

SCHEDULE PART 22

This is the Schedule Part 22 comprising the Variation Procedure referred to in the Project Agreement relating to the design, financing and construction of, and the provision of services at the Stobhill Local Forensic Psychiatric Unit

between

Greater Glasgow Health Board

and

Stobhill Healthcare Facilities Limited

SCHEDULE PART 22

Part 1: Variations

1 General

Subject to receiving the Variation Confirmation issued in accordance with the terms of this Schedule Part 22 and to any Consent which must be obtained or modified being so obtained or modified and subject to the other provisions of this Schedule Part 22, Project Co shall be under a duty to implement a Variation. Project Co will not be entitled to any payment or compensation for or in respect of a Variation save as provided in accordance with this Schedule Part 22.

2 Variation Enquiries

2.1 A Variation Enquiry shall be a document issued by the Board's Representative which:

- (a) states on its face that it is a Variation Enquiry;
- (b) states, in the case of a Board Works Variation or a Board Additional Works Item, whether it is the intention of the Board that the Board will pay a capital sum in respect of the Variation in accordance with paragraph 3 of Part 2 of this Schedule Part 22 or whether it is the intention of the Board that Project Co should seek to obtain finance in accordance with Part 2 of this Schedule Part 22; and
- (c) in the case of:
 - (i) a Board Works Variation, specifies the nature of the Board Works Variation and which of the provisions of the Board's Construction Requirements and/or Project Co's Proposals are required to be amended to accommodate the relevant Board Works Variation; or
 - (ii) a Board Additional Works Variation, specifies:
 - (aa) the nature and scope of the relevant Board Additional Works Item to the same level of detail as set out in Project Co's Proposals and/or the Board's Construction Requirements; and
 - (bb) the times at or by which the Board wishes the work at the Facilities to implement the relevant Board Additional Works Item to be commenced and completed; or
 - (iii) a Board Service Variation specifies, the nature of the Board Service Variation and is accompanied by a marked up or amended version of the relevant section(s) of the Method Statements and/or Service Level Specifications.

2.2 The Board's Representative may not issue a Variation Enquiry other than in accordance with the provisions of this Part 1 of the Schedule Part 22.

3 Project Co Response to Variation Enquiry

Preliminary Indicative Information

3.1 Prior to giving a notice referred to in paragraph 3.2 of this Part 1:

- (a) Project Co may at its option within ten (10) Business Days of receipt of a Variation Enquiry:
 - (i) give to the Board in good faith a preliminary non-binding indication of the estimated cost of implementing the Variation and provide such other information about the Variation as is available to Project Co and which it believes is useful to the Board; and
 - (ii) in the case of a Board Works Variation, such information shall include in particular Project Co's estimated effect on the date when the Actual Completion Date will occur;
- (b) if Project Co provides an indication referred to in paragraph (a)(i), the Board shall within a further five (5) Business Days of its receipt confirm whether or not it wishes Project Co to proceed to respond to the Variation Enquiry in accordance with provisions of paragraph 3.2; and
- (c) in the case of a Variation Enquiry for a Board Works Variation or a Board Additional Works Item where the Board has stated an intention that Project Co should obtain finance, Project Co will, if so required in the Variation Enquiry, use reasonable endeavours to obtain an initial non-binding response from the Funders as to availability of finance for the Variation in advance of performing its obligations under Part 2 of this Schedule Part 22.

Project Co Response

3.2 Within twenty-one (21) days of receipt of a Variation Enquiry or (if the provisions of paragraph 3.1(b) apply) within twenty-one (21) days of the Board confirming that it wishes Project Co to proceed with responding to the Variation Enquiry or in either case such longer period as may be agreed by the parties or determined in accordance with the Schedule Part 26 (*Dispute Resolution Procedure*) as reasonable given the nature of the Variation Enquiry and all other relevant considerations, Project Co shall either:

- (a) give notice to the Board's Representative that it objects to the Variation Enquiry stating the grounds of the objection. Project Co may only object to a Variation Enquiry on one or more of the following grounds:
 - (i) that implementation of the Variation would materially and adversely affect the health and safety of any person; or
 - (ii) that implementation of the Variation would:
 - (aa) infringe any Law; or
 - (bb) cause any existing Consent (which is not reasonably likely, on a balance of probabilities, to be capable of modification) to be revoked; or

- (cc) require a new Consent which will not (using all reasonable endeavours) be obtainable; or
 - (dd) have a material and adverse effect on the performance of the Project Operations (except those Project Operations which have been specified as requiring to be amended in the Variation Enquiry) in a manner not compensated pursuant to this Schedule Part 22; or
 - (ee) be a departure from Good Industry Practice; or
- (iii) that the Board does not have the legal power or capacity to require the Variation to be implemented or to do anything envisaged by this Schedule Part 22 in respect of, or in connection with, the Variation; or
 - (iv) in the case of a Variation Enquiry where the Board has stated an intention that Project Co should obtain finance, either that Project Co has performed its obligations under paragraphs 1.1 and 1.2 of Part 2 of this Schedule Part 22 and that finance is not available at the date of such notice to Project Co to implement the Variation, or that Project Co has not yet performed such obligations in which case the provisions of paragraph 3.3 of Part 1 of this Schedule Part 22 shall apply; or
 - (v) that the Variation would, if implemented, result in a change in the essential nature of the Unit; or
 - (vi) that the Variation Enquiry does not comply with paragraph 2 of this Part 1 of this Schedule Part 22; or
 - (vii) in the case of:
 - (aa) a Board Works Variation, that the Capital Expenditure required in respect of the Board Works Variation, when taken together with the Capital Expenditure in respect of other Board Works Variations which are Qualifying Variations, exceeds the Works Variation Capital Limit; or
 - (bb) a Board Works Variation, that the delay to the date on which the Actual Completion Date will occur caused by the Board Works Variation, when taken together with the delays caused by other Board Works Variations which are Qualifying Variations, will exceed the Works Variation Delay Limit; or
 - (cc) a Board Additional Works Item, that the time specified for commencement and/or completion of the Board Additional Works Item cannot reasonably be achieved by Project Co; or
 - (dd) a Board Service Variation, that the time (if any) specified for implementation of the Board Service Variation cannot reasonably be achieved by Project Co; or

- (viii) without prejudice to clause 39 of this Agreement, in the case of a Board Works Variation, such Variation Enquiry has been received on a date falling less than three months prior to the Completion Date and such Variation Enquiry is not (a) in connection with a matter with which the Board is obliged to comply with in accordance with Law or (b) is in connection with any guidance or instructions given to the Board by any department or agency of the Government with whose guidance the Board is accustomed to complying, PROVIDED THAT Project Co shall not be entitled to object to any Variation Enquiry in accordance with this subparagraph (viii) in circumstances where the Actual Completion Date will not or is not likely to occur on the Completion Date other than as a result of Delay Event or Force Majeure;
- (ix) that the information contained in the Variation Enquiry is inadequate to enable Project Co to respond in accordance with paragraph (b) below (on the assumption, whether or not the case, that it has no objection under paragraphs (i)-(viii));

or

- (b) give notice to the Board's Representative stating:
 - (i) the steps which Project Co proposes to take to implement the Variation giving such level of detail as is reasonable and appropriate in all the circumstances;
 - (ii) Project Co's estimated costs reasonably and properly incurred or estimated savings in respect of the Variation having regard to all relevant facts and matters, including:
 - (aa) any costs (by line item) incurred or to be incurred under paragraph 5 of this Part 1 (*Consents*);
 - (bb) in the case of a Board Works Variation, the provisions governing the valuation of variations (however described) in the Construction Contract and any capitalised interest or other costs which may be incurred by Project Co as a result of any delay to the Actual Completion Date by reason of such Board Works Variation; and
 - (cc) in the case of a Board Service Variation, any Capital Expenditure or other lump sum expenditure likely to be incurred in the course of the implementation of the Board Service Variation and any increases or decreases in staffing levels which may be required in any Retained Services as a direct consequence of the Board Service Variation;
 - (iii) in the case of a Board Works Variation, whether, in the view of Project Co, implementing the Board Works Variation Enquiry would be likely to prevent the Actual Completion Date from occurring at the Completion

Date (prior to any adjustment being made to the Completion Date by reason of the implementation or proposed implementation of the Board Works Variation) and, if so, giving an estimate of the extension of time likely to be required (subject to any further time required to obtain or amend any Consent);

- (iv) any Consent which must be obtained or amended for the Variation to be implemented and the latest date by which Project Co must receive a Variation Confirmation and any such Consent must be obtained or modified for the matters set out in (i)-(iii) above to remain valid, such date being a reasonable period of time after service of the notice by Project Co under this paragraph 3.2(b) to enable the Board's Representative to consider any matter under paragraph 4.1(c) below;
- (v) whether Project Co considers that a Service Variation, including, in the case of a Variation Enquiry for a Service Variation, another Service Variation (which for the purpose of this paragraph 3.2(b)(v), shall include a change in the cost to Project Co of performing periodic or life cycle maintenance) shall be required as a consequence of the Variation specified in the Variation Enquiry and, if so, stating the matters specified in this paragraph 3.2 in respect of such Service Variation;
- (vi) such amendments to the provisions of the Payment Mechanism and the Performance Monitoring System and other associated provisions of the Project Agreement which are necessary as a consequence of the Variation, the objective of such amendments being to ensure that (save for the obligation of the Board to make payments or altered payments in respect of the Variation or any other adverse consequences for the Board arising from the Variation itself) the parties are in no better and no worse position in relation to the Project than they would have been in if such Variation had not been implemented; and
- (vii) whether, in the view of Project Co, implementing the Service Variation or the Board Additional Works Item, would cause any Service Failure and/or cause the issue of any Service Failure Point, giving an estimate in each case of relief from any Service Failure Points required to put the parties in no better and no worse position in relation to the Project than they would have been in if such Variation had not been implemented.

Finance

- 3.3 If Project Co shall give notice pursuant to paragraph 3.2(a)(iv) and it has not performed its obligations under paragraphs 1.1 and 1.2 of Part 2 of this Schedule Part 22 then it shall, as soon as reasonably practicable, perform such obligations. In the case of a Board Works Variation, if Project Co cannot obtain finance from the sources referred to in paragraph 1 of Part 2 of this Schedule Part 22, the timetable set out in this Part for implementation of the Variation shall be suspended until the Board either instructs Project Co to proceed with, or withdraws, the Variation as contemplated in paragraph 1.3 of Part 2 of this Schedule Part 22 (which the Board shall decide and notify Project Co within twenty (20) Business Days of the notification from Project Co to the Board in accordance with

paragraph 1.3 of Part 2 (*Funding not available*)). If the operation of those provisions results in finance being available then, as soon as practical after such finance becomes available, Project Co shall, unless it has other objections falling within paragraph 3.2(a)(i)-(iii) or (v)-(viii) (inclusive), give a notice pursuant to paragraph 3.2(b) of this Schedule Part 22 and the other provisions of this Part shall come into operation accordingly.

4 Resolution of Disputes and Variation Confirmation

4.1 Within ten (10) Business Days of receipt of the notice referred to in paragraph 3.2 of this Schedule Part 22:

- (a) if Project Co has served a notice under paragraph 3.2(a) but the Board's Representative does not accept that Project Co is entitled to object to the Variation Enquiry, the matter may be referred for resolution in accordance with the Schedule Part 26 (*Dispute Resolution Procedure*) and if the Dispute is resolved in favour of the Board then Project Co shall forthwith give the notice referred to in paragraph 3.2(b);
- (b) if the contents of the notice under paragraph 3.2(b) shall be to the satisfaction of the Board's Representative he shall so inform Project Co and the parties shall proceed to agree or determine all the matters referred to in paragraph 4.3 of this Part; or
- (c) if he wishes to consider further any matter, the Board's Representative may give notice to that effect to Project Co provided that if no response is given under subparagraph (b) of this paragraph 4.1 prior to the date referred to in paragraph 3.2(b)(iv), (*Latest date for Variation Confirmation*) the Variation Enquiry shall be deemed to have been withdrawn; or
- (d) if any aspect of a notice under paragraph 3.2(b) shall not be to the Board's Representative's satisfaction he shall so notify Project Co and shall specify the alterations to the notice which he would require in order to be so satisfied.

4.2 If the Board's Representative has given a notice referred to in paragraph 4.1(d) of this Part then, unless agreement has been reached with Project Co within a further ten (10) Business Days from the date of issue of that notice (in which case the Board's Representative shall proceed pursuant to paragraph 4.1(b) of this Schedule Part 22) or the Board's Representative withdraws the Variation Enquiry, the outstanding Dispute shall be referred for resolution in accordance with the Schedule Part 26 (*Dispute Resolution Procedure*) to be determined (if the Board's Representative so requires it) concurrently with any matter referred to in paragraph 4.3 of this Part. In seeking to reach agreement and/or in so determining a Dispute pursuant to this paragraph or to paragraph 4.3, the criterion to be applied to resolve any such dispute (except where another criterion or other criteria are expressly or by implication stated in this Schedule Part 22) shall be that Project Co shall be in no worse position in relation to the Project and the Works after the Variation is implemented than it would have been in had the Variation not been implemented.

4.3 The parties shall meet and seek to agree the matters referred to in paragraphs 4.3(a) and 4.3(b) in relation to the Variation, failing which agreement being reached in a reasonable

period of time, either party may refer any matter for resolution in accordance with the Schedule Part 26 (*Dispute Resolution Procedure*). The matters to be agreed or determined are:

- (a) in relation to the terms of the Variation:
 - (i) any alteration to the Completion Date;
 - (ii) the Capital Expenditure required to implement the Variation or saved by such implementation and any costs or expenditure recoverable by Project Co and/or any costs reasonably and properly incurred or expenditure to be met by the Board under this Schedule Part 22 in connection with or as a consequence of the Variation and the timing and method of payment thereof (including, where applicable, payment pursuant to paragraph 3 of Part 2 of this Schedule Part 22);
 - (iii) the specification of any Service Variation (including any further Service Variation) required in connection with the Variation and whether Project Co has any right to object to such Service Variation under the provisions of this Schedule Part 22;
 - (iv) any alteration to the Service Payment pursuant to the provisions of Part 3 of this Schedule and the other results of the operation of Part 3 in accordance with the provisions of that Part;
 - (v) any amendment to the provisions of this Agreement which is referred to in paragraph 3.2(b)(vi) (*Deductions Mechanisms*); and
 - (vi) any relief to be granted to Project Co in respect of any Non Availability or Service Failure Points as referred to in paragraph 3.2(b)(vii) (*Relief*),in each case occasioned by the Variation; and
- (b) the terms of a supplementary agreement under which:
 - (i) as required to give effect to the Variation in each case, the Board's Construction Requirements and/or Project Co's Proposals are amended (in respect of any Board Works Variation or Board Additional Works Item); and/or provision is made for the amendment of the as-built drawings and specifications, including Room Data Sheets and other records, drawings, operating and maintenance manuals, the asset register, the health and safety file (all on completion of a Board Additional Works Item); and/or the Method Statements or Service Level Specifications are amended in respect of any Service Variation; and
 - (ii) the matters referred to in paragraph 4.3 of this Part are fully recorded and given effect as amendments to and/or other variations to the provisions of the Project Agreement and/or such other documentation as is necessary.

4.4 The Board shall upon request from Project Co provide information to Project Co to show how the Service Payments (as altered in accordance with Part 3) and any capital sum payable in accordance with paragraph 3 of Part 2 of this Schedule Part 22 will be funded by the Board, including, to the extent that the Board is required to obtain the same, in accordance with the procedures applicable to the Board or the NHS (or any successor of it):

- (a) written approval to the proposed Variation (and the financial consequences for the Board) by each of Her Majesty's Treasury and by the Scottish Ministers and giving satisfactory comfort to Project Co regarding affordability and the legal capacity of the Board to require and implement the variation, in the manner contemplated by the Variation Enquiry; and
- (b) letters from the principal purchasers or commissioners of healthcare services from the Board (or their equivalent) confirming how the Variation is to be funded and, where required by such procedures, confirming their approval of the Variation,

and, where so requested, Project Co's satisfaction (acting reasonably and without delay) with the information referred to in this paragraph 4.4 shall be a condition of the Variation Confirmation becoming effective.

4.5 Upon the agreement or determination of all the matters referred to in paragraph 4.3 of this Schedule Part 22, and upon any Consent having been modified or obtained, in accordance with paragraph 5 of this Schedule Part 22 (*Consents*) in terms reasonably satisfactory to Project Co and the Board, and upon the provision by Project Co to the Board of evidence reasonably satisfactory to the Board of the availability of committed funding for the Variation (subject only to any condition relating to the issue of the Variation Confirmation pursuant to this paragraph), the Board's representative shall, by notice (a "Variation Confirmation") confirm the Variation. Upon the issue of the Variation Confirmation, the parties shall enter into the supplementary agreement referred to in paragraph 4.3 of this Schedule Part 22, subject to and conditional upon any relevant funding procured by Project Co becoming unconditionally available for drawdown to Project Co.

4.6 Upon the Variation Confirmation being issued and the supplementary agreement referred to in paragraph 4.5 of this Schedule Part 22 becoming unconditional in all respects:

- (a) the relevant Variation shall be a Qualifying Variation; and
- (b) the rights and liabilities of the parties under the Project Agreement shall be construed accordingly.

5 Consent and Variations

5.1 If it shall be necessary to obtain or amend any Consent in respect of any Variation then Project Co shall use all reasonable endeavours to obtain and, where the co-operation and involvement of both parties is required, the Board shall use all reasonable endeavours to assist and co-operate in obtaining, such Consent. The provisions of Clause 16 (*Consents and Planning Approval*) shall apply in relation to Planning Permissions, save that the time taken to obtain such Consent shall be taken into account for the purposes of determining

any extension of time and any other amounts payable by the Board to Project Co under this Schedule Part 22.

- 5.2 If it shall not be possible to obtain any such Consent as is referred to in paragraph 5.1 above by the latest date when a Variation Confirmation could be given with regard to the Variation in question in accordance with the notice by Project Co pursuant to paragraph 3.2(b) of this Part 1, the Variation Enquiry shall be deemed to be withdrawn and the provisions of paragraph 7 of this Part 1 shall apply accordingly.

6 Valuation of Variations

Board Works Variations

- 6.1 The General Procedure shall be operated in respect of Board Works Variations so that, subject to the other provisions of the Project Agreement providing for the adjustment of any amount payable under the Project Agreement, the Capital Expenditure used to assess the effect of the Qualifying Variation in respect of the Board Works Variation shall be:
- (a) the proposed amount of Capital Expenditure in respect of the Board Works Variation specified in Project Co's notice under paragraph 3.2(b) of this Part 1; or
 - (b) (if that sum was not agreed by the Board's Representative) the corresponding sum in respect of that Board Works Variation which was agreed by the Board's Representative and Project Co or determined in accordance with the Schedule Part 26 (*Dispute Resolution Procedure*).

Board Additional Works Items

- 6.2 The General Procedure shall be operated in respect of Board Additional Works Items, subject to paragraph 8 of this Part 1 of the Schedule Part 22.

Board Service Variations

- 6.3 The General Procedure shall be operated in respect of Board Service Variations so that the variation in Project Co's costs used to assess the effect of the Qualifying Variation under the General Procedure shall be the actual variation in costs which Project Co and the relevant Service Provider will incur in order to implement the Service Variation (whilst preserving (but not increasing) any margin charged by Project Co and the Service Provider on their respective costs). Project Co shall obtain from the relevant Service Provider and disclose to the Board's Representative the costs of providing the Service to which the Board Service Variation relates for the period from and including the last preceding Market Testing Date (if any) or the Payment Commencement Date (as the case may be) together with the Service Provider's computation of the variation in its costs resulting from the Board Service Variation, taking into account:
- (a) existing labour rates applying to providers of services which correspond to the Service to which the Board Service Variation relates, in the open market;
 - (b) resulting changes in the Service Providers' workforce including costs and provisions associated with the Transfer Regulations and/or the Directive;

- (c) the changes in the Method Statements and Service Level Specifications and any other Variations to the Project Agreement arising out of the Board Service Variation;
- (d) any change in risk transfer; and
- (e) changes in working methods including associated capital investment (and the costs of providing such capital) reasonably required to be made by Project Co or the relevant Service Provider other than Variations in the Facilities which fall to be dealt with under Parts 1 or 2 of this Schedule Part 22.

6.4 If the Board Service Variation will result in any employees of Project Co and/or the relevant Service Provider becoming redundant, the costs of any redundancy payments which require to be paid to each such employee under the Employment Rights Act 1996 and the terms and conditions of their employment shall be paid by the Board to Project Co in the Contract Month in which redundancy occurs save to the extent that such redundancy payments have been increased by reason of any failure by the relevant employer to act reasonably so as to minimise such payments (including any failure to take reasonable efforts to redeploy such employees within the business of Project Co and/or the relevant Service Provider).

7 Withdrawal

The Board's Representative may withdraw a Variation Enquiry at any time prior to the issue of a Variation Confirmation, or, in the case of a Variation which requires the obtaining of, or an amendment to any Consent, the date when the last such Consent is granted, whichever shall be later. In the case of a withdrawal or deemed withdrawal the Board shall pay Project Co all out of pocket expenses reasonably and properly incurred by Project Co in connection with the Variation.

8 Particular provisions in respect of the implementation of Board Additional Works Items

8.1 Where Project Co does not intend to use its own resources to execute any Board Additional Works Items it shall comply with Good Industry Practice with the objective of ensuring that it obtains good value for money (taking into account all relevant circumstances including, in particular, the requirement that Project Co should be no worse off as a result of the implementation of the Board Additional Works Enquiry) when procuring any work, services, supplies, materials or equipment required for the Board Additional Works Items. To avoid doubt, where the Capital Expenditure in respect of the Board Additional Works Item is expected to exceed a value of £50,000 (index linked) Project Co's obligations under this paragraph shall (unless otherwise agreed) include an obligation to seek and evaluate competitive tenders.

8.2 Where the implementation of any Board Additional Works Item by Project Co is subject to the CDM Regulations, the following provisions shall apply:

- (a) Project Co shall timeously serve on the Executive a declaration pursuant to CDM Regulation 4 in respect of the proposed Board Additional Works Item and shall act as "the client" in relation to the relevant Board Additional Works Item for all the purposes of the CDM Regulations;

- (b) Project Co shall comply with all of the obligations incumbent on the client under the CDM Regulations in relation to the relevant Board Additional Works Item; and
- (c) Project Co shall, as soon as reasonably practicable following the completion of the relevant Board Additional Works Item, issue to the Board three copies of either the health and safety file prepared in relation to the relevant Board Additional Works Item (where prior to the implementation of the relevant Board Additional Works Item no health and safety file existed in respect of the structure or structures affected by the relevant Board Additional Works Item) or the relevant page or pages to be added to (or substituted for existing pages in) any existing health and safety file affected by the implementation of such Board Additional Works Item.

8.3 Notwithstanding any other express provision of this Agreement, where the Board considers, in its sole discretion (acting reasonably and having taken appropriate legal and technical advice), that the procurement of any Board Additional Works Item would be governed by any element of the Procurement Legislation with the result that the Board itself is under a duty to competitively tender any contract in relation to such Board Additional Works Item in accordance with such Procurement Legislation, the Board shall not be obliged to issue a Variation Enquiry to Project Co in relation to such Board Additional Works Item and shall be free to procure such Board Additional Works Item by any means it sees fit (which, to avoid doubt, may include awarding a contract to a third party in relation to such work).

8.4 Where the Board exercises its right under paragraph 8.3 above, the parties shall (as soon as possible following the decision of the Board so to exercise) meet and seek to agree such course of action (which may include, where relevant, changes to the terms of the Project Agreement, granting relief from liability or the payment of compensation) as is necessary to leave Project Co (as far as is possible) in no better and no worse a position following the Board exercising such right than it would have been had the Board not exercised the right and had not sought to procure the Board Additional Works Item. If the parties shall fail to agree on the necessary course of action, not less than thirty (30) Business Days prior to the award by the Board of any contract in relation to the Board Additional Works Item, the issue of what course of action is so necessary may be referred for determination in accordance with the Schedule Part 26 (*Dispute Resolution Procedure*) of the Project Agreement.

8.5 Notwithstanding any other express provision of the Project Agreement, as between the Board and Project Co, the taking of and the consequences of any action by the Board in accordance with paragraph 8.3 above shall not give rise to any rights for Project Co or any liability for the Board (whether in contract, delict or otherwise) other than as may be agreed or determined in accordance with paragraph 8.4 above.

9 Deemed Service Variations

9.1 Where there is a change to the Board Policies (subject to Clause 32.7 (*Site Security and Personnel Issues*)) of the Project Agreement or a change of use or occupancy of, or operational hours or activities carried on within the whole or any part of the Facilities by the Board or any Board Party, either party shall be entitled to advise the other party by notice in writing that it considers that a Service Variation has arisen or will arise by

operation of the change provided that it does so within three (3) months of the date when it became aware, or ought reasonably to have become aware, of the relevant change. Any notice so served shall describe in as much detail as practicable the nature of the Service Variation which is likely to be required as a result of the change and the date by which the relevant Service Variation must be implemented.

- 9.2 The Board (in the case of a notice under paragraph 9.1 from Project Co) or Project Co (in the case of a notice under paragraph 9.1 from the Board) shall within fifteen (15) Business Days of receipt of the notice under paragraph 9.1 set out its response to the matters set out in such notice. Any dispute as to the nature of the relevant change or as to its effect shall be referred for resolution in accordance with the Schedule Part 26 (*Dispute Resolution Procedure*).
- 9.3 Within fifteen (15) Business Days of agreement or determination pursuant to paragraph 9.2 above that a relevant change has occurred which requires a Service Variation to be implemented, the provisions of this Part shall apply to the definition and implementation of the Service Variation as if it were a Board Service Variation and as if the notice referred to in paragraph 9.1 of this Part was a Board Service Variation Confirmation given at the end of such period of fifteen (15) Business Days.

Part 2: Finance for Capital Expenditure in respect of Variations

1 General Principle

- 1.1 Project Co shall use reasonable endeavours to obtain finance for any Capital Expenditure required in respect of a Qualifying Variation (which term, when used in this Part, shall include reference to a proposed Variation which will be a Qualifying Variation when all matters in respect of it have been agreed or determined pursuant to this Agreement) in accordance with the other Parts of this Schedule Part 22 from any funds specifically available to it for this purpose under the Funding Agreements in force from time to time.
- 1.2 In particular, Project Co shall use reasonable endeavours to utilise (subject to their terms) any available stand-by facility or "head room" in the loan facilities (however described) (so far as not committed or reserved to fund cost overruns on the Works or otherwise) which is or becomes available to finance Qualifying Variations during the period up to the Actual Completion Date.
- 1.3 In the case of a Board Works Variation, Project Co shall not be required to take any steps to obtain finance beyond those contemplated in paragraphs 1.1 and 1.2. If within fifteen (15) Business Days (or such longer period as Project Co may decide which shall not, in any event, exceed thirty (30) Business Days) of Project Co initiating discussions with the Funders, confirmation has not been obtained from the Funders that they are prepared to enter into their respective credit processes with a view to obtaining credit approval to finance the Board Works Variation, Project Co shall notify the Board's Representative reporting on the response received from the Funders. Within twenty (20) Business Days after receiving such notice the Board shall:
 - (a) subject to the provisions of Part 1 of this Schedule Part 22, instruct Project Co to proceed with development of the Board Works Variation on the basis that the Board will make payment to Project Co in accordance with paragraph 3 of this Part in respect of the expenditure incurred and any increased cost of funding due to any delay to the Completion Date agreed or determined pursuant to Part 1 of this Schedule Part 22, on a current basis in accordance with the provisions of Part 1 of this Schedule Part 22; or
 - (b) withdraw the requirement for Project Co to implement the Board Works Variation in accordance with the provisions of Part 1 of this Schedule Part 22.

2 Funding Shortfalls

- 2.1 If Project Co cannot obtain finance for all or any part of Capital Expenditure required in respect of a Qualifying Variation (other than a Board Works Variation in relation to which Project Co shall have no obligations pursuant to this paragraph 2) (the "Funding Shortfall") from the sources referred to in paragraph 1 above and such Capital Expenditure exceeds £1,000,000 (index linked) then, at the Board's request, Project Co shall use all reasonable endeavours to procure such finance on such reasonable terms as are available to it. The use of reasonable endeavours shall include the preparation of an appropriate business plan in respect of the business of Project Co as affected by the Qualifying Variation to demonstrate the ability of Project Co successfully to implement the relevant financing strategy in respect of the Funding Shortfall.

2.2 If having used reasonable endeavours for a period of no less than sixty (60) Business Days (or such shorter period as may be reasonable in all the circumstances) after the determination of the amount of the Funding Shortfall, Project Co cannot obtain such finance on terms reasonably satisfactory to Project Co and the Board then it shall notify the Board's Representative reporting on the activities seeking finance. Within twenty (20) Business Days after receiving such notice the Board shall:

- (a) subject to the provisions of Parts 2 and 3 (as applicable) of this Schedule Part 22 instruct Project Co to proceed with development of the relevant Qualifying Variation on the basis that the Board will make payments to Project Co in respect of the Funding Shortfall in accordance with paragraph 3 of this Part; or
- (b) where the Qualifying Variation is a Board Service Variation or Board Additional Works Item ordered by the Board, withdraw the requirement for Project Co to implement the relevant Qualifying Variation in accordance with the provisions of Part 1 of this Schedule Part 22.

3 Payment of Capital Sum by the Board

Where pursuant to any provision of this Part of the Schedule the Board is to pay a capital sum in respect of a Qualifying Variation:

- (a) the Board and Project Co shall agree:
 - (i) a payment schedule in respect of the payment of such sum reflecting the amount and timing of the costs to be incurred by Project Co in carrying out the Qualifying Variation to the extent borne by the Board; and
 - (ii) where payment for part of the Qualifying Variation reflects the carrying out of, or specific progress towards, an element within the Qualifying Variation, an objective means of providing evidence confirming that the part of the Qualifying Variation corresponding to each occasion when payment is due under the payment schedule appears to have been duly carried out,

(such payment schedule and evidence to be determined in accordance with the Schedule Part 26 (*Dispute Resolution Procedure*) in the event of the Board and Project Co failing to agree as to its terms) provided that where all or any part of the Qualifying Variation is being carried out by a third party under a contract with Project Co, subject to the terms of any contract between Project Co and that third party in relation to the implementation of the Qualifying Variation having been approved by the Board (such approval not to be unreasonably withheld), the process under the Schedule Part 26 (*Dispute Resolution Procedure*) shall not determine a payment schedule or evidence which would not enable Project Co to be funded by the Board in time to make payments to that third party in accordance with its contract with Project Co;

- (b) the Board shall make payment to Project Co within fifteen (15) Business Days of receipt by the Board of invoices presented to the Board (in all material respects) in accordance with the agreed payment schedule (as the case may be, varied by agreement from time to time) accompanied by the relevant evidence (where applicable) that the relevant part of the Qualifying Variation has been carried out; and

- (c) if payment is not made in accordance with sub-paragraph (b) above, the Board shall pay interest to Project Co on the amount unpaid from the date fifteen (15) Business Days after receipt of the relevant invoice until paid at the Default Interest Rate.

Part 3: General Procedure

1 General

The procedure described in this Part ("the General Procedure") shall apply where required to determine the effect on payments of a Qualifying Variation.

2 Objective of the General Procedure

2.1 The objective of the General Procedure shall be to adjust the values of entries used in the calculation of the Service Payment in the Schedule Part 18 (*Payment Mechanism*) (after entering changes in costs shown in the Financial Model for the Project), taking into account all relevant matters including:

- (a) the effect of the Qualifying Variation (including, to avoid doubt, the method of financing the Qualifying Variation, the impact of the Qualifying Variation on the project economics as reflected in the Financial Model, taxation and the commercial income earned by Project Co through its participation in the Project);
- (b) any adjustments pursuant to paragraph 2.4 of this Part 3 of the Schedule Part 22;
- (c) the effect of indexation to date and forecast inflation as it would affect the Project; and
- (d) when any adjustment to the Service Payment takes effect,

so that comparison of the output from the Financial Model before such adjustments and changes in costs and after such adjustments and changes in costs shows that:

- (i) the nominal internal rate of return from the expected date of implementation of the Qualifying Variation to the expiry of the Project Term in respect of the equity and subordinated debt originally expected to be invested in the Project (as shown in the Financial Model) shall be unchanged before and after modelling the effects of the Qualifying Variation;
- (ii) the nominal internal rate of return from the expected date of implementation of the Qualifying Variation to the expiry of the Project Term in respect of any other equity and subordinated debt (which term when used in this Part in connection with further subordinated debt supplied in connection with funding Qualifying Variations shall include other methods used by equity investors to provide capital to companies whether subordinated to senior lenders or not, other than subscribing for equity in those companies) (in addition to that referred to in (i) above) invested in the Project as a consequence of any other Qualifying Variation (as shown in the Financial Model as adjusted at the time for the investment of such other equity and subordinated debt) shall be unchanged before and after modelling the effects of the Qualifying Variation,

and so that the output from the Financial Model after such adjustments and changes in costs shows that:

- (aa) Project Co would not, by reason of the effect of the Qualifying Variation and the consequential variation in cashflow during the remainder of the Project Term as shown in the Financial Model after such adjustments have been made, be placed in breach of its obligations under the Funding Agreements and there would be no event of default, acceleration event, limitation on drawdown, deterioration in all cover ratios over the period of repayment of the amounts due under the Funding Agreements or other adverse effect (whatever called or however described) (compared to the position if such adjustments were not made) under the Funding Agreements; and
- (bb) the agreed IRR on any additional equity and subordinated debt to be invested in the Project as a consequence of the Qualifying Variation is achieved.

2.2 The output from the operation of the General Procedure shall be the prices and other terms referred to below and such other terms as may be required to give effect to the application of the General Procedure, having taken into account actual indexation as applied pursuant to the Project Agreement to determine the Service Payments in respect of the Contract Year following that in which the General Procedure was brought into operation by substituting new values for the terms designated ASPn for those values in force immediately prior to the operation of the General Procedure; in each such case for such period (not exceeding the remaining term of the Project Term) as shall be appropriate to give effect to the objective of the General Procedure.

2.3 Subject to the other parts of this Schedule Part 22, adjustments shall be made to the Financial Model in accordance with this paragraph 2.3 to achieve the objectives set out in paragraph 2.1 and produce outputs reflecting the results required by paragraph 2.2 by entering into the model the revised or additional costs incurred by Project Co as a result of the Qualifying Variation, and, where necessary, incorporating the consequences of any funding obtained or used by Project Co to implement the Qualifying Variation. The following guidelines shall be followed to the maximum extent possible when making the adjustment:

- (a) wherever possible, the adjustment shall be carried out without altering the logic and formulae incorporated in the Financial Model in any way whatsoever, and only data such as costs incurred by Project Co and the timing and amount of drawdowns of funding shall be changed;
- (b) where it is necessary to amend any logic or formulae incorporated in the Financial Model to permit the adjustments to be made, this shall be done to the minimum extent necessary;
- (c) where any amendment is made to the logic or formulae incorporated in the Financial Model, the Financial Model, as amended, shall first be run with the data included in the Financial Model prior to amendment to ensure that the outputs from the Financial Model as amended correspond to the outputs prior to amendment; and

- (d) any amendments to the logic or formulae incorporated in the Financial Model shall be fully recorded and shall be such that the manner in which the revised prices are calculated can be readily verified.

2.4 In relation to Qualifying Variations, the adjustments to the Financial Model shall only take place as follows:

- (a) when the expenditure or savings in connection with one or more Qualifying Variations in respect of which no adjustment has been made to the Financial Model exceeds (in either case) £250,000 (index linked) in aggregate;
- (b) on each anniversary of the date of this Agreement falling prior to the Actual Completion Date;
- (c) on the Actual Completion Date; and
- (d) at the end of a Contract Year.

3 **Financing Costs where Lump Sum Payment**

If payment is to be made pursuant to paragraph 3 of Part 2 of this Schedule Part 22 which fully finances the Qualifying Variation, then no account shall be taken of the need to finance any Capital Expenditure in connection with the Qualifying Variation save to the extent that such financing is actually required between implementation of the Qualifying Variation and the payment of the lump sum.

4 **Updating the Financial Model**

Following the adjustment to calculate the new prices following a Qualifying Variation the Financial Model as adjusted in accordance with paragraphs 2 or 5 of this Part 3 of the Schedule Part 22 (*Small Works*) shall be the Financial Model for the purposes of the Project Agreement.

SCHEDULE PART 22

Part 4: Small Works

- 1 After the Actual Completion Date, Project Co shall carry out Small Works which have been requested by the Board. If there shall be any dispute as to whether an item of work requested by the Board constitutes Small Works either party may refer it for resolution in accordance with the Schedule Part 26 (*Dispute Resolution Procedure*).
- 2 Not later than twenty (20) Business Days prior to the commencement of each Contract Year Project Co shall propose a Schedule of Small Works Rates for that Contract Year for the purposes of the same being agreed by the Liaison Committee pursuant to the provisions of Clause 12 (*Liaison*). The value of any such Small Works shall be calculated as follows:
 - (a) the labour element shall be calculated in accordance with the Schedule of Small Works Rates or, where such rates are not applicable, in accordance with analogous rates, failing which rates which are fair and reasonable; and
 - (b) the materials element shall be charged at the cost of the materials to Project Co or to the contractor carrying out the work (net of all discounts) plus 7.5%.
- 3 Project Co shall notify the Board's Representative of the estimated duration of any Small Works so that the Board's Representative and Project Co can agree a convenient time for carrying out the same (so as to minimise inconvenience to the Board). Project Co shall take all reasonable steps to minimise the duration of any Small Works.
- 4 Any dispute as to the cost of Small Works shall be referred for resolution in accordance with Schedule Part 26 (*Dispute Resolution Procedure*). In the event of failure on the part of the Liaison Committee to agree in advance of any Contract Year the Schedule of Small Works Rates, the said rates shall be determined in accordance with the Schedule Part 26 (*Dispute Resolution Procedure*).