
SCHEDULE 24**MARKET TESTING PROCEDURE****1. DEFINITIONS****1.1 Definitions. The following terms shall have the following meanings:**

- (a) "Affiliated Person" means:
- (i) an Affiliate of any of Project Co, the Service Providers, the Constructor, the Subcontractors or other Project Co Parties or the Shareholders;
 - (ii) any partner in any partnership or any person who participates in any profit sharing, cost-sharing or joint venture arrangement, in each case to which any of Project Co, the Service Providers, the Constructor, other Project Co Parties or the Shareholders or any person mentioned in Section 1.1(a)(i) is also a party;
 - (iii) any shareholder, director, officer or employee of any of the persons referred to in Sections 1.1(a)(i) and 1.1(a)(ii) or any of those persons' spouses, children, step-children or partners; or
 - (iv) any body corporate of which any person referred to in Section 1.1(a)(iii) is a shareholder, director, officer or employee.
- (b) "Benchmarking Exercise" has the meaning given in Section 2.2(a) of this Schedule.
- (c) "Benchmark Price" means the range of prices that is within 5% less than and 5% greater than the simple average of prices for the relevant Market Tested Services obtained from the suitable comparators as part of a Benchmarking Exercise conducted hereunder, once adjustments have been made to make such comparators comparable, including adjusting for standards, as agreed by the Parties, provided however that the higher limit of such range shall not exceed the highest of the suitable comparators.
- (d) "Benchmarking Proposal" has the meaning given in Section 2.2(e) of this Schedule.
- (e) "Draft Proposal" means the proposal described in Section 2.5(a) of this Schedule.
- (f) "Excluded Person" means Project Co, any Affiliated Person, any subcontractor of an Affiliated Person or any Affiliate of their respective subcontractors.
- (g) "Market Tested Services" means all Services, other than the Plant Services and the General Management Services, unless otherwise agreed from time to time by the Parties.
- (h) "Market Testing" means the process described in Section 2 of this Schedule, including the Benchmarking Exercise if applicable.
- (i) "Market Testing Date" means the date which is the fifth anniversary of the Substantial Completion Date, and thereafter every 5th anniversary of such date.

- (j) "Market Testing Meeting" means a meeting convened in accordance with Section 2.3 of this Schedule.
- (k) "Market Testing Proposal" means the final version of the Draft Proposal, as agreed by the Parties or as determined, in either case, in accordance with this Schedule.
- (l) "Preferred Service Tenderer" means, following the Market Testing of any Market Tested Service, any group of Market Tested Services or any part of any Market Tested Service (as the case may be), the Service Tenderer selected to provide such services in accordance with the provisions of Section 2.8 of this Schedule.
- (m) "Prospective Service Tenderers" means those persons who express an interest in being requested, or are identified by the Parties pursuant to Section 2.6(a) to prepare and submit tenders for each Market Tested Service, group of Market Tested Services or any part of any Market Tested Service (as the case may be).
- (n) "Qualifying Service Tender" means a tender received from a Service Tenderer which complies with the Service Tender Requirements.
- (o) "Service Tender Requirements" means the form and requirements of the tender documents to be sent to Service Tenderers as agreed or determined in accordance with the provisions of this Schedule.
- (p) "Service Tenderers" means those of the Prospective Service Tenderers selected to submit tenders in accordance with Section 2.6 of this Schedule.
- (q) "Service Tender Validity Period" means the period within which tenders from Service Tenderers must be received if they are to be valid.

2. MARKET TESTING

2.1 Market Testing Dates

- (a) The Market Testing of each Market Tested Service shall, notwithstanding any other provision of this Schedule (including without limitation the participation of Health Co described in Section 2.3 of this Schedule), be the responsibility of Project Co and shall be carried out in accordance with this Schedule so that the Preferred Service Tenderer(s) shall, if appointed to act as Service Provider(s), commence provision of the relevant Market Tested Services on the relevant Market Testing Date.
- (b) If for any reason the applicable Benchmarking Exercise or other Market Testing for any Market Tested Services shall not be complete on the relevant Market Testing Date, then Project Co shall remain responsible to ensure the continued provision of the relevant Market Tested Services, and Health Co shall be responsible to continue to pay Project Co as provided in this Agreement for the continued provision of the relevant Market Tested Services, pending completion of the applicable Benchmarking Exercise or other Market Testing. The pricing of such continued Market Tested Services shall, pending the establishment of new pricing as contemplated under this Schedule, be at the same pricing as prevailed before the relevant Market Testing or Benchmarking Exercise commenced subject to adjustment for CPI increases only calculated as CPIo/CPI_n as those terms are defined in Section 4 of Schedule 23 – Payment Mechanism.

2.2 Benchmarking

- (a) Project Co may, at least 8 months before each Market Testing Date, give notice to Health Co that Project Co wishes to carry out a benchmarking exercise (the "Benchmarking Exercise") of one or more of the Market Tested Services, rather than Market Testing as otherwise provided in this Schedule.
- (b) Unless otherwise agreed by the Parties, such notice referred to in Section 2.2(a) of this Schedule may only be given, and Project Co shall only be entitled to carry out a Benchmarking Exercise, in respect of a Market Tested Service if the relevant Service Provider has, on all quarterly Quality Satisfaction Surveys, conducted in accordance with Section 2 of Schedule 23-3A, during the 12 month period prior to the date of such notice, achieved a score equal to or higher than the fourth highest ranked Fraser Health hospital facility and the second highest ranked BCCA cancer centre facility out of all Health Authority Facilities in such Quality Satisfaction Survey. All such scoring will not be subject to the Dispute Resolution Procedure.
- (c) Within 7 days after receipt of the notice referred to in Section 2.2(a) of this Schedule, the Parties shall meet to:
- (i) discuss and agree to the procedure for, and factors to be taken into account, in the Benchmarking Exercise to ensure that the Market Tested Services are compared on a like to like basis with suitable comparators and reliable information, which shall include comparing the standards and prices of such Market Tested Services and the costs of providing them with the standards and prices of equivalent services and the costs of providing them in similar circumstances by reputable organizations possessing an appropriate degree of skill, resources, reputation and financial standing relative to the provision of such Market Tested Services; and
 - (ii) review the Output Specifications and Method Statements for each Market Tested Service that will be subject to the Benchmarking Exercise and, if required by Health Co, amend the relevant Output Specifications and Method Statements to be applicable to the Market Tested Service after the Market Testing Date, as appropriate, provided that Project Co may only object to any change in the requirements of Health Co on the grounds referred to in Section 1.5 of Schedule 25 - Variation Procedure and any such objection must be made in writing to Health Co within 15 days of the relevant meeting at which the change was contemplated.
- (d) If Project Co cannot establish to Health Co's satisfaction, acting reasonably, that for a Market Tested Service there are suitable comparators and reliable information as described in Section 2.2(c)(i) of this Schedule, then the Benchmarking Exercise for that Market Tested Service shall not proceed and Market Testing of such Market Tested Service shall be as otherwise provided in this Schedule.
- (e) Project Co shall, prior to the start of the Benchmarking Exercise, submit a proposal (the "Benchmarking Proposal") for the pricing of each Market Tested Services that is the subject of the Benchmarking Exercise. The pricing shall not exceed any amount contractually agreed between Project Co and the relevant Service Provider that is applicable for the period after the Market Testing Date.

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- (f) After Project Co submits the Benchmarking Proposal, Project Co shall carry out the Benchmarking Exercise for the relevant Market Tested Services.
 - (g) Project Co shall maintain complete and accurate records of each Benchmarking Exercise and shall present the results of the Benchmarking Exercise to Health Co, together with all necessary supporting documentation and such other information for full transparency of relevant cost and other information relating to the Benchmarking Exercise and as Health Co may reasonably require in order to evaluate properly the results of the Benchmarking Exercise. The Parties shall agree upon the Benchmark Price and if, provided that each Party acts reasonably, no agreement can be reached, Section 2.3 below shall apply.
 - (h) If the pricing of a Market Tested Service in the Benchmarking Proposal is less than the Benchmark Price, then Project Co shall confirm the appointment of the relevant Service Provider then providing such Market Tested Service to continue providing such Market Tested Service for a further five year term and the re-pricing of such Market Tested Service shall be at the pricing set out in the Benchmarking Proposal.
 - (i) If the pricing of a Market Tested Service in the Benchmarking Proposal is within the Benchmark Price, then at Project Co's option Project Co shall confirm the appointment of the relevant Service Provider then providing such Market Tested Service to continue providing such Market Tested Service for a further five year term at the pricing set out in the Benchmarking Proposal. If Project Co does not exercise such option, then Market Testing of such Market Tested Service shall be as otherwise provided in this Schedule.
 - (j) If the pricing of a Market Tested Service in the Benchmarking Proposal is more than the Benchmark Price, then Market Testing of such Market Tested Service shall be conducted as otherwise provided in this Schedule.
 - (k) Project Co shall bear all costs, fees and expenses associated with the Benchmarking Exercise.
 - (l) The provisions of Sections 1, 2.10 and 2.12 of this Schedule shall apply, *mutatis mutandis*, to the Benchmarking Exercise as provided in this Section 2.2.
 - (m) The Parties acknowledge and agree that the Benchmarking Exercise is intended to be an expedited process that is completed at least 6 months prior to the relevant Market Testing Date to allow time for Market Testing to proceed as otherwise provided in this Schedule, and accordingly, either Party may, at any time after the date that is 10 months prior to the relevant Market Testing Date request a meeting with the other Party to discuss the likelihood and scope of a Benchmarking Exercise, as it is then known to the Parties, and to review the proposed timeline, details and issues concerning a Benchmarking Exercise. The other Party shall meet with the requesting Party, and both Parties, acting reasonably, shall consider the timelines set out in this Section 2.2 and if agreed, the timelines set out in this Section 2.2 shall be modified for the Benchmarking Exercise.

2.3 Market Testing Program

- (a) Except as provided in Section 2.2 of this Schedule, at least 6 months before each Market Testing Date, the Parties shall hold Market Testing Meetings in respect of all Market Tested Services:
- (i) to review the Output Specifications and Method Statements for each Market Tested Service and if required by Health Co, to amend the relevant Output Specifications and Method Statements as appropriate, provided that Project Co may only object to any change in the requirements of Health Co on the grounds referred to in Section 1.5 of Schedule 25 - Variation Procedure and any such objection must be made in writing to Health Co within 15 days of the relevant Market Testing Meeting at which the change was contemplated;
 - (ii) to discuss and seek to agree (subject to the provisions of Section 2.4 of this Schedule) upon any grouping or groupings of Market Tested Services or any division of any Market Tested Service into separate parts which will optimize the opportunity for Health Co to obtain best value for money;
 - (iii) to discuss and seek to agree upon the appropriate media for advertising the Market Tested Services and identifying the Prospective Service Tenderers;
 - (iv) to discuss and seek to agree upon the basis on which the Service Tenderers shall be selected by Project Co from among the Prospective Service Tenderers; and
 - (v) to discuss and seek to agree upon the Service Tender Requirements which shall be in sufficient detail to allow Project Co, with Health Co's agreement, to determine the Preferred Service Tenderer and shall include, without limitation:
 - (A) a statement of the Service Tender Validity Period;
 - (B) requirements in respect of the possible grouping or groupings of Market Tested Services and any division of any Market Tested Service into separate parts;
 - (C) details of the tender evaluation criteria;
 - (D) the information Service Tenderers are required to provide; and
 - (E) details of the required financial capacity and performance security/guarantees to be provided to support the Preferred Service Tenderer's obligations.
- (b) Any tender evaluation criteria agreed between Project Co and Health Co and made available to the Service Tenderers as part of the Service Tender Requirements must be objective and impartial.
- (c) Project Co shall provide at least one month's prior written notice to Health Co of the time, place and agenda for the first Market Testing Meeting. Thereafter, each subsequent Market Testing Meeting shall be convened on not less than 7 days notice,

with such notice identifying the agenda items to be discussed at the Market Testing Meeting, provided that in emergencies a Market Testing Meeting may be called at any time on such notice as may be reasonable in the circumstances. The Parties shall hold Market Testing Meetings as often as necessary.

2.4 Grouping of Services

- (a) Unless Project Co can demonstrate to Health Co that Project Co will optimize its ability to obtain best value for money for Health Co if Market Tested Services are tendered separately or in particular groupings or if any Market Tested Service is divided into separate parts, the grouping of any Market Tested Services shall be left to the discretion of Service Tenderers on the basis that the Service Tender Requirements shall specify that:
- (i) Service Tenderers may submit tenders for all or any of the Market Tested Services; and
 - (ii) where a Service Tenderer submits a tender for a group or groups of Market Tested Services, such Service Tenderer may be required to provide all or any of the Services in such group or groups and shall, in any event, provide separate pricing for each Service in such group or groups.

2.5 Market Testing Proposal

- (a) Notwithstanding any failure of the Parties to agree upon any matter referred to in Section 2.3(a), Project Co shall prepare and deliver to Health Co no later than 4 months before the relevant Market Testing Date a draft market testing proposal (the "Draft Proposal") describing in detail Project Co's proposals for the Market Testing of each Market Tested Service. The Market Testing Proposal shall describe all of the matters referred to in, and agreed pursuant to, Section 2.3(a) and the form of contract which the Preferred Service Tenderer will be required to accept.
- (b) Health Co may, within 30 days of Health Co's receipt of the Draft Proposal, provide comments and request amendments to the Draft Proposal and Project Co shall revise the Draft Proposal as required by Health Co.
- (c) If Project Co and Health Co are unable to agree on any matter relating to the Draft Proposal within 60 days of Health Co's receipt of the Draft Proposal, either Party may refer the matter for resolution in accordance with Schedule 30 - Dispute Resolution Procedure.
- (d) It shall be a principle of the Market Testing Proposal that, unless otherwise agreed by the Parties, the allocation of risk to the Preferred Service Tenderer, if appointed to act as a Service Provider, shall not be materially greater than such allocation to the Service Provider whom the Preferred Service Tenderer is to replace.
- (e) The Output Specifications, Method Statements, Service Tender Requirements and form of contracts set out in the Market Testing Proposal shall be used for the Market Testing.

2.6 Selection of Service Tenderers

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- (a) Project Co shall be responsible for compiling the list of Prospective Service Tenderers. Except with the prior written consent of Health Co in its sole discretion, the Prospective Service Tenderers shall not include any Restricted Person or other person who is not permitted to be a Subcontractor pursuant to this Agreement. If Health Co recommends any Prospective Service Tenderers, then Project Co shall include any such recommendations in the list of Prospective Service Tenderers.
- (b) Project Co, in consultation with Health Co, shall be responsible for selecting the Service Tenderers from the list of Prospective Service Tenderers on the basis of relevant criteria, including:
- (i) the financial standing of the Prospective Service Tenderers;
 - (ii) the technical, managerial and other relevant experience and ability of the Prospective Service Tenderers, taking into account any relevant customer references; and
 - (iii) any other basis or Service Tender Requirements identified pursuant to Sections 2.3(a)(iv) or 2.3(a)(v) of this Schedule.

All such relevant criteria shall be subject to the prior written approval of Health Co, not to be unreasonably withheld.

- (c) Health Co shall have the right to object to the selection of, and Project Co shall not select, any person as a Prospective Service Tenderer if such person does not, or could not reasonably be considered to, comply with and meet any of the criteria referred to in Section 2.6(b) of this Schedule or with the requirements of Section 59.3.
- (d) An Excluded Person shall not be disqualified from selection as a Service Tenderer merely by virtue of being a party to one or more of the Project Documents, subject to:
- (i) compliance with all Applicable Laws; and
 - (ii) the establishment of, and compliance with, arrangements reasonably satisfactory to Health Co to avoid any conflict of interest or unfair advantage, provided however that failure by Project Co to comply with any such arrangements shall automatically lead to the disqualification of the Excluded Person and the provisions of Section 2.12 shall apply.
- (e) Health Co shall, in its absolute discretion, have the right to reject and veto the selection of any person as a Service Tenderer on the grounds that the Prospective Service Tenderer has committed a Prohibited Act, where the term "Prohibited Act" shall have the extended meaning given in Section 2.13 of this Schedule.
- (f) Project Co shall, after consultation with Health Co, provide any Prospective Service Tenderer which is unsuccessful in being selected as a Service Tenderer with an appropriate explanation of the reasons behind its non-selection, if so requested by the person in question.
- (g) Where, in respect of any Market Tested Service or group of Market Tested Services or any part of any Market Tested Service, there is only one Prospective Service Tenderer,

or Project Co intends to select only one of the Prospective Service Tenderers as Service Tenderer, then Project Co will provide notice thereof to Health Co and the following shall apply:

- (i) The Parties will discuss and consider whether the Market Testing conducted for the relevant Market Tested Services was adequate or whether such Market Testing should be re-performed on a broader or other basis.
- (ii) If the Parties conclude that such Market Testing was adequate, or if such Market Testing is re-performed and there is still only one Prospective Service Tenderer or only one Prospective Service Tenderer that Project Co intends to select as Service Tenderer, then Project Co shall confirm the appointment of such Service Tenderer to provide the relevant Market Tested Service. The pricing of such Market Tested Service shall be at the same pricing as prevailed before the relevant Market Testing, subject to (A) adjustment for the higher of CPI increases only calculated as CPI_n/CPI₀ as those terms are defined in Section 4 of Schedule 23 – Payment Mechanism or increases in the British Columbia Average Weekly Wage Rates as published by BC Stats in the monthly report “Earnings and Employment Trends” over the same period, and (B) adjustment for any extraordinary additional costs incurred since the last Market Testing or foreseeable before the next Market Testing which are identified by Project Co to the extent the same are not taken into account by (A), by price increases since the last Market Testing, or by any other price variation mechanism under this Agreement, such additional costs to be approved by Health Co acting reasonably or determined pursuant to Schedule 30 – Dispute Resolution Procedure. Such pricing so adjusted shall continue until the next scheduled Market Testing hereunder unless Project Co elects to perform earlier Market Testing for such Market Tested Services in which case such earlier Market Testing shall occur in accordance with this Schedule, *mutatis mutandis* to take account of the earlier Market Testing date.

2.7 Service Tendering Process

- (a) Project Co shall be responsible for managing and co-ordinating the Market Testing in an efficient and fair manner in accordance with the Market Testing Proposal (and in particular, but without limitation, the Service Tender Requirements) and shall ensure that only Service Tenderers selected in accordance with this Schedule are invited to submit tenders. Project Co shall ensure that the principle of equality of information to, and treatment of, Service Tenderers shall apply at all times.
- (b) Project Co shall send all necessary documents and information to Service Tenderers (including without limitation the Service Tender Requirements) in a timely manner.
- (c) Tenders must be assessed on the basis of relevant criteria, including:
 - (i) their compliance with the Service Tender Requirements; and
 - (ii) the value for money that the tenders represent for Health Co.
- (d) Project Co shall bear all costs, fees and expenses associated with Market Testing.

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- (e) Health Co may, at its own cost, appoint a monitor for the purpose of monitoring and reporting to Health Co on Project Co's compliance with all requirements for Market Testing. Such monitor shall be entitled to attend all meetings and processes relating to Market Testing, including without limitation evaluation meetings and processes, inspect copies of all the tender documentation, bids and evaluation documentation and comment (on behalf of Health Co) to Project Co as to compliance with the requirements for Market Testing.
 - (f) In the event that Project Co does not comply with all requirements for Market Testing, then, without limiting any other remedies of Health Co under this Agreement or otherwise, Project Co shall re-perform the relevant Market Testing in accordance with such requirements.

2.8 Preferred Service Tenderers

- (a) Following expiry of the Service Tender Validity Period, Project Co shall, subject to the provisions of this Section 2.8, determine which Service Tenderer (the "Preferred Service Tenderer") offers the Qualifying Service Tender in respect of any Market Tested Service, group of Market Tested Services or individual part of any Market Tested Service, that represents, as the case may be, the best value for money for Health Co.
- (b) Immediately upon making the aforesaid determination of the Preferred Service Tenderer, Project Co shall supply to Health Co a copy of its tender evaluation, together with sufficient supporting information concerning the tender evaluation to enable Health Co to analyse and understand the basis for Project Co's determination.
- (c) If Health Co does not agree with Project Co's determination in the case of any Qualifying Service Tender, Health Co may, within 30 days of being provided with the tender evaluation, dispute such determination and, if the Parties do not resolve such Dispute within a further 30 days, the Dispute shall be referred for resolution in accordance with Schedule 30 - Dispute Resolution Procedure.

2.9 Appointment

- (a) On, or about each Market Testing Date, Project Co shall ensure that all Preferred Service Tenderers, as agreed or determined in accordance with Section 2.8 of this Schedule, are appointed to provide and enter into contracts to provide the relevant Market Tested Service or group of Market Tested Services or individual parts of any Market Tested Service, as the case may be, for five year terms and on the basis set out in their Qualifying Service Tender.
- (b) Without prejudice to Section 2.6(g) of this Schedule, where Project Co believes that only one Qualifying Service Tender is likely to be submitted, or where only one Qualifying Service Tender is in fact submitted, then Project Co will provide notice thereof to Health Co and the following shall apply:
 - (i) The Parties will discuss and consider whether the Market Testing conducted for the relevant Market Tested Services was adequate or whether such Market Testing should be re-performed on a broader or other basis; and

- (ii) If the Parties conclude that such Market Testing was adequate, or if such Market Testing is re-performed and there is still only one Qualifying Service Tender likely to be or in fact submitted, then Project Co shall confirm the appointment of such Qualifying Service Tender to provide the relevant Market Tested Service. The pricing of such Market Tested Service shall be at the same pricing as prevailed before the relevant Market Testing, subject to (A) adjustment for the higher of CPI increases only calculated as CPI_n/CPI₀ as those terms are defined in Section 4 of Schedule 23 – Payment Mechanism or increases in the British Columbia Average Weekly Wage Rates as published by BC Stats in the monthly report “Earnings and Employment Trends” over the same period, and (B) adjustment for any extraordinary additional costs incurred since the last Market Testing or foreseeable before the next Market Testing which are identified by Project Co to the extent the same are not taken into account by (A), by price increases since the last Market Testing, or by any other price variation mechanism under this Agreement, such additional costs to be approved by Health Co acting reasonably or determined pursuant to Schedule 30 – Dispute Resolution Procedure. Such pricing so adjusted shall continue until the next scheduled Market Testing hereunder unless Project Co elects to perform earlier Market Testing for such Market Tested Services in which case such earlier Market Testing shall occur in accordance with this Schedule, *mutatis mutandis* to take account of the earlier Market Testing date.
- (c) Project Co shall, after consultation with Health Co, provide any Service Tenderer which is unsuccessful in being selected as a Preferred Service Tenderer with an appropriate explanation of the reasons behind its non-selection, if so requested by the Party in question.

2.10 Periodic Service Payment Adjustments

- (a) On the appointment of any Preferred Service Tenderer or, if applicable, on the completion of the re-pricing of a Market Tested Service pursuant to the Benchmarking Exercise, the Total Annual Service Payment and the Periodic Service Payments shall be altered in accordance with Schedule 23 - Payment Mechanism.
- (b) Any alteration to the Total Annual Service Payment and Periodic Service Payments shall take effect, in the case of Market Tested Services subject to a Benchmarking Exercise, on the Market Testing Date, and in the case of all other Market Tested Services, on the later of the Market Testing Date to which the Market Testing related and the date on which the Preferred Service Tenderer begins to perform the relevant Market Tested Services.

2.11 Information Requirements

- (a) Without prejudice to any of Project Co’s general obligations under this Agreement, including without limitation pursuant to Section 37 of this Agreement, Schedule 29 - Record Provisions and the other provisions of this Schedule, Project Co shall:
 - (i) maintain a full record and audit trail of each Market Testing and make all such records, including details of all tenders received, available for inspection by Health Co, Health Co’s Representative and other authorized representatives on reasonable notice from Health Co;

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- (ii) provide to Health Co, in a comprehensive and accurate manner, all information necessary to enable Health Co to review and assess all matters relating to the Market Testing; and
 - (iii) certify to Health Co within 30 days of expiry of the Service Tender Validity Period that:
 - (A) to the best of Project Co's knowledge after due enquiry, no Excluded Person intends to or will obtain any direct or indirect financial or other benefit from such appointment, other than the benefit of the contract itself;
 - (B) to the best of Project Co's knowledge after due enquiry, no Excluded Person has colluded in connection with the Market Testing; and
 - (C) there has been full compliance with all requirements relating to ensuring equality of information provided to, and treatment of, Service Tenderers.

2.12 Indemnities

- (a) Project Co shall indemnify and keep Health Co fully indemnified at all times from and against all claims, demands or notices which may be brought or alleged or threatened against Health Co and from and against all Direct Losses or fines, including which Health Co may suffer or incur in relation to any such claims, demands or notices, which occur as a result of or in connection with:
 - (i) the implementation of this Schedule;
 - (ii) any breach of the provisions of this Schedule; and
 - (iii) any claim made by any person, including any Prospective Service Tenderer, Service Tenderer or Preferred Service Tenderer, that is not awarded a contract,

save and except to the extent that any such breach or claim results from any failure of Health Co to comply with the express provisions of this Schedule.

2.13 Irregularity in Award of Contracts

- (a) Where Project Co carries out Market Testing, for the purposes of this Schedule and Section 60 of this Agreement, the following shall extend the definition of "Prohibited Act":
 - (i) all references to "Health Co" in such definition shall be deemed to be references to "Project Co or Health Co";
 - (ii) all references to "Project Co" in such definition shall be deemed to be references to "Project Co or the Prospective Service Tenderer"; and
 - (iii) it shall be an additional Prohibited Act for Project Co or any Affiliated Person, or anyone acting on its or their behalf, to:
 - (A) accept or agree to accept any gift or consideration of any kind as an inducement or reward:

- (1) for doing or not doing, or for having done or not having done, any act in relation to the obtaining or performance of any Service Contract or other Subcontract; or
 - (2) for showing or not showing favour or disfavour to any person in relation to any Service Contract or other Subcontract; or
- (B) enter into any Service Contract or Subcontract for Market Tested Services in connection with which a commission or fee has been paid or has been agreed to be paid to Project Co or Health Co or any public body or to any person employed by or on behalf of Project Co or Health Co or any public body, or to any family member of such person, unless before the Service Contract or Subcontract is made, particulars of any such commission or fee have been disclosed in writing to Project Co and Health Co and Health Co has consented to the same, in Health Co's absolute discretion,

and the provisions of Section 60 shall be deemed to be modified accordingly and to apply and be construed accordingly. For greater certainty, the provisions of Section 60.4 shall apply such that nothing in this Section 2.13 shall prevent any person from paying any proper commission, fee or bonus whether to its employees within the agreed terms of their employment or otherwise, and such commission, fee or bonus shall not constitute a Prohibited Act.

- (b) In addition, where Project Co carries out Market Testing and any Prospective Service Tenderer or Service Tenderer (or anyone acting on its or their behalf or any of its or their directors, officers or employees) offers or agrees to give to Project Co or any Affiliated Person any gift or consideration of any kind as inducement or reward contrary to Section 2.13(a)(iii) of this Schedule:
- (i) for doing or not doing, or for having done or not having done, any act in relation to the obtaining or performance of any Service Contract or other Subcontract; or
 - (ii) for showing or not showing favour or disfavour to any person in relation to any Service Contract or Subcontract,

Health Co may (without prejudice to any of its other rights) by notice to Project Co require Project Co to secure, as soon as practicable, the termination of that person's involvement in the Market Testing or, if discovered after the award of the relevant contract, the termination of the relevant Service Contract or other Subcontract (and the provisions of Section 60 shall apply and be construed accordingly).

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