should be managed as soon as is reasonably practicable.

36.25 In the event that Clause 36.21.1 and/or Clause 36.21.2 apply in respect of an Insurance Term, (irrespective of the reasons for the same) Project Co shall approach the insurance market at least every four months to establish whether Clause 36.21.1 and/or Clause 36.21.2 remain applicable to the Insurance Term. As soon as Project Co is aware that Clause 36.21.1 and/or Clause 36.21.2 has ceased to apply to the Insurance Term, Project Co shall take out and maintain or procure the taking out and maintenance of insurance (to be incepted as soon as is reasonably practicable) incorporating such Insurance Term in accordance with this Agreement.

[Insurance Premium Risk Sharing](#)

[36.26 In respect of increases and/or decreases in insurance premia the provisions of Part V of Schedule 21 \(Insurances\) shall apply.](#)

**37 CUSTODY OF FINANCIAL MODEL**<sup>84</sup>

- 37.1 Immediately after execution of this Agreement, Project Co shall deliver two (2) copies of the Financial Model to the Custodian (both on disc and in hard copy) to be held in custody in accordance with the provisions of the Custody Agreement.
- 37.2 Either party shall have the right to inspect and audit the Financial Model at all reasonable times.
- 37.3 Unless otherwise agreed between the parties, any amendments to the Financial Model shall reflect, be consistent with and be made only in accordance with the provisions of this Agreement, and shall in all cases be subject to the prior written approval of CHP (such approval not to be unreasonably withheld or delayed). In the event that the parties fail to agree any proposed amendments to the Financial Model, the matter shall be referred for resolution in accordance with Schedule 26 (*Dispute Resolution Procedure*).
- 37.4 Following the approval of any amendment of the Financial Model by CHP, Project Co shall promptly deliver a copy of the revised Financial Model to CHP, and two (2) copies to the Custodian, in the same form as the original form (or such other form as may be agreed by the parties from time to time).
- 37.5 The parties shall instruct the Custodian to keep a copy of all versions of the Financial Model on disc and in hard copy.

**38 INFORMATION AND AUDIT ACCESS**

- 38.1 Project Co shall provide to CHP's Representative all information, documents, records and the like in the possession of, or available to, Project Co (and to this end Project Co shall use all reasonable endeavours to procure that all such items in the possession of the Contractor or any Service Providers shall be available to it and Project Co has included, or shall include, relevant terms in all contracts with the Contractor or any Service Providers to this effect) as may be reasonably requested by CHP's Representative for any purpose in connection with this Agreement.
- 38.2 For the purpose of:
  - 38.2.1 the examination and certification of CHP's accounts; or
  - 38.2.2 any examination pursuant to Section 6(1) of the National Audit Act 1983 of the economy, efficiency and effectiveness with which CHP has used its resources,

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<sup>84</sup> CHP to consider whether alternative arrangements might be more appropriate provided it is always clear which the most recent version of the model is and where it is kept.

the Comptroller and Auditor General may examine such documents as he may reasonably require which are owned, held or otherwise within the control of Project Co (and Project Co shall procure that any person acting on its behalf who has such documents and/or other information shall also provide access) and may require Project Co to produce such oral or written explanations as he considers necessary. To avoid doubt, it is hereby declared that the carrying out of an examination under Section 6(3)(d) of the National Audit Act 1983 in relation to Project Co is not a function exercisable under this Clause 38.2.

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

## PART I: CHANGES IN LAW AND VARIATIONS

### 39 CHANGES IN LAW

#### General

39.1 Project Co shall take all steps necessary to ensure that the Project Operations are performed in accordance with the terms of this Agreement (including, without limitation, Clause 5.2.5 (*Compliance with applicable law*)) following any Change in Law.

#### Relevant Changes in Law

39.2 Subject to Clause 39.4(c)(iv) and 39.4(c)(v), on the occurrence of any Relevant Change in Law, the parties shall be entitled to seek adjustments to the Service Payment to compensate for any increase or decrease (as the case may be) in the net cost to Project Co of performing the Project Operations. Such adjustments (if any) will be calculated in accordance with (and subject to) Clause 39.4.

39.3 Relevant Change in Law means the occurrence of any (a) General Change in Law which comes into effect during the Operational Term and which involves Capital Expenditure, (b) Discriminatory Change in Law, (c) NHS Specific Change in Law, (d) [or Best Value Change in Law] having an impact on the cost of performance of the Project Operations:

39.3.1 provided that:

- (a) the impact of such Relevant Change in Law (either singly or in aggregate with any other such Relevant Change in Law in any Contract Year) on the cost of performance of the Project Operations exceeds [one thousand pounds (£1,000)] (index linked). To avoid doubt, any such amount of [one thousand pounds (£1,000)] (index linked) shall always be borne by Project Co;
- (b) such Change in Law was not reasonably foreseeable at the date of this Agreement by an experienced contractor performing operations similar to the relevant Project Operations, on the basis of draft bills published in Government green or white papers or other Government departmental consultation papers, bills, draft statutory instruments or draft instruments or proposals published in the Official Journal of the European Communities, in each case published:
  - (i) prior to the date of this Agreement; and
  - (ii) in substantially the same form or having substantially the same effect as the Relevant Change in Law; and
- (c) a Change in Law relating to the application for, coming into effect, terms, implementation, repeal, revocation or otherwise of any Planning Permission shall not constitute a Relevant Change in Law.

- 39.4 On the occurrence of a Relevant Change in Law:
- 39.4.1 either party may give notice to the other of the occurrence of the Relevant Change in Law;
  - 39.4.2 the parties shall meet within twenty (20) Business Days of the notice referred to in Clause 39.4(a) to consult and seek to agree the effect of the Relevant Change in Law. If the parties, within twenty (20) Business Days of this meeting, have not agreed the occurrence or the effect of the Relevant Change in Law, either party may refer the question of whether a Relevant Change in Law has occurred or the effect of any Relevant Change in Law for resolution in accordance with the Dispute Resolution Procedure; and
  - 39.4.3 within ten (10) Business Days of the agreement taking into account the reasonable commercial considerations of a company in a similar position to that of Project Co or determination referred to in Clause 39.4(b) above, CHP's Representative shall (where such Relevant Change in Law necessitates a Variation) issue a Variation Enquiry and the relevant provisions of Schedule 22 shall apply except that:
    - (a) Project Co may give notice to CHP's Representative that it objects to such a Variation Enquiry only on the grounds that the implementation of the Variation would not give effect to or comply with the Relevant Change in Law;
    - (b) CHP shall issue a Variation Confirmation in respect of the Variation in accordance with the relevant provisions of Schedule 22;
    - (c) CHP shall not be entitled to withdraw any Variation Enquiry or Variation Confirmation issued in accordance with this Clause 39.4(c)(iii);
    - (d) Project Co shall, without prejudice to its general obligation to comply with the terms of this Agreement:
      - (i) use all reasonable endeavours to mitigate the adverse effects of any Relevant Change in Law and take all reasonable steps to minimise any increase in costs arising from such Relevant Change in Law; and
      - (ii) use all reasonable endeavours to take advantage of any positive or beneficial effects of any Relevant Change of Law and take all reasonable steps to maximise any reduction in costs arising from such Relevant Change in Law; and
    - (e) any compensation payable, or increase or reduction to the Service Payments, shall be calculated in accordance with Clause 39.5 or Clause 39.6 (as appropriate) provided that:
      - (i) the amount of any compensation payable; or

- (ii) the amount by which the Service Payment is to be increased or reduced,

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

39.5 Any compensation payable or increase in, or reduction to the Service Payment, pursuant to this Clause 39.5 shall be calculated on the basis that Project Co shall be placed in no better or worse position than it would have been in had the Relevant Change in Law not occurred and any assessment of whether Project Co is in a better or worse position shall take account (inter alia) of the provisions of Clause 39.4.(c)(iv) and 39.4(c)(v) and shall also take account of the following factors;

39.5.1 the extent to which Project Co has been (or will be) compensated as a result of any indexation of the Service Payment under this Agreement;

39.5.2 any decrease in its costs resulting from any Relevant Change in Law;

39.5.3 any amount which Project Co will recover under any insurance policy (or would have recovered if it had complied with the requirements of this Agreement or of any policy of insurance required under this Agreement) which amount, to avoid doubt, shall not include the amount of any excess or deductibles or any amount above the maximum insured amount applicable to such insurance policy; and

39.5.4 any increase or decrease in the fees which Lift Co will charge to Project Co which relate solely to the increase or decrease in the Partnering Services Costs of Lift Co which are allocated to the Service Payment under this Agreement in accordance with the Strategic Partnering Agreement

Project Co shall not be entitled to any other payment or compensation or, save as expressly provided otherwise in this Agreement, relief in respect of such Relevant Change in Law or associated Variation (or the consequences of either).

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

39.6.1 the parties shall meet within twenty (20) Business Days to consult in respect of the effect of the Change in Law and any Variation required as a consequence; and

39.6.2 within twenty (20) Business Days of the meeting referred to in Clause 39.6(a) above CHP's Representative shall, if a Variation is required in order to comply with the Change in Law, issue a Variation Enquiry and the relevant provisions of Schedule 22 shall apply except that:

- (a) Project Co may give notice to CHP's Representative that it objects to such a Variation Enquiry only on the grounds that the implementation of the Variation would not implement the Change in Law;

- (b) CHP shall issue a Variation Confirmation in respect of the Variation in accordance with the relevant provisions of Schedule 22;
- (c) CHP shall not be entitled to withdraw any Variation Enquiry or Variation Confirmation issued in accordance with this Clause 39.6; and
- (d) Project Co shall not be entitled to any payment or other compensation or relief from any performance of its obligations under this Agreement in respect of such Change in Law or associated Variation (or the consequences of either).

#### 40 VARIATION PROCEDURE

The provisions of Schedule 22 (*Variation Procedure*) shall have effect in respect of Variations except as otherwise expressly provided in this Agreement.

### PART J: DELAY EVENTS, RELIEF EVENTS AND FORCE MAJEURE

#### 41 DELAY EVENTS<sup>85</sup>

41.1 If, at any time, Project Co becomes aware that there will be (or is likely to be) a delay in completion of the Works, Project Co shall forthwith give notice to CHP's Representative to that effect specifying the relevant delay or impediment. In relation to any such delay or impediment:

41.1.1 if CHP's Representative is satisfied, or it is determined in accordance with Schedule 26 (*Dispute Resolution Procedure*), that such delay or impediment has arisen as a result of the occurrence of a Delay Event, then, subject to Clause 41.2 (*Mitigation*) CHP's Representative shall allow Project Co an extension of time equal to the delay or impediment caused by such Delay Event (taking into account reasonably foreseeable consequences of the Delay Event) and shall fix a new Completion Date which shall replace the existing Completion Date; but

41.1.2 to avoid doubt, there shall be no extension to the Project Term as a result of any such delay or impediment.

41.2 If Project Co is (or claims to be) affected by a Delay Event:

41.2.1 it shall (and shall procure that the Project Co Parties shall) take and continue to take all reasonable steps to eliminate or mitigate the consequences of such an event upon the performance of its obligations under this Agreement and, where relevant, resume performance of its obligations affected by the Delay Event as soon as practicable; and

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<sup>85</sup> Delay Events give rise to an extension of time for completion of construction. Compensation is payable for all Delay Events (other than Force Majeure or Relief Events) as follows:  
 CHP Variations: Variation Procedure  
 CHP breach 41.3.2, 41.3.3 and 41.3.4: Compensation Event  
 Relevant Change in Law referred to in Clause 41.3.7: Change in Law provisions.  
 An amendment has been made to the previous version of the standard form to allow for Delay Events to apply after the original completion date. However, CHP should be under no obligation to accept early completion where Project Co has completed prior to the revised completion date.

- 41.2.2 it shall neither be relieved from liability under this Agreement nor entitled to any extension of time for the purpose of Clause 41.1.1 (*Delay Event*) to the extent that it is delayed or impeded due to its failure (if any) to comply with its obligations under Clause 41.2.1 above.
- 41.3 For the purposes of this Agreement, Delay Events means any of the following to the extent in each case that there will be (or is likely to be) a delay in completion of the Facilities:
- 41.3.1 a CHP's Works Variation initiated by a CHP's Works Variation Enquiry in accordance with paragraph 2 of Part 1 of Schedule 22 (*Variation Procedure*) in relation to which Project Co has issued a response pursuant to paragraph 3.2(b) of Part 1 of Schedule 22 (*Variation Procedure*) specifying and providing evidence that implementation of CHP's Works Variation would delay the completion of the Facilities if this has been agreed between the parties or determined to be the case in accordance with Schedule 26 (*Dispute Resolution Procedure*);
- 41.3.2 any breach by CHP and/or any CHP Party of any of CHP's express obligations under this Agreement (including any delay in CHP giving access to the Site pursuant to Clause 14 (*Nature of Land Interests*) or any obstruction of the Ancillary Rights afforded to Project Co pursuant to Clause 14 (*Nature of Land Interests*) by CHP or any CHP Party) to the extent in each case that any such breach is not caused, or contributed to, by Project Co or any Project Co Party;
- 41.3.3 the execution of works on the Site not forming part of this Agreement by CHP or any contractors employed by CHP;
- 41.3.4 opening up of the Works pursuant to Clauses 18.3 to 18.7 (inclusive) (*Right to open up*) where such Works are not subsequently found to be defective (unless it is agreed or determined in accordance with Schedule 26 (*Dispute Resolution Procedure*) that the opening up of the Works was reasonable in the light of other defects previously discovered by CHP);
- 41.3.5 Force Majeure;
- 41.3.6 a Relief Event; or
- 41.3.7 a Discriminatory Change in Law or an NHS Specific Change in Law having an impact on the cost of performance of the Project Operations.
- 41.4 Without prejudice to the generality of Clause 41.1, Project Co shall give notice in writing to CHP's Representative as soon as it (or the Contractor) can reasonably foresee a Delay Event occurring or, if the same is not reasonably foreseeable, as soon as it (or the Contractor) shall become aware of a Delay Event. Project Co shall within [ ] Business Days after such notification, give further written details to CHP's Representative which shall include:
- 41.4.1 a statement of which Delay Event the claim is based upon;
- 41.4.2 details of the circumstances from which the Delay Event arises;

- 41.4.3 details of the contemporary records which Project Co will maintain to substantiate its claim for extra time;
  - 41.4.4 details of the consequences (whether direct or indirect, financial or non financial) which such Delay Event may have upon completion of the Facilities; and
  - 41.4.5 details of any measures which Project Co proposes to adopt to mitigate the consequences of such Delay Event.
- 41.5 As soon as possible but in any event within [ ] Business Days of Project Co (or the Contractor) receiving, or becoming aware of, any supplemental information which may further substantiate or support Project Co's claim then Project Co shall submit further particulars based on such information to CHP's Representative.
- 41.6 CHP's Representative shall, after receipt of written details under Clause 41.4, or of further particulars under Clause 41.5, be entitled by notice in writing to require Project Co to provide such further supporting particulars as he may reasonably consider necessary. Project Co shall afford CHP's Representative reasonable facilities for investigating the validity of Project Co's claim including, without limitation, on site inspection.
- 41.7 Subject to the provisions of this Clause, CHP's Representative shall fix a revised Completion Date in accordance with Clause 41.1.1 (*New Completion Date*) as soon as reasonably practicable and in any event within [ ] Business Days of the later of:
- 41.7.1 the date of receipt by CHP's Representative of Project Co's notice given in accordance with Clause 41.4 and the date of receipt of any further particulars (if such are required under Clause 41.6), whichever is the later; and
  - 41.7.2 the date of receipt by CHP's Representative of any supplemental information supplied by Project Co in accordance with Clause 41.5 and the date of receipt of any further particulars (if such are required under Clause 41.6), whichever is the later.
- 41.8 If Project Co has failed to comply with the requirements as to the giving of notice under Clause 41.4, or has failed to maintain records or afford facilities for inspection to CHP's Representative, then the following provisions shall apply:
- 41.8.1 CHP's Representative may require Project Co to submit details of the reasons for such failure. If CHP's Representative has not stated that he is satisfied with the reasons given within [ ] Business Days of their receipt, Project Co may refer the matter for resolution in accordance with Schedule 26 (*Dispute Resolution Procedure*);
  - 41.8.2 if either CHP's Representative is satisfied with the reasons given or the decision of the Dispute Resolution Procedure is that the failure is excusable, then CHP's Representative shall proceed to the evaluation of the request for an extension of time in accordance with Clause 41.7; or
  - 41.8.3 if the decision of CHP's Representative (or in the event that the decision is disputed, if the determination in accordance with Schedule 26 (*Dispute Resolution Procedure*)) is that the failure is not excusable, then Project Co

shall not be entitled to a revised Completion Date in respect of the relevant Delay Event to the extent that CHP's Representative has, as a result of such failures, been prevented from assessing the consequences of the Delay Event.

41.9 If:

41.9.1 CHP's Representative declines to fix a revised Completion Date; or

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

41.9.3 there is a disagreement as to whether a Delay Event has occurred;

then Project Co shall be entitled to refer the matter for determination in accordance with Schedule 26 (*Dispute Resolution Procedure*).

### **Compensation**

41.10 If either the Delay Event is a Delay Event referred to in Clause 41.11.1 or there is an event referred to in Clause 41.11.2 (each a "Compensation Event"), Project Co's sole right to compensation shall be as provided for in this Clause. To avoid doubt, no other Delay Event (or event referred to in Clause 41.3 pursuant to which Project Co incurs a loss or expense) shall entitle Project Co to receive any compensation save as otherwise expressly provided in:

41.10.1 Schedule 22 (*Variation Procedure*) in the case of a Delay Event referred to in Clause 41.3.1 (*Works Change*) (subject always to the provisions of Clause 39 (*Changes in Law*)); or

41.10.2 Clause 39 (*Changes in Law*) in the case of a Delay Event referred to in Clause 41.3.7 (*Discriminatory and NHS Specific Changes in Law*).

41.11 For the purposes of Clause 41.10, a Compensation Event means either:

41.11.1 any Delay Event referred to in Clause 41.3.2 (*Breach*), 41.3.3 (*Execution of non project related works*) or 41.3.4 (*Opening up of Works*) for which, in each case, it has been agreed or determined pursuant to this Clause that Project Co is entitled to an extension of time; or

41.11.2 in the period prior to the Actual Completion Date, in circumstances where there is no delay in completion of the Facilities, any breach by CHP and/or any CHP Party of any of CHP's express obligations under this Agreement (including any delay in CHP giving access to the Site pursuant to Clause 14.1 (*Nature of Land Interests*) or any obstruction of the Ancillary Rights afforded to Project Co pursuant to Clause 14.1 (*Nature of Land Interests*) by CHP or any CHP Party) to the extent in each case that any such breach is not caused, or contributed to, by Project Co or any Project Co Party or the occurrence of the circumstances described in Clause 15.4 to the extent that such circumstances are not caused, or contributed to, by Project Co or any Project Co Party.

41.12 Subject to Clause 41.13, if it is agreed, or determined, that there has been a Compensation Event, and Project Co has incurred loss and/or expense as a direct result of such Compensation Event, Project Co shall be entitled to such compensation

as would place Project Co in no better or no worse position than it would have been in had the relevant Compensation Event not occurred. Project Co shall promptly provide CHP's Representative with any additional information he may require in order to determine the amount of such compensation<sup>86</sup>.

41.13 Project Co shall take all reasonable steps so as to minimise the amount of compensation due in accordance with this Clause in relation to any Compensation Event and any compensation payable shall:

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

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

41.14 The amount of any compensation due to Project Co under this Clause shall be agreed between the parties or, failing agreement, determined pursuant to Schedule 26 (*Dispute Resolution Procedure*).

## 42 RELIEF EVENTS

42.1 For the purposes of this Agreement, subject to Clause 42.4 (*Mitigation*), Relief Events mean any of the following events<sup>87</sup>:

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

42.1.2 failure by any statutory undertaker, utility company, local authority or other like body to carry out works or provide services;

42.1.3 accidental loss or damage to the Works and/or Facilities or any roads servicing the same;

42.1.4 without prejudice to any obligation of Project Co to provide stand by power facilities in accordance with CHP's Construction Requirements, the Service Level Specifications, failure or shortage of power, fuel or transport;

42.1.5 blockade or embargo falling short of Force Majeure;

<sup>86</sup> CHP need to determine on a project specific basis when this compensation will be paid. Clause 41 to be amended as appropriate. Project Co should be in no better and no worse a position as a result of the chosen payment method.

<sup>87</sup> To the extent that it will not be possible for Project Co to investigate the site conditions of any area of the Site prior to financial close (due, for example, to occupation of the relevant site by CHP) Clause 15.3 provides relief to Project Co. In addition, should particular project specific circumstances warrant, the list of events could be extended to include other similar events with CHP approval. However, CHP should not permit the inclusion of a "catch all" provision to the extent that any event outside the control of the parties should be a Relief Event. Only approved specified events should be listed. Equally, CHP are free, on a project specific basis, to delete any item from this list if project specific circumstances merit although examples of this have been, and are expected to remain, extremely rare.

- 42.1.6 the discovery of fossils, antiquities and human remains requiring action in accordance with Clause 24 (*Fossils and Antiquities*); or
- 42.1.7 official or unofficial strike, lockout, go slow or other dispute in each case generally affecting the construction, building maintenance or facilities management industry (or a significant sector of that industry),

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

- 42.2 Subject to Clauses 42.3 and 42.4, no right of termination shall arise under this Agreement by reason of any failure by a party to perform any of its obligations under this Agreement to the extent that such failure to perform occurs because of the occurrence of a Relief Event (and, to avoid doubt, and without prejudice to Clause 42.9 (*No Compensation*), unless expressly stated to the contrary in this Agreement, it is acknowledged that all other rights and obligations of the parties under this Agreement remain unaffected by the occurrence of a Relief Event).
- 42.3 Without prejudice to Project Co's rights under Clause 41 (*Delay Events*), Project Co shall only be relieved of its obligations under Clauses 17 (*The Design, Construction and Commissioning Process*), 18 (*Right of Access of CHP's Representative*), 19 (*Programme and Dates for Completion*), 22 (*Pre-Completion Commissioning and Completion*) and 41 (*Delay Events*) by Delay Events in accordance with Clause 41 (*Delay Events*).

### **Mitigation**

- 42.4 Where a party is (or claims to be) affected by a Relief Event:
  - 42.4.1 it shall take all reasonable steps to mitigate the consequences of such an event upon the performance of its obligations under this Agreement, resume performance of its obligations affected by the Relief Event as soon as practicable and use all reasonable endeavours to remedy its failure to perform; and
  - 42.4.2 it shall not be entitled to rely upon the relief afforded to it pursuant to Clause 42.2 of this Agreement to the extent that it is not able to perform, or has not in fact performed, its obligations under this Agreement due to its failure (if any) to comply with its obligations under Clause 42.4.1 above.
- 42.5 The party claiming relief shall serve written notice on the other party within five (5) Business Days of it becoming aware of the relevant Relief Event. Such initial notice shall give sufficient details to identify the particular event claimed to be a Relief Event.
- 42.6 A subsequent written notice shall be served by the party claiming relief on the other party within a further five (5) Business Days of the notice referred to in Clause 42.5 which shall contain such relevant information relating to the failure to perform (or delay in performing) as is available, including (without limitation) the effect of the Relief Event on the ability of the party to perform, the action being taken in accordance with Clause 42.4 (*Mitigation*), the date of the occurrence of the Relief Event and an estimate of the period of time required to overcome it (and/or its effects).

- 42.7 The party claiming relief shall notify the other as soon as the consequences of the Relief Event have ceased and of when performance of its affected obligations can be resumed.
- 42.8 If, following the issue of any notice referred to in Clause 42.6, the party claiming relief receives or becomes aware of any further information relating to the Relief Event (and/or any failure to perform), it shall submit such further information to the other party as soon as reasonably possible.
- 42.9 To avoid doubt, the occurrence of a Relief Event shall not entitle Project Co to any compensation and the remedies available to CHP set out in Schedule 18 (Payment Mechanism) shall continue to apply where a Relief Event occurs.

### **43 FORCE MAJEURE**

- 43.1 For the purposes of this Agreement, Force Majeure means any of the following events or circumstances:
- 43.1.1 war, civil war, armed conflict or terrorism; or
  - 43.1.2 nuclear contamination unless in any case Project Co and/or any Project Co Party is the source or cause of the contamination; or
  - 43.1.3 chemical or biological contamination of the Works and/or the Facilities and/or the Site from any of the events referred to in Clause 43.1.1 above; or
  - 43.1.4 pressure waves caused by devices travelling at supersonic speeds,
- which directly causes either party to be unable to comply with all or a material part of its obligations under this Agreement.
- 43.2 Subject to Clauses 43.3 and 43.4 the party claiming relief shall be relieved from liability under this Agreement to the extent that by reason of the Force Majeure it is not able to perform its obligations under this Agreement.
- 43.3 Where a party is (or claims to be) affected by an event of Force Majeure:
- 43.3.1 it shall take all reasonable steps to mitigate the consequences of such an event upon the performance of its obligations under this Agreement, resume performance of its obligations affected by the event of Force Majeure as soon as practicable and use all reasonable endeavours to remedy its failure to perform; and
  - 43.3.2 it shall not be relieved from liability under this Agreement to the extent that it is not able to perform, or has not in fact performed, its obligations under this Agreement due to its failure (if any) to comply with its obligations under Clause 43.3.1.
- 43.4 Without prejudice to Project Co's rights under Clause 41 (*Delay Events*), Project Co shall only be relieved from its obligations under Clauses 17 (*The Design, Construction and Commissioning Process*), 18 (*Right of Access of CHP's Representative*), 19

(*Programme and Dates for Completion*) and 41 (*Delay Events*) by Delay Events in accordance with Clause 41 (*Delay Events*).

- 43.5 The party claiming relief shall serve written notice on the other party within five (5) Business Days of it becoming aware of the relevant event of Force Majeure. Such initial notice shall give sufficient details to identify the particular event claimed to be an event of Force Majeure.
- 43.6 A subsequent written notice shall be served by the party claiming relief on the other party within a further five (5) Business Days which shall contain such relevant information relating to the failure to perform (or delay in performing) as is available, including (without limitation) the effect of the event of Force Majeure on the ability of the party to perform, the action being taken in accordance with Clause 43.3 (*Mitigation*), the date of the occurrence of the event of Force Majeure and an estimate of the period of time required to overcome it (and/or its effects).
- 43.7 The party claiming relief shall notify the other as soon as the consequences of the event of Force Majeure have ceased and of when performance of its affected obligations can be resumed.
- 43.8 If, following the issue of any notice referred to in Clause 43.6, the party claiming relief receives or becomes aware of any further information relating to the event of Force Majeure (and/or any failure to perform), it shall submit such further information to the other party as soon as reasonably possible.

### **Compensation**

- 43.9 If the event of Force Majeure occurs on or after the [Actual Completion Date, the provisions of Part [ ] of Schedule 18 (*Payment Mechanism*) shall apply to determine the payments to be made to Project Co during the existence of any event of Force Majeure].
- 43.10 If an event of Force Majeure occurs prior to the Actual Completion Date, Project Co shall not be entitled to receive any compensation other than as expressly provided in Clause 48.1 (*Compensation on Termination*).
- 43.11 Subject to Clause 48.1 (*Compensation on Termination*), Project Co's sole right to payment or otherwise in relation to the occurrence of an event of Force Majeure shall be as provided in this Clause.

### **Modifications**

- 43.12 The parties shall endeavour to agree any modifications to the Agreement which may be equitable having regard to the nature of an event or events of Force Majeure. Schedule 26 (*Dispute Resolution Procedure*) shall not apply to a failure of CHP and Project Co to reach agreement pursuant to this Clause 43.12.

## PART K: TERMINATION

### 44 PROJECT CO EVENTS OF DEFAULT

#### Project Co Events of Default

44.1 For the purposes of this Agreement, Project Co Events of Default means any of the following events or circumstances:

#### Insolvency

44.1.1 the occurrence of any of the following events in respect of Project Co, namely:

- (a) any arrangement or composition with or for the benefit of creditors (including any voluntary arrangement as defined in the Insolvency Act 1986) being entered into by or in relation to Project Co;
- (b) a receiver, administrator, administrative receiver or other encumbrancer taking possession of or being appointed over, or any distress, execution or other process being levied or enforced (and not being discharged within ten (10) Business Days) upon, the whole or any material part of the assets of Project Co;
- (c) Project Co ceasing to carry on business;
- (d) a petition being presented (and not being discharged within twenty (20) Business Days), or a resolution being passed or an order being made for the administration or the winding up, bankruptcy or dissolution of Project Co; or
- (e) if Project Co shall suffer any event analogous to the events set out in Clauses 44.1.1(a)- 44.1.1(d) in any jurisdiction in which it is incorporated or resident<sup>88</sup>;

#### Long stop

44.1.2 Project Co failing to achieve the Actual Completion Date within a period of [ ] after the Completion Date<sup>89</sup>;

#### Default

44.1.3

- (a) Project Co committing a material breach of its obligations under this Agreement which has a material and adverse effect on the delivery of Clinical Services or any other services<sup>90</sup> at the Facilities

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<sup>88</sup> Delete if relevant parties are incorporated and resident in England and Wales.

<sup>89</sup> If it is critical for project specific reasons to meet the scheduled date for completion, CHP may need to include an earlier trigger which would enable it to terminate prior to the longstop date if it became clear at a given point in time that the longstop date was incapable of being met.

<sup>90</sup> CHP to consider which "other services" are material to its ability to provide the Clinical Services. Consider listing specified services.

for which Project Co is not responsible (other than as a consequence of a breach by CHP of its obligations under this Agreement);

(b) Not used;

44.1.4 Project Co abandoning the Works (other than as a consequence of a breach by CHP of its obligations under this Agreement);

44.1.5 Project Co ceasing to provide all or a substantial part of the Services to CHP in accordance with this Agreement (other than as a consequence of a breach by CHP of its obligations under this Agreement);

### Health and safety

44.1.6 At any time after the Actual Completion Date Project Co committing a material breach of its obligations under this Agreement (other than as a consequence of a breach by CHP of its obligations under this Agreement) which results in the criminal investigation, prosecution and conviction of Project Co or any Project Co Party or CHP under the Health and Safety Regime (an "H&S Conviction") provided that an H&S Conviction of a Project Co Party or CHP shall not constitute a Project Co Event of Default if, within ninety (90) Business Days from the date of the H&S Conviction (whether or not the H&S Conviction is subject to an appeal or any further judicial process), the involvement in the Project Operations of each relevant Project Co Party (which in the case of an individual director, officer or employee shall be deemed to include the Project Co Party of which that person is a director, officer or employee) is terminated and a replacement is appointed by Project Co in accordance with Clause 50.5 (*Sub contracting*)<sup>91</sup>;

In determining whether to exercise any right of termination or right to require the termination of the engagement of a Project Co Party pursuant to this Clause 44.1.6, CHP shall:

(a) act in a reasonable and proportionate manner having regard to such matters as the gravity of any offence and the identity of the person committing it; and

(b) give all due consideration, where appropriate, to action other than termination of this Agreement;

### Change in Control

44.1.7 the occurrence of any Change in Control which is prohibited by Clause 50 (*Assignment, sub contracting and Changes in Control*);

### Assignment

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<sup>91</sup> CHP should note that this provision is intended to address the situation where Project Co is responsible for a significant contravention of health and safety law which would (in CHP's perception) make Project Co's position untenable but might not otherwise be caught by the "material breach" event of default (at paragraph (d)) because there may not (arguably) be a material impact on CHP's Clinical Services. An example of such a situation would be Project Co poisoning a number of patients via the catering service.

- 44.1.8 Project Co failing to comply with the provisions of Clauses 50.2 or 50.5 (*Assignment, sub contracting and Changes in Control*); or

### **Service Failure Points**

- 44.1.9 Project Co being awarded a total of [ ] or more Service Failure Points in any [ ] rolling period; or

### **Payment**

- 44.1.10 Project Co failing to pay any sum or sums due to CHP under this Agreement (which sums are not in dispute) which, either singly or in aggregate, exceed(s) £[ ] (index linked) and such failure continues for sixty (60) Business Days from receipt by Project Co of a notice of non payment from CHP<sup>92</sup>.

### **Notification**

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

### **CHP's options**

- 44.3 On the occurrence of a Project Co Event of Default, or within a reasonable time after CHP becomes aware of the same, and while the same is subsisting, CHP may<sup>93</sup>:
- 44.3.1 in the case of the Project Co Events of Default referred to in Clauses 44.1.1, 44.1.2, 44.1.3(b), 44.1.6, 44.1.7, 44.1.8 or 44.1.10, terminate this Agreement in its entirety by notice in writing having immediate effect;
- 44.3.2 in the case of any Project Co Event of Default referred to in Clauses 44.1.3(a), 44.1.4 and 44.1.5, serve notice of default on Project Co requiring Project Co at Project Co's option either:
- (a) to remedy the Project Co Event of Default referred to in such notice of default (if the same is continuing) within twenty (20) Business Days of such notice of default; or
  - (b) to put forward within twenty (20) Business Days of such notice of default a reasonable programme (set out, if appropriate, in stages) for remedying the Project Co Event of Default. The programme shall specify in reasonable detail the manner in, and the latest date by, which such Project Co Event of Default is proposed to be remedied (Project Co shall only have the option of putting forward a programme in accordance with this Clause 44.3.2(b) if it first notifies CHP within ten (10) Business Days of such notice of default that it proposes to do so); and

<sup>92</sup> This needs to be calibrated and related to the performance measures in Schedule 14 (Service Requirements) and the requirements of Schedule 18 (Payment Mechanism).

<sup>93</sup> CHP should note that any rights to terminate will be subject to the terms of the Funders' Direct Agreement.

- 44.3.3 in the case of any Project Co Event of Default referred to in Clause 44.1.9 (*Service Failure Points*), if Project Co is awarded [ ] or more [*Service Failure Points / Warning Notices*] in the following [ ] month period, terminate this Agreement in its entirety by notice in writing having immediate effect.

### **Remedy provisions**

- 44.4 Where Project Co puts forward a programme in accordance with Clause 44.3.2(b), CHP shall have twenty (20) Business Days from receipt of the same within which to notify Project Co (acting reasonably) that it does not accept the programme, failing which CHP shall be deemed to have accepted the programme. Where CHP notifies Project Co that it does not accept the programme as being reasonable, the parties shall endeavour within the following five (5) Business Days to agree any necessary amendments to the programme put forward. In the absence of agreement within five (5) Business Days, the question of whether the programme (as the same may have been amended by agreement) will remedy the Project Co Event of Default in a reasonable manner and within a reasonable time period (and, if not, what would be a reasonable programme) may be referred by either party for resolution in accordance with Schedule 26 (*Dispute Resolution Procedure*).

- 44.5 If:

- 44.5.1 the Project Co Event of Default notified in a notice of default served under Clause 44.3.2 is not remedied before the expiry of the period referred to in Clause 44.3.2(a); or
- 44.5.2 where Project Co puts forward a programme pursuant to Clause 44.3.2(b) which has been accepted by CHP or has been determined to be reasonable and Project Co fails to achieve any element of the programme or the end date for the programme (as the case may be); or
- 44.5.3 any programme put forward by Project Co pursuant to Clause 44.3.2(b) is rejected by CHP as not being reasonable, and the Dispute Resolution Procedure does not find against that rejection,

then CHP may terminate this Agreement in its entirety by written notice to Project Co with immediate effect. Provided that for the purposes of Clause 44.5.2 if Project Co's performance of the programme is adversely affected by the occurrence of Force Majeure, a Relief Event or an Excusing Cause then, subject to Project Co complying with the mitigation and other requirements in this Agreement concerning Force Majeure, a Relief Event or an Excusing Cause (as the case may be), the time for performance of the programme or any relevant element of it shall be deemed to be extended by a period equal to the delay caused by Force Majeure, the Relief Event or the Excusing Cause (as the case may be) which is agreed by the parties or determined in accordance with Schedule 26 (*Dispute Resolution Procedure*).

### **Replacement of a non-performing Sub-Contractor**

- 44.6 Where the Facility Deduction Percentage in:

- 44.6.1 any three successive Contract Months is at least [ ]%; or
- 44.6.2 each of any four successive Contract Months is at least [ ]%; or

44.6.3 any ~~six~~ out of any twelve successive Contract Months is at least [ ]%;  
provided that any Deduction arising as a direct result of a Relief Event or the occurrence of Force Majeure shall be disregarded; or

44.6.4 any Service Provider appointed by Project Co is a Restricted Person;

in addition to any other rights of CHP under this Agreement, CHP may (in its absolute discretion) require Project Co by written notice to terminate a Supply Chain Agreement to which it is a party and under which a Supply Chain Member has caused or materially contributed to the occurrence of the event specified above in respect of any relevant Service and procure that a replacement Supply Chain Member is appointed in accordance with Clause 50 (Assignment, Sub-Contracting and Changes in Control) to provide all those Services which were performed by the previous contractor as soon thereafter as is reasonably practicable.

44.7 ~~44.6A~~—If CHP exercises its rights under Clause 44.6 Project Co shall forthwith put forward proposals for the interim management or provision of the relevant Services to CHP – until such time as an alternative Supply Chain Member can be engaged by Project Co. If Project Co fails to do so (or its proposals if implemented are not reasonably likely to give adequate provision of the relevant Services) then without prejudice to the other rights of CHP in this Clause, CHP may perform, or procure a third party to perform, such Services itself and the provisions of Clause 29.6 to 29.12 (inclusive) (*Monitoring of Performance*) shall apply, changed according to context, to such Service in those circumstances.

44.8 ~~44.7~~ Not used.

~~44.8—Not used.~~

#### **CHP's costs**

44.9 Project Co shall reimburse CHP for all reasonable costs incurred by CHP in exercising any of its rights (including, without limitation, any relevant increased administrative expenses). CHP shall take reasonable steps to mitigate such costs.

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

## **45 CHP EVENTS OF DEFAULT**

45.1 For the purposes of this Agreement, CHP Events of Default means any of the following events or circumstances:

45.1.1 CHP committing a material breach of its obligations under Clause 14 (*Nature of Land Interests*) and/or the Licence (other than as a consequence of a breach by Project Co of its obligations under this Agreement) and such breach shall materially adversely affect the ability of

Project Co to perform its material obligations under this Agreement for a continuous period of not less than thirty (30) Business Days;

45.1.2 the failure of CHP to pay any sum or sums due to Project Co under this Agreement (which sums are not in dispute) which, either singly or in aggregate, exceed(s) the amount of CHP's Monthly Service Payment from time to time and such failure continues for thirty (30) Business Days from receipt by CHP and the [Clinical Commissioning Group and/or NHS England] and to the Director of Finance and Investment of the Department of Health [and Social Care](#) (or such other party as may be notified in advance in writing by CHP to Project Co in substitution for such regional office) of a notice of non payment from Project Co; or

45.1.3 an Adverse Law or a Proposal for an Adverse Law being made.

### **Project Co's options**

45.2 On the occurrence of a CHP Event of Default, or within a reasonable time after Project Co becomes aware of the same, and while the same is still subsisting, Project Co may, at its option:

45.2.1 in respect of execution of the Works prior to the Actual Completion Date, suspend performance by it of its obligations under this Agreement until such time as CHP shall have demonstrated to the reasonable satisfaction of Project Co that it will perform and is capable of performing its obligations under this Agreement; or

45.2.2 serve notice on CHP and the [Clinical Commissioning Group and/or NHS England] and to the Director of Finance and Investment of the Department of Health [and Social Care](#) (or such other party as may be notified in advance in writing by CHP to Project Co) of the occurrence (and specifying details) of such CHP Event of Default. If the relevant matter or circumstance has not been rectified or remedied by CHP (or otherwise) in respect of Clause 45.1.1 or 45.1.3 within sixty (60) Business Days of such notice, and in respect of Clause 45.1.2 within thirty (30) Business Days of such notice, Project Co may serve a further notice on CHP and the [Clinical Commissioning Group and/or NHS England] and to the Director of Finance and Investment of the Department of Health [and Social Care](#) (or its substitute notified in accordance with this Clause 45.2.2) terminating this Agreement with immediate effect.

45.3 Project Co shall not exercise or purport to exercise any right to terminate this Agreement (or accept any repudiation of this Agreement) except as expressly set out in this Agreement.

## **46 NON-DEFAULT TERMINATION**

### **Force Majeure**

46.1 If, in the circumstances referred to in Clause 43 (*Force Majeure*), the parties have failed to reach agreement on any modification to this Agreement pursuant to Clause 43 (*Force Majeure*) within six (6) calendar months of the date on which the party affected serves notice on the other party in accordance with Clause 43 (*Force Majeure*) either party may at any time afterwards terminate this Agreement by written

notice to the other party having immediate effect provided always that the effects of the relevant event of Force Majeure continues to prevent either party from performing any material obligation under this Agreement.

### **Voluntary termination**

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

### **Expiry**

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

## **47 EFFECT OF TERMINATION**

### **Termination**

47.1 Notwithstanding any provision of this Agreement, on service of a notice of termination, this Agreement shall only terminate in accordance with the provisions of this Clause.

### **Continued effect - no waiver**

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

### **Continued performance**

47.3 Subject to any exercise by CHP of its rights to perform, or to procure a third party to perform, the obligations of Project Co, the parties shall continue to perform their obligations under this Agreement, notwithstanding the giving of any notice of default or notice of termination, until the termination of the Agreement becomes effective in accordance with the provisions of this Clause.

### **Transfer to CHP of Assets, Contracts etc.**

47.4 On the service of a notice of termination in accordance with this Agreement for any reason:

47.4.1 if prior to the Actual Completion Date, in so far as any transfer shall be necessary fully and effectively to transfer property to CHP, Project Co shall transfer to, and there shall vest in, CHP, such part of the Works and/or the Facilities as shall have been constructed and such items of the Plant and

[Category A Equipment] [CHP to add other project specific items] as shall have been procured by Project Co if CHP so elects:

- 47.4.2 all goods and all materials on or near to the Site not yet incorporated in the Works shall remain available to CHP for the purposes of completing the Works and if the cost of such goods and materials has not been reflected in the payment of any compensation pursuant to Schedule 23 (*Compensation on Termination*), subject to the payment by CHP (determined as between a willing vendor and willing purchaser with any disputes determined pursuant to Clause 56 (*Dispute Resolution Procedure*));
- 47.4.3 the construction plant shall remain available to CHP for the purposes of completing the Works, subject to payment of the Contractor's reasonable charges;
- 47.4.4 Project Co shall hand over to, and there shall vest in, CHP, free from all encumbrances, the Facilities [include project specific provisions re IT and Equipment etc] (which in the case of the termination of this Agreement in accordance with Clause 46.3 (*Non-Default Termination - Expiry*) shall be in the state required in accordance with Schedule 24 (*Handback Procedure*));
- 47.4.5 if CHP so elects, Project Co shall procure that any of the Construction Contract, the Service Contracts and/or the Independent Tester Contract shall be novated or assigned to CHP, provided that where termination occurs under Clause 45 (*CHP Events of Default*) the consent of the Contractor, the Service Provider or the Independent Tester (as the case may be) shall be required;
- 47.4.6 Project Co shall, or shall procure that any Contracting Associate shall (as the case may be), offer to sell to CHP at a fair value (determined as between a willing vendor and willing purchaser, with any disputes as to such fair value being determined pursuant to Schedule 26 (*Dispute Resolution Procedure*)), free from any security interest with full title guarantee all or any part of the stocks of material and other assets, road vehicles, spare parts and other moveable property owned by Project Co or any of its Contracting Associates and reasonably required by CHP in connection with the operation of the Facilities or the provision of the Services;
- 47.4.7 Project Co shall deliver to CHP (as far as not already delivered to CHP) one complete set of:
- (a) "as built drawings" showing all alterations made to the Facilities since the commencement of operation of the Facilities; and
  - (b) maintenance, operation and training manuals for the Facilities;
- 47.4.8 Project Co shall use all reasonable endeavours to procure that the benefit of all manufacturer's warranties in respect of mechanical and electrical plant and equipment used or made available by Project Co under this Agreement and included in the Facilities are assigned, or otherwise transferred, to CHP with full title guarantee; and

47.4.9 Project Co shall deliver to CHP information equivalent to the information it is required to provide in accordance with Clause 30 (*TUPE and Employment matters*) in relation to the employees employed by Project Co and/or Service Providers and the records referred to in Clause 55 (*Records and Reports*) except where such documents are required by Law to be retained by Project Co or its Contracting Associates (in which case complete copies shall be delivered to CHP).

47.5 Project Co shall ensure that provision is made in all contracts of any description whatsoever to ensure that CHP will be in a position to exercise its rights, and Project Co will be in a position to comply with its obligations, under Clause 47.4.

### **Termination**

47.6 On completion of the transfer required by Clause 47.4 (except in so far as any of the requirements of that Clause may be waived by CHP), this Agreement shall terminate and, save as provided in Clause 47.9 (*Continuing obligations*), all rights and obligations of CHP and Project Co under this Agreement shall cease and be of no further force and effect.

### **Transitional arrangements**

47.7 On the termination of this Agreement for any reason, for a reasonable period both before and after any such termination, Project Co shall have the following duties:

47.7.1 Project Co shall co-operate fully with CHP and any successor providing to CHP services in the nature of any of the Services or any part of the Services in order to achieve a smooth transfer of the manner in which CHP obtains services in the nature of the Services and to avoid or mitigate in so far as reasonably practicable any inconvenience or any risk to the health and safety of the employees of CHP and members of the public;

47.7.2 Project Co shall as soon as practicable remove from the Site all property not acquired by CHP pursuant to Clause 47.4 (or not belonging to CHP or any CHP Party) and if it has not done so within forty (40) Business Days after any notice from CHP requiring it to do so CHP may (without being responsible for any loss, damage, costs or expenses) remove and sell any such property and shall hold any proceeds less all costs incurred to the credit of Project Co;

47.7.3 Project Co shall forthwith deliver to CHP's Representative:

- (a) any keys to the Facilities; and
- (b) without prejudice to Clause 51 (*Intellectual Property*), any copyright licences for any computer programmes (or licences to use the same) necessary for the operation of the Facilities (but excluding computer programmes, which have been developed or acquired by a Service Provider for its own use and not solely for the purposes of provision of any of the Services at the Facilities or the assignment or transfer of which is otherwise restricted); and

- 47.7.4 Project Co shall as soon as practicable vacate the Site and (without prejudice to Schedule 24 (*Handback Procedure*)) shall leave the Site and the Facilities in a safe, clean and orderly condition.
- 47.8 If CHP wishes to conduct a competition prior to the Expiry Date with a view to entering into an agreement for the provision of services (which may or may not be the same as, or similar to, the Services or any of them) following the expiry of this Agreement, Project Co shall co-operate with CHP fully in such competition process including (without limitation) by:
- 47.8.1 providing any information which CHP may reasonably require to conduct such competition but, to avoid doubt, information which is commercially sensitive to Project Co shall not be provided (and, for the purpose of this Clause 47.8.1 commercially sensitive shall mean information which would if disclosed to a competitor of Project Co give that competitor a competitive advantage over Project Co and thereby prejudice the business of Project Co but shall, to avoid doubt, exclude any information referred to in Clause 30 (*TUPE and Employment matters*)); and
- 47.8.2 assisting CHP by providing all (or any) participants in such competition process with access to the Site and the Facilities.

### **Continuing Obligations**

- 47.9 Save as otherwise expressly provided in this Agreement:
- 47.9.1 termination of this Agreement shall be without prejudice to any accrued rights and obligations under this Agreement as at the date of termination; and
- 47.9.2 termination of this Agreement shall not affect the continuing rights and obligations of Project Co and CHP under Clauses 8 (*Indemnities and Liability*), 9 (*Limits on Liability*), 14 (*Nature of Land Interests*), [30 (*TUPE and Employment Matters*),] 35 (*Payment*), 36 (*Insurance*), 43 (*Force Majeure*), 46 (*Non Default Termination*), 47.7 and 47.8 (*Transitional Arrangements*) 48 (*Compensation on Termination*), 51 (*Intellectual Property*), 52 (*Confidentiality*), 53 (*Taxation*), 54 (*Corrupt Gifts and Payments*), 55 (*Records and Reports*), 56 (*Dispute Resolution Procedure*), 57 (*Notices*), 67 (*Mitigation*) and Clause 68 (*Governing Law and Jurisdiction*) or under any other provision of this Agreement which is expressed to survive termination or which is required to give effect to such termination or the consequences of such termination.

## **48 COMPENSATION ON TERMINATION**

- 48.1 If this Agreement is terminated pursuant to Clause 46.1 (*Force Majeure*), then CHP shall pay compensation to Project Co in accordance with Part [C] of Schedule 23 (*Compensation on Termination*).
- 48.2 If this Agreement is terminated pursuant to Clause 44 (*Project Co Events of Default*) other than pursuant to Clause 44.1.3(b), then CHP shall pay compensation to Project Co in accordance with Part [B] of Schedule 23 (*Compensation on Termination*).

- 48.3 If this Agreement is terminated pursuant to Clause 45 (*CHP Events of Default*), then CHP shall pay compensation to Project Co in accordance with Part [A] of Schedule 23 (*Compensation on Termination*).
- 48.4 If this Agreement is terminated pursuant to Clause 46.2 (*Voluntary Termination*), then CHP shall pay compensation to Project Co in accordance with Part [A] of Schedule 23 (*Compensation on Termination*).
- 48.5 If this Agreement is terminated pursuant to Clause 54.4 (*Corrupt Gifts and Payments*) or Clause 44.1.3(b), then CHP shall pay compensation to Project Co in accordance with Part [D] of Schedule 23 (*Compensation on Termination*).

#### **Tax equalisation<sup>94</sup>**

- 48.6 Where a payment is to be made to Project Co pursuant to Clauses 48.1 (*Force Majeure*), 48.3 (*CHP Events of Default*), 48.4 (*Voluntary Termination*) or 48.5 (*Corrupt Gifts*) (a "Compensation Payment") and Project Co has a Relevant Tax Liability in respect of such payment, then the amount of the Compensation Payment to be made by CHP to Project Co shall be increased so as to ensure that Project Co is in the same position (after account is taken of the Relevant Tax Liability) as it would have been in had it not been for such Relevant Tax Liability.
- 48.7 For the purposes of this Clause 48:
- 48.7.1 "Relief" shall mean any relief, allowance or deduction in computing profits or tax or a credit against, or right to repayment of, tax granted by or pursuant to any legislation for tax purposes;
- 48.7.2 a "Relief derived from the Project" is a Relief which arises in connection with the Project and includes any Relief arising as a consequence of the distribution of any amount obtained in respect of the Project (other than a Compensation Payment) by Project Co (whether by way of interest, dividend or other distribution, repayment, reduction or redemption of capital or indebtedness or return of assets or otherwise); and
- 48.7.3 Project Co shall be regarded as having a "Relevant Tax Liability" in respect of a Compensation Payment to the extent that:
- (a) it has a liability for tax in consequence of or in respect of a Compensation Payment ("Actual Liability"); or
- (b) it would have had a liability for tax within paragraph (a) above but for the utilisation of a Relief other than a Relief derived from the Project ("Deemed Liability").
- 48.8 In determining whether Project Co has a Relevant Tax Liability by reason of a Compensation Payment, it should be assumed that any Reliefs derived from the Project which are available to Project Co (or would have been so available but for a surrender by Project Co of such Reliefs by way of group or consortium relief) for offset

<sup>94</sup>

The grossing up provisions are drafted on the basis of compensation payments which are calculated by reference to the return the shareholders/junior debt holders in Project Co would have received but for the termination. If the basis of calculation of the compensation payment differs from this these provisions will need to be considered in the light of such alternative basis of calculation.

against the Compensation Payment, or against tax in relation to the same, have been so offset to the maximum extent possible.

- 48.9 Project Co shall keep CHP fully informed of all negotiations with the Inland Revenue in relation to any Relevant Tax Liability in respect of a Compensation Payment. Project Co shall not agree, accept or compromise any claim, issue or dispute relating to such Relevant Tax Liability without the prior written consent of CHP, which shall not be unreasonably withheld or delayed. CHP may, if it considers in good faith that such action is justified having regard to the likely costs and benefits, direct Project Co to resist, appeal, defend or otherwise dispute the Relevant Tax Liability in respect of the Compensation Payment, provided that the cost of any such dispute (including any interest or penalties incurred) shall be at CHP's expense. However, if Project Co obtains professional advice from an independent person with relevant expertise that any resistance, appeal, defence or other mode of dispute is not likely to result in any more beneficial position in relation to the Relevant Tax Liability, Project Co shall be entitled not to continue with such resistance, appeal, defence or other mode of dispute. Where any resistance, appeal, defence or other mode of dispute results in a more beneficial position in relation to the Relevant Tax Liability, an adjustment will be made to the amount payable under Clause 48.6 (*Tax equalisation*) to reflect such outcome.
- 48.10 Any increase in the amount of a Compensation Payment which is payable under Clause 48.6 (*Tax equalisation*) shall be paid on the later of five (5) Business Days after a demand therefore (together with evidence in sufficient detail for CHP to satisfy itself of the Relevant Tax Liability and its calculation) is made by Project Co and:
- 48.10.1 in the case of an Actual Liability, five (5) Business Days before the date on which the relevant tax must be paid to the tax authority in order to avoid incurring interest and penalties; and
- 48.10.2 in the case of a Deemed Liability, five (5) Business Days before the date on which tax which would not have been payable but for the utilisation of the relevant Relief must be paid in order to avoid incurring interest or penalties (whether by Project Co or otherwise) and, for the purposes of determining when the Relief would otherwise have been utilised, Reliefs shall be regarded as utilised in the order in which they arise.
- 48.11 CHP shall have the right to pay the amount payable under Clause 48.6 (*Tax equalisation*) direct to the Inland Revenue in satisfaction of the relevant tax due by Project Co.

#### **Rights of Set-Off**<sup>95</sup>

- 48.12 To avoid doubt, CHP's obligations to make any payment of compensation to Project Co pursuant to this Clause are subject to CHP's rights under Clause 35.13 (*Set-Off*), save that CHP agrees not to set-off any amount agreed or determined as due and payable by Project Co to CHP against any payment of termination compensation under Clauses 48.1 (*Force Majeure*), 48.3 (*CHP Events of Default*), 48.4 (*Voluntary Termination*) and 48.5 (*Corrupt Gifts*), except to the extent that such termination payment exceeds the Senior Debt Amount.

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<sup>95</sup> The limits on CHP's rights of set-off do not apply to compensation payable on termination for Project Co default.

### **Full and final settlement**

48.13 Subject to the provisions of paragraph 2.1 of Part E of Schedule 23 (*Compensation on Termination*):

48.13.1 any compensation paid pursuant to this Clause shall be in full and final settlement of any claim, demand and/or proceedings of Project Co in relation to any termination of this Agreement, the Licences and/or any Project Document (and the circumstances leading to such termination) and Project Co shall be excluded from all other rights and remedies in respect of any such termination; and

48.13.2 the compensation payable (if any) pursuant to any of Clauses 48.1 to 48.5 above shall be the sole remedy of Project Co and Project Co shall not have any other right or remedy in respect of such termination.

### **49 HANDBACK PROCEDURE**

The provisions of Schedule 24 (*Handback Procedure*) shall apply to the handback of the Facilities to CHP on expiry of this Agreement.

## PART L: MISCELLANEOUS

### 50 ASSIGNMENT, SUB CONTRACTING AND CHANGES IN CONTROL

#### Assignment

- 50.1 This Agreement, the Licences [the Leases<sup>96</sup>] and any other agreement in connection with the Project to which both CHP and Project Co are a party shall be binding on, and shall ensure to the benefit of, Project Co and CHP and their respective successors and permitted transferees and assigns. In the case of CHP, its successors shall include any person to whom the Secretary of State, in exercising his statutory powers to transfer property, rights and liabilities of CHP upon CHP ceasing to exist, transfers the property, rights and obligations of CHP under this Agreement, the Licences [the Leases] and such other agreements in connection with the Project to which CHP and Project Co are both a party.
- 50.2 Subject to Clause 50.3, Project Co shall not, without the prior written consent of CHP, assign, transfer, sub-contract or otherwise dispose of any interest in this Agreement, the Licences, [the Leases], [the Independent Tester Contract,] the Construction Contract, the Service Contracts and [any other contract] entered into by Project Co for the purposes of performing its obligations under this Agreement.
- 50.3 The provisions of Clause 50.2 do not apply to the grant of any security, in a form approved by CHP prior to its grant (such approval not to be unreasonably withheld or delayed), for any loan made to Project Co under the Initial Funding Agreements provided that any assignee shall enter into the Funders' Direct Agreement in relation to the exercise of its rights, if CHP so requires.
- 50.4 CHP shall not assign or otherwise dispose of the benefit of the whole or part of this Agreement or any agreement in connection with this Agreement to which Project Co and CHP are a party to any person, save:
- 50.4.1 to the Secretary of State, a National Health Service Trust, NHS England, a clinical commissioning group or any other person or body replacing any of the foregoing (or to whom the Secretary of State exercising his statutory rights would be entitled to transfer such benefits) covered by Section 70 of the National Health Service Act; or
- 50.4.2 with the prior written consent of Project Co (such approval not to be unreasonably withheld or delayed),
- provided that nothing in this Clause shall restrict the rights of the Secretary of State to effect a statutory transfer.

#### Sub-contractors

- 50.5 Project Co shall:
- 50.5.1 not terminate or agree to the termination of the engagement and/or employment of (or the replacement of) the Contractor or any Service Provider under the Ancillary Documents; and

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<sup>96</sup> Leases will be required for any areas in relation to which Project Co is granted exclusive rights of occupation, e.g. retail areas.

50.5.2 without prejudice to Clause 50.1 (*Assignment*), procure that none of the persons listed below shall sub-contract all (or substantially all) of their obligations under or in the agreement set out next to its name:

| <b>Person</b>    | <b>Contract</b>       |
|------------------|-----------------------|
| Contractor       | Construction Contract |
| Service Provider | Service Contract      |

without, in each case, the prior written consent of CHP (such consent not to be unreasonably withheld or delayed). To avoid doubt, (i) any failure to comply with Clause 50.7 shall be a reasonable ground for withholding consent and (ii) consent shall, without prejudice to the other provisions of Clause 50.5, not be required in respect of the appointment of any party currently approved by CHP as a suitable replacement.

50.6 If the contract set out next to the name of any person referred to in Clause 50.5 shall at any time lapse, terminate or otherwise cease to be in full force and effect (whether by reason of expiry or otherwise), with the effect that such person shall cease to act in relation to the Project, Project Co shall forthwith appoint a replacement (subject to compliance with Clause 50.5 (*Sub-contractors*)).

50.7 Project Co shall procure that any replacement for any person referred to in Clause 50.5 shall enter into a contract upon the same or substantially similar terms as the person so replaced and shall also enter into a collateral agreement on the same or substantially the same terms as the Collateral Agreement entered into by the person so replaced.

### **Changes in Control**

50.8 Prior to the expiry of a period of twelve (12) months commencing on the Actual Completion Date, no Change in Control in any or all of the shares in Project Co shall be permitted without the prior written approval of CHP.

50.9 Not used.

50.10 No Change in Control (at any time) in any or all of the shares in Project Co shall be permitted without the prior written approval of CHP where the person acquiring control is a Restricted Person.

## **51 INTELLECTUAL PROPERTY**

### **Project Data**

51.1 Project Co shall make available to CHP free of charge and either in a format required by CHP (acting reasonably) or by giving CHP equivalent access (for example through appropriate hardware or device) (and hereby irrevocably licences CHP to use) all Project Data that might reasonably be required by CHP and Project Co shall ensure

that it obtains all necessary licences, permissions and consents to ensure that it can make the Project Data available to CHP on these terms, for the purposes of:

- 51.1.1 CHP (or its tenants or licencees) carrying out the Clinical Services (and its operations relating to the performance of the Clinical Services), its duties under this Agreement and/or any statutory duties which CHP may have; and
- 51.1.2 following termination of this Agreement, the design or construction of the Facilities, the operation, maintenance or improvement of the Facilities and/or the carrying out of operations the same as, or similar to, the Project Operations,

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

### **Intellectual Property Rights**

51.2 Project Co:

- 51.2.1 hereby grants to CHP, free of charge, an irrevocable, non exclusive and transferable (but only to any assignee or transferee of any rights or benefits under this Agreement or upon or at any time following termination of this Agreement) licence (carrying the right to grant sub licences) to use the Intellectual Property Rights which are or become vested in Project Co; and
- 51.2.2 shall, where any Intellectual Property Rights are or become vested in a third party, use all reasonable endeavours to procure the grant of a like licence to that referred to in Clause 51.2.1 above to CHP,

in both cases, solely for the Approved Purposes.

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

### **Maintenance of data<sup>97</sup>**

- 51.4 To the extent that any of the data, materials and documents referred to in this Clause are generated by or maintained on a computer or similar system, Project Co shall:
  - 51.4.1 use all reasonable endeavours to procure for the benefit of CHP, at no charge or at the lowest reasonable fee, the grant of a licence or sub

<sup>97</sup>

If either party is to be given access to any of the other party's computer systems, as a matter of good practice and also to clarify potential liability for unauthorised access to those systems under the Computer Misuse Act 1990, the scope of each party's authorisation to access each other's computer systems will need to be defined clearly. The terms of such authorisation will be project specific.

licence for any relevant software to enable CHP or its nominee to access and otherwise use (subject to the payment by CHP of the relevant fee, if any) such data for the Approved Purposes. As an alternative, Project Co may provide such data, materials or documents in a format which may be read by software generally available in the market at the relevant time or in hard copy format; and

51.4.2 enter into the NCC's then current multi licence escrow deposit agreement or standard single licence escrow deposit agreement as appropriate in each case.

51.5 Project Co shall ensure the back up and storage in safe custody of the data, materials and documents referred to in Clause 51.4 in accordance with Good Industry Practice. Without prejudice to this obligation, Project Co shall submit to CHP's Representative for approval its proposals for the back up and storage in safe custody of such data, materials and documents and CHP shall be entitled to object if the same is not in accordance with Good Industry Practice. Project Co shall comply, and shall cause all Project Co Parties to comply, with all procedures to which CHP's Representative has given its approval. Project Co may vary its procedures for such back-up and storage subject to submitting its proposals for change to CHP's Representative, who shall be entitled to object on the basis set out above.

## Claims

51.6 Where a claim or proceeding is made or brought against CHP which arises out of the infringement of any rights in or to any Intellectual Property Rights (other than any Disclosed Data) or because the use of any materials, Plant, machinery or equipment in connection with the Project Operations infringes any rights in or to any Intellectual Property of a third party then, unless such infringement has arisen out of the use of any Intellectual Property by or on behalf of CHP otherwise than in accordance with the terms of this Agreement, Project Co shall indemnify CHP at all times from and against all such claims and proceedings and the provisions of Clause 8.3 (*Conduct of Claims*) shall apply.

## Data Protection<sup>98</sup>

51.7 For the purpose of the following Clauses, the term "personal data" shall have the meaning given to it in the Data Protection ~~Act 1998~~ [Legislation](#).

51.8 Project Co undertakes to CHP that it shall comply with the obligations of a ~~"data controller" under the provisions of the Seventh Data Protection Principle as set out in Schedule 1 of the Data Protection Act 1998~~ [Data Controller as required by the Data Protection Legislation including the provisions which specifically relate to the security of personal data](#). In addition, Project Co:

51.8.1 warrants that it has, or will have at all material times, (and it shall use best endeavours to procure that all [Data Processors](#), Sub Contractors (and their agents and sub contractors of any tier have or will have at all material times) the appropriate technical and organisational measures in place against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data held or

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<sup>98</sup> CHP should review the scope of this provision in the light of project specific data processing requirements.

processed by it and that it has taken, or will take at all material times, all reasonable steps [in line with its obligations under the Data Protection Legislation](#) to ensure the reliability of any of its staff which will have access to personal data processed as part of the Project Operations;

- 51.8.2 undertakes that it will act only on the instructions of CHP in relation to the processing of any personal data made available by or on behalf of CHP as part of the Project Operations [subject to Project Co's obligations under the Data Protection Legislation and any other applicable Law](#);
- 51.8.3 undertakes that it will only obtain, hold, process, use, store and disclose personal data as is necessary to perform its obligations under this Agreement and (without prejudice to Clause 5.2 (*General standards*)) that such data will be held, processed, used, stored and disclosed only in accordance with the Data Protection ~~Act 1998~~ [Legislation](#) and any other applicable Law; and
- 51.8.4 undertakes to allow CHP access to any relevant premises on reasonable notice to inspect its procedures described at (a) above.

## 52 CONFIDENTIALITY

### 52.1 Confidential Information

- 52.1.1 The parties agree that the provisions of this Agreement and each Ancillary Document shall, subject to Clause 52.1.2 below, not be treated as Confidential Information and may be disclosed without restriction.
- 52.1.2 Clause 52.1.1 above shall not apply to provisions of this Agreement or an Ancillary Document designated as Commercially Sensitive Information and listed in [\[Part 1 of Schedule 35 ~~\[\(Commercially Sensitive Information\)\]~~\]](#) which shall, subject to Clause 52.2, be kept confidential for the periods specified in that Part.
- 52.1.3 The parties shall keep confidential all Confidential Information received by one party from the other party relating to this Agreement and Ancillary Documents or the Project and shall use all reasonable endeavours to prevent their employees and agents from making any disclosure to any person of any such Confidential Information.

### Permitted Disclosure

52.2 Clauses 52.1.2 and 52.1.3 of Clause 52.1 shall not apply to:<sup>99</sup>

- 52.2.1 any disclosure of information that is reasonably required by any person engaged in the performance of their obligations under this Agreement for the performance of those obligations;

<sup>99</sup>

CHP should keep this exemption strictly limited and should be mindful of FoIA and Efficiency and Reform Group Guidance when agreeing what parts of the documents should be treated as Commercially Sensitive Information. Proper due diligence is required here in order to avoid CHP being in a position where it is required to disclose information under FoIA which has been designated as Commercially Sensitive.

- 52.2.2 any matter which a party can demonstrate is already or becomes generally available and in the public domain otherwise than as a result of a breach of this Clause;
- 52.2.3 any disclosure to enable a determination to be made under Schedule 26 (Dispute Resolution Procedure) or in connection with a dispute between Project Co and any of its subcontractors;
- 52.2.4 any disclosure which is required pursuant to any Law or Parliamentary obligation placed upon the party making the disclosure or the rules of any stock exchange or governmental or regulatory authority having the force of law or, if not having the force of law, compliance with which is in accordance with the general practice of persons subject to the stock exchange or governmental or regulatory authority concerned;
- 52.2.5 any disclosure of information which is already lawfully in the possession of the receiving party, prior to its disclosure by the disclosing party;
- 52.2.6 any provision of information to the parties' own professional advisers or insurance advisers or insurers or to the Senior Funders or the Senior Funders' professional advisers or insurance advisers or, where it is proposed that a person should or may provide funds (whether directly or indirectly and whether by loan, equity participation or otherwise) to Project Co to enable it to carry out its obligations under this Agreement, or may wish to acquire shares in Project Co and/or Holdco in accordance with the provisions of this Agreement to that person or their respective professional advisers but only to the extent reasonably necessary to enable a decision to be taken on the proposal;
- 52.2.7 any disclosure by CHP of information relating to the design, construction, operation and maintenance of the Project and such other information as may be reasonably required for the purpose of conducting a due diligence exercise, to:
  - (a) any proposed new contractor, its advisers and lenders, should CHP decide to retender this Agreement; or
  - (b) any person in connection with the operation of Schedule 17 (Market Testing Procedure);
- 52.2.7A any disclosure by CHP of information relating to the Services (including performance monitoring data) and such other information as may reasonably be required for the purpose of the service review pursuant to Clause 29A.
- 52.2.8 any registration or recording of the Consents and property registration required;
- 52.2.9 any disclosure of information by CHP to any other department, office or agency of the Government or their respective advisers or to any person engaged in providing services to CHP for any purpose related to or ancillary to this Agreement;
- 52.2.10 any disclosure for the purpose of:

- (a) the examination and certification of CHP's or Project Co's accounts;
- (b) any examination pursuant to Section 6(1) of the National Audit Act 1983 of the economy, efficiency and effectiveness with which CHP has used its resources;
- (c) complying with a proper request from either party's insurance adviser, or insurer on placing or renewing any insurance; or
- (d) (without prejudice to the generality of Clause 52.2.4 above) compliance with the FOIA and/or the Environmental Information Regulations;

52.2.11 disclosure pursuant to Clause 52.10 (Department of Health [and Social Care](#) Disclosure); or

52.2.12 disclosure to the extent required pursuant to Clause 38.2 (Information and Audit Access),

provided that, to avoid doubt, neither Clauses 52.2.10(d), nor Clause 52.2.4 above shall permit disclosure of Confidential Information otherwise prohibited by Clause 52.1.3 (Confidential Information) where that information is exempt from disclosure under section 41 of the FOIA.

52.3 Where disclosure is permitted under Clause 52.2 (Permitted Disclosure), other than under Clauses 52.2.2, 52.2.4, 52.2.5, 52.2.8, and 52.2.10, the party providing the information shall procure that the recipient of the information shall be subject to the same obligation of confidentiality as that contained in this Agreement.

52.4 Project Co shall not make use of this Agreement or any information issued or provided by or on behalf of CHP in connection with this Agreement otherwise than for the purpose of this Agreement, except with the written consent of CHP.

52.5 Where Project Co, in carrying out its obligations under this Agreement, is provided with information relating to patients or any CHP Party, Project Co shall not disclose or make use of any such information otherwise than for the purpose for which it was provided, unless Project Co has sought the prior written consent of that person and has obtained the prior written consent of CHP.

52.6 On or before the Expiry Date, Project Co shall ensure that all documents or computer records in its possession, custody or control, which contain information relating to any patient or CHP Party including any documents in the possession, custody or control of a Sub-Contractor, are delivered up to CHP.

52.7 The parties acknowledge that the National Audit Office has the right to publish details of this Agreement (including Commercially Sensitive Information) in its relevant reports to Parliament.

52.8 The provisions of this Clause 52 are without prejudice to the application of the Official Secrets Acts 1911 to 1989.

#### Announcements

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

Department of Health [and Social Care](#) Disclosure

52.10 Subject to Clause 52.11, CHP shall be free to disclose the terms of this Agreement, the Independent Tester Contract, the Funders' Direct Agreement and the Collateral Agreements to the Department of Health and [Social Care and](#)/or HM Treasury and/or a clinical commissioning group and/or NHS England and the parties agree that CHP shall be free to use and disclose such information on such terms and in such manner as the Department of Health and/or HM Treasury and/or a clinical commissioning group and/or NHS England see fit.

52.11 CHP shall notify Project Co in writing not less than ten (10) Business Days prior to any intended disclosure of the terms of any of the documents referred to in Clause 52.10 to the Department of Health [and Social Care](#) and/or HM Treasury and/or a clinical commissioning group and/or NHS England. Project Co shall notify CHP in writing of any terms of such documents (the "Sensitive Information") that Project Co objects to being disclosed within five (5) Business Days of any such notification by CHP (failing which Project Co shall be deemed to have notified CHP that it has no objection to any such disclosure). Without prejudice to CHP's right to disclose the Sensitive Information pursuant to Clause 52.5, CHP shall consult with Project Co following receipt of a notification from Project Co that it objects to disclosure of such Sensitive Information with a view to agreeing whether or not part or all of the Sensitive Information can be removed from the information to be disclosed.

52.12 Project Co shall provide to both CHP and HM Treasury (addressed to PF2@hmtreasury.gsi.gov.uk or such other address as HM Treasury may notify to Project Co from time to time) the following information: a calculation of the equity internal rate of return (for both an actual cumulative return to the date of preparation and for the expected forecast return up to the end of the Term) for the Project and for each of the Shareholders to be prepared using the Senior Credit Agreement Financial Model and calculated on a cash basis to include all Distributions and any other payments made to Shareholders in respect of fees. This is to be provided on each 31 March and 30 September throughout the Term (or such other six (6) month reporting cycle as the Parties may agree).

52.13 The parties agree that the internal rate of return information provided pursuant to Clause 52.12 shall not be treated as Confidential Information and Project Co acknowledges that the government intends to publish such information on a website.

Additional definitions

52.14 In this Agreement:

**"Commercially Sensitive Information"**

means the sub set of Confidential Information listed in [\[column 1 of Part 1 \(Commercially Sensitive Contractual Provisions\) and column 1 of Part 2 \(Commercially Sensitive Material\)\]](#)

of Schedule 35 (Commercially Sensitive Information) in each case for the period specified in column 2 of Parts 1 and 2 of Schedule 35];

**"Confidential Information"**

means :

- (a) information that ought to be considered as confidential (however it is conveyed or on whatever media it is stored) and may include information whose disclosure would, or would be likely to, prejudice the commercial interests of any person, trade secrets, Intellectual Property Rights and know-how of either party and all personal data and sensitive personal data / [special categories of personal data](#) within the meaning of the Data Protection Act 1988 [Legislation](#); and
- (b) Commercially Sensitive Information<sup>100</sup>;

**"FOIA"**

means the Freedom of Information Act 2000 and any subordinate legislation (as defined in section 84 of the Freedom of Information Act 2000) made under the Freedom of Information Act 2000 from time to time together with any guidance and/or codes of practice issued by the Information Commissioner or relevant Government Department in relation to such Act.

**"Information"**

has the meaning given under Section 84 of the Freedom of Information Act 2000;

**"Environmental Information Regulations"**

means the Environmental Information Regulations 2004 together with any guidance and/or codes of practice issued by the Information Commissioner or relevant Government Department in relation to such regulations;

**"Fees Regulations"**

means The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004; and

**"Requests for Information"**

shall have the meaning set out in the FOIA or the Environmental Information Regulations as relevant (where the meaning set out for the term "request" shall apply).

**52A. FREEDOM OF INFORMATION**

52A.1 Project Co acknowledges that CHP is subject to the requirements of the FOIA and the Environmental Information Regulations and shall facilitate CHP's compliance with its Information disclosure requirements pursuant to the same in the manner provided for in Clauses 52A.2 to 52A.8.

52A.2 Where CHP receives a Request for Information in relation to Information that Project Co is holding on its behalf<sup>101</sup> and which CHP does not hold itself CHP shall refer to Project Co such Request for Information that it receives as soon as practicable and in any event within five (5) Business Days of receiving a Request for Information and Project Co shall:

<sup>100</sup> Any information or classes of information that the parties agree should be treated as Commercially Sensitive Information should be included in Part 2 of the Schedule entitled Commercially Sensitive Material. CHP should be mindful of guidance on this issue when agreeing which information should be categorised as commercially sensitive. This can cover specific bid information (for specific periods) or other types of generic information but broad blanket categorisations are not appropriate.

<sup>101</sup> This should enable CHP to comply with its obligations under FOIA. If CHP wished to go beyond this, for instance, by referring in addition to other information or to information held by first tier subcontractors on behalf of Project Co, this can be specified – but this may have cost/vfm implications.

- (a) provide CHP with a copy of all such Information in the form that CHP requires as soon as practicable and in any event within ten (10) Business Days (or such other period as CHP acting reasonably may specify) of CHP's request; and
- (b) provide all necessary assistance as reasonably requested by CHP in connection with any such Information, to enable CHP to respond to a Request for Information within the time for compliance set out in section 10 of the FOIA or Regulation 5 of the Environmental Information Regulations.

52A.3 Following notification under Clause 52A.2, and up until such time as Project Co has provided CHP with all the Information specified in Clause 52A.2(a), Project Co may make representations to CHP as to whether or not or on what basis Information requested should be disclosed, and whether further information should reasonably be provided in order to identify and locate the information requested, provided always that CHP shall be responsible for determining at its absolute discretion:

- (a) whether Information is exempt from disclosure under the FOIA and the Environmental Information Regulations;
- (b) whether Information is to be disclosed in response to a Request for Information, and

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

52A.4 Project Co shall ensure that all Information held on behalf of CHP is retained for disclosure for at least the number of years (from the date it is acquired) [specified in CHP Policy relating to records retention] and shall permit CHP to inspect such Information as requested from time to time.<sup>102</sup>

52A.5 Project Co shall transfer to CHP any Request for Information received by Project Co as soon as practicable and in any event within two (2) Business Days of receiving it.

52A.6 Project Co acknowledges that any lists provided by it listing or outlining Confidential Information are of indicative value only and that CHP may nevertheless be obliged to disclose Confidential Information in accordance with the requirements of FOIA and the Environmental Regulations.

52A.7 In the event of a request from CHP pursuant to Clause 52A.2, Project Co shall as soon as practicable, and in any event within five (5) Business Days of receipt of such request, inform CHP of Project Co's estimated costs of complying with the request to the extent these would be recoverable if incurred by CHP under Section 12(1) of the FOIA and the Fees Regulations. Where such costs (either on their own or in conjunction with CHP's own such costs in respect of such Request for Information) will exceed the appropriate limit referred to in Section 12(1) of the FOIA and as set out in the Fees Regulations (the "Appropriate Limit") CHP shall inform Project Co in writing whether or not it still requires Project Co to comply with the request and where it does require Project Co to comply with the request the ten (10) Business Days period for compliance shall be extended by such number of additional days for compliance as CHP is entitled to under Section 10 of the FOIA. In such case, CHP shall notify Project Co of such additional days as soon as practicable after becoming aware of them and shall reimburse Project Co for such costs as Project Co incurs in complying with the

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<sup>102</sup> CHP should ensure that an appropriate policy is in place.

request to the extent it is itself entitled to reimbursement of such costs in accordance with its own FOIA policy from time to time.<sup>103</sup>

52A.8 Project Co acknowledges that (notwithstanding the provisions of Clause 52 (Confidentiality)) CHP may, acting in accordance with the Department of Constitutional Affairs' Code of Practice on the Discharge of Functions of Public Authorities under Part I of the Freedom of Information Act 2000 (the "Code"), be obliged under the FOIA, or the Environmental Information Regulations to disclose Information concerning Project Co or the Project:

- (a) in certain circumstances without consulting with Project Co; or
- (b) following consultation with Project Co and having taken their views into account,

provided always that where paragraph 52A.8(a) above applies CHP shall, in accordance with the recommendations of the Code, draw this to the attention of Project Co prior to any disclosure.

## 53 TAXATION

### VAT

53.1 All amounts stated to be payable by either party under this Agreement shall be exclusive of any VAT properly chargeable on any amount.

53.2 Each party shall pay to the other party any VAT properly chargeable on any supply made to it under this Agreement provided that it shall first have received from the other party a valid tax invoice in respect of that supply which complies with the requirements of Part III VAT Regulations 1995.

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

53.4 The following further provisions shall apply in respect of the application for a ruling in accordance with Clause 53.3:

- 53.4.1 prior to submitting its request for such a ruling and any further communication to the Commissioners in connection with the obtaining of the ruling, the Second Party shall first obtain the agreement of the First Party to the contents of such request and any such further communication, such agreement not to be unreasonably withheld or delayed;

<sup>103</sup>

It is up to the parties to decide whether costs associated with future change in CHP's FoIA cost recovery policy should go through Schedule 22 (Variation Procedure). If the Environmental Information Regulations are relevant to the project, the parties may include broadly equivalent provisions in the Agreement dealing with costs and based upon CHP's policy towards reimbursement of costs under Section 8 of the Environmental Information Regulations.

- 53.4.2 the Second Party shall provide to the First Party copies of all communications received from the Commissioners in connection with the application for a ruling as soon as practicable after receipt; and
- 53.4.3 the Second Party shall use all reasonable endeavours (including without limitation the provision of such additional information as the Commissioners may require) to obtain such a ruling as soon as reasonably practicable following the initial request.
- 53.5 If a ruling is required by the First Party under Clause 53.3, the First Party shall not be obliged to pay the VAT so claimed by the Second Party unless and until a ruling is received from the Commissioners which states that a sum of VAT (the "VAT Sum") is properly so chargeable or the Commissioners state that they are not prepared to give any ruling on the matter. In this case, then subject to Clauses 53.6 and 53.7 and provided that the First Party shall first have received a valid tax invoice which complies with the requirements of Part III VAT Regulations 1995 and which states the VAT Sum to be the amount of VAT chargeable to the First Party, the First Party shall pay the VAT Sum (and any interest or penalties attributable to the VAT Sum) to the Second Party.
- 53.6 If the First Party disagrees with any ruling obtained pursuant to Clause 53.3 by the Second Party from the Commissioners, then the Second Party (provided that it is indemnified to its reasonable satisfaction against all costs and expenses including interest and penalties which it may incur in relation thereto) shall take such action and give such information and assistance to the First Party as the First Party may require to challenge such ruling or otherwise to resist or avoid the imposition of VAT on the relevant supply.
- 53.7 The following further provisions shall apply if the First Party shall exercise its rights under Clause 53.6:
- 53.7.1 the action which the First Party shall be entitled to require the Second Party to take shall include (without limitation) contesting any assessment to VAT or other relevant determination of the Commissioners before any VAT tribunal or court of competent jurisdiction and appealing any judgement or decision of any such tribunal or court;
- 53.7.2 if the Second Party shall be required to pay to or deposit with the Commissioners a sum equal to the VAT assessed as a condition precedent to its pursuing any appeal, the First Party shall, at its election, either pay such sum to the Commissioners on behalf of the Second Party or on receipt of proof in a form reasonably satisfactory to the First Party that the Second Party has paid such sum to or deposited such sum with the Commissioners the First Party shall pay such sum to the Second Party;
- 53.7.3 save as specifically provided in Clause 53.5, the First Party shall not be obliged to pay to the Second Party any sum in respect of the VAT in dispute to the Second Party or in respect of VAT on any further supplies made by the Second Party to the First Party which are of the same type and raise the same issues as the supplies which are the subject of the relevant dispute unless and until the final outcome of the relevant dispute is that it is either determined or agreed that VAT is properly chargeable on the relevant supply or supplies; and

- 53.7.4 the Second Party shall account to the First Party for any costs awarded to the Second Party on any appeal, for any sum paid to or deposited with the Commissioners in accordance with Clause 53.7.2 which is repayable to the Second Party and for any interest to which the Second Party is entitled in respect of such sums.

#### **Changes in recoverability of VAT**

- 53.8 Subject to Clause 53.9, if, following a Change in Law, Project Co becomes unable to recover VAT attributable to supplies to be made to CHP by Project Co pursuant to this Agreement, CHP shall ensure that Project Co is left in no better and no worse position than it would have been had such Change in Law not occurred (including but not limited to making such amendments to the Agreement as Project Co and CHP shall agree acting reasonably), provided that Project Co shall use all reasonable endeavours to mitigate the adverse effects of any such Change in Law.
- 53.9 The provisions of Clause 53.8 shall apply only if (and to the extent that) the Change in Law was not reasonably foreseeable at the date of this Agreement by an experienced contractor performing operations similar to the relevant Project Operations on the basis of draft bills published in Government green or white papers or other Government departmental consultation papers, bills, draft statutory instruments or draft instruments or proposals published in the Official Journal of the European Union, in each case published:
- 53.9.1 prior to the date of this Agreement; and
- 53.9.2 in substantially the same form as the Change in Law.
- 53.10 Not used

#### **Construction Industry Tax Deduction Scheme<sup>104</sup>**

- 53.11 This Clause relates to the Construction Industry Tax Deduction Scheme (the "Scheme"):
- 53.11.1 in this Clause (but not otherwise):
- (a) **"the Legislation"**  
means Chapter 3 of Part 3 of the Finance Act 2004 (the "FA 2004"), any regulations made under Section 73 of the FA 2004, the Income Tax (Construction Industry Scheme) Regulations 2005 (SI 2005/2045) (the "CIS Regulations") and any other statute or subordinate legislation relating to the Scheme as from time to time modified or replaced whether before or after the date of this Agreement;
- (b) **"contractor"**  
means a person who is a contractor for the purposes of the Legislation pursuant to Section 59 of the FA 2004;

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<sup>104</sup>

CHP's legal advisers should ensure that this drafting is up to date at the time that the Project Agreement is signed.

- 53.11.2 Each of Project Co and CHP shall comply with their respective obligations under the Legislation;
- 53.11.3 The Parties believe that all payments under this Agreement will be exempt from the CIS Regulations (SI 2005/2045) under Regulation 23 (the "PFI Exemption"), however, if and to the extent that the payments under this Agreement are contract payments then CHP, as contractor, shall verify in accordance with Regulation 6 of the Regulations whether Project Co or its nominee are registered for gross payment, for payment under deduction or are not registered under Chapter 3 of Part 3 of the FA 2004 and for these purposes Project Co hereby agrees to provide the CHP with all information and assistance which may be required by the CHP under the Scheme including (but not limited to) Project Co's name, unique taxpayer reference (UTR), company registration number, the National Insurance number (if applicable) and/or such other information as may be required under Regulation 6 of the CIS Regulations in sufficient time to enable the CHP to comply with its obligations. The CHP shall, upon reasonable request from Project Co, keep Project Co informed of the verification process with HMRC;
- 53.11.4 if any payment due from the CHP to Project Co under this Agreement is a contract payment under the Legislation then:
- (a) if CHP is satisfied that Project Co is registered for gross payment under Section 63(2) of the FA 2004, CHP shall make a payment to Project Co without any deduction; or
  - (b) if Project Co is not registered for gross payments under the Legislation, CHP shall make the payment to Project Co subject to the deduction of the relevant percentage in accordance with the Legislation;
- 53.11.5 where any error or omission has occurred in calculating or making the statutory deduction then:
- (a) in the case of an over deduction, CHP shall correct that error by repayment of the sum over deducted to Project Co; and
  - (b) in the case of an under deduction, Project Co shall correct that error or omission by repayment of the sum under deducted to CHP;
- 53.11.6 if compliance with this Clause involves CHP or Project Co in not complying with any other of the terms of this Agreement, then the provisions of this Clause shall prevail;
- 53.11.7 in the event of any conflict between this Clause and any other term of this Agreement, the provisions of this Clause shall prevail.

## **54 CORRUPT GIFTS AND PAYMENTS**

### **Prohibition on corruption**

- 54.1 The term "Prohibited Act" means:

- 54.1.1 offering, giving or agreeing to give to CHP or any other public body or to any person employed by or on behalf of CHP or any other public body any gift or consideration of any kind as an inducement or reward:
- (a) for doing or not doing (or for having done or not having done) any act in relation to the obtaining or performance of this Agreement or any other agreement with CHP or any other public body; or
  - (b) for showing or not showing favour or disfavour to any person in relation to this Agreement or any other agreement with CHP or any other public body;
- 54.1.2 entering into this Agreement or any other agreement with CHP or any other public body in connection with which commission has been paid or has been agreed to be paid by Project Co or on its behalf, or to its knowledge, unless before the relevant agreement is entered into particulars of any such commission and of the terms and conditions of any such agreement for the payment of such commission have been disclosed in writing to CHP;
- 54.1.3 committing any offence:
- (a) under the Prevention of Corruption Acts 1889-1916;
  - (b) under any Law creating offences in respect of fraudulent acts;
  - (c) at common law, in respect of fraudulent acts in relation to this Agreement or any other agreement with CHP or any other public body; or
  - (d) under the Bribery Act 2010.
- 54.1.4 defrauding or attempting to defraud or conspiring to defraud CHP or any other public body.

### **Warranty**

- 54.2 Project Co warrants that in entering into this Agreement it has not committed any Prohibited Act.
- 54.3 Project Co warrants and undertakes that it has and will throughout the duration of this Agreement have in place adequate procedures (as referred to in Section 7(2) of the Bribery Act 2010) designed to prevent persons associated with Project Co from bribing any person with the intention of obtaining or retaining business for Project Co or with the intention of obtaining or retaining an advantage in the conduct of business for Project Co.

### **Remedies**

- 54.4 If Project Co or any Project Co Party (or anyone employed by or acting on behalf of them) commits any Prohibited Act, then CHP shall be entitled to act in accordance with Clauses 54.4.1 to 54.4.6 below:

- 54.4.1 if a Prohibited Act is committed by Project Co or by an employee not acting independently of Project Co<sup>105</sup>, then CHP may terminate the Agreement with immediate effect by giving written notice to Project Co provided that, if the Prohibited Act is an offence under section 7(1) of the Bribery Act 2010, CHP may not terminate the Agreement unless acting reasonably, it considers termination of the Agreement to be in the best interests of the Project;
- 54.4.2 if the Prohibited Act is committed by an employee of Project Co acting independently of Project Co, then CHP may give written notice to Project Co of termination and the Agreement will terminate, unless within twenty (20) Business Days of receipt of such notice Project Co terminates the employee's employment and (if necessary) procures the performance of the relevant part of the Works and/or Services by another person provided that Project Co shall not be entitled to avoid termination of the Agreement in such circumstances if it shall itself in connection with the Prohibited Act committed by the employee have committed the Prohibited Act specified in Section 7 of the Bribery Act 2010 ~~provided further that, if the Prohibited Act is an offence under section 7(1) of the Bribery Act 2010, CHP may not terminate the Agreement unless acting reasonably, it considers termination of the Agreement to be in the best interests of the Project;~~
- 54.4.3 if the Prohibited Act is committed by a Contracting Associate or by an employee of that Contracting Associate not acting independently of that Contracting Associate<sup>106</sup> then CHP may give written notice to Project Co of termination and the Agreement will terminate, unless within twenty (20) Business Days of receipt of such notice Project Co terminates the relevant Sub-Contract and procures the performance of the relevant part of the Works and/or Services by another person, where relevant, in accordance with Clause 50 (*Assignment, sub contracting and Change in Control*) provided further that, if the Prohibited Act is an offence under section 7(1) of the Bribery Act 2010, CHP may not terminate the Agreement unless acting reasonably, it considers termination of the Agreement to be in the best interests of the Project ;
- 54.4.4 if the Prohibited Act is committed by an employee of a Contracting Associate acting independently of that Contracting Associate, then CHP may give notice to Project Co of termination and the Agreement will terminate, unless within twenty (20) Business Days of receipt of such notice Project Co procures the termination of the employee's employment and (if necessary) procures the performance of the relevant part of the Works and/or Services by another person provided that Project Co shall not be entitled to avoid termination of the Agreement in such circumstances if the Contracting Associate shall itself in connection with the Prohibited Act committed by its employee have committed the Prohibited Act specified in Section 7 of the Bribery Act 2010 ~~provided further that, if the Prohibited Act is an offence under section 7(1) of the Bribery Act 2010, CHP may not terminate the Agreement unless acting~~

<sup>105</sup> This means the employee acts under the authority of or with the knowledge of any one or more directors of Project Co.

<sup>106</sup> This means the employee acts under the authority of or with the knowledge of any one or more directors of the Contracting Associate.

~~reasonably, it considers termination of the Agreement to be in the best interests of the Project;~~

54.4.5 if the Prohibited Act is committed by any other person not specified in Clauses 54.4.1 to 54.4.4 above, then CHP may give notice to Project Co of termination and the Agreement will terminate unless within twenty (20) Business Days Project Co procures the termination of such person's employment and of the appointment of their employer (where the employer is not CHP and such person is not employed by Project Co or the Contracting Associate) and (if necessary) procures the performance of the relevant part of the Works and/or Services by another person provided that Project Co shall not be entitled to avoid termination of the Agreement in such circumstances if ~~the Contracting Associate~~ shall itself in connection with the Prohibited Act committed by ~~the~~its employee have committed the Prohibited Act specified in Section 7 of the Bribery Act 2010 and provided further that, if the Prohibited Act is an offence under section 7(1) of the Bribery Act 2010, CHP may not terminate the Agreement unless acting reasonably, it considers termination of the Agreement to be in the best interests of the Project; and

54.4.6 any notice of termination under this Clause shall specify:

- (a) the nature of the Prohibited Act;
- (b) the identity of the party who CHP believes has committed the Prohibited Act; and

54.4.7 the date on which the Agreement will terminate in accordance with the applicable provisions of this Clause.

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

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

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

#### **Permitted payments**

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

#### **Notification**

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

#### **Interim management**

54.8 Where Project Co is required to replace any Sub Contractor pursuant to this Clause, the provisions of Clause 44.7 (*Project Co Events of Default*) shall apply and be construed accordingly.

### **55 RECORDS AND REPORTS**

The provisions of Schedule 25 (*Record Provisions*) shall apply to the keeping of records and the making of reports.

### **56 DISPUTE RESOLUTION PROCEDURE**

Except where expressly provided otherwise in this Agreement, any dispute arising out of or in connection with this Agreement shall be resolved in accordance with the procedure set out in Schedule 26 (*Dispute Resolution Procedure*).

### **57 NOTICES**

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

If to Project Co

Address:

Fax No:

If to CHP

Address:

Fax No:

[If to the Clinical Commissioning Group] Address(es):

Fax No

If to the Director of Finance and Investment of the Department of Health [and Social Care](#) Richmond House  
79 Whitehall  
London  
SW1A 2NL

Fax No: [ ]

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

If to Project Co' Representative      Address:

Fax No:

If to CHP's Representative      Address:

Fax No:

[If to the Clinical Commissioning Group]      Address(es):

Fax No

If to the Director of Finance and Investment of the Department of Health [and Social Care](#)      Richmond House  
79 Whitehall  
London  
SW1A 2NL

Fax No: [ ]

(copied in each case to CHP)

57.3 Either party to this Agreement (and either Representative or the Clinical Commissioning Group) may change its nominated address or facsimile number by prior notice to the other party.

57.4 Notices given by post shall be effective upon the earlier of (i) actual receipt, and (ii) five (5) Business Days after mailing. Notices delivered by hand shall be effective upon delivery. Notices given by facsimile shall be deemed to have been received where there is confirmation of uninterrupted transmission by a transmission report and where there has been no telephonic communication by the recipient to the senders (to be confirmed in writing) that the facsimile has not been received in legible form:

57.4.1      within two (2) hours after sending, if sent on a Business Day between the hours of 9am and 4pm; or

57.4.2      by 11am on the next following Business Day, if sent after 4pm, on a Business Day but before 9am on that next following Business Day.

## 58      AMENDMENTS

This Agreement may not be varied except by an agreement in writing signed by duly authorised representatives of the parties.

**59 WAIVER**

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

**60 NO AGENCY**

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

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

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

**61 ENTIRE AGREEMENT**

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

61.2 Each of the parties acknowledges that:

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

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

**62 CONFLICTS OF AGREEMENTS**

Subject to Clause 25.8 (*Quality Plans and Systems*), in the event of any conflict between this Agreement and the Project Documents and/or the Licences [and/or the Leases], the provisions of this Agreement shall prevail.

**63 SEVERABILITY**

If any provision of this Agreement shall be declared invalid, unenforceable or illegal by the courts of any jurisdiction to which it is subject, such provision may be severed and such

invalidity, unenforceability or illegality shall not prejudice or affect the validity, enforceability and legality of the remaining provisions of this Agreement.

#### **64 COUNTERPARTS**

This Agreement may be executed in one or more counterparts. Any single counterpart or a set of counterparts executed, in either case, by all the parties shall constitute a full original of this Agreement for all purposes.

#### **65 COSTS AND EXPENSES**

Each party shall be responsible for paying its own costs and expenses incurred in connection with the negotiation, preparation and execution of this Agreement.

#### **66 NO PRIVITY**

It is agreed for the purposes of the Contracts (Rights of Third Parties) Act 1999 that this Agreement is not intended to, and does not, give to any person who is not a party to this Agreement any rights to enforce any provisions contained in this Agreement except for any person to whom the benefit of this Agreement is assigned or transferred in accordance with Clause 50 (*Assignment, subcontracting and changes in control*).

#### **67 MITIGATION**

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

#### **68 GOVERNING LAW AND JURISDICTION**

68.1 This Agreement shall be considered as a contract made in England and Wales this Agreement and any dispute or claim arising out of or in connection with it or its subject matter or formation (including any non-contracted disputes or claims) and shall be subject to the laws of England and Wales.

68.2 Subject to the provisions of the Dispute Resolution Procedure, both parties agree that the courts of England and Wales shall have exclusive jurisdiction to hear and settle any dispute or claim arising out of or in connection with this Agreement or subject matter or formation (including non-contractual disputes or claims) and each of them and irrevocably submits to the jurisdiction of those courts.

#### **69 FURTHER ASSURANCE**

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

**IN WITNESS WHEREOF** the parties have executed this Agreement as a Deed the day and year first above written:

The Corporate Common Seal of )  
Community Health Partnership )  
was hereunto affixed in )  
the presence of:<sup>107</sup> )

.....  
Chairman

.....  
Signatory Full Name

.....  
Chief Executive

.....  
Signatory Full Name

**EXECUTED AND DELIVERED** )  
as a deed by Project Co acting by )

.....  
Project Co Director/Secretary/  
Authorised Signatory

.....  
Witness (Signature)

.....  
Signatory Full Name

.....  
Witness (Full Name)

Witness (Full Address)

<sup>107</sup> CHP must check their standing orders to determine the appropriate form of execution.

.....  
Project Co Director/Secretary/  
Authorised Signatory

.....  
Witness (Signature)

Witness (Full Address)

**SCHEDULE 1**

**DEFINITIONS AND INTERPRETATION**

This is Schedule 1 comprising Definitions and Interpretation referred to in the Project Agreement for the description of Project

between

[ ]

and

[ ]

## SCHEDULE 1

### Part 1 : Definitions<sup>108</sup>

In this Agreement unless the context otherwise requires:

#### **"5 Year Maintenance Plan"**

means the plan, to be prepared by or on behalf of Project Co, for any works for the maintenance or repair of the Facilities, including the renewal or replacement of plant or equipment as necessary, during each five year period for the duration of the Project Term, which shall be updated not later than [ ] Business Days prior to the commencement of each Contract Year

#### **"Actual Completion Date"**

means the date on which the Works have been completed in accordance with this Agreement, as such date shall be stated in the Certificate of Practical Completion or, in the event of dispute, as such date may be determined in accordance with Schedule 26 (*Dispute Resolution Procedure*)

#### **"Actual Liability"**

has the meaning given in Clause 48.7.3(a) (*Compensation on Termination*)

#### **"Additional De Minimis Amount"**

has the meaning given in Clause 39 (*Changes in Law*)

#### **"Additional Permitted Borrowing"**

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

- (a) this amount is less than or equal to the Additional Permitted Borrowings Limit; and
- (b) in respect of any Additional Permitted Borrowing the Agent is not in material breach of its obligations under Clause 10.4.3 of the Funders' Direct Agreement as it applies to such Additional Permitted Borrowing,

and provided further that any such excess amount of principal which is (i) invested as part of any Qualifying Variation; or (ii) outstanding from time to time as a result of any drawing under the Senior Funders Agreements as entered into at the date of this Agreement, disregarding any subsequent amendment; or (iii) outstanding from time to time as a result of any amendment to the Senior Funders Agreements in respect of which CHP has agreed that its liabilities on termination may be increased pursuant to Clause 4.3.1, shall not be counted as Additional Permitted Borrowing

#### **"Additional Permitted Borrowings Limit"**

means an amount equal to:

- (a) 10% of the Original Senior Commitment, for any Additional Permitted Borrowing subsisting in the period from the date of Financial Close to the date on which the

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<sup>108</sup> Definitions contained elsewhere in the Agreement (e.g. Schedule 23 - Compensation) may be included within this schedule.

amount outstanding under the Senior Funders Agreements is reduced to 50% or less of the Original Senior Commitment; and thereafter

- (b) the higher of:
  - (i) 5% of the Original Senior Commitment; and
  - (ii) the amount of any Additional Permitted Borrowing outstanding on the last day of the period referred to in (a)

**"Adverse Law"**

means any Change in Law which would if passed into Law have the following effects, and any administrative act of the Government or any minister of the Crown, department, agency, regulator or other public body or official not amounting to a Change in Law but which has (or would, if made, have) the following effects:

- (a) remove, transfer to another party or otherwise have a material adverse effect upon CHP's legal capacity (or obligation) to perform any of its material obligations in relation to the Project which are material to the interests of Project Co and/or its Funders; or
- (b) amend or repeal (without re-enactment, consolidation or replacement by Law having an equivalent effect) the National Health Service Act 2006 or the National Health Service (Consequential Provisions) Act 2006; or
- (c) not used; [or
- (d) disapply from CHP or alter in a manner adverse to the material interests of Project Co or the Funders the manner of application to CHP (including through amendment or repeal (without re-enactment, consolidation or replacement by Law having an equivalent effect)) of any of the Protective Legislation by comparison with the manner in which the Protective Legislation applies to CHP as at the date of this Agreement;]

provided that,

- (i) not used;
- (ii) in the circumstances referred to in paragraph (a), where a Change in Law would have the effect of transferring the legal capacity or obligation of CHP in relation to such material obligations to a new entity (a "CHP Substitute"), the relevant Law shall not be an Adverse Law if:
  - (aa) either:
    - (i) the provisions of the National Health Service Act 2006 and the National Health Service (Consequential Provisions) Act 2006 (together the "**Protective Legislation**") apply to such CHP Substitute in full; or
    - (ii) the relevant Law has the same effect in relation to CHP Substitute as the Protective Legislation; and

- (bb) the relevant Law does not otherwise have any adverse material effect on the legal capacity or obligation of CHP Substitute which affects (or could reasonably be expected to affect) CHP Substitute's ability to perform any material obligations owed to Project Co and/or the Funders in relation to the Project which are material to the interests of Project Co and/or its Funders, when compared to the material obligations of CHP under this Agreement

**"Ancillary Documents"**

means the Construction Contract, the Service Contracts and any other Supply Chain Agreements the Performance Guarantees [CHP to consider if there are any other project significant documents], all as the same may be amended or replaced from time to time

**"Ancillary Rights"**

means such rights of passage over, access to and egress from the Site in the manner previously agreed with CHP as the same may be varied with the approval of CHP such approval not to be unreasonably withheld (but only insofar as these rights are vested in CHP and are capable of being assigned or granted by CHP to Project Co, whether as a result of any restriction in the Title Deeds or otherwise)

**"APB Distribution"**

means, for the period during which the Additional Permitted Borrowing subsists, an amount equal to the aggregate of all Distributions made during that period up to an amount equal to the principal of the Additional Permitted Borrowing on the first day of that period

**"Approved RDD Item"**

means an item of Reviewable Design Data which has been returned or has been deemed to have been returned endorsed either "Level A - no comment" or "Level B – proceed subject to amendment as noted" by CHP's Representative pursuant to the provisions of Clause 17.5 (*Design, Construction and Commissioning Process*) and Schedule 10 (*Review Procedure*) (provided that in the case of any item of Reviewable Design Data which has been returned or has been deemed to have been returned endorsed "Level B – proceed subject to amendment as noted" Project Co has taken account of CHP's Representative's comments), as such item of Reviewable Design Data may be varied or amended from time to time in accordance with Schedule 22 (*Variation Procedure*)

**"Associated Entity"**

has the meaning given in Schedule 17 (*Market Testing Procedure*)

**"Base Date"**

has the meaning given in Part 2 to Schedule 1 (*Definitions and Interpretation*)

**"Beneficiary"**

has the meaning given in Clause 8.3 (*Conduct of Claims*)

**"Business Day"**

means a day other than a Saturday, Sunday or a bank holiday in England

**"Capital Expenditure"**

has the meaning given in Schedule 22 (*Variation Procedure*)

**"CDM Regulations"**

has the meaning given in Part 2 of Schedule 8 (*Construction Matters*)

**"Certificate of Commencement"**

means the certificate to be issued and delivered by CHP in accordance with Clause 2 (*Execution and Delivery of Documents*)

**"Certificate of Practical Completion"**

means the certificate to be issued by the Independent Tester in accordance with Clause 22.12 (*Pre-Completion Commissioning and Completion*) in the form set out in Schedule 28 (*Certificates*)

**"Change in Control"**

means any sale or other disposal of any legal, beneficial or equitable interest in any or all of the equity share capital of a corporation (including the control over the exercise of voting rights conferred on that equity share capital or the control over the right to appoint or remove directors)

**"Change in Law"**

means the coming into effect or repeal (without re-enactment or consolidation) in England and Wales of any Law, or any amendment or variation to any Law, or any judgement of a relevant court of law which changes binding precedent in England and Wales in each case after the date of this Agreement

**"CHP Additional Works Confirmation"**

has the meaning given in Schedule 22 (*Variation Procedure*)

**"CHP Additional Works Enquiry"**

has the meaning given in Schedule 22 (*Variation Procedure*)

**"CHP Additional Works Item"**

has the meaning given in Schedule 22 (*Variation Procedure*)

**"CHP Additional Works Variation"**

has the meaning given in Schedule 22 (*Variation Procedure*)

**"CHP Assets"<sup>109</sup>**

means the [insert details of CHP existing premises/sites etc] and any other assets and equipment or other property used by, or on behalf of, CHP or any CHP Party

**"CHP Employees"**

means in relation to any service equivalent to a Service, all those persons employed by CHP under a contract of employment (excluding, to avoid doubt (without limitation), any person engaged by CHP as an independent contractor or persons employed by any sub-contractor engaged by CHP) who are wholly or substantially engaged in the provision of that service as at the relevant Transfer Date

**"CHP Events of Default"**

has the meaning given in Clause 45.1 (*CHP Events of Default*)

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<sup>109</sup> This definition (which is only used in the indemnity to CHP in Clause 8.1.3)) is intended to cover those parts of CHP site that are not the subject of the sole remedy payment mechanism. In practice that means those parts of the site to which Project Co does not provide any service, or where Project Co does provide services to a facility, those parts over which Project Co does not take any element of availability risk. CHP should also consider, e.g. how equipment is treated – if Project Co is not responsible for maintenance and lifecycle of any items of equipment then such items should be included within the definition.

**"CHP Party"**

means any of CHP's agents, contractors and sub contractors of any tier and its or their directors, officers and employees and/or other healthcare providers at the Facilities with the authority of CHP but excluding Project Co, any Project Co Party and statutory undertakers and utilities and "CHP Parties" shall be construed accordingly

**"CHP Policies"**

means, subject to Clause 32.7 (*Exclusion of CHP Policies*), the policies of CHP set out in the document annexed to this Agreement as Attachment [ ] as amended from time to time

**"CHP Service Variation"**

has the meaning given in Schedule 22 (*Variation Procedure*)

**"CHP Service Variation Enquiry"**

has the meaning given in Schedule 22 (*Variation Procedure*)

**"CHP Works Variation"**

has the meaning given in Schedule 22 (*Variation Procedure*)

**"CHP Works Variation Confirmation"**

has the meaning given in Schedule 22 (*Variation Procedure*)

**"CHP Works Variation Enquiry"**

has the meaning given in Schedule 22 (*Variation Procedure*)

**"CHP's Commissioning"**

means CHP's pre-completion commissioning activities to be carried out by CHP in accordance with Clause 22 (*Pre-Completion Commissioning and Completion*)

**"CHP's Construction Requirements"**

means the requirements of CHP set out or identified in Part 3 of Schedule 8 (*Construction Matters*) as amended from time to time in accordance with the terms of this Agreement

**"CHP's Post Completion Commissioning"**

means CHP's post-completion commissioning activities to be carried out by CHP in accordance with Clause 23.1 (*Post Completion Commissioning*)

**"CHP's Representative"**

means the person so appointed by CHP pursuant to Clause 11 (*Representatives*)

**"Clinical Functionality"**

- (a) the following matters as shown on the [1:500 scale development control plan]:
  - (i) the points of access to and within the [development site] and the [buildings];
  - (ii) the relationship between one or more [buildings] that comprise the [development]; and
  - (iii) the adjacencies between different Hospital departments [referenced to a drawing number or numbers];
- (b) the following matters as shown on the [1:200/1:100 scale plans] – (referenced to a list of drawing numbers in Project Co's Proposals for example):

- (i) the points of access to and within the [development site] and the [buildings];
  - (ii) the relationship between one or more [buildings]<sup>110</sup>;
  - (iii) the adjacencies between different Hospital departments; and
  - (iv) the adjacencies between rooms within the Hospital departments;
- (c) the quantity, description and areas (in square metres) of those rooms and spaces shown on the [Schedules of Accommodation];
- (d) the location and relationship of equipment, furniture, fittings and user terminals as shown on the [1:50 loaded room plans] in respect of:
- (i) all bed and trolley positions;
  - (ii) internal room elevations;
  - (iii) actual ceiling layouts; and
  - (iv) [other project specific requirements might need to be considered, for example with regard to theatres and imaging departments]; and
- (e) The location of and the inter-relationships between rooms within a department as shown on [ ] scale drawings, but only insofar as each of the matters listed in (a) to (e) above relate to or affect Clinical Use

**"Clinical Services"**

means management, responsibility, administration and carrying out of the clinical and medical services provided at the Facilities [CHP to consider any other relevant areas] by CHP from time to time and which are not services to be provided by Project Co to CHP under this Agreement

**"Clinical Use"**

means the use of a room or space to the extent that it is used by CHP or its employees, tenants, agents and/or contractors (but not, to avoid doubt, [Project Co staff] for carrying out the Clinical Services

**"Collateral Agreements"**

means the Contractor's Collateral Agreement, the Service Providers' Collateral Agreements [and the Independent Tester's Collateral Agreement]<sup>111</sup>

**"Commencement Date"**

has the meaning given in Schedule 22 (*Variation Procedure*)

**"Commissioners"**

has the meaning given in Clause 53.3 (*VAT*)

**"Commissioning End Date"**

<sup>110</sup> The need to check the relationship between buildings will be project specific.

<sup>111</sup> Note: CHP to consider circumstances where professional team warranties may be appropriate, e.g. where a design and build contract is not used.

means the date by which the parties' commissioning activities are to be completed in accordance with the Final Commissioning Programme

**"Compensation Event"**

has the meaning given in Clause 41 (*Delay Events*)

**"Compensation Payment"**

has the meaning given in Clause 48.6 (*Compensation on Termination*)

**["Completion Criteria"<sup>112</sup>]**

means the Completion Tests as defined in Appendix [ ] of Schedule 12 (*Outline Commissioning Programme*) and as may be applicable to each Phase]

**"Completion Date"**

means [insert agreed date on which completion is scheduled to occur] or such revised date as may be fixed pursuant to Clause 41

**["Completion Process"**

means the process and procedures for carrying out the notifications, testing, inspections and completion certification as defined in Part [ ] of Schedule 12 as may be applicable to each Phase of the Works the dates for which shall be incorporated in the Final Commissioning Programme]

**"Compliant Tender"**

has the meaning given in Schedule 17 (*Market Testing Procedure*)

**"Conducting Media"**

means all gas and water pipes, water tanks, cisterns, drains, sewers, watercourses, pumps, electric and communication wires and cables, ducts, gutters, waste pipes, conduits, chimney flues, meters or other similar media now or at any time providing services to or under any part of the Facilities whether for drainage, gas, water, electricity, telephone, television or any other service provided to or in or on the Facilities

**"Consents"**

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

**"Construction Contract"**

means the design and build contract dated the same date as this Agreement between Project Co and the Contractor as amended from time to time in accordance with this Agreement

**"Construction Quality Plan"**

means the document at Part 8 of Schedule 8 (*Construction Matters*)

**"Contamination"**

means all or any pollutants or contaminants, including any chemical or industrial, radioactive, dangerous, toxic or hazardous substance, waste or residue (whether in solid, semi-solid or liquid form or a gas or vapour) and including without limitation genetically modified organisms

**"Contracting Associate"**

<sup>112</sup>

Additional definitions consequent upon multiple phases drafting appear in square brackets.

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

NB: This provision should be drafted on a project specific basis to encompass any principal sub-contractors to Project Co

**"Contract Month"**

means a calendar month

**"Contract Year"<sup>113</sup>**

means the period of twelve (12) calendar months commencing on and including [the date of this Agreement] and each subsequent period of twelve (12) calendar months commencing on each anniversary of the date of this Agreement, provided that the final Contract Year shall be such period as commences on and includes the anniversary of [the date of this Agreement] that falls in the year in which this Agreement expires or is terminated (for whatever reason) and ends on and includes the date of expiry or earlier termination of this Agreement (as the case may be)

**"Contractor"**

means [insert the name of Contractor] engaged by Project Co to carry out the Works and any substitute design and/or building contractor engaged by Project Co as may be permitted by this Agreement

**"Contractor's Collateral Agreement"**

means the collateral agreement between CHP, Project Co and the Contractor in the form set out in Schedule 11 (*Collateral Agreements*)

**"Contractor's Site Manager"**

means the manager to be appointed by the Contractor for purposes of supervision of all day-to-day activities on Site

**"Contractor's Site Rules"**

means the Contractor's rules, applicable on Site to CHP, Project Co, the Contractor and their respective sub-contractors and suppliers of every tier during the construction of the Facilities

**"Convictions"**

means other than in relation to minor road traffic offences, any previous or pending prosecutions, convictions, cautions and binding-over orders (including any spent convictions as contemplated by section 1(1) of The Rehabilitation of Offenders Act 1974 (as amended by the Protection of Freedoms Act 2012) by virtue of the exemptions specified in Part II of Schedule 1 of the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (SI 1975/1023) and the Rehabilitation of Offenders Act 1974 (Exceptions) (Amendment) Order 2001 (SI 2001/1192) or any replacement or amendment to those Orders)

**"Custodian"**

means [insert the name of Custodian] or any new custodian appointed by Project Co and CHP pursuant to this Agreement from time to time

**"Custody Agreement"**

means the agreement with the Custodian set out in Schedule 3 (*Custody Agreement*)

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<sup>113</sup> This definition is relevant to the timing of annual reviews of Service Payments (see Schedule 1 part 2 (*Interpretation*) paragraph [ ]). CHP may prefer to amend the definition such that the timing of reviews occurs at the commencement of CHP's financial year on 1 April. This may assist CHP in setting annual expenditure budgets, although in many cases it will accelerate the timing of the annual review.

**"Data Controller"**

has the meaning given in the Data Protection Legislation

**"Data Processor"**

has the meaning given in the Data Protection Legislation

**"Data Protection Legislation"**

means, for the periods in which they are in force in the United Kingdom, the Data Protection Act 1998, the EU Data Protection Directive 95/46/EC, the Regulation of Investigatory Powers Act 2000, the Telecommunications (Law Business Practice) (Interception of Communications) Regulations 2000, the Electronic Communications Data Protection Directive 2002/58/EC, the Privacy and Electronic Communications (EC Directive) Regulations 2003, the GDPR and all applicable Laws and regulations relating to the processing of personal data and privacy, including where applicable the guidance and codes of practice issued by the Information Commissioner, in each case as amended or substituted from time to time

**"Deemed Liability"**

has the meaning given in Clause 47.7.3(b) (*Compensation on Termination*)

**"Default Interest"**

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

**"Default Interest Rate"**

means ~~2% over LIBOR~~ 8% above the Bank of England's base rate from time to time

**"Defects"**

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

**"Delay Event"**

has the meaning given in Clause 41.3 (*Delay Events*)

**"Delivery Date"**

means the date being five (5) Business Days after the start of a Contract Month

**"Department of Health and Social Care"**

means the Department of Health and Social Care, or such body that may supersede or replace the Department of Health and Social Care from time to time

**"Design Data"**

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

**"Design Quality Plan"**

means the document at Part 8 of Schedule 8 (*Construction Matters*)

**"Direction Employer"**

means a contractor who obtains a Direction Letter

**"Direction Letter"**

means a letter issued to NHS Business Services Authority (on behalf of the Secretary of State pursuant to Section 7(2) of the Superannuation (Miscellaneous Provisions) Act 1967 to Project Co or a Supply Chain Member (as appropriate) is to be granted access to the NHS Pension Scheme in connection with this Agreement or the relevant Supply Chain Agreement (as appropriate)

**"Directive"**

has the meaning given in Schedule 22 (*Variation Procedure*)

**"Direct Losses"**

means, subject to the provisions of Clause 9.1 (*Limits on liability*), all damage, losses, liabilities, claims, actions, costs, expenses (including the cost of legal or professional services, legal costs being on an agent/client, client paying basis), proceedings, demands and charges whether arising under statute, contract or at common law but, to avoid doubt, excluding Indirect Losses

**"Disaster Plan"**

means the plan set out in Schedule 5 (*Disaster Plan*)

**"Disclosed Data"**

means any Design Data and any other written information, data and documents (including, to avoid doubt, data and documents concerning the Title Deeds and any rights of any person in respect of the Site) made available or issued to Project Co or any Project Co Party in connection with the Project by or on behalf of CHP (or any CHP Party) whether before or after the execution of this Agreement

**"Discriminatory Change in Law"**

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

- (a) primary healthcare and/or social care premises whose design, construction, financing and operation are procured by a contract under the NHS LIFT initiative (or any similar successor programme) in relation to other similar primary healthcare and/or social care centres; or
- (b) companies undertaking partnering arrangements and/or projects procured by contracts in either case under the NHS LIFT initiative (or any similar successor programme) in relation to other companies undertaking similar projects; or
- (c) the [insert name of the Project hospital] primary healthcare and/or social care premises in relation to other primary healthcare and/or social care premises; or
- (d) Project Co or LiftCo in relation to other companies, save that:
  - (i) such action shall not be a Discriminatory Change in Law where it is in response to any act or omission on the part of Project Co or LiftCo which is illegal (other than an act or omission rendered illegal by virtue of the Discriminatory Change in Law itself);
  - (ii) such action shall not be deemed to be discriminatory solely on the basis that its effect on Project Co or LiftCo is greater than its effect on other companies; and
  - (iii) a change in taxes or the introduction of a tax affecting companies generally or a change in VAT shall be deemed not to be discriminatory in any circumstances (to avoid doubt, such changes being given effect in accordance with Clause 53 (*Taxation*))

**"Dispute"**

has the meaning given in paragraph 1 of Schedule 26 (*Dispute Resolution Procedure*)

**"Dispute Resolution Procedure"**

means the procedure set out in Schedule 26 (*Dispute Resolution Procedure*)

**"Draft Proposal"**

has the meaning given in Schedule 17 (*Market Testing Procedure*)

**"Economic Reinstatement Test"**

has the meaning given in the Funders' Direct Agreement

**"Employee Transfer"**

means a relevant transfer of an undertaking in accordance with the Transfer Regulations

**"Enhanced DBS & Barred List Check"**

an Enhanced DBS & Barred List Check (child) or Enhanced DBS & Barred List Check (adult) or Enhanced DBS & Barred List Check (child & adult) (as appropriate)

**"Enhanced DBS & Barred List Check (child)"**

a disclosure of information comprised in an Enhanced DBS Check together with information from the DBS children's barred list

**"Enhanced DBS & Barred List Check (adult)"**

a disclosure of information comprised in an Enhanced DBS Check together with information from the DBS adult's barred list

**"Enhanced DBS & Barred List Check (child & adult)"**

a disclosure of information comprised in an Enhanced DBS Check together with information from the DBS children's and adult's barred list

**"Enhanced DBS Check"**

a disclosure of information comprised in a Standard DBS Check together with any information held locally by police forces that it is reasonably considered might be relevant to the post applied for

**"Enhanced DBS Position"**

any position listed in the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (as amended), which also meets the criteria set out in the Police Act 1997 (Criminal Records) Regulations 2002 (as amended), and in relation to which an Enhanced DBS Disclosure or an Enhanced DBS & Barred List Check (as appropriate) is permitted

**"Estimated Increased Maintenance Costs"**

has the meaning given in Clause 28.7 (*Maintenance*)

**"Executive"**

has the meaning given in Schedule 22 (*Variation Procedure*)

**"Excluded Person"**

has the meaning given in Schedule 17 (*Market Testing Procedure*)

**"Excusing Cause"**

has the meaning given in Clause 8.7 (*Excusing Causes*)

**"Existing Service Provider"**

Any organisation or body other than CHP (including for the avoidance of doubt any sub-contractor or agent engaged by CHP) who is engaged in the provision of services which will become the Project Operations for which Project Co or a Supply Chain Member will become responsible in accordance with the provisions of this Agreement

**"Expert"**

means the individual(s) appointed in accordance with Schedule 26 (*Dispute Resolution Procedure*)

**"Expiry Date"**

means the date on which this Agreement will terminate in accordance with Clause 46.3 (*Non-Default Termination*)

**"Facilities"**

means the [primary care/health centre], buildings and other facilities, together with all supporting infrastructure (including the Plant and Category A Equipment) and amenities located on the Site as required to enable Project Co to comply with its obligations under this Agreement, all as the same may be varied, amended or supplemented from time to time in accordance with this Agreement

**"Facility Deduction Percentage"**

means the percentage of the Service Payments under this Agreement represented by the Deductions made under this Agreement

**"Fair Deal Guidance"**

~~Means~~means the Department of Health document Fair Deal for Staff Pensions: staff transfers from Central Government – DH Guidance for NHS Pension Scheme available at <http://www.nhsbsa.nhs.uk/2806.aspx>

**"Fair Deal for Staff Pensions"**

means the HM Treasury document Fair Deal for Staff Pensions: staff transfer from Central Government October 2013 available at <https://www.gov.uk/governmentpublications/fair-deal-guidance>

**"Fair Value"**

means the amount at which an asset or liability could be exchanged in an arms length transaction between informed and willing parties, other than in a forced or liquidated sale

**"Fast Track Dispute Resolution Procedure"**

means the procedure referred to in paragraph 6 of Schedule 26 (*Dispute Resolution Procedure*)

**"Final Commissioning Programme"**

means the programme to be jointly developed and agreed by CHP and Project Co in accordance with the provisions of Clause 22.2 (*Pre-Completion Commissioning and Completion*)

**"Financial Close"**

means the date of this Agreement

**"Financial Model"**

means the computer spreadsheet model for the Project incorporating statements of Project Co's cashflows including all expenditure, revenues, financing and taxation of the Project Operations together with the profit and loss accounts and balance sheets for Project Co throughout the Project Term accompanied by details of all assumptions, calculations and methodology used in their compilation and any other documentation necessary or desirable to operate the model, as amended from time to time in accordance with the terms of Clause 37 (*Custody of Financial Model*), the output from which at the date of this Agreement is

shown at Schedule 19 (*Financial Model*) and a copy of which is attached to this Agreement on disk as Attachment [ ]

**"Finishes"**

means those finishes listed at Table A of Schedule 10 (*Review Procedure*)

**"Force Majeure"**

has the meaning given in Clause 43 (*Force Majeure*)

**"Funders"**

means all or any of the persons who provide financing or funding in respect of the Project Operations under the Funding Agreements including [\[give details of Funders\]](#) and, where the context so permits, prospective financiers or funders

**"Funders' Direct Agreement"**

means the agreement to be entered into between CHP, the Senior Funders and Project Co in the form set out in Schedule 6 (*Funders' Direct Agreement*)

**"Funding Agreements"**

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

**"Funding Shortfall"**

has the meaning given in Schedule 22 (*Variation Procedure*)

**"GDPR"**

means (a) the General Data Protection Regulations (Regulation (EU) 2016/679) which comes into force on 25 May 2018; and (b) any equivalent legislation amending or replacing the General Data Protection Regulations (Regulation (EU) 2016/679)

**"General Procedure"**

has the meaning given in Schedule 22 (*Variation Procedure*)

**"General Change in Law"**

means a Change in Law which is not a Discriminatory Change in Law, a Specific Change in Law or a Qualifying Change in Law

**"Good Industry Practice"**

means using standards, practices, methods and procedures conforming to the Law and exercising that degree of skill and care, diligence, prudence and foresight which would reasonably and ordinarily be expected from a skilled and experienced person engaged in a similar type of undertaking under the same or similar circumstances

**"Government"**

means the government of the United Kingdom

**"Ground Physical and Geophysical Investigation"**

means the investigation of all the conditions of and surrounding the Site and of any extraneous materials in, on or under the Site (including its surface and subsoil) to enable the Facilities to be designed and constructed and the Works to be carried out with due regard for those conditions and the seismic activity (if any) in the region of the Site

**"Group 1 Equipment"**

means [insert definition of Group 1 Equipment]

**"Handback"**

means the return of the Facilities by Project Co to CHP on the Expiry Date in accordance with this Agreement

**"Handback Amount"**

has the meaning given in Schedule 24 (*Handback Procedure*)

**"Handback Bond"**

has the meaning given in Schedule 24 (*Handback Procedure*)

**"Handback Certificate"**

means the certificate of confirmation that the Facilities comply with the Handback Requirements to be issued by CHP in accordance with Schedule 24 (*Handback Procedure*)

**"Handback Procedure"**

means the procedure for Handback described in Schedule 24 (*Handback Procedure*)

**"Handback Programme"**

has the meaning given in Schedule 24 (*Handback Procedure*)

**"Handback Requirements"**

has the meaning given in Schedule 24 (*Handback Procedure*)

**"Handback Works"**

has the meaning given in Schedule 24 (*Handback Procedure*)

**"Health and Safety Regime"**

means the Food Safety Act 1990 (and associated regulations), the Health & Safety at Work etc Act 1974 (and associated regulations), the Fire Precautions Act 1971, the Environmental Protection Act 1990, the Water Industry Act 1991, the Water Resources Act 1991 and any similar or analogous health, safety or environmental legislation in force from time to time

**"Heating Degree Day"**

means in respect of each calendar month, the figure published by ~~DH Estates and Facilities~~ [insert nearest \_\_\_\_\_] showing the extent to which the average outdoor temperature in [insert nearest

~~geographical location in which measurement takes place~~ was less than a mean temperature of +18.5 degrees Celsius.

**"H&S Conviction"**

has the meaning given in Clause 44.1.6 (*Project Co Events of Default*)

**"HoldCo"**

means ~~[insert details of Project Co's Holding Company]~~

**"Holding Company"**

has the meaning given to it in Section 1159 of the Company Act 2006

**"Hospital"**

means ~~[insert details]~~

**"Hospital Manager"**

means Project Co's duty manager who shall be present at the Facilities in accordance with the Service Level Specifications

**"Indemnifier"**

has the meaning given in Clause 8.3 (*Conduct of Claims*)

**"Independent Tester"**

means the ~~[insert name of Independent Tester]~~ or such substitute independent tester as may be permitted pursuant to this Agreement

**"Independent Tester Contract"**

means the contract dated the same date as this Agreement in the form set out in Schedule 15 (*Independent Tester Contract*) between Project Co, CHP and the Independent Tester, the Contractor and the Senior Funder

**"Independent Tester's Collateral Agreement"**

means the collateral agreement between CHP, Project Co and the Independent Tester in the form set out in Schedule 11 (*Collateral Agreements*)

**"Indirect Losses"**

has the meaning given in Clause 9 (*Limits on Liability*)

**"Initial Funding Agreements"**

means ~~[describe the Funding Agreements put into place upon signature of the Agreement]~~

~~**"Insurance Cost"**~~

~~means (subject to paragraph 2.4 of Part 1 of Schedule 18) the cost of taking out and maintaining the insurances set out in paragraph 1 of Part 2 of Schedule 21 incurred by Project Co from time to time, after deducting agency or other commission paid or allowed to Project Co~~

**"Insurance Term"**

Means any terms and/or conditions required to be included in a policy of insurance by Clause 36 and/or Schedule 21 (Insurance) but excluding any risk

**"Insurances"**

means, as the context requires, all or any of the insurances required to be maintained by Project Co pursuant to this Agreement

**"Intellectual Property"**

means all registered or unregistered trade marks, service marks, patents, registered designs, utility models, applications for any of the foregoing, copyrights, unregistered designs, the sui generis rights of extraction relating to databases, trade secrets and other confidential information or know-how

**"Intellectual Property Rights"**

means the Intellectual Property which (or the subject matter of which) is created, brought into existence, acquired, used or intended to be used by Project Co, any Project Co Party or by other third parties (for the use by or on behalf of or for the benefit of Project Co) for the purposes of the design or construction of the Facilities, the operation, maintenance, improvement and/or testing of the Facilities or the conduct of any other Project Operation or otherwise for the purposes of this Agreement

**"IRR"**

has the meaning given in Schedule 22 (*Variation Procedure*)

**"IT"**

means information technology systems, hardware and software

**"Law"**

means:

- (a) any applicable statute or proclamation or any delegated or subordinate legislation;
- (b) any enforceable community right within the meaning of section 2(1) European Communities Act 1972;
- (c) any applicable guidance, direction or determination with which CHP and/or Project Co is bound to comply to the extent that the same are published and publicly available or the existence or contents of them have been notified to Project Co by CHP; and
- (d) any applicable judgement of a relevant court of law which is a binding precedent in England and Wales, in each case in force in England and Wales

**"Liaison Committee"**

means the committee referred to in Clause 12 (*Liaison*)

**"Liaison Procedure"**

means the procedure referred to in Clause 12 (*Liaison*)

**~~"LIBOR"~~**

~~means the rate per annum determined by [ ] Bank plc to be the offered rate for six month sterling deposits in the London interbank market which appears on Telerate Page 3750 (or such other page as may replace that page on the Dow Jones Telerate service)~~

~~NB: The entry of the United Kingdom into European Monetary Union (EMU) may have an effect on the continued availability or general applicability of a sterling denominated LIBOR rate and other provisions of this standard form. CHP should consider, on a project specific basis, the effect EMU could have on the Agreement and take steps accordingly.~~

**"Licences"**

means the licences granted by CHP pursuant to Clauses 14.1 and 14.2

**"Lifecycle Assets"**

means each item of building fabric, plant and machinery, furniture, fittings and Category A Equipment (but excluding any CHP's Assets) to be renewed or replaced during the Term as identified in the Lifecycle Schedule or as may be identified by the Parties applying Good Industry Practice

**"Lifecycle Profile"**

means the amounts profiled to be spent by Project Co on the replacement or renewal of Lifecycle Assets as shown in the Financial Model [in row [ ]] from the Actual Completion Date onwards

**"Lifecycle Schedule"**

means the detailed annual lifecycle schedule showing when the Lifecycle Assets will be renewed or replaced, and forming part of the Schedule of Programmed Maintenance

**"Lifecycle Spend"**

means the actual amount spent by Project Co on the replacement or renewal of Lifecycle Assets

**"LiftCo"**

means [ ] a company incorporated in England and Wales under registration number [ ]

**"Liquid Market"**

means that there are sufficient willing parties (being at least two parties, each of whom is capable of being a Suitable Substitute Contractor) in the market for public private partnership contracts or similar contracts for the provision of services (in each case the same as or similar to this Agreement) for the price that is likely to be achieved through a tender to be a reliable indicator of Fair Value provided always that any vehicle controlled and established by the Senior Funders specifically for the purposes of the Project and to which this Agreement may be novated shall be discounted in assessing whether there are sufficient willing bidders in the market for such purposes

**"Maintenance Works"**

means any works for maintenance or repair of the Facilities that are necessary to ensure that the Facilities are maintained in accordance with Service Level Specifications and Method Statements for [describe relevant service] and that the Facilities comply with CHP's Construction Requirements and Project Co's Proposals (including, without limitation, the renewal or replacement of any Plant or equipment) throughout the Project Term

**"Market Tested Services"**

has the meaning given in Schedule 17 (*Market Testing Procedure*)

**"Market Testing"**

has the meaning given in Schedule 17 (*Market Testing Procedure*)

**"Market Testing Date"**

has the meaning given in Schedule 17 (*Market Testing Procedure*)

**"Market Testing Meeting"**

has the meaning given in Schedule 17 (*Market Testing Procedure*)

**"Market Testing Proposal"**

has the meaning given in Schedule 17 (*Market Testing Procedure*)

**"Medical Contamination"**

means a disease carrying agent which cleaning and prevention of infection or contamination techniques in use in accordance with Good Industry Practice and this Agreement cannot substantially prevent or cannot substantially remove with the result that:

- (a) it is unsafe to admit patients or staff to the relevant area or to use the area for the purpose for which it is intended; and
- (b) the area cannot be made safe for the admission of patients or staff;

**"Method Statements"**

means the method of providing a Service as set out or identified in Part 2 of Schedule 14 (*Service Requirements*) as amended from time to time in accordance with Clause 40 (*Variation Procedure*) and Clause 27 (*The Services*)

**"Monthly Service Payment"**

has the meaning given in Schedule 18 (*Payment Mechanism*)

**"National Health Service Trust" or "NHS Trust"**

means a body established pursuant to Section 25(1) of the National Health Service Act 2006

**"NCC"**

means the National Computing Centre Limited (or any body that may supersede or replace it from time to time)

**"NHS"**

means the National Health Service

**"NHS Employment Check Standards"**

the documents which set out the pre-appointment checks that are required by Law, those that are mandated by any Regulatory Body policy, and those that are required for access to the NHS Care Record Service and include, without limitation, verification or identity checks, right to work checks, registration and qualification checks, employment history and reference checks, criminal record checks and occupational health checks

**"NHS Pension Scheme"**

Means the NHS Pension Scheme for England and Wales established pursuant to regulations made in exercise of powers under sections 10 and 13 and Schedule 3 of the Superannuation Act 1972 (as amended from time to time)

**"NHS Pension Scheme Regulations"**

means The National Health Service Pension Scheme Regulations 1995 (SI 1995/300) and The National Health Service Pension Scheme Regulations 2008 (SI 2008/653) (as amended)

**"NHS Requirement"**

means:

- (a) in relation to the Works, Health Building Notes and Health Technical Memoranda and such other requirements as are designated as NHS Requirements in CHP's Construction Requirements; and
- (b) in relation to the Project Operations (other than the Works), Health Building Notes, Health Technical Memoranda, all Executive Letters, Health Service Guidelines, Health Circulars of the NHS and any similar official requests, requirements and guidance having similar status for the time being in force, but only to the extent the same are published and publicly available or the existence and contents of them have been notified to Project Co by CHP;

**"NHS Specific Change in Law"**

means any Change in Law which specifically refers to the provision of a service the same or similar to the Services or to the holding of shares in companies whose main business is providing a service the same or similar to such services or any change in an NHS Requirement (other than an NHS Requirement which merely gives effect to law generally and does not principally affect or principally relate to the provision or operation of the Facility or primary healthcare or social care premises)

**"Operational Term"**

means the period from the Actual Completion Date until the end of the Project Term

**"Original Senior Commitment"**

means the amount committed by the Senior Funder under the Initial Funding Agreements as at Financial Close (as adjusted to take into account any Qualifying Variation)<sup>114</sup>

**"Outline Commissioning Programme"**

means the programme setting out the standards, specifications, procedures and other requirements for the carrying out and completion of the commissioning activities of the parties set out in outline in Schedule 12 (*Outline Commissioning Programme*)

~~**"Pass Through Cost"**~~

~~means the Insurance Cost payable for the relevant Contract Month~~

**"Payment Commencement Date"**

means the later of the Completion Date (or such earlier date as may be agreed by the parties in their absolute discretion) and the Actual Completion Date

**"Payment Mechanism"**

has the meaning given in Schedule 18 (*Payment Mechanism*)

**"Payment Notice"**

means the monthly notice to be delivered by Project Co to CHP

**"Pensionable CHP Employee"**

means a CHP Employee who is a member of or is entitled to be a member of the NHS Pension Scheme on or immediately prior to the Relevant Service Transfer Date

**"Performance Failure"**

has the meaning given in Part A Schedule 18 (*Payment Mechanism*)

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<sup>114</sup> Adjust for Bond transaction to refer to: (a) the gross bonds proceeds to be raised; and (b) the amount committed under the Senior Funders Agreements other than such bond proceeds in each case as at Financial Close (as adjusted to take into account any Qualifying Variation).

**"Performance Guarantees"**

means the guarantees to Project Co in respect of the Construction Contract, the Service Contracts [insert details of any other guarantees to be given]

**"Performance Monitoring Report"**

means the monthly report to be delivered by Project Co to CHP containing the information specified in clause 35.2

**"Performance Monitoring System"**

has the meaning given in Schedule 14 (*Service Requirements*)

**"Permitted Borrowing"**

means, without double counting, any:

- (a) advance to Project Co under the Senior Funders Agreements, [provided that such advance is not made under any Committed Standby Facility];
- (b) Additional Permitted Borrowing;
- (c) [advance to Project Co under any Committed Standby Facility which is made solely for the purpose of funding any cost overruns, increased expenses or loss of revenue which Project Co incurs, provided that such funds are not used in substitution for other sources of committed funding designated for those purposes<sup>115</sup>]; and
- (d) interest and, in respect of the original Senior Funders Agreements only (as entered into at the date of this Agreement prior to any subsequent amendment), other amounts<sup>116</sup> accrued or payable under the terms of such original Senior Funders Agreements,

except where the amount referred to in paragraphs (a) to (d) above is or is being used to fund a payment of Default Interest on any Additional Permitted Borrowing

**["Phase"**

means, as the context may require, Phase 1 and/or Phase 2 as described in Schedule [ ]<sup>117</sup> and "Phases" shall be construed accordingly]

**["Phase 1"**

means Phase 1 as described in Schedule [ ]<sup>118</sup>

**["Phase 2"**

means Phase 2 as described in Schedule [ ]]

**["Phase Actual Completion Date"**

means, as the context may require, the Phase 1 Actual Completion Date and/or the Phase 2 Actual Completion Date<sup>119</sup>]

<sup>115</sup> The "Committed Standby Facility", if used, will be any standby facility that is committed by the Senior Funders at financial close for the purposes of funding any unforeseen cost overruns, increased expenses or loss of revenues incurred by Project Co. If there is no such facility limb (c) of the definition of "Permitted Borrowing" will not be required.

<sup>116</sup> It is vital CHP's advisers satisfy themselves as to the appropriateness of the senior finance terms (especially any possibly unusual fees or indemnities) in light of this potential liability. If CHP is not so satisfied, it should either ask the senior funders to revise their terms or alternatively restrict CHP's exposure under sub-clause (d) of Permitted Borrowings above to those fees which it is willing to pay on a relevant termination.

<sup>117</sup> Cross-refer to description of Phases.

<sup>118</sup> Define separately each and every Phase referred to in the definition of "Phase".

**["Phase Completion Date"**

means, as the context may require, the Phase 1 Completion Date and/or the Phase 2 Completion Date]

**["Phase 1 Actual Completion Date"**

means the date on which Phase 1 has been completed in accordance with this Agreement, as such date shall be stated in the Certificate of Practical Completion for Phase 1, or, in the event of dispute, as such date may be determined in accordance with Schedule 26 (Dispute Resolution Procedure)]

**["Phase 1 Completion Date"**

means (subject to Clause 41) the date described as such in Schedule [ ] (*Table of Phases*)

**["Phase 2 Actual Completion Date"**

means the date on which Phase 2 has been completed in accordance with this Agreement, as such date shall be stated in the Certificate of Practical Completion for Phase 2, or, in the event of dispute, as such date may be determined in accordance with Schedule 26 (*Dispute Resolution Procedure*)]

**["Phase 2 Completion Date"**

means (subject to Clause 41) the date described as such in Schedule [ ] (*Table of Phases*)

**"Planning Approval"**

means detailed planning consent for the Project dated [insert date of Planning Approval] and annexed as Attachment [ ]

**"Planning Permission"**

means any planning permission, approval of reserved matters, listed building consent, conservation areas consent and/or other consent or approval reasonably required from time to time for construction and/or operation of the Facilities (including without limitation for any CHP Additional Works Item or Works Changes and the Planning Approval)

**"Plant"**

means the plant and equipment to be provided and/or maintained by Project Co pursuant to this Agreement

**"Post Completion Commissioning"**

means, as appropriate, Project Co's Post Completion Commissioning and/or CHP's Post Completion Commissioning

**"Preferred Tenderer"**

has the meaning given in Schedule 17 (*Market Testing Procedure*)

**"Principle of Good Employment Practice"**

means the guidance note issued by the Cabinet Office in December 2010 titled "SUPPLIER INFORMATION NOTE: WITHDRAWAL OF TWO-TIER CODE" (available at <http://www.cabinetoffice.gov.uk/sites/default/files/resources/withdrawal%20of%20TwoTier%20ocode.doc>) including Annex A of that guidance note setting out a set of voluntary principles of good employment practice, as amended, superseded or otherwise from time to time

**"Procurement Legislation"**

means the Public Works Contracts Regulations 1991 (SI 1991/2680), the Public Supply Contracts Regulations 1995 (SI 1995/201), the Public Services Contracts Regulations 1993 (SI 1993/3228) and any other legislation or rules which may from time to time regulate the procurement activities of CHP

**"Programme"**

means the programme set out in Schedule 9 (*The Programme*) as revised and issued by Project Co (or on its behalf) from time to time pursuant to Clause 19 (*Programme and Dates for Completion*)

**"Programmed Maintenance"**

means the maintenance work (for the avoidance of doubt, including but not limited to renewal or replacement of Lifecycle Assets) which Project Co is to carry out in accordance with the Schedule of Programmed Maintenance

**"Programmed Maintenance Information"**

has the meaning given in Clause 28.3 (*Maintenance*)

**"Prohibited Act"**

has the meaning given in Clause 54 (*Corrupt Gifts*)

**"Project"**

has the meaning given in Recital B

**"Project Co Event of Default"**

has the meaning given in Clause 44 (*Project Co Events of Default*)

**"Project Co Party"**

means Project Co's agents and contractors (including without limitation the Contractor and the Service Providers) and its or their sub-contractors of any tier and its or their directors, officers, employees and workmen in relation to the Project and including Retained Staff Members (but only when such Retained Staff Members are engaged in the performance of the Services) and "Project Co Parties" shall be construed accordingly

**"Project Co's Post-Completion Commissioning"**

means Project Co's commissioning activities carried out in accordance with Clause 23.1 (*Post Completion Commissioning*)

**"Project Co's Pre-Completion Commissioning"**

means Project Co's commissioning activities to be carried out in accordance with Clause 22 (*Pre Completion Commissioning and Completion*)

**"Project Co's Proposals"**

means the document at Part 4 of Schedule 8 (*Construction Matters*) as amended from time to time in accordance with Clause 40 (*Variation Procedure*)

**"Project Co's Representative"**

means the person appointed by Project Co pursuant to Clause 11 (*Representatives*)

**"Project Data"**

means:

- (a) all Design Data;

- (b) all drawings, reports, documents, plans, software, formulae, calculations and other data relating to the provision of the Services; and
- (c) any other materials, documents and or data acquired, brought into existence or used in relation to the Project Operations or this Agreement;

**"Project Documents"**

means the Ancillary Documents, the Funding Agreements and the Retained Staff Agreement

**"Project Operations"**

means the carrying out of the Works, the carrying out of Project Co's Pre-Completion Commissioning and Project Co's Post-Completion Commissioning, the maintenance of the Facilities (including the renewal or replacement of Plant), the management and provision of the Services and the performance of all other obligations of Project Co under this Agreement from time to time

**"Project Term"**

means the period commencing at [midnight] on the date of this Agreement and expiring at [midnight] on [date] or on such other date as may be determined in accordance with this Agreement

**"Proposal"**

means:

- (a) in the case of a bill, the bill being introduced by the Government or receiving the support of the Government at its second reading in the first House of Parliament into which it is introduced or the bill passing a second reading in the first House of Parliament into which it is introduced; or
- (b) in the case of subordinate legislation, the proposed statutory instrument or order being laid before Parliament in draft; or
- (c) in the case of a directive, regulation or decision of the European Union, its adoption; or
- (d) in the case of an administrative act as referred to in the definition of Adverse Law, any of the following prior or preparatory to the making of such an act:
  - (i) the taking by CHP, the Government, a minister of the Crown, or a department, agency, regulator or other public body or official of any step in a process defined by Law for the making of such administrative acts, other than any early stages of such process (such as, without limitation, consultation or information gathering) following the completion of which further substantive steps remain in such process before the making of such an administrative act can occur; or
  - (ii) any communication from the Government, a minister of the Crown, or the department, agency, regulator or other public body or official responsible for making such administrative acts, to the effect that such an administrative act will be made.

**"Prospective Tenderers"**

has the meaning given in Schedule 17 (*Market Testing Procedure*)

**"Protective Legislation"**

means each of the National Health Service Act 2006 and the National Health Service (Consequential Amendments) Act 2006

**"Public Sector Body"**

means the Secretary of State for Health and his successors or a body within Section 82 of the National Health Service Act 2006 or a local government body established pursuant to the Local Government Act 1972 or the Local Government Act 1992

**"Qualifying Variation"**

has the meaning given in Schedule 22 (*Variation Procedure*)

**"Quality Manager"**

means the quality manager appointed pursuant to Clause 25 (*Quality Assurance*)

**"Quality Plans"**

means the Design Quality Plan and Construction Quality Plan, prepared in accordance with Part 9 of Schedule 8 (*Construction Matters*), and the Services Quality Plan, prepared in accordance with Part 3 of Schedule 14 (*Service Requirements*), as required to be implemented by Project Co in accordance with Clause 25 (*Quality Assurance*)

**"Range of Finishes"**

has the meaning given in paragraph 1.2.3(a) of Schedule 10 (*Review Procedure*)

**"Recognition Agreement"**

means any agreement or arrangement made by or on behalf of one or more trade unions and one or more employers or employer's associations relating to recognition of a trade union or unions by an employer to any extent for the purpose of collective bargaining (as defined by Section 178(2) of the Trade Union and Labour Relations (Consolidation) Act 1992) (as amended by the Trade Union Reform and Employment Rights Act 1993);

**"Rectification"**

has the meaning given in Schedule 18 (*Payment Mechanism*)

**"Relevant Change in Law"**

has the meaning given in Clause 39 (*Change in Law*)

**"Relevant Service Transfer Date"**

has the meaning given in [\[Clause 30.1 \(\*Employee Transfer\*\)\]](#)

**"Relevant Tax Liability"**

has the meaning given in Clause 48.7.3 (*Compensation on Termination*)

**"Relief"**

has the meaning given in Clause 48.7.1 (*Compensation on Termination*)

**"Relief Events"**

has the meaning given to it in Clause 42 (*Relief Events*)

**"Restricted Person"**

means either:

- (a) a person providing or proposing to provide healthcare services of a similar nature to those provided or contemplated by CHP at the time in question; or

- (b) any person who has a material interest in the production of tobacco products and/or alcoholic beverages;

NB: This definition is to be considered by CHP on a project specific basis.

**"Review Procedure"**

means the procedure set out in Schedule 10 (*Review Procedure*)

**"Reviewable Design Data"**

means the Design Data listed at Part 5 of Schedule 8 (*Construction Matters*)<sup>120</sup>

**"Room Data Sheets"**

has the meaning given in Schedule 22 (*Variation Procedure*)

**"RPI"**

means the Retail Prices Index (All Items) as published by the Office for National Statistics from time to time (the "Index"), or failing such publication or in the event of a fundamental change to the Index, such other index as the parties may agree, or such adjustments to the Index as the parties may agree (in each case with the intention of putting the parties in no better nor worse position than they would have been in had the Index not ceased to be published or the relevant fundamental change not made) or, in the event that no such agreement is reached, as may be determined in accordance with the Fast Track Dispute Resolution Procedure

**"Schedule of Programmed Maintenance"**

means the programme referred to in Clause 28.1 to be submitted to CHP's Representative by Project Co in accordance with Schedule 10 (*Review Procedure*)

**"Secretary of State"**

means the Secretary of State for Health

**"Security Trustee"**

means [ ]

**"Selection Period"**

has the meaning given in paragraph 1.2.3(a) of Schedule 10 (*Review Procedure*)

**"Senior Credit Agreement"**

means a loan agreement dated on or about the date of this Agreement between the Senior Funder and Project Co

**"Senior Credit Agreement Financial Model"**

Means the financial model as defined in the Senior Credit Agreement as the same may be updated from time to time in accordance with the provisions of the Senior Credit Agreement (provided always that such model shall continue on the same basis after Senior Debt has been repaid until the end of the Term

**"Senior Debt"**

means any debt arising under the Senior Funding Documents (as defined in the Senior Credit Agreement)

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<sup>120</sup>

This is not intended to encompass design material agreed prior to signature.

**"Senior Debt Amount"**

has the meaning given in Schedule 23 (*Compensation on Termination*)

**"Senior Funders"**

means [ ] as defined in the Senior Credit Agreement

**"Sensitive Information"**

has the meaning given in Clause 52.6 (*Confidentiality*)

**"Service Contracts"**

means the contracts dated the same date as this Agreement between Project Co and each Service Provider, by which Project Co will procure the performance of the Services (as amended or replaced from time to time in accordance with this Agreement)

**"Service Failure Points"**

means the points awarded in accordance with the provisions of the Performance Monitoring System

**"Service Level Specifications"**

means the requirements of CHP set out in Part 1 of Schedule 14 (*Service Requirements*) as amended from time to time in accordance with Clause 40 (*Variation Procedure*)

**"Service Payments"**

has the meaning given in Schedule 18 (*Payment Mechanism*)

**"Service Provider"**

means each of [insert description of Service Providers] or any other person engaged by Project Co from time to time as may be permitted by this Agreement to procure the provision of the Services (or any of them)

**"Service Providers' Collateral Agreements"**

means the collateral agreements between CHP, Project Co and each Service Provider in the form set out in Schedule 11 (*Collateral Agreements*)

**"Service Variation"**

has the meaning given in Schedule 22 (*Variation Procedure*)

**"Services"**

means the services to be provided, managed and/or procured by Project Co for CHP in accordance with Schedule 14 (*Service Requirements*) as subsequently amended or adjusted in accordance with this Agreement

**"Services Quality Plan"**

means the document set out in Part 3 of Schedule 14 (*Service Requirements*)

**"Shareholder(s)"**

means a party listed as such in Schedule 27 (*Project Co Information*) as changed from time to time in accordance with this Agreement

**"Shareholders Agreements"**

means the agreement or agreements between the Shareholders relating to Project Co, including any agreement relating to the subscription of equity (or other shareholder funding) by the Shareholders in Project Co [or HoldCo]

**"Site"**

means the land made available to Project Co for the Project and outlined in red on [insert details of relevant plan]

**"Site Conditions"**

means the condition of the Site including (but not limited to) climatic, hydrological, hydrogeological, ecological, environmental, geotechnical and archaeological conditions

**"Small Works"**

has the meaning given in Part 1A of Schedule 22 (*Variation Procedure*)

**"Snagging Matters"**

means minor items of outstanding work (including in relation to landscaping) which would not materially impair CHP's use and enjoyment of the Facilities or the carrying out by CHP [or its tenants and/or licencees] of the Clinical Services or the performance of the Services by Project Co

**"Snagging Notice"**

means the notice to be issued by the Independent Tester in accordance with Clause 22.13 (*Completion Certificate*)

**"Standard DBS Check"**

a disclosure of information which contains details of an individual's convictions, cautions, reprimands or warnings recorded on police central records and includes both 'spent' and 'unspent' convictions

**"Standard DBS Position"**

any position listed in the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (as amended) and in relation to which a Standard DBS Check is permitted

**"Strategic Partnering Agreement"**

means the agreement dated [ ] entered into between LiftCo (1) and [ ] relating to the primary health and social care estate in [ ] area

**"Strategic Partnering Board"**

means the board set up pursuant to the Strategic Partnering Agreement and defined in that agreement as the SPB

**"Sub-Contracts"**

means the contracts entered into by or between Project Co, the Contractor and/or a Service Provider and other third parties in relation to any aspect of the Project Operations

**"Sub-Contractors"**

means any third party (including the Contractor and a Services Provider) who enters into any Sub-Contract

**"Subsidiary"**

has the meaning given to it in Section 1159 of the Companies Act 2006

**"Supply Chain Agreements"**

the agreements between Project Co and its Service Providers and Contractors from time to time

**"Supply Chain Members"**

means any party (except Project Co) to a Supply Chain Agreement to which Project Co is a party

**"Tenderers"**

has the meaning given in Schedule 17 (*Market Testing Procedure*)

**"Tender Requirements"**

has the meaning given in Schedule 17 (*Market Testing Procedure*)

**"Tender Validity Period"**

has the meaning given in Schedule 17 (*Market Testing Procedure*)

**"Termination Date"**

means the date on which termination of this Agreement takes effect in accordance with its terms

**"Third Party Shareholder"**

means [definition of non-sponsor equity providers]

**"Title Deeds"**

means the certified copies of the title deeds to the Site which have been supplied to (and examined by) Project Co and with which Project Co is deemed by its execution of this Agreement to be satisfied with regard to their content, validity and completeness

**"Transfer Date"**

means the date on which a Relevant Transfer occurs

**"Transfer Regulations"**

means the Transfer of Undertaking (Protection of Employment) Regulations 2006 (SI No. 246) and EC Council Directive 77/187 (as amended)

**"Transferring Employee"**

means any Transferring CHP Employee [or Transferring Non-CHP Employee]

**"Transferring CHP Employee"**

means in relation to any service equivalent to a Project Operation, all those persons employed by CHP under a contract of employment (excluding, to avoid doubt, (without limitation) any person engaged by CHP as an independent contractor or persons employed by any sub-contractor engaged by CHP) who are wholly or substantially engaged in the provision of that service as at the relevant Transfer Date

**"Transferring Non-CHP Employee"**

means in relation to any service equivalent to a Project Operation, any persons engaged by any Existing Service Provider who is wholly or mainly engaged in the provision of that service as at the Relevant Service Transfer Date and who will become an employee of Project Co or a Supply Chain Member on the Relevant Service Transfer Date in accordance with the provisions of paragraph 1 of Schedule 34 (Transfer of Employment and Pensions)

**"TUPE Information"**

has the meaning given in Schedule 17 (*Market Testing Procedure*)

**"Uninsurable Risk"**

means in respect of the insurance referred to in Part 2 of Schedule 21 (Insurance Requirements) and for which with effect from the Actual Completion Date:

- (a) insurance is not available within the worldwide insurance market with reputable insurers of good standing in respect of that risk; or
- (b) the insurance premium payable for insuring such risk is at such a level that the risk is not generally being insured against in the worldwide insurance market with reputable insurers of good standing by contractors in the United Kingdom;

to the extent that Project Co has demonstrated to CHP that Project Co and a prudent board of directors of a company operating the same or substantially similar public private partnership businesses in the United Kingdom to that operated by Project Co would in similar circumstances (in the absence of the type of relief envisaged by Clause 36) be acting reasonably and in the best interests of the company if they resolved to cease to operate such businesses as a result of that risk becoming uninsured, taking into account inter alia (and without limitation) the likelihood of the risk occurring (if it has not already occurred), the financial consequences for such company if such risk did occur (or has occurred) and other mitigants against such consequences which may be available to such company

**"Unprogrammed Maintenance Work"**

has the meaning given in Clause 28.8 (*Maintenance*)

**"Unreasonable Act"**

means any act or omission which is contrary to any reasonable instruction, guidance or rules for the operation or management of the Facilities

**"Variation"**

has the meaning given in Schedule 22 (*Variation Procedure*)

**"Variation Confirmation"**

has the meaning given in Schedule 22 (*Variation Procedure*)

**"Variation Enquiry"**

has the meaning given in Schedule 22 (*Variation Procedure*)

**"Variation Order"**

has the meaning given in part [ ] of Schedule 22 (*Variation Procedure*)

**"Variation Procedure"**

means the procedure set out in Schedule 22 (*Variation Procedure*)

**"VAT"**

means value added tax at the rate prevailing at the time of the relevant supply charged in accordance with the provisions of the Value Added Tax Act 1994 (as amended)

**"VAT Sum"**

has the meaning given in Clause 53.5 (*VAT*)

**"Viability Statement"**

means a case made by CHP and accepted in writing by [relevant] Clinical Commissioning Group and/or NHS England and the Department of Health [and Social Care](#) that the Facilities (or substantially all of them) are no longer needed on the grounds of the healthcare needs of CHP's geographical area

**"Works"**

means the design (including the preparation of all Design Data), construction, testing, commissioning and completion of the Facilities (including any temporary works) and the installation and commissioning of Category A Equipment and Category B Equipment to be performed by Project Co in accordance with this Agreement (as varied, amended or supplemented from time to time in accordance with this Agreement)

**"Works Variation Capital Limit"**

has the meaning given in Schedule 22 (*Variation Procedure*)

**"Works Variation Delay Limit"**

has the meaning given in Schedule 22 (*Variation Procedure*); and

**"Your Guide to the NHS"**

means the document entitled "Your Guide to the NHS – getting the most from your National Health Service" published by the Department of Health on 26 January 2001.

## **Part 2 : Interpretation**

This Agreement shall be interpreted according to the following provisions, unless the context requires a different meaning:

- 1 The headings and marginal notes and references to them in this Agreement shall be deemed not to be part of this Agreement and shall not be taken into consideration in the interpretation of this Agreement.
- 2 Except where the context expressly requires otherwise, references to Clauses, Sub-clauses, paragraphs, sub-paragraphs, parts and Schedules are references to Clauses, Sub-clauses, paragraphs, sub-paragraphs and parts of and Schedules to this Agreement and references to Sections, Appendices and Attachments (if any) are references to Sections, Appendices and Attachments to or contained in this Agreement.
- 3 The Schedules to this Agreement are an integral part of this Agreement and a reference to this Agreement includes a reference to the Schedules.
- 4 Words importing persons shall, where the context so requires or admits, include individuals, firms, partnerships, trusts, corporations, governments, governmental bodies, authorities, agencies, unincorporated bodies of persons or associations and any organisations having legal capacity.
- 5 Where the context so requires words importing the singular only also include the plural and vice versa and words importing the masculine shall be construed as including the feminine or the neuter or vice versa.
- 6 The language of this Agreement is English. All correspondence, notices, drawings, Design Data, test reports, certificates, specifications and information shall be in English. All operating and maintenance instructions, name plates, identification labels, instructions and notices to the public and staff and all other written, printed or electronically readable matter required in accordance with, or for purposes envisaged by, this Agreement shall be in English.
- 7 References to any agreement or document include (subject to all relevant approvals and any other provisions of this Agreement concerning amendments to agreements or documents) a reference to that agreement or document as amended, supplemented, substituted, novated or assigned.

- 8 References to any Law are to be construed as references to that Law as from time to time amended or to any Law from time to time replacing, extending, consolidating or amending the same provided that the provisions of this paragraph shall be without prejudice to the operation of Clause 39 (*Changes in Law*) and Schedule 22 (*Variation Procedure*) which shall operate in relation to a Change in Law on the basis set out in this Agreement.
- 9 References to a public organisation (other than CHP) shall be deemed to include a reference to any successor to such public organisation or any organisation or entity which has taken over either or both the functions and responsibilities of such public organisation. References to other persons (other than CHP) shall include their successors and assignees.
- 10 References to a deliberate act or omission of CHP or any CHP Party shall be construed having regard to the interactive nature of the activities of CHP and of Project Co and the expression shall exclude acts or omissions which were within the contemplation of the parties or which were otherwise provided for in this Agreement.
- 11 The words in this Agreement shall bear their natural meaning. The parties have had the opportunity to take legal advice on this Agreement and no term shall, therefore, be construed contra proferentem.
- 12 Reference to "parties" means the parties to this Agreement and references to "a party" mean one of the parties to this Agreement.
- 13 In construing this Agreement, the rule known as the ejusdem generis rule shall not apply nor shall any similar rule or approach to the construction of this Agreement and accordingly general words introduced or followed by the word "other" or "including" or "in particular" shall not be given a restrictive meaning because they are followed or preceded (as the case may be) by particular examples intended to fall within the meaning of the general words.
- 14 All of Project Co's obligations, duties and responsibilities shall be construed as separate obligations, duties and responsibilities owed to CHP and to be performed at Project Co's own cost and expense.
- 15 References to amounts or sums expressed to be "index linked" are references to amounts or sums in [give base date reference] ("Base Date") prices which require to be adjusted whenever the provision containing the amount or sum is given effect in accordance with this Agreement to reflect the effects of inflation after that date. The adjustment shall be measured by changes in the relevant index published for that Contract Year<sup>121</sup> as calculated in accordance with the following formula:

$$\text{Amount or sum in [date] prices} \times \frac{\text{RPI}_d}{\text{RPI}_0}$$

Where  $\text{RPI}_d$  is the value of the Retail Prices Index published or determined with respect to the month of [relevant month, or other date] most recently preceding the date when the provision in question is to be given effect and  $\text{RPI}_0$  is the value of the Retail Prices Index in respect of [date].

- 16 Reference to a document being in the Agreed Form is a reference to the form of the relevant document agreed between the parties and for the purpose of identification initialled by each of them or on their behalf.

<sup>121</sup> See footnote to the definition of "Contract Year" regarding the timing of index linked reviews of the Service Payments.

- 17** Where this Agreement states that an obligation shall be performed "no later than" or "within" or "by" a stipulated date or event which is a prescribed number of Business Days after a stipulated date or event the latest time for performance shall be noon on the last Business Day for performance of the obligations concerned.
- 18** Where this Agreement states that an obligation shall be performed "no later than" or "by" a prescribed number of Business Days before a base date or "by" a date which is a prescribed number of Business Days before a base date, the latest time for performance shall be noon on the last Business Day for performance of the obligations concerned.
- 19** The operation of the Act (referred to in Recital F of the Agreement) upon any Project Document shall not affect the rights or obligations of the parties under this Agreement.

Document comparison by Workshare Compare on 13 February 2018 15:27:00

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| Document 1 ID | interwovenSite://DMSBRISTOL/MATTERS/21094522/1                |
| Description   | #21094522v1<MATTERS> - Land Retained Agreement (v60) Nov 2017 |
| Document 2 ID | interwovenSite://DMSBRISTOL/MATTERS/20869844/1                |
| Description   | #20869844v1<MATTERS> - Land Retained Agreement v6.1           |
| Rendering set | bb standard (no nos and change summary)                       |

| Legend:                   |  |
|---------------------------|--|
| <a href="#">Insertion</a> |  |
| <del>Deletion</del>       |  |
| <del>Moved from</del>     |  |
| <a href="#">Moved to</a>  |  |
| Style change              |  |
| Format change             |  |
| <del>Moved deletion</del> |  |
| Inserted cell             |  |
| Deleted cell              |  |
| Moved cell                |  |
| Split/Merged cell         |  |
| Padding cell              |  |

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|----------------|-------|
|                | Count |
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| Deletions      | 135   |
| Moved from     | 2     |
| Moved to       | 2     |
| Style change   | 0     |
| Format changed | 0     |
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