

Schedule 30 – Collateral Warranty

Contents

Collateral Warranty made at	on
Parties	Health Administration Corporation (ABN 45 100 538 161) , a corporation sole constituted under section 9 of the <i>Health Administration Act 1982</i> (NSW) (HAC and, together with the NSLHD, the State) Northern Sydney Local Health District (ABN 63 834 171 987) (NSLHD and, together with HAC, the State) [] ACN [] of [] (Engaging Entity) [] ACN [] of [] (Subcontractor)

Background

- A The State, Operator B and the Operator have entered, or will enter, into the Project Deed for the provision of the Project.
- B The Engaging Entity and the Subcontractor have entered, or will enter, into the Subcontract for, amongst other things, the *[insert purpose of Subcontract]*.
- C The State and the Subcontractor have agreed that the Subcontractor will, in addition to its obligations to the Engaging Entity under the Subcontract, owe obligations directly to the State as set out in this document.

Operative provisions

1. Interpretations

1.1 Definitions

The following definitions apply in this document:

Operator means NBH Operator Co Pty Ltd (ACN 169 029 181) in its capacity as trustee of the NBH Operating Trust.

Operator B means NBH Operator B Pty Ltd (ACN 602 943 911).

Project Deed means the deed entitled 'Project Deed – Northern Beaches Hospital' dated *[insert date]* 2014 between the State, Operator B and the Operator.

Subcontract means the document entitled *[insert]* dated on or about the date of this document between the Engaging Entity and the Subcontractor.

1.2 Definitions in Project Deed

Subject to clause 1.1, terms used in this document that are defined in the Project Deed have the same meaning in this document.

1.3 Interpretation

The parties agree to be bound by clause 1.2 of the Project Deed as if set out in its entirety in this clause 1.3, except for the purposes of this document:

- (a) clause 1.2(c) of the Project Deed will be taken to read as follows:
 - (c) party refers to the State, the Engaging Entity or the Subcontractor and parties refers to the State, the Engaging Entity and the Subcontractor';
- (b) references in clause 1.2 of the Project Deed to 'this document' or 'the Project Deed' shall be read as references to 'this document'; and
- (c) references in clause 1.2 of the Project Deed to 'the Operator' shall be read as references to 'the Engaging Entity and the Subcontractor'.

1.4 Exclusion of Civil Liability Act 2002 (NSW)

To the extent permitted by Law, the operation of Part 4 of the *Civil Liability Act 2002 (NSW)* is excluded in relation to any and all rights, obligations and liabilities arising under or in relation to this document howsoever such rights, obligations or liabilities are sought to be enforced.

1.5 Multiple parties

If a party to this document is made up of more than one person, or a term is used in this document to refer to more than one party:

- (a) an obligation of those persons is joint and several;
- (b) a right of those persons is held by each of them severally; and
- (c) any other reference to that party or term is a reference to each of those persons separately, so that (for example) a representation, warranty or undertaking is given by each of them separately.

1.6 Client Representative

The State must procure that the other parties to this document are notified, within 5 Business Days after the date of the appointment of the Client Representative, of the identity and address of the Client Representative, and, as soon as practicable, of any changes in the identity or address of the Client Representative.

1.7 Project Documents

The Subcontractor acknowledges that it has received a copy of the Project Deed.

1.8 No liability

Subject only to the terms of the Project Deed in respect of the Operator the State shall not be liable to the Engaging Entity or the Subcontractor under this document or otherwise and neither the Engaging Entity or the Subcontractor shall have any entitlement under this document or otherwise for an act or omission of the State or any State Related Party to the extent that the State's act or omission is caused by an act or omission of the Operator, the Engaging Entity or the Subcontractor.

1.9 Approvals and consents

- (a) For the avoidance of doubt, in respect of all approvals, consents, decisions or exercises of discretion required to be given or made by the State or the Client Representative:

- (i) relating to, or arising under or in connection with this document;
- (ii) relating to the satisfaction of a condition precedent pursuant to the terms of this document; or
- (iii) sought in relation to or in connection with, or referable to, or determinative of, the occurrence of any breach by the Operator of any of its obligations under the Project Deed,

and regardless of whether the requirement of the approval, consent, decision or exercise of discretion is express or implied, the State or the Client Representative (as the case may be), has or have the right to give or make its approval, consent or decision or exercise its discretion conditionally or unconditionally or to withhold its approval, consent, decision or exercise of discretion but in giving or withholding its approval, consent, decision or exercise of discretion, or in imposing any conditions, the State or the Client Representative (as the case may be) must act reasonably.

- (b) Without limitation, the State or the Client Representative will not be acting unreasonably if, in giving or withholding any approval or consent, or in imposing any conditions, the State or the Client Representative:
 - (i) acts in accordance with relevant government policies;
 - (ii) adopts a 'whole of government' approach; or
 - (iii) acts to protect its reputation.

1.10 The Engaging Entity

The Engaging Entity is a party to this document for the purposes only of acknowledging that the Subcontractor will not be in breach of the Subcontract by complying with its obligations under this document.

1.11 Novation to State Nominee

- (a) If the State elects to assign or novate its rights and obligations under the Project Deed in accordance with clause 1.8 of the Project Deed to any other nominee being an agency of the NSW Government (**State Nominee**), it must also assign or novate its rights and obligations under this document to the same State Nominee.
- (b) If the State elects to assign or novate its rights and obligations under this document to a State Nominee:
 - (i) each of the parties consents to that assignment or novation;
 - (ii) the parties must promptly do all further acts and execute and deliver all further documents (in form and content reasonably satisfactory to the State and the State Nominee) to give effect to that assignment or novation;
 - (iii) the State Nominee's rights and liabilities under this document will be supported by a guarantee from the NSW Government on terms no less favourable than those contained in the PAFA Act Guarantee; and
 - (iv) from the date of such assignment or novation to the State Nominee:
 - (A) this clause 1.11 will be deleted; and
 - (B) all references to 'the State' in this document will be deemed to be references to the State Nominee.

2. Subcontractor's undertakings

2.1 Undertakings

The Subcontractor undertakes and warrants for the benefit of the State as follows:

- (a) it will fully comply with all of its obligations under the Subcontract and this document;
- (b) it is reputable and has, or has access to, sufficient experience, expertise and ability to perform its obligations to the standards required by the Subcontract;
- (c) it has exercised and will continue to exercise, in accordance with [*select as appropriate*] [Good Industry Practice / Good Operating Practice], the level of skill, care and diligence in performing its duties under the Subcontract which may reasonably be expected of a contractor experienced in the performance of [*select as appropriate*] [the same or similar works to the Project Works / the same or similar services to the Services], provided that, other than as expressly set out in this document, the Subcontractor will have no greater obligations to the State by virtue of this document than it would have had if the State had been named as the Engaging Entity under the Subcontract;
- (d) the [Project Works / Services] will be carried out and completed:
 - (i) in accordance with the Subcontract and this document;
 - (ii) in accordance with the Consents and applicable Law;
 - (iii) in a good and workmanlike manner;
 - (iv) using (including installing) materials, equipment and goods, that will be to the quality and standard specified in the Subcontract, but if no standard is specified, new and of merchantable or serviceable quality and which are and will be capable of remaining at all relevant times fit for their purpose provided that reasonable maintenance is carried out with respect to those materials, equipment and goods; and
 - (v) [so that the Project Works carried out or performed by the Subcontractor, when completed, will be and will be capable of remaining at all relevant times Fit for Intended Purpose (provided that reasonable maintenance is carried out with respect to the Project Works)];
 - (vi) [so that the Services (or part thereof) performed by the Subcontractor will satisfy or exceed the Services Specifications, the Services Plans, the KPIs and the Quality Standards];
- (e) it has exercised and will continue to exercise reasonable skill, care and diligence in connection with the selection and supervision of its employees, agents, subcontractors and suppliers;
- (f) if at any time called upon to do so by the State, it must:
 - (i) extend to the State any guarantee of performance by the Subcontractor or any warranty provided to the Engaging Entity in accordance with the Subcontract;
 - (ii) provide the State, or any person authorised by the State, with such information related to the [Project Works / Services] as the State may reasonably require; and
 - (iii) allow the State, or any person authorised by the State, on reasonable notice, to inspect the [Project Works / Services] as the State may reasonably require;
- (g) the copy documents annexed to this document confirm the substance of all the relevant risks, indemnity and liability insurances required to be taken out by the Subcontractor, that

such insurances are valid and the premiums for the current periods of insurance have been duly paid, that the Subcontractor is not aware (after having made due and careful enquiry) of any circumstances likely to give rise to any claim under such insurances which may materially affect coverage under the relevant insurances, and that the Subcontractor will maintain such insurances for so long as is required under the Subcontract and this document;

- (h) it will not do anything that may invalidate any insurance policy held by the State or the NSW Government in relation to the Facility or the Site, or any indemnity to which the State or the NSW Government may be entitled from the New South Wales Treasury Managed Fund; and
- (i) it will promptly inform the State of any material default by the Engaging Entity under the Subcontract.

2.2 Reliance on representations and warranties

The Subcontractor acknowledges and agrees that the State entered into this document in reliance on the undertakings and warranties made in clause 2.1.

2.3 Indemnities

- (a) Subject to clause 2.3(b), the Subcontractor indemnifies and holds harmless the State and its officers, employees, agents and representatives from and against all Claims and Losses arising out of, or in connection with, a breach by the Subcontractor of any of the representations and warranties given by it under clause 2.1 or a failure by the Subcontractor to comply with any of its other obligations under this document or the Subcontract.
- (b) The Subcontractor will not be obliged to indemnify and hold harmless the State and its officers, employees, agents and representatives (each an **Indemnified State Party**) from and against any Claim or Loss to the extent only that the Claim or Loss is:
 - (i) caused by the negligent or unlawful act or omission or wilful misconduct of any Indemnified State Party, the Operator, the Engaging Entity or their respective officers, employees, agents and representatives, where the Claim or Loss did not occur as a result of the Subcontractor's breach of the Subcontract;
 - (ii) caused by a breach of the State, the Operator or the Engaging Entity of its express obligations under a Project Document;
 - (iii) caused by the Subcontractor following the express directions of any Indemnified State Party or the Engaging Entity with respect to its obligations under the Subcontract or this document, where such directions were given in accordance with the Subcontract or this document;
 - (iv) caused by any fraudulent or negligent act or omission of any Indemnified State Party, the Operator or Engaging Entity or their respective officers, employees, agents and representatives;
 - (v) a third party claim for pure economic loss; or
 - (vi) caused by a Compensation Event, Relief Event, Force Majeure Event or any other risk accepted by the Engaging Entity under an express provision of the Subcontract, or by the State under the Project Documents.

3. Liability of Subcontractor

- (a) The liability of the Subcontractor under this document is not affected by the State exercising or refraining from exercising any or all of its rights against the Operator or the Engaging Entity under the Project Deed or under any other Project Document or at Law.
- (b) Any information provided to, and any inspection undertaken by, the State or any person authorised by the State under clauses 2.1(f)(ii) and 2.1(f)(iii) will not limit or discharge the obligations of the Subcontractor under the Subcontract nor will it relieve the Subcontractor from any liability which it may have in respect of any defect or default in or relating to the [Project Works / Services].
- (c) For the avoidance of doubt, and notwithstanding any other provision of this document:
 - (i) the Subcontractor will have no greater obligations or liabilities to the State under, arising out of, or in connection with, this document, than it would have had if the State had been named as the principal under the Subcontract, to the extent that those obligations or liabilities relate to a Subcontract; and
 - (ii) the liability of the Subcontractor under, arising out of, or in connection with, this document, will not exceed the difference between the maximum liability of the Subcontractor under the Subcontract and the liability incurred (from time to time) by the Subcontractor to the Engaging Entity under the Subcontract.

4. Termination of Project Deed or Assignment/Novation of Engaging Entity's Rights and Obligations

If the Project Deed is terminated or the rights and obligations of the Engaging Entity are assigned or novated pursuant to the terms of any of the Project Documents, if required by the State:

- (a) the Engaging Entity must transfer, assign, novate or otherwise convey its respective interest in the Subcontract to the State or the State's nominee at the State's election;
- (b) the Subcontractor agrees to perform the Subcontract for the benefit of the State or the relevant assignee or novatee; and
- (c) the Subcontractor will enter into any document with the State or the relevant assignee or novatee and the Engaging Entity reasonably required to formalise this arrangement.

5. General

5.1 Notices

Each communication (including each notice, consent, approval, request and demand) under or in connection with this document:

- (a) must be in writing;
- (b) must be addressed as follows (or as otherwise notified by that party to each other party from time to time):

The State

Name: Health Administration Corporation
Address: [●]
Fax No: [●]
For the attention of: [●]

The Engaging Entity

Name:
Address:
Fax No:
For the attention of:

The Subcontractor

Name:
Address:
Fax No:
For the attention of:

- (c) must be signed by the person making it or (on that person's behalf) by the solicitor for, or any attorney, director, secretary or authorised agent of, that person;
- (d) must be delivered by hand or posted by prepaid post to the address, or sent by fax to the number, of the addressee, in accordance with clause 5.1(b); and
- (e) is taken to be received by the addressee:
 - (i) (in the case of prepaid post sent to an address in the same country) on the third day after the date of posting;
 - (ii) (in the case of prepaid post sent to an address in another country) on the fifth day after the date of posting by airmail;
 - (iii) (in the case of fax) at the time in the place to which it is sent equivalent to the time shown on the transmission confirmation report produced by the fax machine from which it was sent; and
 - (iv) (in the case of delivery by hand) on delivery,but if the communication is taken to be received on a day that is not a Business Day, or after 5.00pm, it is taken to be received at 9.00am on the next Business Day.

5.2 The State as a Public Authority

- (a) This document will not in any way unlawfully restrict or otherwise unlawfully affect the unfettered discretion of the State to exercise any of its functions and powers pursuant to any Law.
- (b) The Engaging Entity and the Subcontractor acknowledge and agree that, without limiting clause 5.2(a), anything which the State does, fails to do or purports to do pursuant to their functions and powers under any Law will be deemed not to be an act or omission by the State under this document and will not entitle the Engaging Entity or the Subcontractor to make any Claim against the State.
- (c) The parties agree that clauses 5.2(a) and 5.2(b) are taken not to limit any liability which the State would have had to the Engaging Entity or the Subcontractor under this document as a result of a breach by the State of a term of this document but for clauses 5.2(a) and 5.2(b) of this document.

5.3 Certification

For the purposes of this document, a copy of a document will be regarded as duly certified by a party if it is certified as a true copy by a director, secretary or general manager of that party (as applicable).

5.4 Cost of performing obligations

Each party must perform its obligations under this document at its own cost, unless expressly provided otherwise.

5.5 Governing Law

This document is governed by and must be construed according to the Law applying in New South Wales and the parties irrevocably submit to the non-exclusive jurisdiction of the courts of New South Wales and the courts competent to determine appeals from those courts.

5.6 Amendments

This document may only be varied by a deed executed by or on behalf of each party.

5.7 Assignment

Except as expressly contemplated by this document or clause 86.1(a) of the Project Deed (where applicable), neither the Engaging Entity nor the Subcontractor may assign or transfer any of its rights or obligations under this document without the prior written consent of the State, which must not be unreasonably withheld.

5.8 GST

(a) **(Interpretation):**

- (i) Except where the context suggests otherwise, terms used in this clause 5.8 have the meanings given to those terms by the GST Law (as amended from time to time).
- (ii) Any part of a supply that is treated as a separate supply for GST purposes (including attributing GST payable to tax periods) will be treated as a separate supply for the purposes of this clause 5.8.
- (iii) Unless otherwise expressly stated, all consideration to be provided under this document (other than under this clause 5.8) is exclusive of GST. Any consideration that is specified to be inclusive of GST must not be taken into account in calculating the GST payable in relation to a supply for the purpose of this clause 5.8.
- (iv) A reference to something done (including a supply made) by a party includes a reference to something done by any entity through which that party acts.
- (v) For the purposes of this clause 5.8:
 - (A) references to the 'State' means the Health Administration Corporation ('HAC') or Northern Sydney Local Health District ('NSLHD') as the case may be; and
 - (B) to the extent HAC or NSLHD makes a supply or acquisition on behalf of the other in accordance with this document, it is authorised to do so as agent of the other and may issue or obtain a tax invoice in that capacity.

- (b) **(Reimbursements)** Any payment or reimbursement required to be made under this document that is calculated by reference to a cost, expense, or other amount paid or incurred will be limited to the total cost, expense or amount less the amount of any input tax credit to which an entity is entitled for the acquisition to which the cost, expense or amount relates.

- (c) **(Additional amount of GST payable)** Subject to the remainder of this clause 5.8, if GST becomes payable on any supply made by a party (**Supplier**) under or in connection with this document (except where it is expressly stated to be inclusive of GST):
- (i) any party (**Recipient**) that is required to provide consideration for that supply must pay an additional amount to the Supplier equal to the amount of the GST payable on that supply (**GST Amount**), at the same time as any other consideration is to be first provided for that supply; and
 - (ii) the Supplier must provide a Tax Invoice to the Recipient for that supply, no later than the time at which the GST Amount for that supply is to be paid in accordance with clause 5.8(c)(i).
- (d) **(Variation of GST):**
- (i) If the GST Amount recovered by the Supplier from the Recipient under clause 5.8(c) for a supply varies from the amount of GST paid or payable by the Supplier on that supply, then the Supplier will provide a corresponding refund or credit to, or will be entitled to receive the amount of that variation from, the Recipient.
 - (ii) The Supplier must issue an Adjustment Note to the Recipient in respect of any adjustment event occurring in relation to a supply made under or in connection with this document within seven days after the Supplier becomes aware of the adjustment event.
- (e) **(Exclusion of GST from calculations)** If a payment is calculated by reference to or as a specified percentage of another amount or revenue stream, that payment shall be calculated by reference to or as a specified percentage of that other amount or revenue stream net of GST.
- (f) **(No merger)** This clause will not merge on completion or termination of this document.

5.9 Taxes

Subject to clause 97 of the Project Deed and clause 5.8 of this document, the Engaging Entity:

- (a) must pay all taxes in respect of this document, the performance of this document and each transaction effected by or made under this document;
- (b) indemnifies each other party against liability arising from failure to comply with clause 5.9(a); and
- (c) is authorised to apply for and retain the proceeds of any refund due in respect of any taxes paid under this clause 5.9.

5.10 Waiver

- (a) Failure to exercise or enforce, or a delay in exercising or enforcing, or the partial exercise or enforcement of, a right, power or remedy provided by Law or under this document by a party does not preclude, or operate as a waiver of, the exercise or enforcement, or further exercise or enforcement, of that or any other right, power or remedy provided by Law or under this document.
- (b) A waiver or consent given by a party under this document is only effective and binding on that party if it is given or confirmed in writing by that party.
- (c) No waiver of a breach of a term of this document operates as a waiver of another breach of that term or of a breach of any other term of this document.

5.11 Survival of certain provisions; no merger

- (a) Without limiting clause 5.20:
 - (i) clauses 2.3, 5.1, 5.5 and 5.20, any indemnities given under this document and any other provisions which are expressed to survive termination (together, the **Surviving Clauses**) will survive rescission, termination or expiration of this document; and
 - (ii) if this document is rescinded or terminated, no party will be liable to any other party except:
 - (A) under the Surviving Clauses; or
 - (B) in respect of any breach of this document occurring before such rescission or termination.
- (b) No right or obligation of any party will merge on completion of any transaction under this document. All rights and obligations under this document survive the execution and delivery of any transfer or other document which implements any transaction under this document.

5.12 Further acts and documents

Each party must promptly do all further acts and execute and deliver all further documents (in form and content reasonably satisfactory to that party) required by Law or reasonably requested by another party to give effect to this document.

5.13 Consents

A consent required under this document from the State, a State Related Party or the Client Representative may be given or withheld, or may be given subject to any conditions, as that party (in its absolute discretion) thinks fit, unless this document expressly provides otherwise.

5.14 No representation or reliance

- (a) Each party acknowledges that no party (nor any person acting on a party's behalf) has made any representation or other inducement to it to enter into this document, except for representations or inducements expressly set out in this document.
- (b) Each party acknowledges and confirms that it does not enter into this document in reliance on any representation or other inducement by or on behalf of any other party, except for representations or inducements expressly set out in this document.

5.15 Reading down

If a word, phrase, sentence, clause or other provision of this document would otherwise be unenforceable, illegal or invalid the effect of that provision will so far as possible be limited and read down so that it is not unenforceable, illegal or invalid.

5.16 Severance

Any provision of this document which is illegal or unenforceable in any jurisdiction will, as to such jurisdiction, be ineffective to the extent of such prohibition or unenforceability without invalidating the remaining provisions of this document or affecting the validity or unenforceability of such provision in any other jurisdiction.

5.17 Remedies cumulative

The rights and remedies provided in this document are cumulative and are not exclusive of any rights or remedies provided by Law or any other agreement, except to the extent expressly provided in this document.

5.18 Moratorium legislation

Unless application is mandatory by Law, any present or future Law will not apply to this document so as to abrogate or otherwise prejudicially affect any rights, powers, remedies or discretions given or accruing to the State.

5.19 Entire agreement

To the extent permitted by Law, in relation to its subject matter, this document:

- (a) embodies the entire understanding of the parties, and constitutes the entire terms agreed by the parties; and
- (b) supersedes any prior written or other agreement of the parties.

5.20 Indemnities

- (a) Each indemnity in this document is a continuing obligation, separate and independent from the other obligations of the parties, and survives termination, completion or expiration of this document.
- (b) It is not necessary for a party to incur expense or to make any payment before enforcing a right of indemnity conferred by this document.
- (c) A party must pay on demand any amount it must pay under an indemnity in this document.
- (d) Where a party gives any indemnity or release to the State under this document, it gives an equivalent indemnity and release to the NSW Government. The State holds for itself and on trust for the NSW Government the benefit of each such indemnity and release in this document.

5.21 Counterparts

This document may be executed in any number of counterparts and by the parties on separate counterparts. All such counterparts taken together will be deemed to constitute one and the same instrument.

5.22 Attorneys

Each person who executes this document on behalf of a party under a power of attorney declares that he or she is not aware of any fact or circumstance that might affect his or her authority to do so under that power of attorney and that he or she has, at the time of executing this document, no notice of the revocation of the power of attorney under which he or she executes this document.

EXECUTED as a deed.

[Execution clauses to be inserted]