

McDonagh, Murray & Spence
Solicitors
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GARTNAVEL COMMUNITY CENTRE

INTERPRETATION AND DEFINITIONS

INTERPRETATION

1. Where one provision of this Agreement imposes upon the FM Provider a standard, duty or obligation which is more onerous than, or additional to, that imposed by another provision, this shall not be treated as an inconsistency. Rather the relevant standards, duties or obligations shall, so far as possible, be treated as cumulative, failing which the more onerous standard, duty or obligation shall prevail.
2. Save where otherwise stated:
 - 2.1 references in this Agreement to Clauses, sub-Clauses and Appendices refer to clauses, sub-clauses and appendices of this Agreement;
3. references in one of the Appendices to paragraphs refer to paragraphs of that Appendix;
- 3.1 the words "herein", "hereto" and "hereunder" refer to this Agreement as a whole and not to the particular Clause, sub-Clause, Appendix or paragraph in which such expressions are used.
4. Headings, sub-headings and the table of contents of this Agreement are inserted for ease of reference only and shall be ignored for the purpose of interpreting this Agreement.
5. In this Agreement:
 - 5.1 all references to agreements, documents and instruments (including this Agreement, the other Project Documents (apart from the Project Agreement) and any Consent) include reference to the same as amended, supplemented, substituted, novated or assigned from time to time (in accordance with their terms);
 - 5.2 all references to a Law include reference to that Law as amended from time to time and to any Law which consolidates, re-enacts or replaces that Law and includes reference to any subordinate or delegated legislation or codes of practice made or issued pursuant to that Law;
 - 5.3 words importing the singular include the plural and vice versa and words importing the masculine shall be construed as including the feminine or the neuter or vice versa;

- 5.4 "person" includes any individual, partnership, firm, trust, body corporate, government, governmental or statutory body, authority, emanation or agency and any unincorporated body or association of persons;
- 5.5 where general words are followed or preceded by specific examples, the nature of the specific examples shall not restrict or qualify the natural meaning of the general words and the "ejusdem generis" rule shall not apply; and
- 5.6 the Parties have had equal opportunity to take legal advice and to negotiate and amend this Agreement and the "contra proferentem" rule shall not apply.

DEFINITIONS

Expressions which are defined in the Project Agreement shall have the same meanings where used in this Agreement, unless differently defined below in this Appendix 1 for the purposes of this Agreement.

The following capitalised expressions in bold shall, where used in this Agreement, have the meanings ascribed to them:

"Adjudication Rules"	has the meaning provided in Clause 9.4 of the Interface Agreement;
"Adjudicator"	means the person appointed as such in accordance with Clause 56;
"Advance"	has the meaning given to it in Clause 6.5;
"Agreement"	has the meaning given to it in Clause 1.1;
"Ancillary Rights"	means the rights of passage over, access to and egress from the Site set out in Part 2 to Part 30 of the Schedule to the Project Agreement;
"Annual Services Fee"	means £221,059 Index Linked;
"Bank's Technical Adviser"	has the meaning given in Appendix 5;
"Board Derived Benefit"	has the meaning given to it in Clause 6.1;
"Board's Representative"	means the representative appointed by the Board pursuant to Clause 11 of the Project Agreement;

"Building Contractor"	means Robertson Construction Central Limited (Registered Number SC249933) in its capacity as a party to the Construction Contract, and its successors and assignees and any person engaged by Project Co to replace it as Building Contractor;
"Commissioners"	has the meaning given in Clause 53.3;
"Commissioning Period"	means the period of four weeks before the proposed Actual Completion Date;
"Contract Year"	has the meaning given in Appendix 5;
"Date for Payment"	has the meaning given to it in Clause 35.5;
"Dispute"	means a dispute between Project Co and the FM Provider as to their obligations, rights and/or entitlements under or the operation of this Agreement;
"Dispute Resolution Procedure"	means the procedure set out in Clause 56 hereof;
"Disputed Amount"	means any part or amount of an invoice submitted by the FM Provider to Project Co under Clause 35.3 which Project Co disputes is owing to the FM Provider under the terms of this Agreement;
"Estimated Increased Maintenance Costs"	is defined in Clause 28.7;
"Event of Project Co Default"	is defined in Clause 45;
"FM Contract Confidential Information"	is defined in Clause 52;
"FM Default Interest Rate"	means a rate of interest per annum equivalent to 2% per annum above the base lending rate from time to time of the Bank of Scotland;
"FM Event of Default"	is defined in Clause 44;
"FM Provider"	means the person appointed by the FM Provider pursuant to Clause

Representative"	11;
"FM Provider's Hospital Manager"	means the FM Provider's duty manager who shall be present at the Facilities in accordance with the Service Level Specification;
"FM Setup Costs"	means the amounts to be paid to the FM Provider under paragraph 1 of Appendix 4;
"Guarantor"	means Robertson Group Limited, a company incorporated in Scotland under the Companies Acts with the registered number SC060077 and having its registered office at 10 Perimeter Road, Pinefield Industrial Estate, Elgin, Morayshire, IV30 3AF;
"H&S Conviction"	has the meaning given in Clause 44.1.6;
"Index Linked"	means that the sum set out in this Agreement shall be multiplied by $\frac{RPI_d}{RPI_o}$ where RPI_d is the value of RPI published or determined with respect to the month of February in the Contract Year $n-1$ (ie in the February preceding the relevant Contract Year n , for example RPI for February 2009 to apply to the Contract Year 1 April 2009 to 31 March 2010); and RPI_o is the value of RPI in respect of October 2004;
"Interface Agreement"	means the interface agreement among the FM Provider, the Building Contractor and Project Co;
"Lender FM Direct Agreement"	means the agreement to be entered into among the FM Provider, the Senior Funders and Project Co in the form set out in Appendix 8;
"Monthly Payment"	has the meaning given to it in Appendix 3;
"Party"	means a party to this Agreement (including any permitted successors or assignees of the original parties) and "Parties" shall be construed accordingly;
"Project Agreement"	means the agreement entered into, on or about the date of this Agreement, between the Board and Project Co relating, inter alia, to the financing, design and construction of a new psychiatric hospital

at Gartnavel Hospital and the services to be provided in connection therewith;

- "Project Co Variation"** is defined in Clause 40.20;
- "Project Documents"** means the Project Agreement, the Licence, the Funding Agreements, this Agreement and the Ancillary Documents (excluding this Agreement);
- "Project Participant"** means any of the parties to the Project Documents, their successors or assignees;
- "Services"** shall, in this Agreement, have the same meaning as is given to that term in the Project Agreement, save only that if (pursuant to a Project Co Variation or otherwise) the services to be performed by the FM Provider pursuant to this Agreement diverge from those to be performed by Project Co under the Project Agreement the term "Services" where used in this Agreement shall refer, in addition, to those services which are to be performed by the FM Provider pursuant to this Agreement;
- "Services Quality Plan"** means the Services Quality Plan prepared in accordance with Part D of Part 14 of the Schedule to the Project Agreement as required to be implemented by the FM Provider in accordance with Clause 25;
- "Termination Date"** means the date of termination of this Agreement;
- "VAT Sum"** has the meaning in Clause 53.5.

APPENDIX 2 referred to in the foregoing agreement between Robertson Health (Gartnavel) Limited and Robertson Facilities Management Limited dated 25th November 2005

HANDBACK

1. The FM Provider shall cause the Facilities to be in a condition, on the Expiry Date, which satisfies the Handback Requirements.
2. Project Co shall inform the FM Provider of when the joint inspection of the Facilities referred to at paragraph 1.2 of Part 24 to the Schedule to the Project Agreement will be conducted, and the FM Provider shall participate in that inspection.
3. Following the joint inspection referred to in paragraph 2, the FM Provider shall, within the time permitted by the Project Agreement, prepare and submit to the Board's Representative, on behalf of Project Co, any proposals and estimates concerning Handback Works, the Handback Programme and the Handback Amount, which Project Co is required to provide to the Board pursuant to paragraph 1.3 of Part 24 of the Schedule to the Project Agreement.
4. The FM Provider shall be responsible for responding, on Project Co's behalf, to comments of the Board's Representative under paragraph 2 of Part 24 of the Schedule to the Project Agreement on any such proposals or estimate. The FM Provider shall revise the proposals and/or estimate and re-submit them as required to the Board's Representative in order that the Handback Works, Handback Programme and Handback Amount are agreed for the purposes of Part 24 of the Schedule to the Project Agreement. In default of such agreement, the FM Provider may (subject to and in accordance with Clause 7) seek a determination as to such matters for the purposes of the Project Agreement.
5. On agreement or determination as aforesaid of the Handback Works, the Handback Programme and the Handback Amount, the FM Provider shall carry out the Handback Works in accordance with Handback Programme, to the satisfaction of the Board's Representative in accordance with Good Industry Practice and so as to meet the Handback Requirements. The FM Provider shall carry out the Handback Works at its own cost notwithstanding that the actual cost of the Handback Works may be higher than the Handback Amount.
6. Within the time permitted by the Project Agreement, the FM Provider shall at its own expense procure the provision to the Board of the Handback Bond as required by paragraph 3.2 of Part 24 of the Schedule to the Project Agreement.

7. Nothing in this Appendix 2 (or in Part 24 of the Schedule to the Project Agreement) shall relieve the FM Provider from any other obligation or liability under this Agreement. Any obligation to perform Handback Works shall be in addition to, and not in substitution for, any other obligation to perform works or services under this Agreement and where any Handback Works item is required, by any other provision of this Agreement, to be carried out earlier than indicated in the Handback Programme, the FM Provider shall carry out that work item at the earlier time.
8. The FM Provider acknowledges and agrees that Project Co may withhold from the Monthly Payment amounts equal to those amounts withheld by the Board under paragraph 3.5 of Part 24 of the Schedule to the Project Agreement.
9. The FM Provider shall participate in the joint inspection of the Facilities pursuant to paragraph 4.1 of Part 24 of the Schedule to the Project Agreement.
10. Project Co shall promptly pass to the FM Provider a copy of the Handback Certificate or notice of refusal to issue a Handback Certificate (as applicable) issued by the Board's Representative under paragraph 4.2 of Part 24 of the Schedule to the Project Agreement.
11. Project Co shall forward to the Board's Representative any objection of the FM Provider to any matter set out in a notice issued by the Board's Representative as aforesaid. The FM Provider may, subject to and in accordance with Clause 7, seek a determination for the purposes of the Project Agreement as to any such objection which is not accepted by the Board's Representative, as contemplated by paragraph 4.5 of Part 24 of the Schedule to the Project Agreement.
12. Not later than one Business Day before Project Co is liable to pay to the Board any sum pursuant to paragraph 5 of Part 24 of the Schedule to the Project Agreement, the FM Provider shall pay an equal sum to Project Co (failing which Project Co may deduct that sum, or any unpaid part thereof, from any payment due from Project Co to the FM Provider under this Agreement).
13. Where the Handback Bond is returned to Project Co by the Board, Project Co will forward it to the FM Provider.

APPENDIX 3 referred to in the foregoing agreement between Robertson Health (Gartnavel) Limited and Robertson Facilities Management Limited dated 25th November 2005

PAYMENT SCHEDULE

1. DEFINITIONS

In this Agreement the following capitalised terms in bold shall have the meaning set out opposite them:

“Annual Services Fee” has the meaning given to it in Appendix 1 to this Agreement.

“Basic Monthly Fee” or means:

“BMF”

(a) in respect of the first Contract Month following the Payment Commencement Date and the last Contract Month prior to the Termination Date, the amount or figure produced by multiplying that amount which is equal to one-twelfth of the Annual Services Fee for the first or last Contract Year (as the case may be) by the Fraction A/B where:

A is the number of days in that Contract Month which (in the case of the first Contract Month) fall after the Payment Commencement Date or (in the case of the last Contract Month) fall before the Termination Date (as the case may be); and

B is the total number of days in that Contract Month;

(b) in respect of any other Contract Month, one twelfth of the Annual Services Fee for the Contract Year in question.

2. CALCULATION OF SUMS DUE TO THE FM PROVIDER UNDER CLAUSE 25

Subject to the terms of this Agreement, for each Contract Month during the Operational Term the Monthly Payments to the FM Provider shall be calculated in accordance with the following formula, namely:-

$$MP = BMF - D + EP$$

Where:

MP is the Monthly Payment;

BMF is the Basic Monthly Fee for the Contract Month in question;

D is an amount equal to the Deductions which the Board is entitled to make under Part 18 of the Schedule to the Project Agreement for the Contract Month in question.

EP means the Energy Payment calculated in accordance with paragraph 3.

3. **ENERGY**

- 3.1 The Energy Payment shall be the amount calculated pursuant to Clause 34 of this Agreement in respect of the immediately preceding Contract Month.

APPENDIX 4 referred to in the foregoing agreement between Robertson Health (Gartnavel) Limited and Robertson Facilities Management Limited dated 25th November 2005

FM SETUP COSTS

1. PAYMENT OF FM SETUP COSTS

Project Co shall pay to the FM Provider the amounts set out below on the dates set out opposite them

Amount	Date for Payment
£14,000.00	On the date of Financial Close of the Project
£5,132.00	On the first Business Day of the month which is 6 months before the Completion Date
£5,132.00	On the first Business Day of the month which is 5 months before the Completion Date
£5,132.00	On the first Business Day of the month which is 4 months before the Completion Date
£21,921.00	On the first Business Day of the month which is 3 months before the Completion Date
£24,826.00	On the first Business Day of the month which is 2 months before the Completion Date
£35,225.00	On the first Business Day of the month which is 1 month before the Completion Date
£10,000.00	On the date of Service Commencement

APPENDIX 5 referred to in the foregoing agreement between Robertson Health (Gartnavel) Limited and Robertson Facilities Management Limited dated 25th November 2005

LIFECYCLE

Definitions

Expressions which are defined in the Project Agreement shall have the same meanings where used in this Agreement, unless differently defined below in this Appendix 5 for the purposes of this Agreement.

The following expressions shall, where used in this Agreement, have the following meanings:-

“Account Review Shortfall Payments”	has the meaning in paragraph 6.5.4;
“Account Review”	has the meaning in paragraph 6.5;
“Actual Contributions”	means the contributions to be made by Project Co during each Contract Year to the Lifecycle Account in accordance with the Lifecycle Account Contribution Payment Profile (index linked);
“Balance”	has the meaning in paragraph 6.5.1;
“Bank’s Technical Adviser”	means the technical adviser appointed from time to time by the Senior Funders;
“Budget Authorised Expenditure”	has the meaning in paragraph 4.1.2;
“Certificate”	means as defined in paragraph 5.1;
“Contract Year”	means the period of twelve (12) calendar months commencing on the date of this Agreement and each subsequent period of twelve (12) calendar months commencing on each anniversary of the date of this Agreement, provided that the final Contract Year shall be such period as commences on the anniversary of the date of this Agreement that falls in the year which this Agreement expires or is terminated (for whatever reason) and ends on the date of expiry or earlier termination of this Agreement (as the case may be);
“Expenditure”	has the meaning in paragraph 6.5.2;

“Indicative Lifecycle Fund Expenditure Programme”	means the indicative expenditure set out in Appendix 6;
“LCA Payments”	has the meaning in paragraph 6.5.3;
“Lifecycle Account Contribution Payment Profile”	means the table of payments to be made by Project Co into the Lifecycle Account set out in Appendix 7;
“Lifecycle Account”	means the Maintenance Reserve Account as defined in the Loan Agreement forming one of the Senior Funders Agreements;
“Lifecycle Service”	means the management and undertaking of Lifecycle Works;
“Lifecycle Works”	means the attendance at, investigation, diagnosis, repair, replacement (if appropriate) and/or maintenance of the Facilities and the Equipment, including dismantling and reassembling of single assets, plant or equipment or building fabric which has reached the end of its useful life so as to enable Project Co to comply with its obligations under the Project Agreement;
“NPV”	means in relation to any amount, the net present value of that amount (the discount factor to be applied an interest rate of 6% per annum in real terms, equivalent in nominal terms to 8.65% compounded with the annual rate of inflation assumed in the future cash flows to which it is applied);
“Review Date”	has the meaning in paragraph 6.1;
“Review”	has the meaning in paragraph 6.3;
“Senior Debt Discharge Date”	has the meaning given to it in the Subordination Deed;
“Shortfall”	has the meaning in paragraph 3.1;
“Subordination Deed”	means the Subordination Agreement dated on or around the date hereof among Project Co, the Senior Creditors, the Subordinated Creditors, the Agent and the Security Trustee (all as defined

therein);

“Surplus” has the meaning in paragraph 6.6.2(a).

1. FM PROVIDER’S OBLIGATIONS TO CARRY OUT THE LIFECYCLE WORKS

1.1 Notwithstanding the terms of the Indicative Lifecycle Fund Expenditure Programme or the amounts standing to the credit of the Lifecycle Account from time to time, the FM Provider shall carry out the Lifecycle Works in full at such times and to such extent as is necessary to perform its obligations under this Agreement notwithstanding that the FM Provider may only recover the costs of carrying out such Lifecycle Works in accordance with paragraphs 4 and 5 of this Appendix 5.

1.2 Subject to paragraph 6, the FM Provider acknowledges and agrees that it has assumed the risk that the cost to it of performing Lifecycle Works may exceed the Actual Contributions. The FM Provider further acknowledges and agrees that on:-

1.2.1 early termination of this Agreement, (other than where the shortfall results from a Project Co breach of its obligations under paragraph 2) or;

1.2.2 expiry of this Agreement;

the FM Provider will have no right to recover any shortfall in its recovery of costs incurred in carrying out Lifecycle Works.

2. PROJECT CO PAYMENT INTO LIFECYCLE ACCOUNT

Subject to paragraph 3, Project Co shall pay into the Lifecycle Account in each month of each Contract Year one twelfth of the Actual Contributions for that Contract Year.

3. FM PROVIDER PAYMENT INTO LIFECYCLE ACCOUNT

3.1 Where Project Co notifies to the FM Provider that it has been unable to pay into the Lifecycle Account the full amount due under paragraph 2 due to a breach by the FM Provider of its obligations under this Agreement (“the Shortfall”), the FM Provider will pay the Shortfall into the Lifecycle Account within six (6) Business Days of receipt of such written notification.

3.2 If following payment of the amount equal to the Shortfall by the FM Provider, Project Co subsequently pays into the Lifecycle Account a sum equal to the Shortfall or part thereof then the FM Provider shall be entitled upon written application to Project Co to receive payment in the same sum as the amount of that payment made into the Lifecycle Account by

Project Co, 10 Business Days following receipt by Project Co of the said written application.

4. **RECOVERY BY FM PROVIDER OF LIFECYCLE COSTS**

4.1 The FM Provider agrees that it shall only be entitled to recover from Project Co expenditure incurred in respect of completed Lifecycle Works the costs of which:-

4.1.1 have been incurred by the FM Provider; and

4.1.2 are no more than the sum of:-

(a) the projected sum to be expended within the Indicative Lifecycle Fund Expenditure Programme during the relevant Contract Year for the Lifecycle Works; and

(b) those sums which were projected to be expended within the Indicative Lifecycle Fund Expenditure Programme following the previous Review Date on Lifecycle Works but which sums remain at that Review Date to be expended

in either case (“the Budget Authorised Expenditure”).

4.2 The FM Provider shall recover the balance of any expenditure not recovered under paragraph 4.1 above if at any future date before the next Review there is paid into the Lifecycle Account by Project Co further sums in accordance with the Indicative Lifecycle Fund Expenditure Programme for the Lifecycle Works, in which event the FM Provider shall be entitled to claim the balance of such expenditure as Budget Authorised Expenditure pursuant to paragraph 5 below.

4.3 The FM Provider acknowledges and agrees that it is obliged to carry out the Lifecycle Works throughout the Operational Term, even if the Budget Authorised Expenditure is insufficient to cover the amount incurred by the FM Provider in relation to the Lifecycle Works requiring the FM Provider to make up the difference from its own funds.

5. **CLAIM FOR RECOVERY OF LIFECYCLE EXPENDITURE BY FM PROVIDER**

5.1 To claim recovery of Budget Authorised Expenditure the FM Provider shall submit to Project Co a certificate (“the Certificate”) evidencing in reasonable detail:-

5.1.1 the Lifecycle Works which have been undertaken by the FM Provider for which reimbursement is sought; and

- 5.1.2 the costs incurred by the FM Provider in undertaking such Lifecycle Works.
- 5.2 Project Co shall be deemed to have accepted the Certificate if it has not within ten (10) Business Days of receipt of the Certificate given written notice to the FM Provider that Project Co disputes the Certificate in accordance with paragraph 5.4 below.
- 5.3 Subject to paragraph 6.9, ten (10) Business Days following receipt by Project Co of the Certificate, Project Co shall pay to the FM Provider either:-
- 5.3.1 the amount shown as due on the Certificate, or
- 5.3.2 such sum as represents those elements of the Lifecycle Works which are not disputed by Project Co (which sums will be accepted by the FM Provider without prejudice to any dispute notified by Project Co so as not to be in full and final settlement of the amount requested under the Certificate).
- 5.4 Project Co shall only be entitled to withhold payment of monies in accordance with paragraph 5.3.2 above upon giving written notice to the FM Provider that it disputes the Certificate for one or more of the following reasons:-
- 5.4.1 the FM Provider expenditure was not properly incurred by the FM Provider in relation to the Lifecycle Works in question; and/or
- 5.4.2 the works in respect of which the FM Provider is claiming reimbursement are or were not Lifecycle Works; and/or
- 5.4.3 the Lifecycle Works have not been carried out in accordance with the terms of the Project Agreement; and/or
- 5.4.4 the FM Provider is not entitled to recover the expenditure by virtue of the operation of paragraph 4.1.2.

5.5 **Dispute**

Should Project Co serve such written notice on the FM Provider confirming that it disputes terms of the Certificate in whole or in part then for the period of five (5) Business Days following receipt by FM Provider of the said written notice, Project Co and the FM Provider shall try to reach agreement on the terms of the Certificate in respect of which the FM Provider is seeking reimbursement under paragraph 4. In the event that Project Co and the FM Provider are unable to reach agreement within those five (5) Business Days the dispute between the parties shall be resolved in accordance with the Dispute Resolution Procedure.

5.6 Value Added Tax

Both Project Co and the FM Provider agree that all money received by the FM Provider under this paragraph 5 shall be paid net of VAT and no VAT shall be recoverable by the FM Provider from the Lifecycle Account in respect of any Lifecycle Works, however this paragraph 5.5 is without prejudice to any obligation by Project Co to pay any VAT to HM Customs & Excise which may be payable or is assessed as payable by Project Co.

6. REVIEW PROCEDURE

6.1 Project Co and the FM Provider shall meet together with the Bank's Technical Adviser to review the Lifecycle Works on the following occasions:-

- 6.1.1 on the fifth anniversary of the Actual Completion Date,
- 6.1.2 every third anniversary following the first such review referred to in 6.1.1 above, and
- 6.1.3 the Termination Date of the Operational Term however so determined in relation to the assessment of any surplus or deficit contained in the Lifecycle Account.

Such occasions to be referred to as "the Review Date".

6.2 Should the above mentioned meeting not take place within five (5) Business Days of the Review Date then either Project Co or the FM Provider may serve written notice on the other requiring attendance of both parties together with the Bank's Technical Adviser at either the Site or the registered office of the party serving the notice.

6.3 On each Review Date Project Co, the FM Provider and the Bank's Technical Adviser shall agree the Lifecycle Works required to be undertaken over the remainder of the Operational Term and the projected costs of those Lifecycle Works, ("the Review").

6.4 In reaching agreement on the matters referred to in paragraph 6.3 above Project Co, the FM Provider and the Bank's Technical Adviser shall take the following considerations into account:-

- 6.4.1 the Lifecycle Works which have been undertaken since the immediately preceding Review (or in the case of the first such Review, since the first day of the Operational Term); and
- 6.4.2 the Lifecycle Works which will require to be undertaken during the remainder of the Operational Term; and

6.4.3 where and to the extent ascertainable from the Indicative Lifecycle Fund Expenditure Programme:-

- (a) Lifecycle Works which were scheduled to take place prior to the Review Date under the terms of the Indicative Lifecycle Fund Expenditure Programme which have been delayed; and
- (b) Lifecycle Works which have been undertaken in advance of the Review Date but which in terms of the Indicative Lifecycle Fund Expenditure Programme were planned to have been undertaken after that Review Date; and
- (c) any Lifecycle Works not shown in the Indicative Lifecycle Fund Expenditure Programme but which will nevertheless be required to be undertaken in relation to the Facilities; and
- (d) any Lifecycle Works shown in the Indicative Lifecycle Fund Expenditure Programme which are no longer required to be undertaken in relation to the Facilities; and
- (e) any other relevant factors agreed between the parties.

6.5 Adequacy of Lifecycle Account

In addition to those matters to be considered during the Review, Project Co, the FM Provider and the Bank's Technical Adviser shall also review the adequacy of the Lifecycle Account, ("the Account Review") and in carrying out the Account Review Project Co, the FM Provider and the Bank's Technical Adviser shall take the following matters into account:-

- 6.5.1 the sum outstanding to the credit of the Lifecycle Account (less any sums which are properly due to the FM Provider in accordance with paragraph 4) ("the Balance")
- 6.5.2 the NPV of the projected expenditure due to be incurred in respect of the Lifecycle Works during the remainder of the Operational Term as set out in the Indicative Lifecycle Fund Expenditure Programme from time to time and ascertained pursuant to the Review (as such sums stated therein shall be Index Linked) ("the Expenditure") and

- 6.5.3 the NPV of the sums to be credited to the Lifecycle Account as set out in the Lifecycle Account Contribution Payment Profile throughout the remainder of the Operational Term (“the LCA Payments”) and
- 6.5.4 the NPV of any sums which remain to be paid by the FM Provider to the Lifecycle Account pursuant to paragraph 6.6.1 as a result of the immediately preceding Account Review (“the Account Review Shortfall Payments”); and
- 6.5.5 the extent to which the FM Provider has complied with its obligations under this Agreement.

6.6 Lifecycle Account Deficit/Surplus

6.6.1 Deficit position:-

If following the Review on a Review Date referred to in paragraph 6.1.1 or 6.1.2 a potential future deficit is identified in the Lifecycle Account (i.e. the Balance plus the LCA Payments plus the Account Review Shortfall Payments, equates to less than the Expenditure) then, the FM Provider shall make payment to Project Co of an amount equal to such deficit in two equal payments. The first of such payment to be made six months following the identification of the said deficit and the second payment twelve months following the identification of such said deficit.

6.6.2 Surplus position:-

- (a) If following the Review and the Account Review in accordance with this paragraph 6 there is identified a surplus (i.e. the Balance plus the LCA Payments plus the Account Review Shortfall Payments, equates to more than the Expenditure) (“the Surplus”) then the following paragraph (b) shall apply.
- (b) Subject to paragraph 6.9 below, Project Co will pay to the FM Provider within five (5) Business Days of agreement between Project Co, the FM Provider and the Bank’s Technical Adviser of the existence and size of the Surplus identified in accordance with paragraph (a) above or within five (5) Working Days of any such Surplus being identified following determination pursuant to the Dispute Resolution Procedure eighty (80) per cent of that Surplus.

6.7 **Surplus Caused by Insured Risk Event**

Subject to paragraph 6.9 below, where repair works have been carried out following an insured risk event causing an item to be replaced or renewed prior to the anticipated date identified on the Indicative Lifecycle Fund Expenditure Programme which would but for the repair works have been carried out under the Indicative Lifecycle Fund Expenditure Programme, and as a result of such repair works the sum budgeted within the Indicative Lifecycle Fund Expenditure Programme need no longer be expended as a direct result of those repair works causing there to be Surplus as identified in accordance with paragraph 6.6 above, then such particular Surplus shall be shared between Project Co and the FM Provider equally, payment to the FM Provider to be made within five (5) Business Days of identification of such Surplus.

6.8 **Surplus and Deficit at End of Operational Term**

6.8.1 Both Project Co and the Funders agree that 100% of any Surplus after the Facilities have been returned to the Board in accordance with Schedule 24 (Handback Procedure) of the Project Agreement shall be paid to the FM Provider within 20 Business Days of determination of such Surplus.

6.8.2 If, at the Review Date referred to in paragraph 6.1.3, the total sums paid into the Lifecycle Account together with any interest earned on the monies held in the Lifecycle Account are less than the total sum required to be spent on Lifecycle Works throughout the Operational Term (such sum to be referred to as “the Lifecycle Account Budget Shortfall”) then the FM Provider shall make a lump sum payment to the Lifecycle Account equal to the Lifecycle Account Budget Shortfall within 20 Business Days of determination of such sum.

6.9 **Approval of Figures by Bank’s Technical Adviser**

Until the Senior Debt Discharge Date:-

6.9.1 prior to final settlement of any Certificate, Review or Account Review, the Bank’s Technical Adviser must approve all calculations upon which the Certificate, Review or Account Review are based; and

6.9.2 the approval of the Bank’s Technical Adviser is required prior to the payment of any monies out of the Lifecycle Account pursuant to any Certificate or Account Review or otherwise.

- 6.10 Project Co and the FM Provider both acknowledge and agree that notwithstanding the preceding terms of this Appendix 5 no sum shall be paid or be payable by Project Co to the FM Provider from the Lifecycle Account at any time when an Event of Default (as defined in the Senior Funders Agreements) or FM Event of Default has occurred and is continuing.

**APPENDIX 6 referred to in the foregoing agreement between Robertson Health (Gartnavel)
Limited and Robertson Facilities Management Limited dated 25th November 2005**

INDICATIVE LIFECYCLE FUND EXPENDITURE PROGRAMME

Indicative Lifecycle Fund Expenditure Programme

Contract Year	Amount
2007	0
2008	0
2009	0
2010	£34,278.64
2011	£55,329.36
2012	£70,838.19
2013	£53,691.38
2014	£48,735.50
2015	£125,774.07
2016	£128,125.85
2017	£178,708.45
2018	£203,515.77
2019	£175,118.51
2020	£189,855.33
2021	£228,735.50
2022	£215,948.67
2023	£241,482.11
2024	£225,889.44
2025	£237,468.17
	£238,650.24

2026	
	£276,637.80
2027	
	£307,235.40
2028	
	£347,063.66
2029	
	£355,701.15
2030	
	£398,470.98
2031	
	£471,884.68
2032	
	£50,014.39
2033	
	£75,293.21
2034	
	£53,179.49
2035	
	£25,338.00
2036	
	0
2037	
TOTAL	£5,012,963.95

**APPENDIX 7 referred to in the foregoing agreement between Robertson Health (Gartnavel)
Limited and Robertson Facilities Management Limited dated 25th November 2005**

LIFECYCLE ACCOUNT CONTRIBUTION PAYMENT PROFILE

Contract Year	Amount
	0
2007	
2008	£11,884.62
2009	£42,129.05
2010	£60,884.68
2011	£64,890.72
2012	£51,383.20
2013	£75,146.05
2014	£127,644.04
2015	£145,162.94
2016	£187,599.24
2017	£193,332.46
2018	£178,951.20
2019	£202,924.77
2020	£224,243.04
2021	£223,761.76
2022	£235,754.57
2023	£228,837.89
2024	£237,364.41
2025	£251,123.02
2026	£287,174.56
2027	£320,713.72
2028	£349,778.30

2029	£369,611.04
2030	£429,238.64
2031	£331,030.56
2032	£63,789.69
2033	£74,556.84
2034	£48,337.62
2035	£17,151.13
2036	£4,173.39
2037	0
TOTAL	£5,038,573.15

APPENDIX 8 referred to in the foregoing agreement between Robertson Health (Gartnavel) Limited and Robertson Facilities Management Limited dated 25th November 2005

LENDER FM DIRECT AGREEMENT

LENDERS FM DIRECT AGREEMENT

among

Robertson Facilities Management Limited
as the FM Contractor

and

The Governor and Company of the Bank of Scotland
as Agent and Security Trustee

and

Robertson Health (Gartnavel) Limited
as ProjectCo

and

Robertson Group Limited
as the Guarantor

Dated:

*1.1.1.1.1 DUNDAS & WILSON
CS LLP*

Saltire Court
20 Castle Terrace
Edinburgh EH1 2EN

Tel 0131 228 8000
Fax 0131 228 8888
Legal Post: LP2 Edinburgh 6

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LENDERS FM DIRECT AGREEMENT

among

- (1) **ROBERTSON FACILITIES MANAGEMENT LIMITED**, a company incorporated under the Companies Acts with registered number SC185956 and having its registered office at 10 Perimeter Road, Pinefield Industrial Estate, Elgin, Moray, IV30 6AE (**the FM Contractor**);
- (2) **THE GOVERNOR AND COMPANY OF THE BANK OF SCOTLAND**, acting through its office at New Uberior House, 11 Earl Grey Street, Edinburgh, EH3 9BN , as agent for the Banks and as Security Trustee for the Finance Parties as defined in the Loan Agreement referred to below (**the Agent and the Security Trustee** respectively);
- (3) **ROBERTSON HEALTH (GARTNAVEL) LIMITED**, a company incorporated under the Companies Acts with registered number SC271565 and having its registered office at 10 Perimeter Road, Pinefield Industrial Estate, Elgin, Moray, IV30 6AE (**ProjectCo**); and
- (4) **ROBERTSON GROUP LIMITED**, a company incorporated under the Companies Acts with registered number SC060077 and having its registered office at 10 Perimeter Road, Pinefield Industrial Estate, Elgin, Morayshire, IV30 3AF (**the Guarantor**).

WHEREAS:

- A. By the FM Contract, the FM Contractor has contracted with ProjectCo to provide the Services;
- B. by the Financing Documents, the Banks have agreed to make available certain loan facilities to ProjectCo, to assist it in financing the Project; and
- C. it is a requirement of the Project Documents and of the Financing Documents that this Agreement is entered into by the parties.

NOW IT IS AGREED as follows:

1. DEFINITIONS AND INTERPRETATION

- 1.1 In this Agreement, unless the context otherwise requires:

Board means Greater Glasgow Health Board, a Health Board established by the National Health Service (Constitution of Health Boards) (Scotland) Order 1974 (SI 1974/267) as amended by the National Health Service (Constitution of Health Boards) (Scotland) Order 2003 (SSI 2003/217) pursuant to Section 2 of the National Health Service (Scotland) Act 1978 as amended by the National Health Service and Community Care Act 1990 and having its principal office at Gartnavel Royal Hospital, 1055 Great Western Road, Glasgow, G12 0XH;

Direct Agreement(s) means any direct agreement between ProjectCo and a third party, contemplated by the Project Documents (other than this Agreement);

Dispute Resolution Procedure means the procedure set out in the Schedule;

Effective Novation Date means the date referred to in Clause 5.1;

FM Contract means the agreement entitled FM Agreement between ProjectCo and the FM Contractor dated on or about the date hereof whereby the FM Contractor has agreed to provide the Services;

Loan Agreement means the Loan Agreement dated on or around the date of this Agreement between ProjectCo, Robertson Health (Gartnave) Holdings Limited, the Agent and the Banks;

Notice has the meaning given to it in Clause 9.1;

Notice of Disclosed Liabilities has the meaning given to it in Clause 4.2.1 or Clause 5.1 (as the context may require);

Notice of Enforcement has the meaning given to it in Clause 3.4;

Novation has the meaning given to it in Clause 5.1;

Parent Company Guarantee means the guarantee dated on or around the date hereof granted by Robertson Group Limited in favour of ProjectCo.

Project Agreement means the Project Agreement dated on or around the date hereof between the Board and ProjectCo;

Proposed Novation Notice has the meaning given to it in Clause 5.1;

Proposed Substitute has the meaning given to it in Clause 5.1;

Receiver means any receiver (including an administrative receiver) or receiver and manager appointed under the Security Documents;

Step-In Date means the date of issue of the Step-In Undertaking;

Step-In Notice has the meaning given to it in Clause 4.1;

Step-In Party has the meaning given to it in Clause 4.2.7;

Step-In Period means the period commencing on the Step-In Date and ending on the earliest of:

- (a) the Step-Out Date;
- (b) the completion of a Novation;
- (c) the day falling 6 months after the Step-In Date; and
- (d) the expiry or termination of this Agreement;

Step-In Undertaking has the meaning given to it in Clause 4.2.7;

Step-Out Date has the meaning given to it in Clause 4.3;

Substitute Entity has the meaning given to it in Clause 5.5.1; and

Termination Notice has the meaning given to it in Clause 3.1.

1.2 In this Agreement, except where the context otherwise requires:

- 1.2.1 headings and sub-headings are for ease of reference only and shall be ignored in construing this Agreement;
 - 1.2.2 all references to **Clauses** and the **Schedule** are references to clauses of and the schedule to this Agreement, unless otherwise specified;
 - 1.2.3 the Schedule to this Agreement is an integral part of this Agreement and reference to this Agreement includes reference to the Schedule;
 - 1.2.4 all references to agreements, documents or other instruments include (subject to all relevant approvals) a reference to that agreement, document or instrument as amended, supplemented, substituted, novated or assigned;
 - 1.2.5 all references to time of day shall be a reference to whatever time of day shall be in force in Great Britain;
 - 1.2.6 words importing the singular include the plural and vice versa;
 - 1.2.7 words importing a particular gender include all genders;
 - 1.2.8 a reference to any person is to be construed so as to include that person's successors in title and permitted transferees and assigns;
 - 1.2.9 **person** includes any individual, partnership, firm, trust, body corporate, government, governmental body, authority, agency or instrumentality, unincorporated body of persons or associations;
 - 1.2.10 any reference to a public organisation shall be deemed (subject to all relevant approvals) to include a reference to any successor to that public organisation or any organisation or entity which has taken over the functions or responsibilities of that public organisation;
 - 1.2.11 references to **parties** mean the parties to this Agreement and a **party** means anyone of them; and
 - 1.2.12 a reference to a document **in the Agreed Form** is to a copy of that document approved or which shall have been approved by the parties and initialled by each of them for identification.
- 1.3 The following words and phrases shall have the meaning given to them in the Loan Agreement:
- Banks;
 - Business Day;
 - Financing Documents;
 - Finance Parties;
 - Proceeds Account;

Project Documents;
Security Documents; and
Security Interest.

1.4 The following words and phrases shall have the meaning given to them in the Project Agreement:

Project;
Services; and
Service Level Specifications.

2. INTIMATION AND ACKNOWLEDGEMENT OF SECURITY INTERESTS AND PAYMENT INSTRUCTION

2.1 **Intimation of Security Interests.** The Agent hereby gives notice to the FM Contractor of the assignment in security by ProjectCo under the Security Documents of ProjectCo's right, title and interest in and to the FM Contract.

2.2 **Acknowledgement of intimation.** Without prejudice to its rights the FM Contractor acknowledges notice of the assignment referred to in Clause 2.1.

2.3 **Consent to Security Interests.** The FM Contractor hereby consents to (i) the creation and enforcement of the Security Interest in the FM Contract by the Agent in accordance with the terms of the Security Documents and any other assignment or transfer of the FM Contract by way of enforcement of the Security Documents by the Agent or any liquidator or administrator, receiver, administrative receiver or other similar official. Notwithstanding such assignment or the granting of any other Security Interest in the FM Contract by or pursuant to the Financing Documents, until the FM Contractor is notified in writing by the Agent to the contrary under the terms of the Financing Documents (and the FM Contractor shall be entitled to assume compliance therewith), the FM Contractor shall (unless provided otherwise in this Agreement) be entitled to exercise or enforce all rights, discretions and remedies under and in respect of the FM Contract and to perform its obligations under the FM Contract as if there had been no assignment thereof.

2.4 **No Notices.** The FM Contractor confirms to the Agent that it has not received notice of any other Security Interests granted by ProjectCo to any third party of any right, title, benefit or interest in and to the FM Contract.

2.5 **Payment Instruction.** ProjectCo hereby irrevocably and unconditionally instructs the FM Contractor and the FM Contractor confirms:

2.5.1 that all sums payable by the FM Contractor to ProjectCo pursuant to the FM Contract otherwise than upon termination thereof shall be paid to the credit of the account of ProjectCo entitled Proceeds Account numbered 06200250, sort code 80-26-43, or to such other account or accounts as the Agent may from time to time direct in writing to the FM

Contractor, unless and until the Agent notifies the FM Contractor otherwise (following issue of a Termination Notice hereunder or the occurrence of an Event of Default under the Loan Agreement), in which event the FM Contractor agrees to make all future payments as directed by the Agent (and this instruction is irrevocable without the prior written consent of the Agent); and

2.5.2 that all sums payable by the FM Contractor to ProjectCo upon termination of the FM Contract shall be paid to the credit of the account of ProjectCo entitled Compensation Account numbered 06200306, sort code 80-26-43 or to such other account or accounts as the Agent may direct in writing to the FM Contractor (and this instruction is irrevocable without the prior written consent of the Agent);

in each case without any set-off, deduction, counterclaim or plea of compensation whatsoever other than any of the foregoing which it is legally entitled to make or assert in relation to the FM Contract, and any such payments by the FM Contractor shall discharge *pro tanto* its obligations under the FM Contract to pay the same to ProjectCo.

3. **NOTICES OF TERMINATION AND ENFORCEMENT, ETC**

3.1 **Termination Notice by the FM Contractor.** The FM Contractor shall not give notice to suspend, rescind, terminate or otherwise take any action to rescind, suspend or terminate the FM Contract or exercise any right it might have to present any petition for or take any other action with a view to the making of an administration order or appointment of a Receiver in respect of ProjectCo or any of its assets or the liquidation or winding-up of ProjectCo or to enforce any remedies against any of the property of ProjectCo without in any such case, giving the Agent at least 20 Business Days prior written notice (**a Termination Notice**) (and copied to any Receiver or administrator) specifying the grounds for that suspension, rescission or termination or such other action.

3.2 **Revocation.** A Termination Notice may be revoked by the FM Contractor (in writing to the Agent) prior to the expiry of its notice period. On any such revocation the parties' rights and obligations shall be construed as if that notice had not been given.

3.3 **Notice of Defaults by ProjectCo.** The FM Contractor shall promptly give the Agent notice (copied to any Receiver or administrator) of:

3.3.1 the occurrence of any payment default by ProjectCo under the FM Contract or of the occurrence of any Event of Force Majeure, Relief Event and Variation (as defined in (or by reference in) the FM Contract) under the FM Contract of which it becomes aware; and/or

3.3.2 any material breach or default by ProjectCo of the terms of the FM Contract which would (or would with the passage of time) entitle the FM Contractor to terminate the FM Contract (together with reasonable details thereof).

3.4 **Notice of enforcement by the Agent.** The Agent shall give prompt notice (**a Notice of Enforcement**) to the FM Contractor within 3 Business Days of the occurrence of any acceleration of amounts due and owing under any of the Financing Documents and/or any enforcement procedure which the Agent has commenced under any of the Security Documents pursuant to an Event of Default as defined in the Loan Agreement specifying the grounds for that acceleration or enforcement.

4. **STEP-IN AND STEP-OUT**

4.1 **Step-In Notice.** At any time prior to the expiry of a Termination Notice or after the Agent delivers a Notice of Enforcement, the Agent may give notice to the FM Contractor (**a Step-In Notice**) of the intention of the Step-In Party to issue a Step-In Undertaking on a specified date which shall be at least 15 Business Days but no more than 60 Business Days after that Step-In Notice. Subject to Clause 6, the FM Contractor shall not be entitled to terminate the FM Contract during the notice period duly specified in a Step-In Notice.

4.2 **Step-In.**

4.2.1 Within 10 Business Days of receipt of the Step-In Notice, the FM Contractor shall give a written notice (**Notice of Disclosed Liabilities**) to the Agent of:

- (a) all amounts which are or shall become due and payable to the FM Contractor under the FM Contract;
- (b) the nature and to the best of the FM Contractor's knowledge and belief, the amount of any monetary claim which is or may be asserted by the FM Contractor under the FM Contract against ProjectCo arising out of or in connection with the breach for which the Termination Notice was served; and
- (c) where the FM Contractor intends to terminate the FM Contract due to some default or breach of contract of a non-financial nature:

1.1.1.1.1 the provision of the FM Contract alleged to have been breached or not fulfilled;

1.1.1.1.2 sufficient information to enable the Agent to identify the material facts;

1.1.1.1.3 the steps reasonably required to remedy the specified breaches or defaults or conditions not fulfilled;

1.1.1.1.4 the time within which the specified steps can reasonably be expected to be taken;

1.1.1.1.5 (if applicable) the amount of damages claimed specifying in reasonable detail the manner in which they have been calculated; and

1.1.1.1.6 (if applicable) the relief to be sought;

on or prior to the date specified in the Step-In Notice as being the proposed date of issue of a Step-In Undertaking. The FM Contractor shall not be entitled as against the Agent and/or the Step-In Party, following the date of the Notice of Disclosed Liabilities to claim any further sums or require the performance of, any further obligations which are or become outstanding on or prior to the proposed date of issue of such Step-In Undertaking which were not either specified in the Notice of Disclosed Liabilities or notified to the Agent prior to the date of any confirmation made by the Agent under Clause 4.2.5.

- 4.2.2 The Agent may appoint a firm of independent chartered accountants and/or firm of technical advisers to verify (at the cost of ProjectCo) the statements submitted by the FM Contractor under Clause 4.2.1 and the FM Contractor shall, subject to such firm(s) executing an appropriate confidentiality undertaking as the FM Contractor may reasonably request, permit such firm to have access to and to make copies of all records, documents, data and accounting and other information not subject to legal privilege which is reasonably required to confirm the accuracy and completeness of such statements.
- 4.2.3 All statements and information given by the FM Contractor in terms of this Clause 4 shall be prepared diligently and be given in good faith and the FM Contractor shall take all reasonable steps to ensure that the statements to be submitted by it under Clause 4.2.1 (and any amendments or supplements thereto) and based on such information as may be available at the time shall be true, complete and accurate statements of the amounts to which the FM Contractor considers itself to be entitled.
- 4.2.4 Without prejudice to the rights of the FM Contractor to pursue any claims against ProjectCo following the expiry of the Termination Notice, for the purpose of determining the extent of the liability of the Step-In Party pursuant to Clause 4.2.7 in respect of matters occurring prior to the Termination Notice or Notice of Enforcement, submission by the FM Contractor of the Notice of Disclosed Liabilities shall be conclusive evidence that the FM Contractor has waived and abandoned all claims known or which ought reasonably to have been known to the FM Contractor at that date arising out of or in connection with the FM Contract prior to the date of the Termination Notice or Notice of Enforcement other than those disclosed in the Notice of Disclosed Liabilities.
- 4.2.5 Within 10 Business Days of receipt of the Notice of Disclosed Liabilities, the Agent shall either (a) confirm to the FM Contractor that it intends to issue a Step-In Undertaking or (b) withdraw the Step-In Notice.

4.2.6 If the Agent withdraws the Step-In Notice pursuant to Clause 4.2.5 then the parties' rights and obligations shall be construed as if the Step-In Notice had not been given and Clause 6.1 shall apply.

4.2.7 If the Agent confirms its intention to issue a Step-In Undertaking under Clause 4.2.5, then on the Step-In Date, the Agent shall give the FM Contractor a written undertaking (**the Step-In Undertaking**) from the Agent, the Receiver or any other person (in the case of the Receiver or such other person, guaranteed by the Agent in terms acceptable to the FM Contractor acting reasonably with regard to the liabilities disclosed in the Notice of Disclosed Liabilities) for the duration of the Step-In Period (**the Step-In Party**) by which the Step-In Party agrees:

- (a) to pay to the FM Contractor within 10 days of demand by the FM Contractor, the monetary amounts notified by the FM Contractor in the Notice of Disclosed Liabilities;
- (b) to procure the performance of the outstanding obligations under the FM Contract which shall have arisen on or prior to the date of issue of the Step-In Undertaking, as notified by the FM Contractor in the Notice of Disclosed Liabilities within such reasonable period as the FM Contractor and the Step-In Party shall agree;
- (c) to pay, or procure the payment, to the FM Contractor any sums which become due and payable by ProjectCo under the FM Contract during the Step-In Period when they become due for payment; and
- (d) to procure the due and timely performance of all ProjectCo's obligations and liabilities arising under the FM Contract during the Step-In Period.

4.3 **Step-Out.** At any time during the Step-In Period, the Step-In Party may give the FM Contractor at least 15 Business Days' prior notice to terminate the Step-In Period on a date (**the Step-Out Date**) to be specified in the notice. Provided that:

4.3.1 all sums due under the Step-In Undertaking have been paid; and

4.3.2 all other obligations and liabilities under the Step-In Undertaking have been performed and discharged in full,

the Step-In Party shall be released from the Step-In Undertaking on the Step-Out Date and Clause 6.1 shall apply. Such release shall not affect the continuation of ProjectCo's obligations to the FM Contractor under the FM Contract.

4.4 **Failure to pay sums, etc.** If the Step-In Party (i) fails to pay any sum owed to the FM Contractor or (ii) fails to comply with any obligation or liability in accordance with the Step-In Undertaking

which entitles the FM Contractor to terminate the FM Contract, then the FM Contractor shall be entitled by notice to the Step-In Party to terminate the Step-In Period, but without limiting the obligations of the Step-In Party to the FM Contractor under the Step-In Undertaking at the date of termination and Clause 6.1 shall apply.

4.5 **Continuation of Step-In Period.** For the avoidance of doubt, if a Proposed Novation Notice is served during the Step-In Period, and ProjectCo does not consent to that Proposed Novation Notice pursuant to Clause 5, the Step-In Period shall continue subject to the terms of this Agreement.

5. **NOVATION OF FM CONTRACT**

5.1 **Substitution**

5.1.1 **Proposed Substitute.** At any time:

- (a) prior to the expiry of a Termination Notice or, if a Termination Notice has not been given, at any time after service of a Notice of Enforcement; or
- (b) during the Step-In Period, but subject to the performance by the Step-In Party of its obligations under the Step-In Undertaking (if given);

the Agent may give notice (**a Proposed Novation Notice**) to the FM Contractor that it wishes another person (**a Proposed Substitute**) to assume by way of sale, transfer, novation or other disposal (each **a Novation**) ProjectCo's rights and obligations under the FM Contract and specifying a date, falling not earlier than 30 Business Days and not later than 50 Business Days after the date of the Proposed Novation Notice, on which such assumption is to be effective (and the date on which that assumption is intended to become effective under this Clause 5 shall be the **Effective Novation Date**).

5.1.2 Subject to Clause 6.1.5, if a Proposed Novation Notice is given under Clause 5.1.1 and no Step-In Notice has been given, then the FM Contractor may not terminate the FM Contract prior to the Effective Novation Date.

5.1.3 If the FM Contractor receives a Proposed Novation Notice, it shall, within 10 Business Days of receipt thereof, give a written notice to the Agent of the same matters as specified in Clause 4.2.1 (and the provisions of Clause 4.2.4 shall apply in ascertaining the effect of a Notice of Disclosed Liabilities under this Clause) but for this purpose as at the Effective Novation Date rather than the date specified in the Step-In Notice (in this Clause 5 **a Notice of Disclosed Liabilities**).

5.2 **Information for Consent.** A Novation shall only be effective if the FM Contractor consents to that Novation in writing under Clause 5.5. The Agent shall supply the FM Contractor (as soon as practicable) with such information as the FM Contractor reasonably requires to enable it to decide whether to give that consent, including (without limitation) in relation to the Proposed Substitute:

- 5.2.1 its name, place of incorporation and residence and registered address;
- 5.2.2 the names of its shareholders and the share capital held by each of them;
- 5.2.3 such details of its directors and secretary as would require to be filed with the Registrar of Companies in Scotland on the appointment of such offices;
- 5.2.4 full particulars of the manner in which it is proposed to finance the Proposed Substitute and its assumption of the liabilities and obligations under the FM Contract and the extent to which that finance is committed;
- 5.2.5 full particulars of the resources (including contracts) which are available to the Proposed Substitute to enable it to perform ProjectCo's obligations under the FM Contract in accordance with its terms; and
- 5.2.6 such other information as may reasonably be required by the FM Contractor to satisfy it as to the matters listed in Clause 5.3.1.

5.3 Grant of consent.

- 5.3.1 The FM Contractor may only withhold or delay consent to a Novation if the Agent or the Step-In Party has failed to show to the FM Contractor's reasonable satisfaction:
 - (a) the legal capacity, power and authority of the Proposed Substitute to become party to and perform ProjectCo's obligations under the FM Contract (as so novated); and
 - (b) that the financial standing of and financial and technical resources available to, the Proposed Substitute are sufficient to perform ProjectCo's obligations under the FM Contract (as so novated) in accordance with their terms.
- 5.3.2 The FM Contractor shall notify the Agent within 10 Business Days of the later of receipt of a Proposed Novation Notice and receipt of all information required under Clause 5.4, whether it has decided to consent to the Proposed Substitute.
- 5.3.3 If the FM Contractor notifies the Agent under Clause 5.3.2 that it has decided not to consent to the Proposed Substitute, the Agent may within 10 Business Days of such notification refer the matter to the Dispute Resolution Procedure.

- 5.4 Subsequent Proposed Novations.** If the FM Contractor exercises its right under Clause 5.3 to withhold consent to a Proposed Novation Notice, the Agent may give one or more subsequent Proposed Novation Notices under Clause 5.1 containing changed particulars relating to the same Proposed Substitute or particulars relating to another Proposed Substitute which the Agent believes would fulfil the requirements of Clause 5.3.1 but so that only one Proposed Novation Notice may be outstanding at anyone time.

5.5 **Implementation of Novation.** If the FM Contractor consents to a Novation, then provided all monetary amounts and other obligations and liabilities, as specified in the Notice of Disclosed Liabilities issued pursuant to Clause 5.1, have been duly paid and fulfilled to the FM Contractor or have been assumed by the Proposed Substitute in accordance herewith, on the Effective Novation Date:

5.5.1 the Proposed Substitute shall become a party to the FM Contract (in that capacity, **the Substitute Entity**) in place of ProjectCo and thereafter shall be treated as if named as a party to the FM Contract in place of ProjectCo;

5.5.2 the FM Contractor, ProjectCo and the Proposed Substitute shall enter into a novation agreement and any other reasonable requisite agreements (including if required, a direct agreement with financiers to the Proposed Substitute in materially similar terms to this Agreement) in form and substance satisfactory to the FM Contractor (acting reasonably) by which the Substitute Entity shall acquire ProjectCo's rights and assume ProjectCo's obligations and liabilities under the FM Contract in each case (i) arising on or after the completion of the Novation and (ii) to the extent not already paid or performed, as specified in the Notice of Disclosed Liabilities, but so that the FM Contractor will not be in breach of any of its obligations under this Agreement if the Proposed Substitute or ProjectCo fails to enter into those agreements to give effect to the Novation;

5.5.3 the FM Contractor shall procure (to the extent that it is within its reasonable control) that if any appointments or collateral warranties in favour of ProjectCo in relation to the FM Contract are terminated or cease to have effect, the other parties thereto shall assume the same obligations in favour of the Proposed Substitute as those under any such affected document to the Agent's reasonable satisfaction;

5.5.4 the FM Contractor shall owe its obligations under the FM Contract arising on and after completion of the Novation to the Substitute Entity alone and the receipt, acknowledgement or acquiescence of the Substitute Entity shall be a good discharge; and

5.5.5 if a Step-In Undertaking has been given and all the obligations of the Step-In Party under the Step-In Undertaking accrued up to the Effective Novation Date have been discharged in full on that date then, following completion of the Novation, the Step-In Party shall be released from the Step-In Undertaking.

5.6 **Continuation of Step-In Period.** For the avoidance of doubt, if a Proposed Novation Notice is served during the Step-In Period and the FM Contractor does not consent to that Proposed Novation Notice, then, unless terminated under any other provision of this Agreement, the Step-In Period shall not be terminated early by virtue of that non-consent.

6. **THE FM CONTRACTOR'S RIGHTS**

6.1 **Rights of termination.** If:

- 6.1.1 a Termination Notice expires and no Step-In Notice or Proposed Novation Notice has been given; or
- 6.1.2 a Step-In Notice is withdrawn; or
- 6.1.3 a Step-In Undertaking has not been issued by the date required by this Agreement; or
- 6.1.4 subject to Clause 5.5, the Step-In Period ends under any of Clauses 4.3, 4.4 or 4.5 and no Novation has been completed; or
- 6.1.5 no Novation has been completed within the period referred to in Clause 5.1 or Clause 5.5; or
- 6.1.6 the Agent gives Notice at any time that it has irrevocably declined to issue a Step-In Notice or a Proposed Novation Notice;

then the FM Contractor may act on any grounds for termination available to it under the FM Contract whenever occurring in each case in such manner as the FM Contractor shall think fit and without further reference to or liability or obligations to the Agent or any Step In Party.

6.2 Termination of the FM Contract during the Step-in Period. During the Step-In Period, the FM Contractor may exercise its rights of termination under the FM Contract by reference to any event occurring during the Step-In Period which gives rise to a right of termination under the FM Contract, provided that the FM Contractor shall not be entitled to exercise such rights of termination during the Step-In Period upon the occurrence of an event referred to in Clause 45.1 (Project Co Event of Default) of the FM Contract which is the subject of a request from the FM Contractor for remedy and which is remedied within any relevant period set out in or determined under that Clause (so that, for the purposes only of this Clause 6.2, the remedy period shall be deemed to start 5 Business Days after the Step-In Date if ProjectCo and/or the Agent and/or Step In Party are taking steps to the satisfaction of the FM Contractor to remedy the breach as soon as possible within that period).

6.3 Termination following Novation. After completion of a Novation, any right of the FM Contractor to terminate the FM Contract or take any other action with respect to a breach of it shall be exercisable against the Substitute Entity, but so that the FM Contractor shall not be entitled to exercise those rights of termination (i) as a result of any event arising before completion of a Novation which has not been the subject of a request from the FM Contractor to the Substitute Entity for remedy prior to completion of a Novation or (ii) upon the occurrence prior to Novation of an event referred to in Clause 45.1 (Project Co Event of Default) of the FM Contract which is the subject of a request from the FM Contractor for remedy which has been remedied within any relevant period set out in or determined under that Clause (but so that, for the purposes of this Clause 6.3, that remedy period shall be deemed to commence seven days after completion of a Novation if the Substitute Entity shall be taking steps to the satisfaction of the FM Contractor to remedy that breach as soon as possible within that time period).