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Maclay Murray & Spens
SOLICITORS
EDINBURGH

ROBERTSON HEALTH (GARTNAVEL) LIMITED

and

ROBERTSON FACILITIES MANAGEMENT LIMITED

**re: FM Agreement
for the provision of services at Gartnavel Hospital**

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FM AGREEMENT

between

- (1) **ROBERTSON HEALTH (GARTNAVEL) LIMITED** (Registered Number SC271565) of 10 Perimeter Road, Pinefield Industrial Estate, Elgin, Moray, IV30 6AE (“Project Co”); and
- (2) **ROBERTSON FACILITIES MANAGEMENT LIMITED** (Registered Number SC185956) of 10 Perimeter Road, Pinefield Industrial Estate, Elgin, Moray, IV30 6AE (the “FM Provider”).

Whereas

- (A) Project Co has entered into or is about to enter into an agreement with Greater Glasgow Health Board (“the Board”) pursuant to which Project Co will undertake the financing, design and construction of a new acute psychiatric hospital at Gartnavel Hospital and the provision of services to the said new acute psychiatric hospital (“the Project Agreement”).
- (B) Project Co wishes to appoint the FM Provider to provide services to the new hospital upon and subject to the terms of this Agreement.

NOW IT IS AGREED as follows:

1. CONTRACT DOCUMENTS AND INTERPRETATION

1.1 This Agreement comprises:

- 1.1.1 this Contract comprising Clauses 1 to 69 hereof; and
- 1.1.2 the Appendices hereto.

1.2 This Agreement shall be interpreted in accordance with the provisions of Appendix 1 hereto.

2. EFFECTIVENESS

This Agreement shall become fully effective when the Project Agreement has been executed and delivered unconditionally by Project Co and the Board.

3. PROJECT DOCUMENTS

3.1 The FM Provider acknowledges that it has received copies of and familiarised itself with the Project Documents.

3.2 The FM Provider acknowledges that it is (and the FM Provider shall be deemed to be) on notice as to the terms of the Project Documents, including the obligations and potential liabilities of

Project Co arising under them. The FM Provider acknowledges that such liabilities are (and such liabilities shall be deemed to be) within the contemplation of the FM Provider.

4. **PROJECT AGREEMENT OBLIGATIONS AND GENERAL STANDARDS**

4.1 Subject to Clause 4.3, the FM Provider shall, save as otherwise expressly provided in this Agreement, perform and assume as part of its obligations under this Agreement Project Co's obligations, risks and liabilities under the Project Agreement and the other Project Documents, insofar as the same relate to the Services (as if the same were expressly referred to herein as obligations, risks and liabilities of the FM Provider mutatis mutandis).

4.2 The FM Provider shall ensure that none of the following occur and shall (subject to Clause 4.3) indemnify Project Co against all claims, proceedings, loss, damage, costs and expenses (including legal costs) suffered or incurred in relation to any of the following:

4.2.1 any breach, non-observance or non-performance by the FM Provider of those of its obligations referred to in Clause 4.1;

4.2.2 any act or omission of the FM Provider, a subcontractor of the FM Provider, or their respective servants or agents which causes, contributes or otherwise gives rise to any breach by Project Co of any of its obligations pursuant to, or liability under, the Project Documents or otherwise gives rise to any other liability on the part of Project Co to the Board, the Senior Funders or any Project Participant or pursuant to any Law or Consent;

4.2.3 any negligence or breach of statutory duty on the part of the FM Provider, a subcontractor of the FM Provider, or their respective servants or agents;

4.2.4 any act or omission of the FM Provider, a subcontractor of the FM Provider, or their respective servants or agents which prejudices or leads to the diminution or loss of any rights, entitlements or other benefits of Project Co under the Project Documents or any Law or Consent.

4.3 Where Project Co proposes to agree an amendment with the Board pursuant to Clause 58 of the Project Agreement (which has not arisen as a result of a Variation or a Change in Law), Project Co shall consult the FM Provider with regard to the agreement of such amendment insofar as it affects the rights and obligations of the FM Provider under this Agreement. The resultant amendment to the Project Agreement shall only amend the scope of the FM Provider's obligations under this Agreement if the FM Provider consents thereto, providing that the FM Provider can only withhold such consent if the proposed amendment would materially and

adversely affect the FM Provider with regard to the discharge of its obligations under this Agreement.

General Standards

- 4.4 The FM Provider shall at its own cost be solely responsible for procuring that the Services are at all times performed:
- 4.4.1 in a manner consistent with Project Co's obligations under the Project Agreement in relation to the Services to be provided by Project Co in terms of the Project Agreement;
 - 4.4.2 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;
 - 4.4.3 in a manner that is not likely to be injurious to health or to cause damage to property;
 - 4.4.4 in a manner consistent with the Services Quality Plan;
 - 4.4.5 except to the extent expressly stated to the contrary in the Service Level Specifications, in compliance with all applicable NHS Requirements;
 - 4.4.6 in a manner consistent with the Board discharging its statutory duties and other functions undertaken by it as the same may be notified to the FM Provider from time to time; and
 - 4.4.7 in so far as not in conflict with an express obligation of the FM Provider under this Agreement, or where in relation to a matter there is no express obligation or standard imposed on the FM Provider under this Agreement, in accordance with Good Industry Practice.

In the event that any ambiguity, uncertainty, dispute or discrepancy arises in the nature and scope of the FM Provider's obligations under this clause 4.4, the provisions of this clause 4.4 will be given meaning and have effect in descending order of precedence set out in this clause 4.4.

Co-operation

- 4.5 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.

4.6 Without prejudice to the generality of Clause 4.5 (Co-operation), the Parties shall liaise with a view to ensuring that the requirements of Patient Rights and Responsibilities and any other NHS requirement relating to customer service and satisfaction which may from time to time supplement or replace Patient Rights and Responsibilities are met in respect of the operation of the Facilities.

5. DOCUMENTS REQUIRED BY LAW OR UNDER PROJECT DOCUMENTS

5.1 Where pursuant to the Project Agreement, other Project Documents, any Law, or any Consent any information, calculations, estimates, invoices or other documents or data in connection with the provision of the Services or the FM Provider's other obligations under this Agreement are required to be submitted by Project Co to the Board or any other person, the FM Provider shall (unless otherwise provided in this Agreement or otherwise instructed by Project Co in writing) submit the same on behalf of Project Co (and at the same time provide a copy to Project Co and such other Project Participants as Project Co may designate) in the manner and within the time (if any) prescribed by the relevant Project Document, Law or Consent.

5.2 Where under the Project Agreement or any other Project Document the taking of any step is required first to be notified to, or be subject to the prior consent or approval of, the Board or any other person, then to the extent that such step relates to the Services or the performance of the FM Provider's other obligations under this Agreement, the FM Provider shall not proceed with such step until the relevant notification has been made or consent or approval given (or has been deemed to be made or given for the purposes of the relevant Project Document).

5.3 If, having submitted any document or information on Project Co's behalf to the Board's Representative pursuant to Part 10 of the Schedule of the Project Agreement, the FM Provider receives any approval, comment or proposal for a modification of what was submitted, and the FM Provider considers that compliance with the same would amount to a Variation, it shall before complying with the same notify Project Co to that effect and shall also notify the Board's Representative, on behalf of Project Co, pursuant to paragraph 6.2 of Part 10 of the Schedule to the Project Agreement. Any failure by the FM Provider to give notice as required by this Clause 5.3 shall constitute an irrevocable acceptance by the FM Provider that any compliance with the relevant approval, comments or proposals for a modification shall be without cost to Project Co and the Board.

5.4 Where the FM Provider serves notice under Clause 5.3 in relation to any approval, comment or proposed modification by the Board's Representative, and it is agreed between Project Co and the Board pursuant to the Project Agreement that compliance with such comment or approval will be a Variation (and if the Board elects to proceed with the same) then the procedures for Variations

under Clause 40 shall apply. If the Board does not so agree then the FM Provider may (subject to and in accordance with Clause 7) seek or require Project Co to seek a determination pursuant to the Project Agreement that such compliance will be a Variation. If the FM Provider succeeds in obtaining such a determination then the procedures for Variations under Clause 40 shall apply. If the FM Provider does not pursue, or does not obtain, such a determination then the FM Provider shall comply with the comments or approval of the Board's Representative without cost to Project Co and the Board.

- 5.5 To the extent that the same relate to the performance of the Services or of the FM Provider's other obligations under this Agreement, Project Co shall promptly pass to the FM Provider all such information and documents of whatever nature which it receives at any time from the Board or any other Project Participant and which it shall be at liberty lawfully to disclose.
- 5.6 To the extent that the same relate to the performance of the Services or of the FM Provider's other obligations under this Agreement, the FM Provider shall promptly pass to Project Co all such information and documents of whatever nature which it receives at any time from the Board or any other Project Participant and which it shall be at liberty lawfully to disclose.
- 5.7 Where, pursuant to the Project Agreement or any other Project Document, Project Co is deemed to have inspected, examined, approved or otherwise satisfied itself as to any matter in connection with or affecting the performance of the Services or the FM Provider's other obligations under this Agreement, the FM Provider shall to the same extent be deemed to have inspected, examined, approved and satisfied itself as to that matter.
- 5.8 Project Co shall render all reasonable assistance (such assistance not to be unreasonably withheld or delayed) to the FM Provider and do all things reasonably necessary to enable the FM Provider to comply with its obligations in relation to the performance of the Services and such assistance shall include (but not be limited to) the prompt supply to the FM Provider of such information as may reasonably be required by the FM Provider for the performance of its duties and which is within the care or control of Project Co but only to the extent that Project Co is not restricted as a matter of law or pursuant to the terms of the Project Agreement or any other Project Document from supplying such information. For the avoidance of doubt Project Co shall not be in breach of its obligations under this Clause 5.8 if, in relation to the provision of information it is required to obtain from the Board, it has used reasonable endeavours to obtain such information but such information has not been forthcoming.

6. PASS-DOWN OF BOARD DERIVED BENEFITS UNDER THE PROJECT AGREEMENT

6.1 The following provisions shall apply in each case where, in this Agreement, the entitlement of the FM Provider to receive from Project Co any sum of money, extension of time or other relief or benefit of whatever nature (a "Board Derived Benefit") is stated to be subject to this Clause 6.

6.2 The entitlement of the FM Provider to any Board Derived Benefit shall arise only upon satisfaction of the following conditions precedent:

6.2.1 it is agreed between Project Co and the Board that Project Co is entitled, under the Project Agreement, to receive from the Board a sum of money, extension of time or other relief or benefit which is attributable to the Board Derived Benefit claimed by the FM Provider under this Agreement; or, in default of such agreement;

6.2.2 it has been determined with binding effect pursuant to the Project Agreement that Project Co is entitled, under the Project Agreement, to receive from the Board a sum of money, extension of time or other relief or benefit which is attributable to the Board Derived Benefit claimed by the FM Provider under this Agreement; and

6.2.3 (whether 6.2.1 or 6.2.2 applies) where the relevant Board Derived Benefit is payment of a sum of money, Project Co's Representative has certified that Project Co has received from the Board a sum of money which is attributable to that Board Derived Benefit (and Project Co shall procure that Project Co's Representative forthwith so certifies where such sum has been received).

6.3 Where the FM Provider claims a Board Derived Benefit which is payment of a sum of money, and the conditions precedent set out in Clause 6.2 have been satisfied in respect of that sum, or part of it, then the sum (or that part) shall become due from Project Co to the FM Provider immediately upon satisfaction of the conditions precedent set out in Clause 6.2 and the final date for payment of the amount due shall be 3 Business Days after that amount became due (or, if later, 3 Business Days after the FM Provider has served upon Project Co a valid tax invoice for the same).

6.4 Where the FM Provider claims a Board Derived Benefit which is payment of a sum of money, then unless and until the conditions precedent set out in Clause 6.2 have been satisfied in respect of that sum the FM Provider may not recover the same from Project Co by way of set-off, counterclaim or otherwise.

- 6.5 If any or all of the conditions precedent referred to in Clause 6.2 are void or unenforceable by Project Co, and as a result any sum of money becomes due from Project Co to the FM Provider at a date earlier than that on which it would have become due if those conditions precedent were all valid and enforceable, then:
- 6.5.1 the FM Provider shall make an advance (an "Advance") to Project Co of an amount of money equal to any sum so paid or due to be paid by Project Co; and
 - 6.5.2 Project Co may set off the liability of the FM Provider to make such an Advance against any sum due from Project Co to the FM Provider under or pursuant to this Agreement.
- 6.6 If the obligation of the FM Provider to make an Advance as referred to in Clause 6.5.1 and/or the right of Project Co to set off the same as referred to in Clause 35.6 are void or unenforceable then the final date for payment of any sum which has become due from Project Co to the FM Provider at a date earlier than that on which it would have become due if the conditions precedent referred to in Clause 6.2 were all valid and enforceable shall be the earliest of:
- 6.6.1 24 (twenty four) months after that sum became due;
 - 6.6.2 (where the FM Provider makes an Advance to Project Co but Project Co's right to set the same off is void or unenforceable) the date on which Project Co receives the said Advance; and
 - 6.6.3 3 Business Days after the date on which the conditions precedent referred to in Clause 6.2 are satisfied in respect of that sum;
- provided, in each case, that the FM Provider has served upon Project Co a valid tax invoice for the same, and provided further that this Clause 6.6 shall not operate to cause any sum which is a Board Derived Benefit of the kind referred to in Clause 35.6 to become due or payable at a date earlier than is prescribed by Clause 35.
- 6.7 Where in relation to any Board Derived Benefit claimed by the FM Provider it is not explicitly stated:
- 6.7.1 in any relevant agreement between the Board and Project Co (as referred to at Clause 6.2.1); or
 - 6.7.2 in any judgement, order or award by which a relevant entitlement of Project Co was or may have been determined (as referred to in Clause 6.2.2),

whether or to what extent the entitlement of Project Co so agreed or determined is attributable to the Board Derived Benefit claimed by the FM Provider then the entitlement of the FM Provider as against Project Co shall be to such proportion of Project Co's relevant corresponding entitlement against the Board as is fair and reasonable, having regard to the following factors (but not to the exclusion of other relevant evidence):

- (a) whether and to what extent the relevant Board Derived Benefit claimed by the FM Provider formed part of the basis of Project Co's submissions to the Board (or the decision making body responsible for making any judgement, order or award referred to at Clause 6.2.2) from which the relevant Project Co entitlement arose;
- (b) whether and to what extent the conditions for establishing a Project Co entitlement under the Project Agreement attributable to the Board Derived Benefit claimed by the FM Provider were met;
- (c) any available evidence as to whether the Board (or the decision making body responsible for making any judgement, order or award referred to at Clause 6.2.2) in fact recognised that the relevant entitlement of Project Co, or any element of it, was attributable to the Board Derived Benefit claimed by the FM Provider; and
- (d) any other claims, in addition to the claim for a Project Co entitlement attributable to the relevant Board Derived Benefit sought by the FM Provider, which were advanced by Project Co, on its own behalf or on behalf of others, in its submissions to the Board (or the decision making body making any judgement, order or award referred to at Clause 6.2.2) from which the relevant Project Co entitlement arose.

For the avoidance of doubt, a fair and reasonable proportion may be none if the relevant Project Co entitlement as against the Board is not attributable to the Board Derived Benefit claimed by the FM Provider. If the FM Provider and Project Co fail to agree the same, the question of what is a fair and reasonable proportion of Project Co's entitlement shall be determined as between the FM Provider and Project Co in accordance with Clause 56.

6.8 Where in relation to a Board Derived Benefit claimed by the FM Provider it is explicitly stated:

- 6.8.1 in any relevant agreement between the Board and Project Co (as referred to at Clause 6.2.1); or
- 6.8.2 in any judgement, order or award by which a relevant entitlement of Project Co was or may have been determined (as referred to in Clause 6.2.2),

whether or to what extent the entitlement of Project Co so agreed or determined is attributable to the Board Derived Benefit claimed by the FM Provider then the entitlement of the FM Provider as against Project Co shall be to such proportion of Project Co's relevant corresponding entitlement against the Board as is so stated to be agreed or determined to be attributable to the FM Provider's claim.

7. PURSUIT OF PROJECT CO ENTITLEMENTS UNDER THE PROJECT AGREEMENT

- 7.1 In order that Project Co shall establish all entitlements under the Project Agreement which are necessary:
 - 7.1.1 for the FM Provider to become entitled, in turn, to any Board Derived Benefit under this Agreement;
 - 7.1.2 in order to challenge any liability of Project Co under the Project Agreement which is asserted by the Board and for which the FM Provider in turn is in substance liable, wholly or in part, to Project Co by virtue of this Agreement (including Deductions from the Service Payment pursuant to the Project Agreement);
 - 7.1.3 in order to obtain an approval from the Board's Representative where the FM Provider is, under this Agreement, responsible for obtaining any approval by the Board's Representative of any item submitted by the FM Provider on Project Co's behalf in accordance with Part 10 of the Schedule to the Project Agreement, and such consent has not been forthcoming;
 - 7.1.4 in order to resolve any matter where the FM Provider is responsible for obtaining the agreement of the Board or the Board's Representative to the same and such agreement is not forthcoming,

the following provisions of this Clause 7 shall apply.

- 7.2 The FM Provider may in cases where this Clause 7 applies (as provided in Clause 7.1) operate the following provisions in order to seek to establish the relevant entitlement of Project Co under the Project Agreement.

- 7.2.1 Project Co shall upon written request by the FM Provider submit to the Board an application (prepared by the FM Provider on Project Co's behalf with all necessary supporting particulars) for any such entitlement, unless it would be frivolous or vexatious to do so, and provided that such application as prepared by the FM Provider complies with any requirements as to format, content and timing stipulated by this Agreement and/or relevant provisions of the Project Agreement.
- 7.2.2 Clause 7.2.1 shall not apply in relation to applications for the Board's Representative's approvals under Part 10 of the Schedule to the Project Agreement or where the FM Provider is responsible for obtaining the Board's or the Board's Representative's agreement to any matter (and in such cases the FM Provider shall itself be responsible for making such applications).
- 7.2.3 Project Co shall not without the consent of the FM Provider compromise or waive any entitlement under the Project Agreement where either the FM Provider has asserted in writing to Project Co that such entitlement is attributable, wholly or in part, to a Board Derived Benefit claimed by the FM Provider under this Agreement, or it is reasonably apparent that the FM Provider would object to such compromise or waiver.
- 7.2.4 Where an application to the Board for a Project Co entitlement of the kinds referred to in Clause 7 is unsuccessful, the FM Provider may require the further pursuit of that entitlement in accordance with Clause 7.3 or Clause 7.4. The FM Provider shall be entitled to elect between the application of Clause 7.3 and Clause 7.4, provided that Project Co may require that Clause 7.4 shall apply if:
- (a) the Board objects to the FM Provider having conduct of a claim in the manner provided for in Clause 7.3 (and the FM Provider acknowledges the absence of provisions in the Project Agreement affording the FM Provider a right formally to participate in the Project Agreement's "Dispute Resolution Procedure"); and/or
 - (b) Project Co and/or one or more other Sub-Contractors engaged in providing the Services assert that Project Co's entitlement to be pursued as against the Board is attributable partly to the Board Derived Benefit claimed by the FM Provider and partly to Project Co itself and/or to other Sub-Contractors (provided further that in such a case Project Co shall endeavour to obtain the agreement of the FM Provider, Project Co and the relevant Sub-Contractors as to who should have conduct of the relevant claim, before itself assuming conduct of the claim in accordance with Clause 7.4, and if such agreement is reached the agreed

arrangements for pursuit of Project Co's relevant entitlement shall apply instead of Clauses 7.3 and 7.4).

- 7.3 Where pursuant to the FM Provider's election under Clause 7.2.4 this Clause 7.3 applies, the FM Provider shall (in the name of Project Co) pursue the relevant Project Co entitlement by invoking the Project Agreement's "Dispute Resolution Procedure" and the following provisions shall have effect.
- 7.3.1 The FM Provider shall act in good faith in the operation of this Clause 7.3.
- 7.3.2 Project Co shall in a timely manner afford to the FM Provider such co-operation as may reasonably be requested by the FM Provider to assist the FM Provider in pursuing a Project Co entitlement against the Board under this Clause 7.3. Such co-operation shall include the provision of documents and the making available of witnesses.
- 7.3.3 The FM Provider shall bear and discharge (and shall indemnify Project Co against) all claims, proceedings, loss, damage, costs and expenses (including legal costs, expert witness costs, witness expenses, court, adjudicator's, mediator's, expert's and arbitrators' fees and charges and any expenses incurred by Project Co in affording the co-operation required by Clause 7.3.2) whether incurred by the FM Provider or Project Co (and including costs and expenses of the Board or other persons, where the FM Provider or Project Co become liable to pay the same) arising from the operation of this Clause 7.3 by the FM Provider, save in all cases to the extent arising from any breach of this Agreement by Project Co or Project Co's negligence.
- 7.3.4 The FM Provider shall keep Project Co fully informed as to the progress of the FM Provider's claim and shall if requested by Project Co provide copies of all documentation relating to the same.
- 7.3.5 The FM Provider shall not without the consent of Project Co (such consent not to be unreasonably withheld or delayed) waive or compromise any claim being pursued by it against the Board under this Clause 7.3. Project Co shall grant its consent to the extent that such waiver or compromise relates to an entitlement of Project Co, as against the Board, which is attributable to a Board Derived Benefit claimed by the FM Provider under this Agreement or an application by the FM Provider on Project Co's behalf for a Board Representative's approval.
- 7.4 Where pursuant to Clause 7.2.4 this Clause 7.4 applies, Project Co shall (on behalf of the FM Provider and any other affected Sub-Contractors) pursue the relevant Project Co entitlement by

invoking the Project Agreement's "Dispute Resolution Procedure" and the following provisions shall have effect.

- 7.4.1 Project Co shall act in good faith in the operation of this Clause 7.4.
- 7.4.2 The FM Provider shall in a timely manner afford to Project Co such co-operation as may reasonably be requested by Project Co to assist in pursuing a Project Co entitlement against the Board under this Clause 7.4. Such co-operation shall include the provision of documents and the making available of witnesses.
- 7.4.3 The FM Provider shall bear and discharge (and shall indemnify Project Co against) all claims, proceedings, loss, damage, costs and expenses (including legal costs, expert witness costs, witness expenses and court, adjudicator's, mediator's, expert's and arbitrator's or arbiter's fees and charges) incurred by the FM Provider or Project Co (and including costs and expenses of the Board or other persons, where the FM Provider or Project Co become liable to pay the same) arising from the operation of this Clause 7.4 by Project Co, but excluding any such costs and expenses which arise from Project Co's negligence or breach of this Agreement or which relate to the pursuit of Project Co entitlements under the Project Agreement other than those which the FM Provider has requested Project Co pursue in accordance with this Clause 7.4.
- 7.4.4 Project Co shall keep the FM Provider fully informed as to the progress of Project Co's claim and shall, if requested by the FM Provider and at the FM Provider's expense, provide copies of all documentation relating to the same.

8. INTERFACES WITH THE BOARD AND OTHER PROJECT CO SUBCONTRACTORS

- 8.1 Project Co is not responsible or liable (whether in contract, delict, breach of statutory duty or under any other legal theory), as against the FM Provider, for any breach of contract, act, omission or statement by the Board or any Board Party. The FM Provider's sole remedy under this Agreement in respect of any such breach, act, omission or statement shall be to such Board Derived Benefits as are obtainable pursuant to Clause 6 of this Agreement or as may expressly be provided for in this Agreement (and subject to Clause 6). This Clause 8.1 shall not prejudice any rights or remedies which the FM Provider may possess directly against the Board but the FM Provider acknowledges the terms of Clause 9.2 of the Project Agreement and agrees that the Board shall not be liable to it in delict in respect of any negligent act or omission of the Board or any Board Party and agrees that it shall not bring any claim in respect of the same against the Board.

- 8.2 Where, as a result of a breach by the Board of the Project Agreement, the FM Provider suffers loss or damage, then subject to Clause 6 the FM Provider shall be entitled to receive, as a Board Derived Benefit, compensation in respect of the same to the extent that Project Co is entitled to receive compensation pursuant to the Project Agreement from the Board attributable to the FM Provider's loss or damage.
- 8.3 Project Co is not responsible or liable (whether in contract, delict, breach of statutory duty or under any other legal theory), as against the FM Provider, for any breach of contract, act, omission or statement by the Building Contractor or the Building Contractor's employees, agents or subcontractors. This Clause 8.3 shall not prejudice any rights or remedies which the FM Provider may possess directly against the Building Contractor.
- 8.4 Without prejudice to the foregoing provisions of this Clause 8, the FM Provider hereby irrevocably and unconditionally waives as against Project Co all and any rights to claim any payment or compensation whatsoever (whether pursuant to any term of this Agreement, by way of damages for breach of contract, in delict, for breach of statutory duty or under any other legal theory) where such claim arises out of or is consequent upon:
- 8.4.1 any breach of the Project Agreement or the Licence by the Board or a Board Party or any act, omission or statement of the Board or a Board Party; or
 - 8.4.2 any breach of the Construction Contract by the Building Contractor or any act omission or statement of the Building Contractor or the Building Contractor's employees, agents or subcontractors; or
 - 8.4.3 any breach by Project Co of any Project Documents (excluding this Agreement).
9. **DETAILED DESIGN DEVELOPMENT AND CONSULTATION WITH THE INDEPENDENT TESTER**
- 9.1 During the development of the design for the Facilities pursuant to the Construction Contract, the Parties will make arrangements for representatives of the FM Provider to attend meetings with Project Co and the Building Contractor from time to time to discuss the development of the design for the Facilities.
- 9.2 Subject to any Variation pursuant to Clause 40, the FM Provider accepts that the design for the Facilities will be developed in accordance with the procedures prescribed by the Construction Contract and the Project Agreement, and will perform its obligations under this Agreement in relation to the Facilities as so designed.

9.3 The FM Provider waives all claims against Project Co for any loss or damage suffered as a result of any non-observance of the procedures in the Construction Contract and/or the Project Agreement governing the development of the design of the Facilities and/or the selection of the Equipment or as a result of any defects or insufficiencies in the design of the Facilities and/or the Equipment (including any non-compliance of the design of the Facilities and/or the Equipment with the requirements of the Project Agreement or Construction Contract) affecting the provision of the Services or the performance of the FM Provider's other obligations under this Agreement, save where such non-observance or defect or deficiency was caused by a breach by Project Co of this Agreement. The FM Provider accepts as conclusive (for the purposes of this Agreement) the decisions of the Board, Project Co and the Building Contractor, pursuant to the Project Agreement and the Construction Contract (or the outcome of any dispute resolution process which occurs pursuant to the Project Agreement or the Construction Contract), in relation to the development of the design for the Facilities and/or the Equipment. This Clause 9.3 shall not prejudice any rights which the FM Provider may possess directly against the Building Contractor, nor any right of the FM Provider to challenge (subject to and in accordance with Clause 7) any decision of the Board relating to the design of the Facilities and/or the Equipment.

9.4 Project Co undertakes to involve the FM Provider in discussions that take place pursuant to Clause 22 of the Project Agreement in relation to the issue of the Completion Certificate. Project Co shall forward to and liaise with the Independent Tester in relation to any comments raised the FM Provider on general completion matters and on the issue of the Certificate of Practical Completion.

10. **DISCLOSED DATA**

No liability

10.1 Project Co shall not be liable to the FM Provider for and the FM Provider shall not seek to recover from Project Co (or the Board or any Project Co Party) any damages, losses, costs, liabilities or expenses which may arise (whether in contract, delict or otherwise) from the adoption, use or application of the Disclosed Data by, or on behalf of, the FM Provider or any subcontractor of FM Provider.

No warranty

10.2 The FM Provider acknowledges the terms of Clause 10.2 of the Project Agreement whereby the Board gives no warranty or undertaking of whatever nature in respect of the Disclosed Data.

11. REPRESENTATIVES, COMMUNICATIONS AND INSTRUCTIONS

- 11.1 At least one month prior to the Actual Completion Date, the FM Provider shall appoint the FM Provider Representative. If the person so appointed ceases to be the FM Provider Representative, the FM Provider shall appoint replacements as necessary so that at all times there is appointed a FM Provider Representative. The FM Provider shall notify Project Co in writing of the FM Provider Representative's identity (and the identity of any replacement) within 7 Business Days of that person being appointed. Save for any limits on his or her authority which the FM Provider may specify by written notice to Project Co, the FM Provider Representative shall be entitled to act generally on behalf of the FM Provider for the purposes of this Agreement.
- 11.2 The FM Provider may appoint competent persons as deputies to the FM Provider Representative from time to time. The identity of such deputies, and the duration of their appointment, shall be notified by the FM Provider to Project Co in writing before their appointment as deputy becomes effective.
- 11.3 The FM Provider shall ensure that the FM Provider Representative, or a deputy duly appointed in accordance with Clause 11.2, is present at the Site or contactable by telephone at all times.
- 11.4 Project Co shall notify the FM Provider of the identity of the person appointed as Project Co's Representative from time to time pursuant to the Project Agreement.
- 11.5 Subject to Clause 57, all notices, consents, approvals, instructions and other communications issued by Project Co in connection with this Agreement shall be deemed to have been issued to the FM Provider if given to the person last notified to Project Co pursuant to Clause 11.1 as being the FM Provider Representative (or his deputy duly appointed in accordance with Clause 11.2).
- 11.6 Project Co's Representative shall:
- 11.6.1 (save for any limits on his or her authority which Project Co may specify by written notice to the FM Provider) be entitled to act generally on behalf of Project Co for the purposes of this Agreement; and
- 11.6.2 subject to Clause 57 shall on behalf of Project Co give and receive all notices, applications, consents, approvals, instructions and other communications issued in connection with this Agreement.

12. SAFETY

- 12.1 The FM Provider shall, throughout the conduct of the Services and the performance of its other obligations under this Agreement, have full regard for the safety of all persons on the Site (whether lawfully or not).
- 12.2 The FM Provider shall keep the Site and the Facilities in an orderly state, appropriate in accordance with Good Industry Practice, to avoid dangers to the persons referred to in Clause 12.1.
- 12.3 Project Co shall, in relation to all works to be carried out by the FM Provider pursuant to this Agreement to which the CDM Regulations apply, act as "client" (to the exclusion of the Board) for the purposes of the CDM Regulations. Project Co shall appoint the "planning supervisor" for such works, where this is required by the CDM Regulations.
- 12.4 Subject to Clause 12.5, the FM Provider is appointed as the "principal contractor" for the purposes of the CDM Regulations in relation to all works to be carried out by the FM Provider pursuant to this Agreement for which the CDM Regulations require the appointment of a principal contractor. The FM Provider shall perform and exercise in a timely manner the obligations and powers of the "principal contractor" under the CDM Regulations in relation to such works.
- 12.5 The FM Provider shall throughout the Operational Term maintain the competence and resources required for it to perform and exercise the obligations and powers of a "principal contractor" under the CDM Regulations as required by Clause 12.4. If at any time the FM Provider fails to maintain such competence and/or resources, Project Co shall appoint another person as and when required by the CDM Regulations to be the "principal contractor" in relation to any works carried out by the FM Provider. The FM Provider shall indemnify Project Co against all costs incurred in appointing such other persons.

13. DISASTER PLAN

- 13.1 The FM Provider shall comply with the provisions of and its obligations under the Disaster Plan.
- 13.2 Project Co shall involve the FM Provider, as appropriate, in liaison with the Board pursuant to Clause 13.2 of the Project Agreement concerning reviews and updates of the Disaster Plan.

14. **CONSENTS AND APPROVALS BY BOARD AND PROJECT CO**

14.1 No consent, approval, review, inspection, comment (or failure to review, inspect and/or comment) in respect of any matter by or on behalf of Project Co, the Board or any other person shall relieve the FM Provider of any obligation or liability under or pursuant to this Agreement.

15. **THE SITE AND RELATED RISKS**

15.1 The FM Provider 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 load-bearing 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 Project Co or the Board), 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.

15.2 To avoid doubt, the FM Provider accepts full responsibility for all matters referred to in Clause 15.1 and the FM Provider shall:

15.2.1 not be entitled to make any claim against the Board or Project Co of any nature whatsoever 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; and

15.2.2 be responsible for, and hold the Board and Project Co harmless from, cleaning up and otherwise dealing with:

- (a) any Contamination at the Site which the FM Provider caused; and
- (b) any Contamination at the Site which the FM Provider did not cause but which was discovered on or later than the twelfth anniversary of the Actual Completion Date but before the Expiry Date so that Project Co may comply with its obligations under the Project Agreement. The responsibility of the FM Provider, as aforesaid, shall include (without limitation) complying at its own expense with all Laws and Consents and any orders, notices or directions issued by any regulatory body (whether made against the Board, Project Co or the FM Provider).

15.3 Not used.

15.4 Not used.

15.5 The FM Provider shall indemnify Project Co against:

15.5.1 all claims, proceedings, loss, damage, costs and expenses (including legal costs) suffered or incurred by Project Co in relation to any Contamination at the Site for which the FM Provider is responsible under clause 15.2 and the cleaning up of the same; and

15.5.2 all losses and liabilities suffered or incurred by Project Co under clause 15.2.2 of the Project Agreement in relation to Contamination at the Site for which the FM Provider is responsible under clause 15.2.

Nature of Land Interests

15.6 After the occurrence of the Actual Completion Date Project Co shall use all reasonable endeavours to procure that the Board shall procure the grant of the Licence from the Scottish Ministers to Project Co and the Project Co Parties (including for the purposes of this Clause 15.6 the FM Provider and sub-contractors of the FM Provider) to enter upon the Site solely for the purposes of:

15.6.1 the carrying out of the Project Operations; and

15.6.2 exercising the Ancillary Rights

and such rights will terminate on the Expiry Date or (if earlier) the Termination Date.

- 15.7 The rights referred to in Clause 15.6 shall not operate or be deemed to operate as a lease of the Facilities or the Site or any part of the Facilities or the Site and the FM Provider shall not have or be entitled to exclusive possession or any estate right title or interest in and to the Site or the Facilities but shall occupy the Site as licensee only.
- 15.8 The rights referred to at clauses 15.6 and 15.7 are personal to the FM Provider and the sub-contractors of the FM Provider and are granted only in so far as such rights are capable of being granted by the Scottish Ministers to Project Co whether as a result of any restriction in the Title Deeds or otherwise.
- 15.9 The FM Provider acknowledges that a breach by the Scottish Ministers or the then heritable proprietors of the Site of its obligations under the Licence shall be deemed to constitute a breach by the Board of the Project Agreement and in respect of such breach Project Co shall be entitled to exercise the rights and remedies available to Project Co in respect of a breach of the Project Agreement by the Board subject to and in accordance with the provisions of the Project Agreement.
- 15.10 The FM Provider shall carry out the Services and its other obligations under this Agreement in a manner which does not breach any provision of the Licence or the Title Deeds.
- 15.11 The FM Provider shall procure that no act or omission of the FM Provider or its employees, agents or subcontractors gives rise to any right for any person to obtain title to the Site or any part of it (save in accordance with the terms of the Project Agreement and of the Licence).
- 15.12 Project Co shall afford to the FM Provider, for the purposes of carrying out the FM Provider's obligations at the Site such rights of access to, and use of, the Site as Project Co itself has been granted under clause 14 of the Project Agreement and under the Licence. Project Co shall have no other obligation to provide the FM Provider with any rights of access to, possession or use of, or egress from the Site and Project Co shall have no liability to the FM Provider in respect of any failure by the Board to afford the rights referred to in this Clause 15.12 (other than as a Board Derived Benefit in terms of Clause 6).
- 15.13 In the event of any failure by the Board to afford the rights referred to at clause 15.6, the FM Provider shall notify Project Co of the same and shall be entitled:
- 15.13.1 (as a Board Derived Benefit, subject to Clause 6) to such further rights of access, use or egress as it may be agreed or determined, as between the Board and Project Co under the Project Agreement, that the Board shall provide; and

15.13.2 to any other Board Derived Benefits arising in accordance with Clauses 6 and 8.2 in relation to such failure.

15.13A The FM Provider acknowledges that in the event that any third party successfully asserts a Property Right which prevents Project Co or any Project Co Party (including for the purposes of this Clause 15.13A the FM Provider and sub-contractors of the FM Provider) obtaining access to the Site by the Agreed Access Route, the Board has undertaken in terms of the Project Agreement to ensure that Project Co and any Project Co Party is provided with a no less adequate alternative access route to enable Project Co and any Project Co Party to perform Project Operations.

Defects

15.14 The FM Provider accepts (as against Project Co and the Board) the risk that any of the Works and/or any Equipment suffer from defects of design, manufacture or workmanship, including defects resulting from any breach by the Building Contractor of its obligations under the Construction Contract. The FM Provider accepts that the Works shall be deemed to have been completed for the purposes of this Agreement on the Actual Completion Date as certified or determined pursuant to the Project Agreement and the Actual Completion Date shall be the date on which the FM Provider shall commence the performance of the relevant Services in accordance with Clause 17. This clause 15.14 shall not prejudice any rights which the FM Provider may possess against the Building Contractor.

15.15 The FM Provider accepts full responsibility for, and all risks associated with, the matters referred to in Clauses 15.1 and 15.14, including any risks that such matters may prevent the FM Provider from performing (or impede the performance by it of) the Services and/or cause the FM Provider to incur additional cost in carrying out the Services and/or cause any events giving rise to Deductions under Part 18 of the Schedule to the Project Agreement or otherwise cause the FM Provider to be in breach of its obligations under this Agreement. The FM Provider shall not be relieved of such responsibility or risks on the basis that it relied on any information provided to it by or on behalf of Project Co or the Board, whether or not such information is incorrect, inaccurate or incomplete and whether or not any such incorrectness, inaccuracy or incompleteness was the result of negligence or negligent misstatement or misrepresentation by Project Co or the Board or any Board Party or any person acting on their behalf.

Project Co shall have no liability to the FM Provider (whether under this Agreement, by way of breach of contract, in delict, for breach of statutory duty or under any other legal theory) in relation to matters referred to in Clauses 15.1 and 15.14 or the consequences thereof, nor in

relation to any such negligence or negligent misstatement or misrepresentation as is referred to in this Clause 15.15.

15.16 The FM Provider shall promptly notify Project Co upon discovering any defect in the Facilities. During the Operational Term, the FM Provider shall, upon receiving an instruction to that effect from Project Co, repair or rectify (i) any such defect present in the Facilities whether resulting from a defect or omission in the design or construction of the Facilities or from the FM Provider's failure to comply with its obligations under this Agreement or (ii) repair, rectify or replace any defective items of Equipment. The FM Provider acknowledges and accepts that under the terms of the Construction Contract, Project Co may instruct the Building Contractor to carry out repairs to the Facilities and/or the Equipment. If the Building Contractor is so instructed, the FM Provider accepts the risk of any and all interference to the performance of the Services and its other obligations under this Agreement caused by the carrying out of such repairs including that it may be delayed or unable to perform the Services.

16. CONSENTS

16.1 The FM Provider shall be responsible for:

16.1.1 obtaining all Consents which may be required for the performance of the Services and the FM Provider's other obligations under this Agreement; and

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

16.2 The FM Provider shall bear the risk that the obtaining of (or compliance with) such Consents may prevent or impede the performance of the Services and the FM Provider's other obligations under this Agreement, and/or increase the costs incurred by the FM Provider in performing the same.

16.3 The FM Provider shall immediately comply with any request from Project Co for any information, assistance or co-operation required by Project Co in order to comply with its obligations under Clause 16.2 of the Project Agreement provided that nothing in this Clause 16.3 shall diminish the FM Provider's obligations pursuant to Clause 16.1 above.

16.4 The FM Provider will use reasonable endeavours to procure that none of the Consents are revoked and that all Consents continue in full force and effect.

17. SERVICES

- 17.1 Throughout the Operational Term the FM Provider shall provide (or procure the provision by its subcontractors of) the Services:
- 17.1.1 in accordance with the terms of this Agreement and so as to perform and comply with Project Co's obligations under the Project Agreement relating to the Services (including, for the avoidance of doubt, Project Co's obligations in terms of Part 14 of the Schedule to the Project Agreement);
 - 17.1.2 in a manner which shall avoid Project Co (i) incurring Deductions from the Service Payments under the Project Agreement and/or (ii) becoming liable to pay sums to the Board under the terms of the Project Agreement;
 - 17.1.3 in accordance with the Method Statements; and
 - 17.1.4 as an obligation independent from, and in addition to, Clause 17.1.3, in such manner as ensures the Service Level Specifications are met.
- 17.2 Subject to the provisions of this Agreement, the FM Provider shall have the sole and exclusive right and obligation to provide the Services at the Site from the Actual Completion Date until the earlier of the Expiry Date or the date of termination of this Agreement.
- 17.3 The FM Provider may at any time submit to Project Co proposals for amendments to or substitution for the Method Statements or any part of them. If Project Co consents to the same then the FM Provider may submit its proposals to the Board's Representative, on Project Co's behalf, pursuant to clause 27.3 of the Project Agreement and in accordance with Part 10 of the Schedule to the Project Agreement. To the extent that the Method Statements as so amended or substituted become the Method Statements for the purposes of the Project Agreement (in accordance with clause 27.3 thereof) then they shall also become the Method Statements for the purposes of this Agreement, subject to any further such amendment or substitution.
- 17.4 To avoid doubt, an amendment to or a substitution for the Method Statements proposed pursuant to Clause 17.3 shall not be a Qualifying Variation or a Project Co Variation entitling the FM Provider to any payment (or other compensation) or to any relief from the performance of its obligations under this Agreement.
- 17.5 The FM Provider shall perform the Services so as to co-ordinate with the Board'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 the Board or any Board Party.

18. **INTERFACE AGREEMENT**

18.1 On or prior to the date of this Agreement, the FM Provider shall deliver to Project Co the Interface Agreement, duly executed by the FM Provider.

19. **DIRECT AGREEMENTS**

19.1 On or prior to the date of this Agreement, the FM Provider shall deliver to Project Co the Service Provider's Collateral Agreement and the Lender FM Direct Agreement, duly executed by the FM Provider.

20. **NOT USED**

21. **EQUIPMENT**

21.1 The provisions of Appendix 9 (Equipment) shall apply.

22. **COMMISSIONING**

22.1 The FM Provider shall undertake all operations necessary to enable it to commence providing the Services from the date specified in Clause 17.2.

22.2 The FM Provider acknowledges that its access rights under Clauses 22.3 and 22.4 are sufficient to enable it to comply with its obligations under Clause 22.1.

22.3 Subject to Clause 22.4 Project Co shall allow (or use reasonable endeavours to ensure that the FM Provider is allowed) all reasonable access to and occupation of the Facilities to the FM Provider and its employees, agents and subcontractors at reasonable times and upon receiving reasonable prior notice during the Commissioning Period. The FM Provider acknowledges that it shall not have free and unrestricted access to the Facilities during the Commissioning Period.

22.4 The FM Provider shall comply with Project Co's and the Building Contractor's reasonable requirements regarding the manner in which its rights of access under Clause 22.3 are exercised and shall minimise any disruption to the Works caused by the exercise by the FM Provider of its rights under this Clause 22.

22.5 The FM Provider shall indemnify Project Co for any costs resulting from damage to the Works, Facilities, other property of Project Co and/ or any damage claims in respect of damage to the property of others (including any costs arising from any delay to the Completion Date as a result of any such damage by the FM Provider), in each case arising as a result of the exercise by the FM Provider of its rights under Clauses 22.2 to 22.4 (inclusive).

22.6 Project Co shall pay the FM Setup Costs to the FM Provider in the amounts and on the dates set out in Appendix 4.

22.7 The FM Provider shall carry out that part of Project Co's Post-Completion Commissioning for which it is responsible under the terms of the Final Commissioning Programme so as to enable Project Co to satisfy its obligations under clause 23.1 of the Project Agreement.

23. **OPERATIONAL MANUALS**

23.1 Throughout the Operational Term the FM Provider shall at all reasonable times make available to Project Co and the Board's Representative all final form operation and maintenance manuals and any other manuals required by Project Co and/or the Board, to allow Project Co to comply with the obligations in Clause 23.5 of the Project Agreement that relate to the Operational Term.

24. **NOT USED**

25. **QUALITY ASSURANCE**

Quality Plans and Systems

25.1 Subject to Clause 25.3, the FM Provider shall procure that all aspects of the Services and the performance of the FM Provider's other obligations under the Agreement are the subject of quality management systems in accordance with the provisions of this Clause 25.

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 them (or either of them).

25.3 The FM Provider shall prepare and obtain certification (to the standard set out in Clause 25.2) for a Services Quality Plan, provided that the FM Provider shall not be obliged to apply for certification for the Services Quality Plan (to the standard set out in clause 25.2) until after the Actual Completion Date, provided that the FM Provider obtains such certification within 15 months of the Actual Completion Date. The FM Provider acknowledges the terms of Clause 25.4 of the Project Agreement and agrees that it will obtain certification of the Services Quality Plan on behalf of Project Co in the terms of that clause.

25.4 The FM Provider shall implement the Services Quality Plan agreed with the Board pursuant to the Project Agreement and shall comply with it when carrying out the Services and the FM Provider's other obligations under this Agreement.

- 25.5 The FM Provider shall procure that its subcontractors implement the Services Quality Plan and that its subcontractors carry out those elements of the Services for which they are responsible in accordance with the Service Quality Plan.
- 25.6 The FM Provider shall from time to time submit to the Board's Representative on Project Co's behalf, in accordance with clause 25.7 of, and Part 10 of the Schedule to the Project Agreement, any changes to the Services Quality Plan required for the Service Quality Plan to continue to comply with the requirements set out in Clause 25.2.
- 25.7 In the event that any ambiguity, uncertainty, dispute or discrepancy arises in relation to the nature and scope of the FM Provider'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):
- 25.7.1 the provisions and standards referred to in Clause 25.2;
 - 25.7.2 the Quality Plan referred to in Clause 25.4;
 - 25.7.3 the Board's Construction Requirements and/or the Service Level Specifications (as the case may be);
 - 25.7.4 Project Co's Proposals and/or the Method Statements (as the case may be);
 - 25.7.5 Project Co's and/or the FM Provider's and/or any subcontractors quality manuals and procedures; and
 - 25.7.6 Good Industry Practice.
- 25.8 If there is no objection by the Board's Representative under Part 10 of Schedule to the Project Agreement (Review Procedure) to a change to any Quality Plan proposed pursuant to Clause 25.7, following submission by the FM Provider to him of a proposed change to the Services Quality Plan in accordance with Clause 25.6, the Services Quality Plan shall be amended to incorporate such change. To avoid doubt, no such change to the Service Quality Plan shall entitle the FM Provider to any payment (or other compensation) or to any relief from the performance of its obligations under this Agreement.

Quality Manuals and Procedures

- 25.9 If the Services Quality Plan refers to, relies on or incorporates any quality manual or procedure, then such quality manual or procedure or the relevant parts of it shall be submitted to the Board's Representative by the FM Provider, on Project Co's behalf, at the time that the Quality Plan or part of (or change to) a Quality Plan is submitted in accordance with the other provisions of this Clause 25 and Part 10 of the Schedule to the Project Agreement (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 Part 10 of the Schedule to the Project Agreement (Review Procedure).

Quality Management

- 25.10 The FM Provider shall maintain a quality management system which shall:
- 25.10.1 ensure the effective operation of the quality systems described in this Clause 25;
 - 25.10.2 cause an audit of the quality systems at regular intervals and the findings of such audit will be reported to Project Co and the Board's Representative;
 - 25.10.3 require review of all quality systems at intervals agreed with Project Co and the Board's Representative to ensure their continued suitability and effectiveness;
 - 25.10.4 require liaison with Project Co and the Board's Representative on all matters relating to quality management; and
 - 25.10.5 require production of reports and their delivery to the FM Provider and Project Co.

Quality Monitoring

- 25.11 Project Co and the Board's Representative may carry out audits of the FM Provider'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 the FM Provider. Project Co and the Board's Representative may carry out such audits at approximate intervals of three (3) months and may carry out other periodic monitoring, spot checks and auditing of the FM Provider's quality management systems and the other quality systems referred to in this Clause 25. The FM Provider shall co-operate and shall procure that any Sub-Contractor co-operates with Project Co and the Board's Representative including providing them with all information and documentation which they reasonably require in connection with their rights under this Clause 25.

26. **NOT USED**

27. **NOT USED**

28. **MAINTENANCE**

Programmed Maintenance Works

28.1 Without prejudice to the FM Provider's other obligations under this Agreement, the FM Provider shall maintain the Facilities and the Equipment in accordance with the Schedule of Programmed Maintenance which is in force from time to time pursuant to the terms of the Project Agreement. No later than 4 months prior to the Completion Date the FM Provider shall submit to Project Co for its approval, (and provide a copy of the same to the Senior Funders and the Bank's Technical Adviser), a draft of the Schedule of Programmed Maintenance for the period from the Completion Date to the expiry of that Contract Year (as defined in the Project Agreement). No later than 4 months prior to the commencement of each subsequent anniversary of the Completion Date the FM Provider shall submit for Project Co's approval a draft of the Schedule of Programmed Maintenance for the next succeeding Contract Year (as defined in the Project Agreement). Project Co shall approve a draft of the Schedule of Programmed Maintenance submitted as aforesaid if:

28.1.1 it provides for maintenance activities to be carried out at times and to standards which will cause the Facilities and the Equipment to be maintained in the condition required by this Agreement and (to the extent provided in Clause 4.1) the Project Agreement, such that Project Co does not incur Deductions from the Service Payments under the Project Agreement and/or become liable to pay sums to the Board under the Project Agreement;

28.1.2 (without prejudice to sub-Clause 28.1.1) it provides for maintenance activities to be carried out at times and to standards which accord with Good Industry Practice;

28.1.3 it is, in form and substance, such that it can reasonably be expected to meet with the approval of the Board's Representative when submitted in accordance with Clause 28.2 (and includes the particulars required by clause 28.3 of the Project Agreement).

Any dispute concerning Project Co's approval or disapproval of a proposed Schedule of Programmed Maintenance shall be resolved in accordance with Clause 56. The Parties shall collaborate with the objective of ensuring that, on each occasion when Project Co is required to submit a Schedule of Programmed Maintenance pursuant to clauses 28.1 and 28.2 of the Project Agreement, there exists a Schedule of Programmed

Maintenance prepared by the FM Provider and approved by Project Co in accordance with this Clause 28.1.

- 28.2 Forthwith upon Project Co approving the same under Clause 28.1, the FM Provider shall submit its proposed Schedule of Programmed Maintenance to the Board's Representative, on Project Co's behalf, pursuant to clauses 28.1 or 28.2 of the Project Agreement (as applicable) and in accordance with Part 10 of the Schedule to the Project Agreement.
- 28.3 Not later than thirty (30) 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), the FM Provider may, on Project Co's behalf, submit to the Board's Representative, pursuant to clause 28.4 of the Project Agreement and in accordance with paragraph 1.2 of Part 10 of the Schedule to the Project Agreement a revision to the Schedule of Programmed Maintenance which is then current and approved by the Board's Representative for the purposes of the Project Agreement. Where the proposed revisions depart materially from the current Schedule of Programmed Maintenance, the FM Provider shall obtain Project Co's written consent before submitting proposed revisions to the Board's Representative as aforesaid; in all other cases the FM Provider shall provide a copy of its proposed revisions to Project Co and the Senior Funders and the Bank's Technical Adviser at the same time as submitting them to the Board's Representative.
- 28.4 Where the FM Provider has submitted revisions to the Schedule of Programmed Maintenance for the Board's Representative's approval as referred to in Clause 28.3, then to the extent that such revised Schedule of Programmed Maintenance becomes the Schedule of Programmed Maintenance for the purposes of the Project Agreement (in accordance with clause 28.4 thereof), it shall also become the Schedule of Programmed Maintenance for the purposes of this Agreement.
- 28.5 The FM Provider shall be responsible for responding, on Project Co's behalf, to comments of the Board's Representative under clause 28.5 of the Project Agreement, and the FM Provider shall re-schedule and amend the relevant Schedule of Programmed Maintenance accordingly, as required in order for the same to become the Schedule of Programmed Maintenance for the purposes of the Project Agreement (and consequently for the purposes of this Agreement). The FM Provider shall keep Project Co informed as to the progress of any such re-scheduling and amendments and shall provide copies to Project Co and the Senior Funders and the Bank's Technical Adviser of all amended Schedules of Programmed Maintenance.

Programmed and Unprogrammed Maintenance

- 28.6 The FM Provider shall not carry out any Programmed Maintenance or Unprogrammed Maintenance Works (as defined in clause 28.8 of the Project Agreement) save:
- 28.6.1 in accordance with a Schedule of Programmed Maintenance which has become effective for the purposes of the Project Agreement as referred to in clause 28.6.1 thereof;
 - 28.6.2 in accordance with the procedures set out in Clause 28.8; or
 - 28.6.3 in an emergency, in accordance with Clause 28.9.
- 28.6A For the avoidance of doubt, any maintenance works of a de minimis nature (which are treated as such in terms of Clause 28.8 of the Project Agreement) shall not be included in the restrictions on Programmed Maintenance Works or Unprogrammed Maintenance Works in Clause 28.6 of this Agreement.
- 28.7 If the Board's Representative notifies Project Co, as described in Clause 28.7 of the Project Agreement, that he requires the acceleration or deferral of any Programmed Maintenance, Project Co shall forthwith notify the FM Provider (and pass a copy of any such notice to the FM Provider as soon as possible) not less than ten (10) 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 the Board requires the Programmed Maintenance to be performed. The FM Provider shall notify Project Co 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") within three (3) Business Days of receipt of such notice from Project Co. Project Co shall inform the Board of the Estimated Increased Maintenance Costs (together with any costs which Project Co itself, or its other Sub-Contractors, may incur as a result of the Board's request). The FM Provider acknowledges that the Board will either confirm or withdraw its request to accelerate or defer the Schedule of Programmed Maintenance in terms of Clause 28.7 of the Project Agreement, and Project Co will notify the FM Provider accordingly within two (2) Business Days of receipt of the response from the Board. The FM Provider acknowledges that if the Board does not respond within the five (5) Business Day period referred to in clause 28.7 of the Project Agreement, the request shall be deemed to have been confirmed. Project Co shall reimburse the FM Provider as a Board Derived Benefit the direct and reasonable costs actually incurred by FM Provider as a consequence of such acceleration or deferment up to, but not exceeding, the amount of the Estimated Increased Maintenance Costs.