

**August 2008**

**KENT COUNTY COUNCIL**

**TERMS AND CONDITIONS**

**For**

**CAMPUS REPROVISION SERVICES**

**The Contracting Authority's Terms and Conditions for the Campus  
Reprovision Programme**

## CONTRACT FOR THE PROVISION OF CAMPUS REPROVISION SERVICES

	<b>Contents</b>	<b>Page</b>
	Recitals	3
1	Definitions	4
2	Introduction	9
3	This Contract and Other Contracts	9
4	Obligations of the Contracting Authority	10
5	Obligations of Both Parties - Confidentiality	10
6	Indemnity	11
7	Obligations of the Provider	13
8	Complaints	13
9	Equalities	13
10	Freedom of Information	14
11	Insurance	15
12	Quality Assurance	16
13	General Payment Conditions	16
14	Price	16
15	Block Contract	17
16	Payment Arrangements	17
17	Price Variations	18
18	Recovery of Sums Due	20
19	Disputes	20
20	Defaults	20
21	Suspension of Service Provider	21
22	Termination of this Contract	23
23	Information and Tendering	24
24	TUPE	25
25	Assignment, Subcontracting and Novation	32
26	Entire Agreement	33
27	Waiver	33
28	Variations to the Contract	33
29	Appointment of Representatives & Notices	34
30	Liaison and Communication	34
31	Unannounced Review	34
32	Best Value	35
33	Environmental Policy	35
34	Force Majeure	36
35	Contracts (Rights of Third Parties)	36
36	Bribery, Corruption and Collusion	36
37	Agency	37
38	Liability of the Contracting Authority	37
39	Equipment, Materials and Consumables	38
40	Financial Records of Provider	38
41	Rights of Audit	38
42	Costs	38
43	Warranty	38
44	Governing Law and Jurisdiction	39
45	Conclusion of Contract	39
46	Performance Review	39
Appendix 1 – Deed of Novation		

Whereas:

[1] The Eastern and Coastal Kent NHS Primary Care Trust currently provide residential accommodation, residential support and residential care services to individuals with learning disabilities;

[2] The 'Valuing People' and 'Our Health Care Our Say' white papers made it clear that people with learning disabilities should enjoy the same rights as other citizens and should no longer have to live within the NHS;

[3] The 'Our Health Care Our Say' white paper set a deadline of 2010 by which date the NHS should cease to provide long term residential accommodation, residential support and residential care services;

[4] In Kent a commissioning plan has been developed and a programme devised in order to re-provide the services currently provided by the NHS and which will also include a new range of options for supported living based around the individual needs of Service Users;

[5] The Eastern and Coastal Kent NHS Primary Care Trust will award and enter into this Contract with the chosen Provider in order to externalise the services currently provided by them;

[6] Both the Service Users currently receiving the services from the NHS and the resources allocated to them will be transferred to the Kent County Council's Adult Social Services department who will become the lead agency and commissioner for services for persons with learning disabilities;

[7] It is intended that the Contract will be novated to Kent County Council upon the transfer to it of responsibility for commissioning services for persons with learning disabilities.

[8] Novation will be within the life of the contract.

## 1 Definitions

As used in these Contract Conditions the following terms and expressions shall have the following definitions

“Block Contract”	Means a guaranteed purchase of the Services specified in the Contract Schedule;
“Care Plan”	Means the document setting out the Service requirements for each individual Service User;
“Commencement Date”	Means the date defined as such in the Signatory Agreement;
“Confidential Information”	Means any information which has been reasonably designated as confidential by either Party in writing or that ought to be considered as confidential (however it is conveyed or on whatever media it is stored) including information which relates to the business, personnel, customers and suppliers of either Party and all personal data and sensitive personal data within the meaning of the Data Protection Act 1998;
“Contract”	Means this agreement comprising the Contract Conditions, Service Specification, Contract Schedule and Signatory Agreement;
“Contract Conditions”	Means the Contracting Authority’s Terms and Conditions contained in the contract.
“Contract Period”	Means the period of duration of the Contract in accordance with the Signatory Agreement;
“Contract Price”	Means the price payable to the Provider by the Contracting Authority under the Contract, as set out in the Contract Schedule, attached to the Signatory Agreement for each Service, for the full and proper performance by the Provider of its part of the Contract;
“Contract Schedule”	Means the document appended to the Contract terms and conditions at point of Contract award and detailing pricing agreed and Service User information;
“Contracting Authority”	Means, at the Commencement Date, the Eastern and Coastal Kent Primary Care Trust;

“Contracting Authority’s Representative”	Means Officer(s) nominated from time to time by the Contracting Authority as responsible for the day-to-day management of this Contract;
“Costs and Losses”	Means all costs, losses, charges, damages, expenses, claims, demands, liabilities, actions and proceedings (including the costs and expenses of such actions and proceedings and the staff costs expended in requiring the discharge of an indemnity or the payment of damages) whatsoever and whether sustained directly or indirectly from the relevant act or omission or in relation to any third party liabilities;
“Day/s”	Means Monday to Sunday inclusive;
“Default”	Means any breach of the obligations of either Party (including but not limited to fundamental breach or breach of a fundamental term) or any default, act, omission, negligence or statement of either Party, its employees, agents or sub-contractors in connection with or in relation to the subject matter of the Contract and in respect of which such Party is liable to the other;
“Default Notice”	Means a Notice served pursuant to Condition 20
“Duly Authorised Signatory”	Means the person(s) entitled to sign this Contract on behalf of either the Contracting Authority and/or the Provider;
“Expiry Date”	Means the expiry date as specified in the Signatory Agreement;
“Fees Payable”	Means the hourly fees payable for supported living services or the weekly fee payable for residential services as submitted by the Provider in its tender;
“Financial Year”	Means a period of 12 months from 1 April in one year to 31 March in the next;
“Force Majeure”	Means acts of war, acts of God, decrees of Government, riots, civil commotion, and any event or circumstance which is both beyond the control of whichever one of the Parties is affected and which could not have been prevented by acting prudently, diligently or with reasonable foresight. For the avoidance of doubt Force Majeure shall not include any labour dispute between the Provider and the Provider’s Staff or the failure to provide the Services by any of the Provider’s sub-contractors;

"FOIA"	Means the Freedom of Information Act 2000 and any subordinate legislation made under this Act from time to time together with any guidance and/or codes of practice issued by the Information Commissioner in relation to such legislation;
"Information"	Has the meaning given under section 84 of the Freedom of Information Act 2000;
"Mediator"	Means an individual who is appointed in accordance with Condition 19 to mediate between the Parties if they are in dispute;
"Notice"	Means a formal communication between the Contracting Authority's Representative and the Provider's Representative, which shall be in writing;
"Party"	Means a party to this Contract and "Parties" shall be construed accordingly;
"Persistent Default"	Means where defaults are repeated and this shall include where Performance Information is not returned on time and this has occurred at least twice in any one financial year
"Protocol"	Means a written agreement that details a system or set of procedures that named parties shall need to adhere to;
"Provider"	Means the person, firm, company or organisation providing the Services to the Contracting Authority under this Contract;
"Provider's Representative"	Means the person nominated from time to time by the Provider who has overall responsibility for the day to day management of the Service as provided for under this Contract;
"Regulatory Body"	Means a body that is established either by statute or otherwise and to whose regulatory supervision a Party is subject. However, this expression does not include any body of which membership is voluntary;
"Relevant Employees"	Means the employees who are the subject of a Relevant Transfer;
"Relevant Transfer"	Means a relevant transfer for the purposes of TUPE;

"Requests for Information"	Shall have the meaning set out in FOIA and shall include any request which reasonably appears to be a Request for Information within the meaning set out in the FOIA;
"Resumption Notice"	Means a notice sent in accordance with Condition 21.6;
"Serious Default"	Means a Default on the part of the Provider including but not limited to a Default which materially prejudices the health, safety or welfare of a Service User or Service Users;
"The Service"	Means the Services as shown in the Service Specification(s). The Services may include either supported living or residential care services for individual Service Users: these shall be agreed via individual Care Plans and Support Plans;
"Service Delivery Orders"	Means the form produced which records the level and detail of the service necessary to meet the Service User's needs as issued by the Contracting Authority from time to time:
"Service Specifications"	Means the Service Specification(s) forming part of the Contract and appended to the Signatory Agreement that describes each Service, the level of staffing hours, property details where relevant, the Contract Price and the Contract Model for each Service to be provided under this Contract;
"Service User"	Means a person who receives or who may receive the Service that the Provider is to provide under this Contract;
"Signatory Agreement"	Means the document that forms part of this Contract and shall be signed in respect of each and every Service by the Parties' Duly Authorised Signatories;
"Staff"	"Staff" means all persons employed by the Provider to perform the Contract together with the Provider's servants, agents and sub-contractors used in the performance of the Contract;
"Support Plan"	Means the plan prepared by the Provider following on from the Care Plan to set out what is required in order to achieve the outcomes identified in the Care Plan; as explained in the Service Specification;

“Suspension Notice”	A Notice from the Contracting Authority to the Provider suspending provision by the Provider of the Service(s) as more particularly described in Condition 21;
“Transferring Employee”	Means an employee of either the Eastern and Coastal Kent NHS Primary Care Trust or other external provider whose contract of employment becomes by virtue of the application of TUPE in relation to what is done for the purpose of carrying out this Contract a contract of employment with the Provider;
“TUPE”	Means the Transfer of Undertakings (Protection of Employment) Regulations 2006 (as amended from time to time) which implement the Acquired Rights Directive;
“Variation”	Means a variation to this Contract or to the Services, made in accordance with Condition 28 (Variations to the Contract);
“Working Days”	Means between 9:00am and 5:00pm Monday to Friday inclusive, but does not include any days which are bank holidays or public holidays;
“Volunteer”	Means any unpaid person other than a Service User, authorised or otherwise engaged by the Service Provider to deliver the service under the terms of this Contract



- 1.1 The interpretation and construction of these Contract Conditions shall be subject to the following provisions:
- 1.2 A reference to any statute, enactment, order, regulation or other similar instrument shall include subsequent amendments or re-enactments;
- 1.3 The headings to the Contract Conditions are for ease of reference only and shall not affect their interpretation;
- 1.4 Where the context allows, references to male gender include the female gender and the neuter, and the singular includes the plural and vice versa.
- 1.5 Unless specifically permitted by this Contract neither Party shall vary or amend this Contract except with the consent of the other Party and as agreed in writing;
- 1.6 All Contract Conditions within these terms and conditions should be self-explanatory. However in cases where elements of this Contract require further explanation they should be referred to a representative of the Contracting Authority for clarification.

## **2 Introduction**

- 2.1 These Contract Conditions are a standard form of contract conditions that define the terms under which the Provider shall provide the Services as detailed in the Service Specification.
- 2.2 This Contract and the Service Specification sets out the obligations of the Provider and the Contracting Authority, and general administrative details. This Contract shall remain in force subject to termination in accordance with the Contract Conditions.

## **3 This Contract and Other Contracts**

- 3.1 These Contract Conditions set out the terms under which the Contracting Authority agrees to purchase and the Provider agrees to provide the Services as set out and more particularly described in the Service Specification.
- 3.2 The Commencement Date shall be as defined in the Signatory agreement
- 3.3 The Contract may be terminated in accordance with Clause 22 Termination of this Contract); or Extended under Condition 3.4.

- 3.4 Subject to satisfactory performance by the Provider during the Contract Period, and continuation of adequate funding, the Contracting Authority may wish to extend the Contract for a further period of up to five years. The Contracting Authority shall approach the Provider if it wishes to do so no later than 3 months before the end of the Contract Period. .

#### **4 Obligations of the Contracting Authority**

- 4.1 In addition to its other obligations under this Contract and in return for the Provider carrying out its obligations under this Contract and providing the Services in accordance with the Service Specification the Contracting Authority shall pay to the Provider the relevant Contract Price applicable for the Service provided. The Contract Price will be determined by the Service being provided and whether this includes residential care or supported living services.

#### **5 Obligations of Both Parties**

##### **5.1 Confidentiality**

Both the Contracting Authority and the Provider shall treat all Confidential Information belonging to the other, and reasonably designated as such, as confidential and will safeguard it accordingly and shall;

- 5.1.1 Not disclose any Confidential Information belonging to the other Party to any other person without the prior written consent of the other Party, except to such persons and to such extent as may be necessary for the performance of the Contract or except where disclosure is otherwise expressly permitted by the provisions of this Contract.
- 5.1.2 Take all necessary precautions to ensure that all Confidential Information obtained from the other Party under or in connection with the Contract is disclosed only as is strictly necessary for the performance of this Contract.
- 5.1.3 Take all necessary precautions to ensure Confidential Information is not disclosed without prior approval or used by any Staff or such professional advisors or consultants otherwise than for the purposes of the Contract.
- 5.1.4 Not use any Confidential Information it receives from the other Party otherwise than for the purposes of the Contract.

- 5.1.5 The provisions of Condition 5 shall not apply to any Confidential Information received by either Party: -
- i) Which is or becomes public knowledge otherwise than by breach of this Condition;
  - ii) Which is disclosed pursuant to a statutory, legal or parliamentary obligation placed upon the Party making the disclosure, including but not limited to any requirements for disclosure under the FOIA.
- 5.1.6 The restrictions in this Condition 5 shall not prevent either of the Parties disclosing to the other or to any other suitable person Confidential Information about a Service User where this is in the best interests of the Service User concerned or such disclosure is necessary so as to protect the health, safety or welfare of the Service User or other Service Users.
- 5.1.7 In the event that the Provider fails to comply with this Condition 5, the Contracting Authority reserves the right to terminate the Contract by notice in writing with immediate effect. The Provider shall indemnify the Contracting Authority for any losses or claims arising from breach of this Condition 5.

## **6. Indemnity**

- 6.1 The Provider shall be liable for and shall fully and promptly indemnify the Contracting Authority, its employees, agents and other suppliers, against all liabilities, damages, costs, claims, losses, expenses, duties, taxes, statutory deductions, demands and proceedings whatsoever and howsoever arising whether directly, indirectly or in relation to any third party liabilities out of or in connection with:
- 6.1.1 the Provider's failure to provide all or any part of the Service in accordance with the Contract to the required standard or at all;
  - 6.1.2 any breach by the Provider of any of the provisions of the Contract;
  - 6.1.3 any negligent, tortious or fraudulent act or omission of, or breach of statutory duty by the Provider;

For the purposes of this Condition 6, references to the Provider shall include the Provider's Staff and for the purposes of Condition 6.1 "third party liabilities" shall mean any demands made by third

parties against the Contracting Authority and all liabilities of the Contracting Authority to third parties.

- 6.2 Without prejudice to the generality of Condition 6.1 the Provider's liability to the Contracting Authority in respect of loss or damage to any property of any nature whatsoever shall include an obligation to reimburse the Contracting Authority all costs and expenses reasonably incurred by the Contracting Authority in the re-instatement or replacement of any such property, whether or not such re-instatement or replacement results in an improvement of or to the property so lost or damaged.
- 6.3 The Provider's liability to the Contracting Authority pursuant to this Condition 6 shall be, for the avoidance of doubt, without prejudice to any other right or remedy available to the Contracting Authority whether under the common law principles of contract equity or tort, under statute or as expressly provided in this Contract and in particular (but without limitation) shall not prejudice in any way the Contracting Authority's right to enforce at any time and in any manner whatsoever any Guarantee or sub-Provider warranty.
- 6.4 The Provider shall not be liable for consequential loss (as opposed to indirect loss for which the Provider shall be liable).
- 6.5 Save as provided by Condition 6.6 below the Contracting Authority shall not under any circumstances be liable to the Provider, whether in contract, tort, under statute or otherwise for any loss, damage, liabilities, costs, claims, expenses, demands and proceedings howsoever caused or arising out of or in the course of or in connection with provision by the Provider of the Services.
- 6.6 Condition 6.5 shall not apply in relation to:
  - 6.6.1 any failure by the Contracting Authority to make proper payments to the Provider in accordance with the terms of the Contract; or
  - 6.6.2 any negligent act or omission or breach of contract giving rise to death or personal injury or fraudulent misrepresentation by the Contracting Authority or its staff in the course of their employment.
- 6.7 In any event or notwithstanding anything contained in this Contract, the Contracting Authority's liability in contract, tort (including negligence or breach of statutory duty) or otherwise arising by reason of or in connection with this Contract (except in relation to death or personal injury caused to the Provider or Provider's Staff by the negligence of the Contracting Authority or its employees acting in the course of their employment) shall be

limited in aggregate to £5,000,000 (five million pounds).

6.8 In no event shall the Contracting Authority be liable to the Provider for loss of profits, business, revenue, goodwill or anticipated savings (whether directly or indirectly caused) and/or indirect or consequential loss or damage.

6.9 The indemnities contained in this Condition 6.1 are without prejudice to and in addition to any warranties or other remedies and rights provided to the Contracting Authority in common law, statute or equity.

## **7. Obligations of the Provider**

7.1 In addition to its other obligations under this Contract, the Provider shall provide the Service in accordance with and to the standard required under this Contract as set out in the Service Specifications. For the avoidance of doubt, obligations set out in the Service Specifications are obligations under this contract.

7.2 The Provider shall comply with all Service Delivery Orders issued to it by the Contracting Authority.

7.3 The Provider must advise the Contracting Authority within three working days when a vacancy arises within the Service.

7.4 The Provider must be registered with the appropriate registration authority (currently the Commission for Social Care Inspection) for the service being provided.

## **8. Complaints**

8.1 All Providers are required to have a robust complaints policy and appropriate procedures for dealing with complaints and shall provide all Service Users or their advocates with a copy of the procedure for making complaints, in an appropriate format, when they begin receiving Services from the Provider.

## **9. Equalities**

9.1 The Provider shall have and follow an equal opportunities policy which shall comply fully with and shall not unlawfully discriminate within the meaning and scope of the provisions of the equalities legislation from time to time in force including but not limited to the legislation listed in the Service Specification.

## **10. Freedom of Information**

- 10.1 The Provider acknowledges that the Contracting Authority is subject to the requirements of the FOIA and other statutory access to information regimes and shall assist and co-operate with the Contracting Authority (at the Provider's expense) to enable the Contracting Authority to comply with FOIA Information disclosure requirements and with other requests for access to information held by the Contracting Authority.
- 10.2 The Provider shall, and shall ensure that its sub-contractors shall:
  - 10.2.1 Transfer any Request for Information to the Contracting Authority as soon as practicable after receipt and in any event within seven working days of receiving a request for information;
  - 10.2.2 Provide the Contracting Authority with information to allow it to fulfil its statutory duties under the FOIA or other legislation.
  - 10.2.3 Provide all necessary assistance as reasonably requested by the Contracting Authority to enable the Contracting Authority to respond to a Request for Information within the time for compliance set out within the applicable legislation, including the timeframe stated in section 10 of the FOIA.
- 10.3 The Contracting Authority shall be responsible for determining at its absolute discretion whether any Information held by it:
  - 10.3.1 Is exempt from disclosure in accordance with the provisions of the FOIA; or
  - 10.3.2 Is to be disclosed in response to a Request for Information and in no event shall the Provider respond directly to a Request for Information unless expressly authorised to do so by the Contracting Authority.
- 10.4 The Provider acknowledges that the Contracting Authority may, acting in accordance with the Code of Practice on the Discharge of Public Authorities' Functions under Part I of the Freedom of Information Act 2000 (issued by the Secretary of State), be obliged under the FOIA, to disclose Information: -
  - 10.4.1 Without consulting with the Provider, or
  - 10.4.2 Following consultation with the Provider and having taken its views into account.

10.5 The Provider shall ensure that all information produced in the course of the Contract and relating to the Contract is retained for disclosure and shall permit the Contracting Authority to inspect such records as requested from time to time.

## **11 Insurance**

11.1 For as long as this Contract is in force the Provider shall take out and maintain as a minimum the insurance set out in these Contract Conditions. The Provider shall also ensure that any of the Provider's sub-contractors who are providing any or all of the Services on the Provider's behalf take out and maintain equivalent insurance, as a minimum.

11.2 The Provider shall procure and maintain at its own expense Public Liability insurance throughout the Contract Period. The cover per incident under such policy as at the Commencement Date shall be at least £5,000,000 (five million pounds).

11.3 The Provider shall procure and maintain at its own expense Employer's Liability Insurance throughout the Contract Period. The cover per incident under such policy as at the Commencement Date shall be at least £10,000,000 (ten million pounds).

11.4 If the Provider is providing a Service for which indemnity insurance would normally be obtained, for example but without limitation legal or medical advice then the Provider shall also maintain at its own expense throughout the Contract Period Professional Indemnity Insurance in respect of the Provider's business generally. The level of insurance shall be in the minimum sum of £1,000,000 (one million pounds) per claim.

11.5 The Provider shall also ensure that it has taken all necessary steps to ensure that all motor vehicles used in the provision of the services under this Contract are insured with a minimum of third party cover with unlimited indemnity for third party injury and £5 million for third party property damage in respect for each and every claim, act or occurrence or series of claims.

11.6 The Provider shall supply to the Contracting Authority immediately on request copies of the relevant certificates and schedules of insurance or a broker's letter of certification in sufficient detail to demonstrate compliance with the Contract Conditions with respect to Insurance. The Provider shall similarly supply a fresh letter of certification or other evidence of renewal of insurance as may be required by the Contracting Authority from time to time during the currency of this Contract

## **12 Quality Assurance**

- 12.1 The Provider shall perform each Service in accordance with the Service Specification and in compliance with the standards as required by any and all codes of practice, performance ratings and quality standards and statutory provisions relating to the service.

## **13 General Payment Conditions**

- 13.1 The Contract Price shall not be increased until the Contract has passed its first anniversary.
- 13.2 The Contracting Authority shall, at its absolute discretion, decide on an annual basis the amount by which it will change the Contract Price and payments made to Providers for provision of the Services.
- 13.3 If the Contracting Authority decides to increase the amount payable for the Services under this Contract then the Contract Price shall be raised by the Contracting Authority by that amount.
- 13.4 Any said increase shall not be effective before the first anniversary of the Contract. Any increase shall take effect from such date as is determined by the Contracting Authority in its absolute discretion.
- 13.5 The Contracting Authority does not guarantee that the Contract Price shall be increased annually.

## **14 Price**

- 14.1 You will be paid the Contract Price in return for carrying out your obligations by providing the Services under this Contract.
- 14.2 You will not charge the Service User or his or her representative for any part of the Service that is provided under this Contract and therefore included in the Contract Price.
- 14.3 If you provide other additional services at the request of the Service User or his or her representative/Advocate, we will regard this as a private arrangement that is outside of the Contract. With the knowledge of the Service User, you will notify the Contracting Authority's representative about any such arrangement prior to its commencement.



## **15 Block Contract**

- 15.1 Any vacancies within the Service will normally be filled upon a request being made to the Provider by the Contracting Authority. The Provider will help to maintain full capacity of the block contract by acting upon all reasonable requests for use of the Service and by complying with clause 7.3.
- 15.2 The Provider and the Contracting Authority will agree the basis for and process by which the Block Contract takes account of the placements that are taken up by Service Users who are allocated an individual budget or direct payment by the Contracting Authority to purchase their own Service.
- 15.3 Where the Contracting Authority use less than the specified total number of placements available for the period of time in question, the Contract Price will be paid for the unoccupied placements. The Contract Price will not be paid if the placements were / are unoccupied due to Provider failing to react to/ or disregarding a reasonable request for use made by the Contracting Authority. The Contracting Authority's Representative shall, in his absolute discretion, determine whether or not the Provider failed to react or comply with a reasonable request.

## **16 Payment Arrangements**

- 16.1 Each month, you will send an invoice for the agreed amount to the Contracting Authority.
- 16.2 On receipt of the invoice, the Contracting Authority will pay the Provider once a month by the banks' automated clearing system. For Residential Care Services payment will be made two weeks in arrears and two weeks in advance
- 16.3 If the Provider is registered for VAT, this information must appear/ be provided on invoices in accordance with the provisions of the VAT Regulations.
- 16.4 Payment will be made within thirty (30) days of receipt of a correct invoice, by BACS (Bank Automated Clearing Service).
- 16.5 If we are late in making any payment of the Contract Price then we will pay you in accordance with the Late Payment of Commercial Debts (Interest) Act 1998.

## **17 Price Variations**

- 17.1 For those Services that will change from residential to supported living services during the life of the contract, the Fees Payable for the supported living service will be paid once a supported living service is provided. The change to a supported living service is dependent on capital works taking place to the relevant properties as detailed in the tendering documents. The date of the supported living service commencing will be agreed between the Parties.
- 17.2 Regular Service User reviews will take place and as individual Service Users needs change, the Fees Payable may as a result be varied up or down. Changes to Service User needs will be determined by applying the Care/Support needs component of the Cost Model and will be agreed between the Parties.
- 17.3 Other than as set out in Conditions 13.1, 17.1 and 17.2 the Fees Payable will not be increased unless there are exceptional circumstances and the Parties agree. Whether or not the Contracting Authority agrees will be entirely at its discretion.
- 17.4 For the purposes of this clause 17.4 the following definitions have the following meanings:
- 17.4.1 “Employment Conditions” shall mean the grade, job description, duties, hours worked, shift patterns, pay scales, rates of pay, terms and conditions and pension arrangements of any existing Staff members or any Relevant Employees;
- 17.4.2 “Employment Costs” shall mean all the costs payable by the Provider in connection with the Employment Conditions.
- 17.4.3 “Left” shall mean where a Relevant Employee(s):
- 17.4.3.1 has been re-deployed or promoted by the Provider so that they are no longer engaged in the provision of the Services under this Contract; or
- 17.4.3.2 for whatever reason ceases to be employed by the Provider,
- and references to Leave shall bear the same meaning.
- 17.4.4 “Relevant Employees” shall mean those employees that were subject to a Relevant Transfer and who as a result became employees of the Provider engaged in the provision of the Services from the Commencement Date.

17.4.5 On the 1<sup>st</sup> April or 1<sup>st</sup> October in each year throughout the Contract Period or two weeks prior to each review meeting as referred to in clause 46.5 (whichever is earlier) the Provider will provide the Contracting Authority with written details of:

(a) those Relevant Employees who have Left since the Commencement Date including what the Relevant Employee(s) Employment Conditions and the Provider's Employment Costs for them were at the date they Left; and

(b) any new members of Staff appointed since the Commencement Date to replace each Relevant Employee that has Left including the new member of Staff's Employment Conditions and the Provider's Employment Costs for the new Staff member; and

(c) where the Provider's Employment Costs have reduced the Provider's proposal for the reduced Fees Payable to pass on to the Contracting Authority the full benefit of any such savings.

17.4.6 Where the Provider's Employment Costs have reduced as a result of any Relevant Employee having Left the Fees Payable for the Services provided shall be reduced to give the Contracting Authority the full benefit of such savings with effect from the date of such Leaving.

17.4.7 The Contracting Authority will consider the Provider's proposal submitted in accordance with clause 17.4.5(c) and will in its absolute discretion determine if this is acceptable to the Contracting Authority and will notify the Provider if their proposal is agreed. The Provider will give the Contracting Authority such access to its information or data and records as the Contracting Authority reasonably requires in order to consider the Provider's proposal.

17.4.8 If the Provider's proposal submitted under clause 17.4.5(c) is not agreed then the Parties will attempt to reach agreement as to the reduced Fees Payable. If they are unable to agree then the procedure set out in clause 19 will be followed.

## **18 Recovery of Sums Due**

- 18.1 If either Party owes the other Party money under this Contract, then the Party who is owed money may set off such sum against any money it subsequently owes to the other Party under this Contract. This right may not be exercised if the sum owed for which the Party seeks to exercise this right of set off is a sum in dispute between the Parties.

## **19 Disputes**

- 19.1 In the event of any dispute arising under the terms of this Contract the Parties shall attempt in good faith to resolve such disputes within 30 days of receipt by either Party of a Notice of such dispute. Resolution of such disputes shall be in the first instance by review and negotiation between senior representatives of the parties with authority to settle disputes.
- 19.2 If the matter is not resolved under the provisions of Condition 19.1 the dispute shall be referred to a Mediator as the Contracting Authority and the Provider shall jointly nominate. If the Contracting Authority and the Provider shall fail to agree on the selection of a Mediator within fourteen (14) days after the date of expiry of the thirty (30) day period specified in Condition 19.1, the Mediator shall be nominated at the request of either Party by the President for the time being of the CEDR (Centre for Dispute Resolution).
- 19.3 The result of such mediation shall, except in the case of manifest error, be final and binding upon the Parties.
- 19.4 The Contracting Authority and the Provider shall use their best endeavours to ensure that the mediation starts within 20 Working Days of service of the Notice referred to in Condition 19.1.
- 19.5 Both Parties shall pay the Mediator's fee in equal shares.
- 19.6 The provisions of this Condition 19 are without prejudice to the rights of the Parties expressed elsewhere in this Contract and the use of the dispute resolution procedures set out in this Condition shall not delay or take precedence over the provisions for termination.

## **20 Defaults**

- 20.1 If the Provider commits a Default then the Contracting Authority shall be entitled to serve on the Provider a Default Notice. This

shall be without prejudice to any other right or remedy, which may be available to the Contracting Authority, either under this Contract or at law.

- 20.2 If the Contracting Authority serves on the Provider a Default Notice which relates to a Default which can be remedied, then on receiving such a Default Notice the Provider shall take the action specified in the Notice, within the timescale set out, at its own cost.
- 20.3 The Provider shall be entitled to apply the provisions of 20.1 and 20.2 to the Contracting Authority except that if the Default concerned is a failure to pay the Provider the Contract Price on time then the Contracting Authority shall make such late payment to the Provider within 10 Working Days of the Default Notice being served.
- 20.4 If there is any disagreement between the Parties as to whether a Default has occurred and/or about the action to be taken and/or the timescale within which the action is to be taken, then either Party can refer the matter for resolution, in accordance with Condition 19.

## **21 Suspension of Service Provider**

- 21.1 If the Default is a Serious Default (and the Default Notice shall say so if it is) then the Contracting Authority shall be entitled to arrange for an authorised person (which may be one of its employees) to carry out an investigation into the Serious Default.
- 21.2 The Contracting Authority shall be entitled to serve on the Provider a Suspension Notice where the Contracting Authority acting reasonably considers it is not appropriate for the Provider to continue to provide any or all of the Services because:
  - 21.1.1 The Serious Default is of such seriousness; or
  - 21.1.2 There is a continuing threat to the health, safety or welfare of any or all of the Service Users; or
  - 21.1.3 The Provider has committed Persistent Defaults
- 21.3 If the Contracting Authority serves a Suspension Notice upon the Provider, the Provider shall cease providing the Service set out in the Suspension Notice from the date specified in the Suspension Notice and the Contracting Authority shall be entitled either to provide some or all of the Service itself or engage another person to do so on its behalf for as long as the Suspension Notice is in force.

- 21.4 The Contracting Authority shall ensure that any investigation is carried out as quickly as possible and shall make available to the Provider a copy of the report of the investigation's findings as soon as practicable after it has been made available to the Contracting Authority.
- 21.5 If the Provider has been served with a Suspension Notice then as soon as practicable after the Contracting Authority has received the report of the investigation the Contracting Authority acting reasonably shall decide whether or not the Provider is to resume provision of any of the suspended Services.
- 21.6 If the Contracting Authority decides that the Provider is to resume provision of any of the suspended Services then it shall serve on the Provider a Resumption Notice that shall set out the Service to be resumed and the date upon which it or they are to be resumed.
- 21.7 The Contracting Authority shall be entitled to set out in the Resumption Notice such conditions relating to the Provider's resumption of the Services as may, in the Contracting Authority's opinion, be reasonable.
- 21.8 If the Contracting Authority decides that the Provider is not to resume provision of any of the suspended Services then it shall be entitled to give the Provider notice terminating the application of this Contract solely to the Services concerned in the Suspension Notice with immediate effect, or if the Contracting Authority acting reasonably considers that the findings of the investigation reflect on the Provider's ability to carry out the Services generally it shall be entitled to give the provider notice terminating this Contract as a whole with immediate effect.
- 21.9 During any period of suspension the Contracting Authority shall continue to pay the Provider the Contract Price but if the Contracting Authority gives the Provider notice of termination in accordance with Condition 21.8, then the Provider shall repay to the Contracting Authority all sums the Contracting Authority has paid to the Provider during the period of suspension that relate to the suspended Services concerned. If the Provider does not repay to the Contracting Authority these sums within 20 Working Days of any notice of termination, then the Contracting Authority shall be entitled to recover these sums as a debt. The Contracting Authority also reserves the right to recover any sums due to it by setting them off against any future payments due to the Provider in relation to this Contract or any other contract the Provider has with the Contracting Authority.

## **22 Termination of this Contract**

- 22.1 This Contract shall terminate in its entirety if either Party gives to the other three months Notice in writing following failure to remedy a Serious Default or Persistent Default under Condition 21.8 above;
- 22.2 This Contract shall terminate in its entirety with immediate effect if the Contracting Authority gives written Notice because:
- 22.2.1 The Provider undergoes a change of control, within the meaning of S.416 of the Income and Corporation Taxes Act 1988, which impacts adversely and materially on the performance of the Contract: or
- 22.2.2 The Provider is an individual or a firm and a petition is presented for the Provider's bankruptcy, or a criminal bankruptcy order is made against the Provider or any partner in the firm, or the Provider or any partner in the firm makes any composition or arrangement with or for the benefit of creditors, or makes any conveyance or assignment for the benefit of creditors, or if an administrator is appointed to manage the Provider's or firm's affairs; or
- 22.2.3 The Provider is a company, if the company passes a resolution for winding up or dissolution (otherwise than for the purposes of and followed by an amalgamation or reconstruction) or an application is made for, or any meeting of its directors or members resolves to make an application for an administration order in relation to it or any party gives or files notice of intention to appoint an administrator of it or such an administrator is appointed, or the court makes a winding-up order, or the company makes a composition or arrangement with its creditors, or an administrative receiver, receiver, manager or supervisor is appointed by a creditor or by the court, or possession is taken of any of its property under the terms of a fixed or floating charge; or
- 22.2.4 The Provider is unable to pay its debts within the meaning of S.123 of the Insolvency Act 1986;
- 22.2.5 Any similar event occurs under the law of any other jurisdiction within the United Kingdom.
- 22.3 The Contracting Authority may only exercise its right under Condition 22.2.2 within six months after a change of control occurs and shall not be permitted to do so where it has agreed in

advance to the particular change of control that occurs. The Provider shall notify the Contracting Authority's Representative immediately when any change of control occurs or is being contemplated.

- 22.4 The Contracting Authority may terminate this Contract with immediate effect and the Contracting Authority may recover from the Provider the amount of any loss resulting from such termination if the Provider or its Staff shall have, in relation to this Contract or any other Contract with the Contracting Authority;
- 22.4.1 Offered, paid or given directly or indirectly any gift in money or any other form to any elected member, employee or agent of the Contracting Authority as an inducement or reward; or
- 22.4.2 Committed any offence under the Prevention of Corruption Acts 1889 to 1916 or paid or offered any fee or reward contrary to Section 117(2) of the Local Government Act 1972.
- 22.4.3 The Provider commits or causes the commission of any criminal offence in providing the Services (except for any minor offence or minor traffic offence).
- 22.5 The Provider hereby warrants that none of the circumstances outlined in Condition 22 apply at the date of this Contract.
- 22.6 Either Party shall be entitled to terminate this Contract by serving a Notice of termination on the other Party in the event of a Force Majeure that continues for a period exceeding 90 calendar days and which prevents either Party from fulfilling any of its material obligations under this Contract.
- 22.7 Either Party shall have the right to terminate this Contract at any time by at least 6 months Notice in writing to the other or, by giving such lesser period of Notice as both Parties shall have agreed to be sufficient.

## **23 Information and Tendering**

- 23.1 Subject to Contract Condition 5 (Confidentiality) and 10 (Freedom of Information), at the Provider's request, the Contracting Authority shall supply the Provider with such information and data as the Provider may reasonably require to enable it to prepare the necessary documentation to tender for the provision of Services.
- 23.2 The requirement set out in Condition 23.1 does not include any information or data that the Contracting Authority, acting



reasonably in relation to the purpose of the request, regards as commercially sensitive or that the Contracting Authority acting in its absolute discretion determines cannot be so disclosed.

## **24 TUPE**

- 24.1 For interpretation purposes any warranties and indemnities given by the Contracting Authority in this clause 24 are given by the Eastern and Coastal Kent Primary Care Trust.
- 24.2 It is the understanding of Contracting Authority that the TUPE Regulations will apply to/ potentially impact upon the provision of Services by the Provider under this Contract due to there being a change of service provision and that this will involve a transfer of employees from the National Health Service (the Contracting Authority) or external providers to the Provider.
- 24.3 The Provider and Contracting Authority confirm and agree that they will comply with all and any of their obligations that may arise out of a Relevant Transfer under The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) arising out of or in connection with the provision of the Services under this Contract.
- 24.4 Where applicable the Provider confirms and agrees that it shall comply with the principles set out in the Cabinet Office Statement of Practice on Staff Transfers in the Public Sector and in the Code of Practice on Workforce Matters in Local Council Service Contracts The Best Value Authorities (Pensions) Direction 2007 and any other statutory provision, guidance or regulation relating to workforce matters in local authority/ public sector service contracts or related matter whether in existence or to be enacted.
- 24.5 During the 12 months preceding the expiry of this Contract or after the Contracting Authority has given notice to terminate this Contract or at any other time as directed by the Contracting Authority, and within 15 working days of being so requested by the Contracting Authority, the Provider shall fully and accurately disclose to the Contracting Authority any and all information in relation to all Staff engaged in providing the Services including all Relevant Employees who are to transfer as a consequence of a Relevant Transfer as the Contracting Authority may request, in particular but not necessarily restricted to any of the following:
- a) A list of employees employed by the Provider;
  - b) A list of agency workers, agents and independent providers engaged by the Provider;
  - c) The total payroll bill (i.e. total taxable pay and allowances including employer's contributions to pension schemes) of those Staff;

- d) The terms and conditions of employment of the Relevant Employees, their age, salary, date continuous employment commenced and (if different) the commencement date, enhancement rates, any other factors affecting their redundancy entitlement and any outstanding claims whatsoever arising from their employment.
  - e) The Provider shall warrant the accuracy of all the information provided to the Contracting Authority pursuant to this Condition and authorises the Contracting Authority to use any and all the information as it may consider necessary for the purposes of its business or for informing any tenderer for any services which are substantially the same as the Services (or any part thereof).
- 24.6 The Provider shall provide and shall procure that any sub-contractor shall provide the Employee Liability Information to the Contracting Authority at such time or times as are required by TUPE, and shall warrant at the time of providing such Employee Liability Information that such information will be updated to take account of any changes to such information as is required by TUPE.
- 24.7 The Provider shall indemnify and shall keep indemnified in full the Contracting Authority and at the Contracting Authority's request any future Contracting Authority or Service Provider against all Costs and Losses arising from any claim by any party as a result of the Provider or sub-contractor failing to provide or promptly to provide the Contracting Authority and/or any future Contracting Authority or Service Provider where requested by the Contracting Authority with any Employee Liability Information or to provide full Employee Liability Information or as a result of any material inaccuracy in or omission from the Employee Liability Information provided that this indemnity shall not apply in respect of and to the extent that such information was originally provided to the Provider by the Contracting Authority and was materially inaccurate or incomplete when originally provided.
- 24.8 The Provider hereby agrees that the contracts of employment of any Relevant Employees shall have affect (subject to Regulation 4(7) of TUPE) thereafter as if originally made between those Relevant Employees and the Provider except insofar as such contracts relate to those parts of an occupational pension scheme relating to old age, invalidity or survivor's benefits.
- 24.9 The Contracting Authority shall comply with its obligations under

TUPE in respect of each Relevant Transfer pursuant to this Contract and the Provider shall comply and shall procure that any sub-contractor shall comply with its obligations (including without limitation under Regulation 13(4) of TUPE) in respect of each Relevant Transfer pursuant to this Contract and each of the Contracting Authority and the Provider shall indemnify the other against any Direct Losses sustained as a result of any breach of this clause 24 (Relevant Transfers) by the party in default save that there shall be no obligation on the Contracting Authority to indemnify the Provider for any breach by the Contracting Authority of its obligations under Regulation 13 of TUPE, or any award of compensation under Regulation 15 where such failure arises from the failure of the Provider or any sub-contractor of the Provider to comply with its or their duties under Regulation 13 of TUPE.

- 24.10 For the purposes of clause 24.9 “Direct Losses” shall include all costs, losses, charges, damages, expenses, claims, demands, liabilities, actions and proceedings (including the costs and expenses of such actions and proceedings and the staff costs expended in requiring the discharge of an indemnity or the payment of damages) whatsoever and sustained as a direct result of the relevant act or omission or in relation to any third party liabilities.
- 24.11 The Contracting Authority or external provider shall be responsible for all remuneration, benefits, entitlements and outgoings in respect of the Transferring Employees, including without limitation all wages, holiday pay, bonuses, commissions, payments of PAYE, national insurance contributions, pension contributions and otherwise, up to the Relevant Transfer.
- 24.12 The Provider shall be responsible or shall procure that any relevant sub-contractor is responsible for all remuneration, benefits, entitlements and outgoings in respect of the Relevant Employees and any other person who is or will be employed or engaged by the Contractor or any sub-contractor in connection with the provision of any of the Services, including without limitation all wages, holiday pay, bonuses, commission, payment of PAYE, national insurance contributions, pension contributions and otherwise, from and including the date of the Relevant Transfer.
- 24.13 The Contracting Authority shall use its reasonable endeavours to obtain and supply to the Provider information regarding the identity, number, age, sex, length of service, job title, grade and terms and conditions of employment and pension arrangements of and other matters affecting each of those employees of the Contracting Authority or any external provider who it is expected, if they remain in the employment of the Contracting Authority or

any external provider until immediately before the Relevant Transfer date, would be Transferring Employees but the Contracting Authority gives no warranty as to the accuracy or completeness of this information where this is obtained from any external provider.

### **Union Recognition**

- 24.14 The Contracting Authority shall supply to the Provider true copies of its written union recognition agreement(s) and the Provider shall, and shall procure that each and every sub-contractor shall, in accordance with TUPE, recognise the trade unions representing Relevant Employees (as relevant to each sub-contractor) after the Relevant Transfer to the same extent as they were recognised by the Contracting Authority before the Relevant Transfer.
- 24.15 The Provider shall procure that, on each occasion on which the identity of a sub-contractor changes pursuant to this Contract, in the event that there is a Relevant Transfer, the new sub-contractor shall in accordance with TUPE recognise the trade unions representing the employees whose contracts of employment transfer to the new sub-contractor to the same extent as they were recognised before the change of identity of the sub-contractor in respect of the provision of the Services.

### **Indemnities**

- 24.16 The Contracting Authority shall indemnify and keep indemnified in full the Provider (for itself and for the benefit of each relevant sub-contractor) against all Costs and Losses (which shall include all Direct Losses and any arising indirectly) incurred by the Provider or any relevant sub-contractor in connection with or as a result of:
- (a) a breach by the Contracting Authority of its obligations under Condition 24.11 above;
  - (b) subject to Condition 24.18 any claim or demand by any Transferring Employee arising out of the employment of any Transferring Employee provided that this arises from any act, fault or omission of the Contracting Authority in relation to any Transferring Employee prior to the date of the Relevant Transfer (save where such act, fault or omission arises as a result of the Provider's or any of its sub-contractor's failure to comply with Regulation 13 of TUPE) and any such claim is not in connection with the Relevant Transfer.

- 24.17 Where any liability in relation to any Transferring Employee, in respect of his or her employment by the Contracting Authority or its termination which transfers in whole or part in accordance with TUPE and/or the Directive arises partly as a result of any act or omission occurring on or before the commencement of the provision of the Services by the Provider and partly as a result of any act or omission occurring after the commencement of the provision of the Services by the Provider, the Contracting Authority shall indemnify and keep indemnified in full the Provider or the relevant sub-contractor against only such part of the direct or indirect Costs and Losses sustained by the Provider or any sub-contractor in consequence of the liability as is reasonably attributable to the act or omission occurring before the commencement of the provision of the Services by the Provider.
- 24.18 The Provider shall indemnify and keep indemnified in full the Contracting Authority and at the Contracting Authority's request any future Contracting Authority or Service Provider against: -
- 24.18.1 all Costs and Losses incurred by the Contracting Authority or any Future Contracting Authority or Service Provider in connection with or as a result of any claim or demand against the Contracting Authority and, as appropriate, any future Contracting Authority or Service Provider by any person who is or has been employed or engaged by the Provider in connection with the provision of the Services or any part thereof where such claim arises during the Contract Period as a result of any act, fault or omission of the Provider after the commencement of provision of the Services following the Relevant Transfer;
- 24.18.2 all Costs and Losses incurred by the Contracting Authority and, as appropriate any future Contracting Authority or Service Provider in connection with or as a result of a breach by the Provider of its obligations under this Condition 24; and
- 24.18.3 all Costs and Losses incurred by the Contracting Authority and, as appropriate any future Contracting Authority or Service Provider in connection with or as a result of any claim by any trade union or staff association or employee representative (whether or not recognised by the Provider and/or the relevant sub-contractor in respect of all or any of the Relevant Employees) arising from or connected with any failure by the Provider to comply with any legal obligation to such trade union, staff association or other employee representative and, whether any such claim arises or has its origin before or after the commencement of provision of the Services following the Relevant Transfer,

save to the extent that any such indemnified liability arises from the act or omission of the Contracting Authority or any future Contracting Authority or Service Provider.

24.19 The Provider shall indemnify and keep indemnified in full the Contracting Authority against all Costs and Losses incurred by the Contracting Authority in connection with or as a result of:

24.19.1 any claim by any Relevant Employee, or any person who would have been a Relevant Employee but for their resignation (or decision to treat their employment as terminated under Regulation 4(9) of TUPE) that the identity of the Provider is to that Transferring Employee's detriment or that any proposed or actual substantial change by the Provider to the Transferring Employees' working conditions or any proposed measures of the Provider are to that employee's detriment whether such claim arises before or after the commencement of provision of the Services following the Relevant Transfer; and

24.19.2 any proposed or actual change by the Provider or any subcontractor to the Relevant Employees' working conditions, terms or conditions or any proposed measures of the Provider or the relevant sub-contractor which are to any of the Relevant Employee's material detriment or to the material detriment of any person who would have been a Relevant Employee but for their resignation (or decision to treat their employment as terminated under Regulation 4(9) of TUPE) on or before the commencement of provision of the Services following the Relevant Transfer as a result of any such proposed changes or measures and whether such claim arises before or after the commencement of provision of the Services following the Relevant Transfer;

24.19.3 any claim arising out of any misrepresentation or mis-statement whether negligent or otherwise made by the Provider to the Relevant Employees or their representatives whether before on or after the commencement of provision of the Services following the Relevant Transfer and whether liability for any such claim arises before on or after the commencement of provision of the Services following the Relevant Transfer, provided that the course of action giving rise to such losses arose in during the Contract Period.

### **Details of measures**

24.20 The Provider shall as soon as reasonably practicable after a request by the Contracting Authority or any external provider and in any event within five (5) Business Days of the request by the Contracting Authority or external provider, provide to the

Contracting Authority details of any measures which the Provider will take in relation to any employees who are or who will be the subject of a Relevant Transfer, and if there are no measures, confirmation of that fact, and shall indemnify the Contracting Authority against all Costs and Losses resulting from any failure by the Provider for failure to comply with this obligation provided that any such claim does not arise as a result of any act or omission by the Contracting Authority or any external provider.

- 24.21 The Contracting Authority and the Provider agree and acknowledge that the provisions of this clause 24 will form part of the Contract Conditions and that compliance with this clause 24 is a condition of this Contract.
- 24.22 The Provider shall and shall procure that any relevant sub-contractor shall consult with the recognised trade unions and where there is no recognised trade union any other employee representative body on the terms to be offered to the employees pursuant to this Contract.
- 24.23 During the Contract Period, the Provider shall on request by the Contracting Authority provide or procure that the Contracting Authority is provided with such accurate and complete information as is reasonably requested by the Contracting Authority as soon as is reasonably practicable, including the terms and conditions of employment of the Transferring Employees where this is required to monitor the Providers compliance with its obligations under this clause 24.
- 24.24 The Provider shall and shall procure that any relevant sub-contractor shall support any central Government sponsored review and monitoring programme on the impact of the Code of Practice on Workforce Matters in Local Council Service Contracts and, on request by the Contracting Authority, provide the Contracting Authority with such accurate and complete information as is reasonably requested by the Contracting Authority as soon as reasonably practicable in order to assist the Contracting Authority in doing this.
- 24.25 On expiry of the Contract Period or termination of this Contract if terminated earlier, the Contracting Authority and the Provider agree that it is their intention that TUPE shall apply in respect of the provision thereafter of any service equivalent to the Services or any part thereof but the position shall be determined in accordance with the law at the relevant date as the case may be and this Condition is without prejudice to such determination.

24.26 The Contracting Authority shall be entitled to assign the benefit of the Provider's indemnities given under this clause 24 to any future Contracting Authority or Service Provider.

## **25 Assignment, Sub-Contracting and Novation**

25.1 The Provider shall not assign any of its rights and/or obligations under this Contract or sub-contract the provision of any of the Services to any person without the previous written consent of the Contracting Authority, which shall not be unreasonably withheld or delayed.

25.2 However, even if the Contracting Authority has given its consent to the Provider's sub-contracting the carrying out of the Provider's obligations under this Contract the Contracting Authority can subsequently withdraw such consent, provided that the Contracting Authority acts reasonably in doing so and gives to the Provider reasonable notice. This means that at the end of the notice period the Provider shall be obliged to terminate the sub-contract concerned.

25.3 The Provider should note that the Contracting Authority's giving the Provider the Contracting Authority's consent to sub-contract under Condition 25.1 shall not relieve the Provider of the Provider's obligations under this Contract and that the Provider shall be responsible for the acts, defaults and neglect of any sub-contractor or any employee, agent or servant of any such sub-contractor, as if they were the Provider's own acts, defaults and neglect. This shall be the case even if as a condition of the Contracting Authority's consent the Contracting Authority require the sub-contractor to agree directly with the Contracting Authority that it shall carry out all the Provider's obligations under this Contract.

25.4 Where the Provider enters into a sub-contract with a supplier or provider for the purpose of performing the Contract, the Provider shall ensure a term is included in such a sub-contract which requires payment to be made by the Provider to the sub-Provider within a specified period not exceeding 30 days from the receipt of a valid invoice, as defined by the sub-contract requirements.

25.5 The Contracting Authority shall also be entitled to assign the benefit of any of its obligations under this Contract and shall give 14 days prior written Notice of any assignment to the Provider.

25.6 It is the intention of the Eastern and Coastal Kent Primary Care Trust to assign or novate this Contract to The Kent County Council (Adult Social Services Directorate) within the lifetime of this Contract. This is due to the anticipated shift of responsibility



for commissioning services for persons with learning disabilities from the NHS to local authorities.

25.7 The Provider hereby irrevocably consents to any assignment under Condition 25.5 and to novate the Contract on a request by the Contracting Authority.

25.8 The Provider hereby irrevocably consents to enter into a novation agreement with the Contracting Authority and the Kent County Council upon request. Such novation agreement will be substantially in the form as set out in Appendix 1 to this Contract.

## **26 Entire agreement**

26.1 This Contract together with the Service Specifications, Signatory Agreement and Contract Schedule constitutes the entire understanding and agreement relating to the Service and, save as expressly referred to or incorporated by reference, supersedes all prior negotiations, submissions or understandings with respect to the Service. Each Party acknowledges that no statement other than those contained in this Contract and the Service Specification shall be valid and binding on either Party.

## **27 Waiver**

27.1 No failure by either Party to insist upon the strict performance of any Condition of this Contract or to exercise any right or remedy upon Default of any breach of any provision of this Contract shall constitute a waiver of any Condition or waiver of any subsequent breach or Default in the performance of any Condition.

## **28 Variations to the Contract**

28.1 A variation to this Contract, excluding a variation of the scope and nature of the Services provided to individual Service Users, shall only be valid if it has been agreed in writing and signed by both the Contracting Authority and the Provider.

28.2 If either one of the Parties wishes to vary this Contract then it shall serve on the other a Variation Notice, dated and signed by the Duly Authorised Signatory which shall set out the nature of the variation sought and the reasons for it.

28.3 If either one of the Parties receives a Variation Notice then within 28 Days of receipt it shall notify the other whether or not it agrees to the variation and if not, the reasons.

- 28.4 Where the Contracting Authority serves a Variation Notice and the Provider does not respond within the 28-day period, the Variation shall be implemented from the date proposed within the Notice.

## **29 Appointment of Representatives and Notices**

- 29.1 In relation to the management of their respective rights and obligations under this Contract, the Provider and the Contracting Authority shall be represented by the Provider's Representative and the Contracting Authority's Representative respectively or such other Representatives as they may from time to time nominate in writing to the other Party. Each Party's Representative shall ensure that appropriate persons are appointed and available at all reasonable times for day-to-day management of the Service and liaison with each other.

29.13 All Notices and other written communications shall be sent to the Party's Representative. If either Party's address changes, it shall notify the other in accordance with this Condition.

## **30 Liaison and Communication**

- 30.1 The Contracting Authority's Representative and the Provider's Representative shall co-operate with each other to such extent as is reasonably necessary to facilitate the proper and timely performance of the Services under this Contract.
- 30.2 The Contracting Authority's Representative shall provide such reasonable advice, support and information to the Provider as would be appropriate to any provider providing Services under this Contract.
- 30.3 The Provider's Representative shall provide the Contracting Authority's Representative with such reasonable information and advice on all matters relating to the Provider as is relevant to the Service provided under this Contract. This shall include disclosure of any serious incident or information, which may adversely affect the health and safety of Service Users, staff or the reputation of the Provider and/or the Contracting Authority.

## **31 Unannounced Review**

- 31.1 Where the Contracting Authority has concerns over the performance of the Services or the reputation and/or the ability of the Provider or where in its opinion another good reason exists that may relate to either:

31.1.1 A particular Service; or

31.1.2 A particular Provider

then the Contracting Authority reserves the right to undertake an unannounced review either by making an unannounced visit to the Provider or otherwise.

- 31.2 The Provider shall fully co-operate with the Contracting Authority in carrying out an unannounced review. The Provider will give the Contracting Authority such access as it requires, including but not, limited to, access to its premises, to interview Staff and Service Users and have sight of and make copies of its records.
- 31.3 The Provider shall make available to the Contracting Authority, at the Provider's expense, such facilities, information and assistance as it may reasonably require in order to undertake an unannounced review.

## **32 Best Value**

- 32.1 The Provider acknowledges that the Contracting Authority is subject to the requirements of Best Value and the Provider has declared its intention to continuously improve delivery of the Service in accordance with the principles of Best Value.
- 32.2 The Provider shall comply with any reasonable request by the Contracting Authority for assistance in preparing its Best Value performance plans under Section 6 of the Local Government Act 1999, and shall co-operate with any reasonable request for information or assistance so as to facilitate any inspection of the Contracting Authority's compliance with Best Value pursuant to Section 17 of the Local Government Act 1999

## **33 Environmental Policy**

- 33.1 Kent County Council has an Environmental Policy restating its commitment to the environment. The Provider is required to set up appropriate measures to conserve energy consumption, reduce water consumption, and ensure that, as far as possible, packaging and paper purchases are of recycled material and waste is reduced to minimum.

## **34 Force Majeure**

- 34.1 Neither Party to this Contract shall be liable for failure to perform its obligations under this Contract if and to the extent such failure is due to Force Majeure provided that:
- 34.2 Each Party gives to the other Notice within 7 days describing the circumstances of the Force Majeure, including the nature, expected duration and the particular obligations (the “Stated Obligations”) affected by it and where reasonably practicable, provides regular reports with respect thereto during the period of Force Majeure.
- 34.3 Any failure to meet the stated obligations is of no greater scope and of no longer duration than is justified by circumstances of Force Majeure.
- 34.4 Any failure to meet the Stated Obligations, which arose before the Force Majeure, shall not be excused by the Force Majeure.
- 34.5 Having regard to the nature of the Force Majeure each Party shall use all reasonable efforts to mitigate the effects and take appropriate remedial action in order to meet the Stated Obligations and undertake to provide the other Party with written Notice immediately it is known that the Stated Obligations shall be met in full.
- 34.6 Where an event of Force Majeure continues for a period exceeding 90 calendar days either Party may terminate this Contract in accordance with Condition 23.

## **35 Contracts (Rights of Third Parties) Act 1999**

- 35.1 The parties to this Contract agree that the Contracts (Rights of Third Parties) Act 1999 shall not apply to the Contract.

## **36 Bribery, Corruption And Collusion**

- 36.1 The Contracting Authority shall be entitled to terminate this Contract and to recover from the Provider the amount of any loss or damage resulting from such cancellation if:
- 36.1.1 The Provider shall have offered, or given, or agreed to give to any person any gift, consideration, inducement or reward of any kind, for doing or not doing any action in relation to this Contract or any other Contract with the Contracting Authority, or

36.1.2 The like acts shall have been done by any person employed by the Provider or acting on its behalf (whether with or without the knowledge of the Provider), or

36.1.3 In relation to any Contract with the Contracting Authority, the Provider or person employed by it or acting on its behalf shall;

- i) Have committed any offence under the Prevention of Corruption Acts 1889 to 1916, or
- ii) Have given any fee or reward the receipt of which is an offence under Section 117(2) of the Local Government Act 1972.

36.2 The Provider and its employees shall not solicit any gratuity or tip or any other form of money token or reward or charge for the Service provided for in this Contract other than bona fide charges approved by the Contracting Authority.

### **37 Agency**

37.1 The Provider acknowledges and agrees that it is not and shall in no circumstances hold itself out as being the servant or agent of the Contracting Authority for any purpose and this Contract does not create the relationship of Principal and Agent between the Parties.

37.2 The Provider is not and shall in no circumstances hold itself out as being authorised to enter into any Contract on behalf of the Contracting Authority or in any other way to bind the Contracting Authority to the performance, variation, release or discharge of any obligation.

37.3 The Provider's Staff or agency personnel are not and shall not hold themselves out as being, nor shall they be held out by the Provider as being, servants or agents of the Contracting Authority for any purposes.

### **38 Liability of the Contracting Authority**

38.1 Any information given to the Provider is only given as a guide. The Provider agrees that it has ascertained for itself the accuracy of the information and shall be deemed to have obtained for itself all necessary information as to risks, contingencies and any other circumstances, which might reasonably influence or affect the Provider's intention to enter into this Contract or provide the Service. No claim against the Contracting Authority shall be

allowed whether in Contract, in tort, under the Misrepresentation Act 1967, or otherwise on the ground of any inaccuracy.

### **39 Equipment, Materials And Consumables**

- 39.1 The Provider shall at all times provide and maintain sufficient equipment, materials and consumables as are required for the proper and efficient performance of the Service.

### **40 Financial Records Of Provider**

- 40.1 If required the Provider shall provide to the Contracting Authority's Representative a copy of each year's audited accounts within six months of the end of the Provider's relevant accounting period. In the event that the Provider fails to provide accounts in accordance with this Condition, then without prejudice to any other rights or remedies available to the Contracting Authority, the Contracting Authority's Representative, or such persons as may from time to time be nominated by the Contracting Authority's Representative, must be permitted access by the Provider to any and all accounting records and financial information in the possession, custody or control of the Provider, including the accounting records and financial information in the possession of the Provider's auditors.

### **41 Rights Of Audit**

- 41.1 Where this Contract requires the Provider to make payments or to collect income on behalf of the Contracting Authority, the Contracting Authority reserves the right to undertake an audit of those payments/ income collection as if the Provider was an employee of the Contracting Authority.

### **42 Costs**

- 42.1 Each Party shall bear its own costs of and incidental to the preparation of this Contract.

### **43 Warranty**

- 43.1 Each Party warrants that it has the power to enter into this Contract and has obtained all the necessary approvals to do so.

#### **44 Governing Law and Jurisdiction**

- 44.1 This Contract shall be governed interpreted and enforced according to the laws of England and under the exclusive jurisdiction of the English Courts.

#### **45 Conclusion of Contract**

- 45.1 When this Contract ends (whether by expiry or termination) the Provider shall give the Contracting Authority, or to any person the Contracting Authority lawfully may specify, all data, information, files, records, documents and the like in whatever format they may be held which the Contracting Authority supplied to the Provider for the purposes of this Contract or which were produced or augmented by the Provider in connection with the carrying out of the Provider's obligations under this Contract.

- 45.2.1 The Provider may keep copies of those documents described in 45.1 that it is required to keep by law provided that it has informed the Contracting Authority of the copies that it has retained and the reasons for their retention.

- 45.3 If the Contracting Authority objects to the Provider holding copies of the said documents then the Provider shall destroy all copies that it holds of those documents.

- 45.3.1 The Provider shall indemnify the Contracting Authority against all actions, claims, demands, proceedings, damages, costs, charges and expenses whatsoever incurred as a result of the Provider keeping copies of any documents described in 45.1 with or without the Contracting Authority's consent.

#### **46 Performance Review**

- 46.1 The Provider's and Contracting Authority's Representatives will meet twice each year throughout the Contract Period in April and October (upon such date as the Parties shall agree) in order to review the operation of the Contract, review the provision of the Services by the Provider, review any Staffing changes and to ensure the benefit of any reduction in the Provider's Employment Costs accrue to the Contracting Authority by a reduction in the Fees Payable in accordance with the provisions of clause 17.4.

## Appendix 1 – Deed of Novation

DATED 20..

(1) THE EASTERN AND COASTAL KENT NHS PRIMARY CARE TRUST (“the Contracting Authority”)

And

(2) ..... (“the Provider”)

And

(3) THE KENT COUNTY COUNCIL (“the Substitute Contracting Authority”)

---

### DEED OF NOVATION

---

THIS DEED OF NOVATION is made the ..... day of ..... 20  
BETWEEN:

(1) THE EASTERN AND COASTAL KENT NHS PRIMARY CARE TRUST (“the Contracting Authority”) whose address is .....; and

(2) ..... (“the Provider”) whose registered office is at [address] and whose company registration number is [ ]; and

(3) THE KENT COUNTY COUNCIL (“the Substitute Contracting Authority”) whose address is at .....

#### RECITALS:

Whereas:

[A] The Contracting Authority and the Provider entered into a contract for the provision of residential care services and/ or supported living services dated ..... (“the Contract”); and

[B] The Contracting Authority is no longer responsible for the commissioning of residential accommodation, residential care and residential services for persons with learning disabilities following a change in legislation/ Government policy; and



[C] The Substitute Contracting Authority has become responsible for the commissioning of residential accommodation, residential care and residential services for persons with learning disabilities; and

[D] The Parties hereto have agreed to transfer the rights and obligations of the Contracting Authority under the Contract to the Substitute Contracting Authority in accordance with the terms of this Deed; and

[E] The Provider hereby consents to the substitution of the Substitute Contracting Authority for the Contracting Authority under the Contract.

## **1. INTERPRETATION**

1.1 The headings and sub-headings are inserted for convenience only and shall not affect the construction of this Deed.

1.2 References to clause(s) unless otherwise stated are references to clause(s) of and to this Deed.

1.3 References to any party include its successors and permitted assigns.

1.4 Any reference to 'writing' shall include typewriting, printing, lithography, photography, telex, facsimile and the printed out version of a communication by electronic mail and other modes of representing or reproducing words in a legible form.

## **2. Novation**

The parties agree that on and from the date of execution of this Deed:

2.1.1 The Substitute Contracting Authority is substituted for the Contracting Authority under the Contract as if the Substitute Contracting Authority had originally been the party to the Contract instead of the Contracting Authority and references to the Contracting Authority within the Contract are to be read and construed as if they were references to the Substitute Contracting Authority; and

2.1.2 The Substitute Contracting Authority is bound by and must fulfil, comply with and observe all the provisions of the Contract as if the Substitute Contracting Authority had been named ab initio as a party thereto.

2.2 The Contracting Authority agrees to indemnify the Substitute Contracting Authority from all loss, damage, cost or expense (including the cost of settling any action) arising from any act, omission or default of the Contracting Authority (whether based in negligence or any other form of legal liability) in performance of the Contract prior to the date of execution of this Deed.

- 2.3 Without prejudice to the provisions of Clause 2.1 above and subject to Clause 4 the Contracting Authority releases and discharges the Provider's obligations under the Contract for events arising prior to, on or subsequent to the date of execution of this Deed.
- 2.4 Subject to Clause 4 the Provider releases and discharges the Contracting Authority from any and all claims, actions, proceedings, obligations and liabilities (whether based in negligence or any other form of legal liability) which the Provider has against the Contracting Authority for events arising prior to, on or subsequent to the date of execution of this Deed.
- 2.5 The Provider agrees to be bound by the terms of the Contract in every way as if the Substitute Contracting Authority were a party to the Contract in the place of the Contracting Authority.

### **3. Acknowledgment and warranty**

Without limiting the generality of this Deed of Novation:

- 3.1 The Provider acknowledges that the Substitute Contracting Authority will rely/ has relied on the Services performed by the Provider prior to the date of this Deed of Novation under the Contract.
- 3.2 Subject to any limitation of liability in the Contract, the Provider shall be liable for any loss, damage, cost or expense (including the cost of settling any action) incurred by the Substitute Contracting Authority arising from any act, omission or default of the Provider (whether based in negligence or any other form of legal liability) in performance of the Contract prior to the execution of this Deed whether or not such act, omission or default would have caused the Contracting Authority to suffer any loss, damage, cost or expense.

### **4. Existing claims**

- 4.1 In this clause the 'Existing Claims' mean such disputes arising under the Contract as are at the date of this Deed the subject of arbitration, adjudication, litigation or binding tribunal decision between the Contracting Authority and the Provider and as are briefly described in Schedule 1 to this Deed.
- 4.2 The Contracting Authority hereby transfers to the Substitute Contracting Authority and the Substitute Contracting Authority hereby accepts the said transfer of the right to pursue or defend the Existing Claims in the name of the Contracting Authority, subject to the following:
- 4.2.1 the Substitute Contracting Authority indemnifying the Contracting Authority in respect of any costs, damages or expenses

for which the Contracting Authority may become liable in consequence of the Substitute Contracting Authority pursuing or defending the Existing Claims

4.2.2 the Contracting Authority shall account to the Substitute Contracting Authority in respect of any sums which he may receive from the Provider in respect of the Existing Claims.

4.3 Nothing in this Deed shall operate to release or discharge the Contracting Authority or the Provider in respect of the Existing Claims.

## **5. Provisions relating to this Deed**

### **5.1 Entire agreement**

5.1.1 This Deed, together with any documents referred to in it, constitutes the whole agreement between the parties relating to its subject matter and supersedes and extinguishes any prior drafts, agreements, undertakings, representations, warranties and arrangements of any nature, whether in writing or oral, relating to such subject matter.

5.1.2 Each party acknowledges that it has not been induced to enter into this Deed by any representation or warranty other than those contained in this Deed and agrees that it shall have no remedy in respect of any other such representation or warranty except in the case of fraud.

5.1.3 No variation of this Deed shall be effective unless made in writing and executed as a Deed by each of the parties.

### **5.2 Further assurance**

At any time after the date hereof each of the parties shall, at the request and cost of another party, exercise or procure the execution of such documents and do or procure the doing of such acts and things as the party so requiring may reasonably require for the purpose of giving to the party so requiring the full benefit of all the provisions of this Deed.

### **5.3 Costs**

Subject to any express provisions to the contrary each party to this Deed shall pay its own costs of and incidental to the negotiation, preparation, execution and carrying into effect of this Deed.

## **5.4 Counterparts**

This Deed may be executed in any number of counterparts, which shall together constitute one Deed. Any party may enter into this Deed by signing any such counterpart.

## **5.5 Notices**

The parties agree that any notice or other communications required to be given under this Deed shall be deemed to have been duly served on the Provider and the Contracting Authority if it is served in accordance with the notice provisions in the Contract or at the addresses provided above, and if served on the Substitute Contracting Authority as if the Substitute Contracting Authority were a party to the Contract at the address stated above in this Deed/ at the following address: (*insert contact details*)

## **5.6 Law and jurisdiction**

5.6.1 This Deed shall be governed by and construed in accordance with English Law

5.6.2 In relation to any legal action or proceedings to enforce this Deed or arising out of or in connection with this Deed (for the purposes of this clause 'proceedings') each of the parties irrevocably submits to the jurisdiction of the English courts and waives any objection to proceedings in such courts on the grounds of venue or on the grounds that the proceedings have been brought in an inappropriate forum.

## **5.7 Contracts (Rights of Third Parties) Act 1999**

No person who is not a party to this Deed shall have any rights under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of this Deed.

Schedule 1: Existing Claims

[INSERT TEXT IF NECESSARY]

IN WITNESS WHEREOF the parties have executed and delivered this document as a deed on the day and year first above written.

[ENSURE THE CORRECT ATTESTATION CLAUSES ARE USED]

THE COMMON SEAL OF )

THE KENT COUNTY COUNCIL )  
was hereunto affixed and this )  
document thereby executed as )  
a Deed in the presence of: )

Authorised Signatory

THE COMPANY SEAL OF )  
[THE PROVIDER] )  
was hereunto affixed and this )  
document thereby executed as )  
a Deed in the presence of: )

Director

Secretary/Director

THE COMMON SEAL OF )  
THE CONTRACTING AUTHORITY )  
was hereunto affixed and this )  
document thereby executed as )  
a Deed in the presence of: )

Trustee/ Director

Trustee/ Secretary/Director