

INDEPENDENT MONITOR'S AGREEMENT

[•] 2020

AMONG

THE GOVERNMENT OF THE REPUBLIC OF FIJI

(as the Government)

AND

HEALTH CARE (FIJI) PTE LIMITED

(as the Concessionaire)

AND

[•]

(as the Independent Monitor)



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INDEPENDENT MONITOR'S AGREEMENT

This Independent Monitor's Agreement (**Agreement**) is executed on this ____ day of _____ 2020 at _____.

AMONG:

- (1) **THE GOVERNMENT OF THE REPUBLIC OF FIJI**, represented by the Ministry of Economy with its principal office at Level 10, Ro Lalabalavu House, Victoria Parade, Suva, Fiji (hereinafter referred to as the **Government**, which expression shall, unless it be repugnant to the context or meaning thereof, include its successors and permitted assigns);

AND

- (2) **HEALTH CARE (FIJI) PTE LIMITED**, a company organised, incorporated, registered and existing under the Companies Act 2015, with its registered office at Level 4, Plaza 2, Provident Plaza, 33 Ellery Street, Suva (hereinafter referred to as the **Concessionaire**, which expression shall, unless it be repugnant to the context or meaning thereof, include its successors and permitted assigns);

AND

- (3) [•] [*insert name of the Independent Monitor*], a company organised, incorporated, registered and existing under the [•], with its registered office at [•] (hereinafter referred to as **Independent Monitor**, which expression shall unless repugnant to the context or meaning thereof include its successors and permitted assigns).

WHEREAS:

- (A) The Concessionaire has entered into a Concession Agreement with the Government for the upgradation, development, operation and maintenance of Lautoka and Ba Hospitals.
- (B) Under the terms of the Concession Agreement, one of the condition precedents is the appointment of the Independent Monitor which is to be jointly satisfied by the Government and the Concessionaire.
- (C) For this purpose, the Government commenced an international competitive bid process for the selection of an independent monitor for the Project by issuing a request for tender on [•] (**RFT**), inviting interested parties to submit their qualification proposal and financial proposal to the Government. Pursuant to the terms of the RFT, the Government received tenders from various bidders, including the bid submitted by [•] [*insert name of the Independent Monitor*].
- (D) Following a process of evaluation of qualification proposal and financial proposal submitted by the bidders (including [•]), the Government has accepted the proposal submitted by [•] and issued the letter of acceptance dated [•] to [•] (**LOA**).

- (E) Further to issuance of the LOA, the Government, through the execution of this Agreement, wishes to appoint [•] as the Independent Monitor for the Project to undertake and perform the Independent Monitor Services (**IM Services**) in accordance with the terms as set out herein.
- (F) The Independent Monitor confirms the acceptance of its engagement to undertake and perform IM Services as set out in this Agreement.

IT IS AGREED as follows:

1. DEFINED TERMS & INTERPRETATION

1.1 Definitions

In this Agreement, unless the context requires otherwise, capitalised terms shall have the meanings set out below. Capitalised terms not defined in this Agreement shall have the meanings ascribed to them under the Concession Agreement.

Agreement means this agreement including the Schedules and Annexes.

Applicable Law means the Constitution of the Republic of Fiji and all and any laws, enacted or brought into force and effect by the Government of the Republic of Fiji or any other Government Authority having jurisdiction over the parties to this Agreement or the IM Services, including rules, regulations, guidelines (whether having the force of law or not) and notifications made thereunder, and judgments, decrees, injunctions, writs and orders of any court of record, applicable to this Agreement and the exercise, performance and discharge of the respective rights and obligations of the parties, hereunder, as may be in force and effect during the subsistence of this Agreement.

Associate means:

- (a) in respect of Concessionaire, any Concessionaire Related Party;
- (b) in respect of the Government, any Government Related Party; and
- (c) in respect of the Independent Monitor, any officers, agents, advisers, consultants, contractors, subcontractors and employees of the Independent Monitor.

Claim includes any claim, proceeding, action, cause of action, demand or suit (including by way of contribution or indemnity) under this Agreement or the Concession Agreement, at law or in equity, including for payment of money (including damages) or for an extension of time, including by statute (to the extent permitted by Applicable Law), in tort for negligence or otherwise, including negligent misrepresentation or for strict liability, breach or for restitution.

Concession Agreement means the Concession Agreement executed between the Government and the Concessionaire on 17 January 2019 in relation to the Project (annexed as Annexure 2).

Concessionaire's Representative is the person named in the Contract Particulars or any other person nominated by Concessionaire under this Agreement to replace that person.

Construction Period Professional Fee [•] (Note: to insert the number from the IM's Bid).

Contract Material is all material:

- (a) provided to the Independent Monitor by any Project Party (including Design and Drawings); or
- (b) brought or required to be brought into existence by the Independent Monitor as part of, or for the purpose of, performing the IM Services including documents, equipment, reports, technical information, plans, charts, drawings, calculations, tables, schedules and data (stored by any means).

Contract Particulars means the particulars set out in Schedule 1 of this Agreement.

Expert shall have the meaning ascribed to the term in the RFT.

Good International Industry Practice or **GIIP** means exercise of that degree of skill, care, prudence, foresight and diligence normally practiced by skilled, experienced and professional international engineers or consultants engaged and specializing in providing services of the same nature, scope, complexity and magnitude that are required for implementation of the Project.

Government Authority(ies) means the Government of the Republic of Fiji, any provincial or local government or any other ministry, governmental department, commission, board, body, bureau, agency, authority, instrumentality, inspectorate, statutory corporation or body corporate (other than a company) over which the Government of the Republic of Fiji or any provincial or local government exercises control, company wholly-owned by the Government of the Republic of Fiji or any provincial or local government, court, tribunal or other judicial or administrative body or official or person, having jurisdiction over the Independent Monitor, the provision of IM Services and the performance of obligations and exercise of the rights of the parties in accordance with this Agreement.

Government's Representative is the person named in the Contract Particulars or any other person nominated by the Government under this Agreement to replace that person.

IM's Bid means the Independent Monitor's bid submitted for the IM Services which is included in the Annexure to this Agreement.

IM Services include:

- (a) all of the functions of the Independent Monitor as set out in Schedule 2;
- (b) all other things or tasks which the Independent Monitor must do to comply with its obligations under this Agreement and the Concession Agreement; and
- (c) without limiting paragraph (b), all other things and tasks not described in this Agreement or the Concession Agreement, if those things and tasks should have been reasonably anticipated by an experienced and competent professional provider of the IM Services as being necessary for the performance of the IM Services or which are otherwise capable of inference from this Agreement or the Concession Agreement .

Independent Monitor's Representative is the person named in the Contract Particulars or any

other person appointed by the Independent Monitor with prior intimation to the Project Parties from time to time to replace that person.

In-house Expert shall have the meaning ascribed to the term in the RFT.

Insolvency Event in respect of the Independent Monitor shall mean:

- (a) that it has (A) applied for or consented to the appointment of, or the taking of possession by, a receiver, custodian, trustee, administrator, liquidator or the like or of all or a substantial part of its assets or business; (B) been unable to pay its debts as such debts become due; (C) enters into a compromise arrangement with its creditors ; (D) an attachment or restraint has been levied on its assets which materially affects its ability to perform its obligations under this Agreement; (E) filed a petition seeking to take advantage of any law relating to bankruptcy, insolvency, reorganization, winding up, or composition or readjustment of debts at any place including in the jurisdiction of its incorporation; or (F) taken any corporate or other action for the purpose of effecting any of the foregoing; or
- (b) a proceeding or a case has been commenced against the IM without the application or consent of the IM in any court of competent jurisdiction seeking: (A) its liquidation, reorganization, dissolution or winding-up or the composition or readjustment of debts; (B) the appointment of an insolvency resolution professional, a trustee, receiver, custodian, administrator, liquidator or the like under the relevant legal statute relating to bankruptcy and insolvency, and an order admitting the insolvency or bankruptcy petition has been passed in such proceeding and such order has not been stayed or dismissed within a period of 90 (ninety) days; or (C) directions with the same or similar effect happen under the provisions of the relevant legal statute in relation to the winding up of a company in its jurisdiction of incorporation.

Intellectual Property means all intellectual property rights, including:

- (a) patents, copyright, rights in circuit layouts, registered designs, trade marks, know how, trade secrets, domain names, website contents, and any right to have confidential information kept confidential; and
- (b) any application or right to apply for registration of any of the rights referred to in paragraph (a).

Key People means the people nominated as an Expert and an In-house Expert by the Independent Monitor in the IM's Bid.

Moral Rights means the rights to Intellectual Property assigned by a party and includes all rights of paternity, integrity, disclosure and withdrawal, and any other rights that may be known as or referred to as "moral rights", "artist's rights", or the like.

O&M Period Professional Fee [•] (Note: to insert the number from the IM's Bid).

Professional Fee means collectively:

- (a) the Construction Period Professional Fee; and

(b) the O&M Period Professional Fee.

Project Parties are the Government and Concessionaire, and 'Project Party' is any one of them.

Project Parties' Representatives means the Government's Representative and Concessionaire's Representative collectively.

RFT shall have the meaning ascribed to the term in Recital C.

Term means the period specified as such in the Contract Particulars, or any extended period notified by the Government under Clause 2.2 or as may be agreed between the parties.

Total Contract Value means the amount equivalent to the sum of (a) and (b) below:

- (a) Construction Period Professional Fee x 12; and
- (b) O&M Period Professional Fee x 20.

Variation means a material change in the nature or scope of the IM Services which will result in a material increase in the resourcing levels required to provide, or the costs of the Independent Monitor in providing, the IM Services.

Variation Direction means a direction given in accordance with Clause 11.1(a).

Wilful Default means:

- (a) fraud; or
- (b) a breach of this Agreement by the Independent Monitor or its Associates in circumstances in which the Independent Monitor or its Associates acts with an intentional, conscious or reckless disregard of any of its obligations under this Agreement.

1.2 Interpretation

In this Agreement, unless otherwise provided or the context otherwise requires:

- (a) Any reference to a statutory provision shall include such provision as modified or re-enacted or consolidated from time to time.
- (b) The words importing the singular shall mean the plural and vice-versa; and words importing the masculine shall include the feminine and neuter and vice-versa.
- (c) Headings in this Agreement are for convenience of reference only.
- (d) The references to the word 'include' or 'including' or to the phrase 'in particular', shall be construed without limitation.
- (e) References to any date or time of day are to Fijian Standard Time (taking into account Fijian Daylight Saving Time, when applicable); any reference to day shall mean a reference to a calendar day; any reference to a month shall mean a reference to a calendar month, any

reference to a year shall mean a reference to a calendar year.

- (f) The references to any agreement, deed or other instrument shall be construed as a reference to such agreement, deed, or other instrument as may be amended, varied, supplemented or novated, from time to time.
- (g) Whenever provision is made for the giving or issuing of any notice, endorsement, consent, approval, permission, certificate or determination by any Person, such notice, etc., shall be reasonably given, shall not be unreasonably withheld or delayed and shall be in writing and the words 'notify', 'endorse', 'approve', 'permit', 'certify' or 'determine' shall be construed accordingly. Where any notice, consent or approval is to be given by any party, the notice, consent or approval shall be given on its behalf only by any authorised persons and shall be given on a Business Day.
- (h) The words written and in writing include a facsimile transmission and any means of reproducing works in a tangible and permanently visible form.
- (i) The terms of the RFT form an integral part of this Agreement and will be in full force and effect as though they were expressly set out in the body of this Agreement. In the event of any discrepancy between this Agreement and the RFT, the provisions set out in this Agreement shall prevail.
- (j) The provisions of the Clauses of this Agreement shall be interpreted in such a manner that will ensure that there is no inconsistency in interpretation between the intent expressed in the Clauses.

Provided that if there are any ambiguities, discrepancies or inconsistencies within this Agreement, the following shall apply:

- (i) between two Clauses of this Agreement, the provisions of the Clause more specific to the issue under consideration shall prevail over those in other Clauses; and
 - (ii) if there is any ambiguity, discrepancy or inconsistency regarding the requirements of quality or any standard of performance between: (A) two or more Clauses; (B) the Applicable Laws, then, notwithstanding anything contained in this Agreement, the highest quality or standard must be applied.
- (k) Neither the giving of any approval or consent, the review, knowledge or acknowledgement of the terms of any document by or on behalf of the Government, nor the failure to do so, shall, unless expressly stated in this Agreement, relieve the Independent Monitor of any of its obligations under this Agreement or of any duty which it may have under this Agreement to ensure the correctness, accuracy or suitability of the matter or thing which is the subject of the approval, consent, review, knowledge or acknowledgement.
- (l) The rule of construction, if any, that an agreement should be interpreted against the party responsible for the drafting and preparation thereof shall not apply to this Agreement.

1.3 Consents or approvals

A consent or approval under this Agreement from the Government or a Government's Representative may be given or withheld, or may be given subject to such conditions, as the Government or the Government's Representative to whom any power, function, duty, discretion, authority or responsibility is given under this Agreement (in its absolute discretion) thinks fit, unless this Agreement expressly provides otherwise.

1.4 Priority of documents

To the extent of any inconsistency between this Agreement and the Concession Agreement, the Concession Agreement prevails.

1.5 Business Day

Where the day on or by which any payment is to be made under this Agreement is not a Business Day it will be made on the next Business Day.

2. ROLE OF THE INDEPENDENT MONITOR

2.1 Engagement

The Independent Monitor is engaged by the Government as an independent expert to carry out the IM Services for the Term in accordance with the terms of this Agreement.

2.2 Extension of Term

The Government may, but is under no obligation to, extend the Term by a further period or periods by a notice to the Independent Monitor of its intention to do so before the end of the Term, which specifies the date to which the Term is extended.

2.3 Standard of care

- (a) The Independent Monitor must exercise the standard of skill, care and diligence in the performance of the IM Services that would be expected of a professional provider of the IM Services experienced in providing services in the nature of the IM Services for projects similar to the Project.
- (b) The Independent Monitor must keep the Project Parties fully and regularly informed as to all matters affecting or relating to the IM Services.

2.4 Duty of independent judgment

In exercising its functions as set out in the Concession Agreement, the Independent Monitor must:

- (a) exercise the powers, duties and authority that are conferred upon the Independent Monitor by this Agreement and the Concession Agreement;
- (b) act professionally, independently and in a timely manner;

- (c) subject to the terms of the requirements set out in the Concession Agreement, arrive at a reasonable measure or value of work, quantities or time;
- (d) exercise its functions impartially, honestly, reasonably and fairly;
- (e) where the Independent Monitor may (rather than must) exercise a right, function or power, exercise or not exercise such right, function or power in a professional, timely and independent manner;
- (f) exercise the powers, duties and authority vested in the Independent Monitor for the benefit of each of the Government and Concessionaire; and
- (g) exercise the powers, duties, discretions and authorities as an independent reviewer, monitor, assessor and valuer, and not as agent for the Government or Concessionaire.

2.5 Conflict of interest

- (a) The Independent Monitor warrants that:
 - (i) at the date of signing this Agreement, no conflict of interest (actual or perceived) exists or is likely to arise in the performance of its obligations under this Agreement or the Concession Agreement;
 - (ii) it will not, during the Term, undertake any activities, work or provide any services that may give rise to a conflict or risk of conflict of interest; and
 - (iii) if, during the Term, without limiting Clause 2.5(a)(ii), any conflict or risk of conflict of interest arises, the Independent Monitor will notify the Project Parties' Representatives immediately of that conflict or risk and take such action to avoid or mitigate the conflict or risk of conflict of interest as the Project Parties' Representatives may require.
- (b) Without the prior consent of the Government, the Independent Monitor will not be appointed or accept any appointment to act:
 - (i) in any role under or relating to any construction contract, or any other subcontract in relation to the Project; or
 - (ii) for any other party in respect of the Project.

2.6 Communication with the Project Parties

The Independent Monitor must ensure that a copy of all written communications, reports, opinions and notices provided by or on behalf of a Project Party to the Independent Monitor, or by or on behalf of the Independent Monitor to a Project Party, is forwarded to the other Project Party.

2.7 Authority to act

The Independent Monitor:

- (a) is an independent consultant and is not, and must not purport to be, a partner, joint venturer or agent of any Project Party;
- (b) other than as expressly set out in this Agreement and in the Concession Agreement, has no authority to give any directions to the Project Parties or their Associates; and
- (c) has no authority to waive or alter any terms of the Project Documents, nor to discharge or release a party from any of its obligations under the Project Documents.

2.8 Knowledge of Project Parties' requirements

The Independent Monitor warrants that:

- (a) it is experienced in (i) the provision of services in the nature of the IM Services; and (ii) projects in the nature of the Project, including hospital and medical centre construction projects.
- (b) it has informed and will be deemed to have informed itself fully of the requirements of this Agreement and the Concession Agreement;
- (c) without limiting Clause 2.8(b), it has and will be deemed to have informed itself fully of all time limits and other requirements for any function which the Independent Monitor has to carry out under this Agreement and as set out in the Concession Agreement;
- (d) it has and will be deemed to have informed itself completely of the nature of the work necessary for the performance of the IM Services and (to the maximum extent possible) the means of access to the facilities within the Site; and
- (e) it has satisfied itself as to the correctness and sufficiency of the IM's Bid for the IM Services and that the Professional Fee covers the cost of complying with all of its obligations under this Agreement and of all matters and things necessary for the due and proper performance and completion of the IM Services.
- (f) in the provision of the IM Services it will comply with all Applicable Laws, the Concession Agreement and the GIIP.

2.9 Coordination by Independent Monitor

The Independent Monitor must during the period of the Project:

- (a) fully cooperate with the Project Parties and their Associates and the Project Parties' Representatives;
- (b) carefully coordinate the IM Services with the work and services performed by the Project Parties and their Associates and the Project Parties' Representatives; and
- (c) perform the IM Services so as to avoid interfering with, disrupting or delaying, the work and the services performed by the Project Parties or their Associates and the Project Parties'

Representatives except where the interference, disruption or delay is as an unavoidable consequence of performing the IM Services.

2.10 Acknowledgment in respect of Schedule 19 of the Concession Agreement

The Project Parties and the Independent Monitor acknowledge that Schedule 2:

- (a) is not intended to be a complete description of functions of the Independent Monitor under the Concession Agreement or any other document;
- (b) does not limit or otherwise affect the IM Services or the performance of the IM Services; and
- (c) cannot be used as an aid to the interpretation of the IM Services.

2.11 Acknowledgment of reliance

The Independent Monitor acknowledges that each party to this Agreement:

- (a) is entitled to, and will, rely on:
 - (i) the skill and expertise of the Independent Monitor in performance of the IM Services; and
 - (ii) any certificate signed or given by the Independent Monitor under the Concession Agreement; and
- (b) may suffer a liability if the Independent Monitor does not perform the IM Services in accordance with the requirements of this Agreement.

3. ROLE OF THE PROJECT PARTIES

3.1 Information and IM Services

- (a) The Project Parties must as soon as practicable make available to the Independent Monitor all existing information, documents and particulars in their possession relating to the IM Services.
- (b) The Project Parties must ensure that the Independent Monitor is provided with all existing information, assistance, documents and particulars in their possession:
 - (i) required under the Concession Agreement to be provided by the Project Parties to the Independent Monitor or as otherwise reasonably required by the Independent Monitor within the time (if any and including any extension of such time) required by the Concession Agreement, or, where no period is specified, as soon as practicable; and
 - (ii) as may be reasonably requested by the Independent Monitor to enable it to perform the IM Services effectively and otherwise in accordance with this Agreement, including any relevant documents prepared by or on behalf of any subcontractor

of the Project Parties, including, where requested by the Independent Monitor, electronic copies of such information, documents or particulars.

3.2 Attendees

- (a) Concessionaire must, if requested by the Independent Monitor, make reasonable efforts to procure the attendance of senior representatives of the constructors, any other Concessionaire Associate, the Senior Lenders or their respective suppliers, consultants or subcontractors, as requested by the Independent Monitor, to provide:
 - (i) such assistance to the Independent Monitor in carrying out the IM Services as is reasonably necessary; and
 - (ii) such explanations and additional information relating to any document, notice or information provided to the Independent Monitor.
- (b) In the event attendance of the persons requested under part (a) is not possible where such person(s) are out of the Republic of Fiji, the Concessionaire shall use its best endeavours to procure the attendance of such person(s) through online, electronic or telecommunication methods. If such alternatives are not reasonably practical for the nature of the assistance required by the Independent Monitor, then the Independent Monitor, acting reasonably, can require the Concessionaire to procure the physical presence of such person(s) (at the Concessionaire's cost and expense).
- (c) The Independent Monitor must, if required by the Project Parties, make reasonable efforts to procure the attendance of any subcontractor, employee or representative of the Independent Monitor at any meeting between the Independent Monitor and the Project Parties.

3.3 Right to enter, inspect and test

The Independent Monitor has the right to enter upon, access, inspect and monitor the Sites and the Project Hospitals (or any part thereof, including the Project Hospitals Assets), and supervise the tests conducted to confirm the achievement of Completion Conditions in accordance with the terms of the Concession Agreement.

3.4 Access to premises of others

Project Parties must ensure that at all reasonable times:

- (a) provided that it has received a 3 (three) Business Days' notice from the Independent Monitor, the Independent Monitor's Representative, or any person authorised in writing by the Independent Monitor's Representative, is given access to premises occupied by the Concessionaire or the Concessionaire's Representatives to inspect any works or services or the performance of such works and services relating to the Project, subject to all such persons complying with the reasonable rules of Concessionaire (and the reasonable rules of Concessionaire's Associates where applicable) regarding safety or security on site as notified in writing to the Independent Monitor; and

- (b) where persons referred to in Clause 3.4(a) inspect any works or services or the performance of any works or services relating to the Project or any relevant information or material relating to the IM Services, that they are able to do so in the presence of persons authorised by the Concessionaire.

3.5 Coordination by Concessionaire

Concessionaire must ensure that:

- (a) during the carrying out of the Project, the Concessionaire's Representatives:
 - (i) fully cooperate with the Independent Monitor; and
 - (ii) provide the Independent Monitor with whatever information and support as is reasonable to facilitate the performance of the IM Services in accordance with this Agreement and the Concession Agreement;
- (b) the Concessionaire's Representatives are aware of the matters referred to in Clauses 3.4 and 3.5(a); and
- (c) the respective contracts under which any subcontractor of Concessionaire is engaged contain terms which require those parties to comply with the matters referred to in Clauses 3.4 and 3.5(a).

3.6 Acknowledgement

Nothing in this Clause 3 obliges Concessionaire to, or to procure its Associates to, act or not act where to do so may delay the execution of, or damage, the Construction Works and all other services and obligations of the Concessionaire under this Agreement or the Concession Agreement, unless such delay or damage is an unavoidable consequence of facilitating the IM Services.

3.7 Non-complying IM Services

The Independent Monitor must:

- (a) unless directed otherwise in writing by the Government, perform or re-perform (as the case may be) all IM Services which have not been performed in accordance with this Agreement; and
- (b) take all such steps as may be reasonably necessary to:
 - (i) mitigate the effect on the Project Parties of the failure to perform the IM Services in accordance with this Agreement; and
 - (ii) put the Project Parties (as closely as possible) in the positions in which they would have been had the Independent Monitor performed the IM Services in accordance with this Agreement, including all such steps as may be reasonably directed by the Government in writing.

4. REPRESENTATIVES

4.1 Independent Monitor's Representative

The Independent Monitor:

- (a) has nominated the Independent Monitor's Representative as the person to act as its representative for the Project;
- (b) may, from time to time, in writing nominate another person to act as the Independent Monitor's Representative, with prior intimation to the Project Parties, in which case that person will be the relevant representative in lieu of the person named in the Contract Particulars; and
- (c) confirms that the Independent Monitor's Representative has the power and authority to bind the Independent Monitor.

4.2 Project Parties' Representatives

The Government and Concessionaire respectively:

- (a) have appointed the Government's Representative and Concessionaire's Representative as the persons to act as their respective representatives for the purposes of this Agreement;
- (b) may, from time to time, in accordance with the terms of the Concession Agreement, in writing nominate another person to act as the Government's Representative or Concessionaire's Representative (as the case may be), in which case that person will be the relevant representative in lieu of the person named in the Contract Particulars; and
- (c) confirm that the Government's Representative and Concessionaire's Representative respectively have the power and authority to bind the Government and the Concessionaire (as the case may be) for all purposes in connection with this Agreement.

4.3 Key People

The Independent Monitor must:

- (a) ensure that the Key People perform the functions as set out in the RFT and, unless reasonably directed otherwise by the Government, ensure that they are committed to the Project as may be necessary during the Term;
- (b) subject to Clause 4.3(d), not replace the Key People without the Government's approval, which approval will not be unreasonably withheld;
- (c) without limiting Clause 4.3(a), use its best endeavours to ensure that none of the Key People resign or otherwise become unavailable to perform their functions as required by Clause 4.3(a); and

- (d) if any of the Key People die, become seriously ill, resign from or are no longer employed by the Independent Monitor or are on leave of absence, replace them as soon as practicable with persons of at least equivalent experience and expertise approved by the Government (in its sole and absolute discretion).

4.4 Restriction on delegation and subcontracting

- (a) The Independent Monitor must not delegate or subcontract any of its powers, duties, obligations, responsibilities or discretions under this Agreement without prior written consent of the Government, which consent may be given or withheld at Government's discretion.
- (b) The Independent Monitor will remain liable to the Project Parties for any acts or omissions of any person to whom it has delegated or subcontracted any of its powers, duties, obligations, responsibilities or discretions (even if that delegation or subcontract has been consented to by the Project Parties).
- (c) The Independent Monitor remains fully responsible for the IM Services notwithstanding that the Independent Monitor has delegated or subcontracted the performance of any part of the IM Services.

5. CONDUCT OF INDEPENDENT MONITOR

Neither the Government nor Concessionaire will be liable for any act or omission by the Independent Monitor.

6. FORM OF NOTICES AND CERTIFICATES

Any notice or certificate given by the Independent Monitor pursuant to the Concession Agreement must be in the form (if any) prescribed under the Concession Agreement and otherwise in a form acceptable to the Government and Concessionaire (each acting reasonably).

7. REPORTS REQUESTED BY PROJECT PARTY

- (a) A Project Party may require the Independent Monitor to prepare an additional report which is not otherwise required by the Concession Agreement or this Agreement (including any report providing information or assistance relating to a modification or proposed modification). Where so requested, the Independent Monitor must (except where the Independent Monitor is of the reasonable opinion that it would be inappropriate, in light of the performance and nature of the IM Services, to prepare such report) provide such report if it is reasonably capable of doing so.
- (b) The Project Party requesting an additional report under Clause 7(a) is solely responsible for the payment of the reasonable costs and expenses of the Independent Monitor in preparing such additional report, in accordance with Clause 10.4.
- (c) For the avoidance of doubt, the request by one of the Project Parties to the Independent Monitor to prepare an additional report under Clause 7(a) is not a Variation to the IM Services under this Agreement.

- (d) For the avoidance of doubt, notwithstanding that one Project Party has paid the costs and expenses of the Independent Monitor in preparing an additional report in accordance with this Clause 7, the Independent Monitor must provide a copy of the report prepared by the Independent Monitor to both of the Project Parties.

8. TIME AND SUSPENSION

8.1 Timely provision of IM Services

The Independent Monitor must perform the IM Services in a timely manner:

- (a) in accordance with the time-lines prescribed under the Concession Agreement; or
- (b) if no time is prescribed, within a time period which the Independent Monitor determines is reasonably necessary to properly perform that IM Service in accordance with its obligations under this Agreement and so as not to prejudice the Project Parties' rights and obligations under the Concession Agreement.

8.2 Notice of suspension

The IM Services (or any part of the IM Services) may be suspended at any time by the Government:

- (a) if the Independent Monitor fails to comply with its obligations under this Agreement, immediately by giving notice to the Independent Monitor; or
- (b) by giving 5 (five) Business Days' notice to the Independent Monitor.

Provided however, the Concessionaire and the Concessionaire Related Parties shall not be liable for any delay or any other non-performance of its obligations under the Concession Agreement, if such delay or non-performance is solely and directly attributable to suspension of IM Services (or any part of the IM Services) in accordance with this Clause 8.2.

8.3 Costs of suspension

The Independent Monitor will:

- (a) subject to Clause 8.3(b), have no right to be paid any costs, expenses or damages arising from a suspension under Clause 8.2; and
- (b) subject to the Independent Monitor complying with Clause 11, be entitled to recover the costs reasonably incurred by the Independent Monitor by reason of a suspension directed under Clause 8.2(b) valued as a Variation to the IM Services under Clause 11.5.

8.4 Recommencement

The Independent Monitor must immediately recommence the carrying out of the IM Services (or any part) on receipt of a notice from the Government requiring it to do so.

9. INSURANCE AND LIABILITY

9.1 Professional indemnity insurance

The Independent Monitor must have in place as at the date of this Agreement professional indemnity insurance:

- (a) in the amount referred to in the Contract Particulars from an insurer and on terms satisfactory to the Project Parties;
- (b) from the date of this Agreement renewed until the expiration of 1 (one) year from the cessation of the IM Services or the Term, whichever is earlier; and
- (c) covering liability which the Independent Monitor might incur as a result of a breach by it of its obligations under Clause 2.3 or any other breach of a duty (including under statute) owed by the Independent Monitor in a professional capacity.

9.2 Public liability insurance

The Independent Monitor must have in place at the date of this Agreement public liability insurance in the amount referred to in Contract Particulars from an insurer and on terms satisfactory to the Project Parties.

9.3 Workers' compensation insurance

The Independent Monitor must insure its liability (including its common law liability) with an insurer as required under any applicable workers' compensation statute or regulation in relation to its employees engaged in the IM Services.

9.4 Alteration of insurance policies

The Independent Monitor must not, without obtaining the prior written consent of the Project Parties:

- (a) materially alter the terms of;
- (b) alter the risks covered by; or
- (c) alter the sum insured under,

the professional indemnity insurance policy referred to in Clause 9.1 or the public liability insurance policy referred to in Clause 9.2.

9.5 Copies of insurance policies

The Independent Monitor must provide copies of its insurance policies to the Project Parties upon request.

9.6 Failure to provide insurance

If, after being notified by the Project Parties to do so, the Independent Monitor fails to produce evidence of compliance with its insurance obligations under this Clause 9 to the reasonable satisfaction of the Project Parties within 5 (five) Business Days of that notice, the Project Parties may effect and maintain the relevant insurance and pay the premiums for that insurance. Any amount paid by the Project Parties will be a debt due from the Independent Monitor to the Project Parties payable on demand.

9.7 Notices from or to insurer

Except to the extent prohibited by Applicable Law, the Independent Monitor must ensure that each policy of insurance required to be effected by the Independent Monitor in accordance with this Agreement contains provisions acceptable to the Project Parties that require the insurer:

- (a) whenever the insurer gives to or serves upon the Independent Monitor, or any of its Associates, a notice of cancellation or other notice concerning the policy, at the same time to give to the Project Parties a copy of the notice that has been given or served upon the Independent Monitor or its Associates; and
- (b) whenever the Independent Monitor fails to renew the policy or to pay a premium, to give notice of that failure to the Project Parties prior to the insurer giving any notice of cancellation or non-renewal.

If a claim, or claims, in any one period of professional indemnity insurance exhausts any first aggregate limit under such policy, the Independent Monitor must immediately give the Project Parties written notice of this.

9.8 Limitation of liability

The Independent Monitor's total liability to the Project Parties under all Claims which the Project Parties might have (whether jointly or severally) against the Independent Monitor:

- (a) under, arising out of, or in connection with this Agreement;
- (b) arising out of, or in connection with the IM Services, or the Project; or
- (c) otherwise at law or in equity including:
 - (i) any statute (insofar as it is possible to exclude such liability); or
 - (ii) in tort for negligence or otherwise, including negligent misrepresentation,

in respect of any fact, matter or thing under, arising out of or in connection with this Agreement, the IM Services, the Project or any Project Document (save in respect of any Wilful Default or abandonment of the IM Services, in the sole discretion of the Government) is limited in aggregate to the greater of:

- (A) the Total Contract Value; and

- (B) to the extent that the liability is the subject of an indemnity under any policy of insurance, the amount of any such indemnity limit.

9.9 Independent Monitor's indemnity

Subject to Clause 9.8, the Independent Monitor indemnifies the Project Parties against any Claim or liability (whether direct or indirect) (including legal costs on an indemnity basis and whether incurred by or awarded against the Project Parties) that the Project Parties may sustain or incur in respect of:

- (a) loss of or damage to any property (including the Construction Works);
- (b) Claims by any person in respect of personal injury or death,

arising out of or in connection with the performance or non-performance of the IM Services, and a Claim by a third party that Contract Material licensed to the Project Parties, or any use of that Contract Material by the Project Parties in accordance with this Agreement and the terms of each relevant licence provided to the Project Parties, infringes any Intellectual Property Rights or other rights of a third party.

Provided that the Independent Monitor's liability to indemnify the Project Parties will be reduced proportionately to the extent that a negligent act or omission of the Project Parties (as applicable) or breach of this Agreement by the Project Parties (as applicable) contributed to the loss, damage, death or injury or infringement.

10. PAYMENT FOR IM SERVICES

10.1 Professional Fee

- (a) In consideration of the Independent Monitor performing the IM Services in accordance with this Agreement, the Independent Monitor will be paid the Professional Fee by the Government in accordance with the Contract Particulars.
- (b) The Professional Fee includes all disbursements and expenses (including accommodation, equipment, car hire, fees in respect of the support staff and Key People and travel expenses), overheads and profit required to perform the IM Services.
- (c) The Professional Fee is:
 - (i) inclusive of all taxes, charges, imports and fees of any nature; and
 - (ii) subject to annual escalation at 3% (three per cent) per annum.

10.2 Payment claim

The Independent Monitor must, on a quarterly basis:

- (a) prepare and submit to the Government's Representatives for approval a payment claim setting out:

- (i) a breakdown of the IM Services (in a form and including such information as the Project Parties may require from time to time) actually carried out during the period for which payment is sought;
 - (ii) the part of the Professional Fee then payable; and
 - (iii) costs and expenses relating to the preparation of additional reports requested by the Government under Clause 7;
- (b) provide to the Government's Representatives all supporting documentation that they may reasonably require; and
- (c) allow the Government's Representatives access to all records relating to the IM Services in order to check the accuracy of the payment claim.

10.3 Payment

Within 30 (thirty) days of the Project Parties receiving a payment claim, the Government will, subject to Clauses 10.4 and 10.5, pay the Independent Monitor the Professional Fee which the Government believes represents the contract value of the IM Services performed by the Independent Monitor during the period for which the payment claim is submitted.

10.4 Payment for special reports

Where any part of a payment claim relates to the preparation of reports by the Independent Monitor requested by a Project Party under Clause 7, the party responsible for payment under Clause 7(b) will pay the Independent Monitor the amounts payable in respect of the preparation of the report within 30 (thirty) days of the relevant Project Party receiving the payment claim.

10.5 Set off

Notwithstanding any other provision of this Agreement, the Government may set off or deduct from any moneys payable by the Government to the Independent Monitor, under this Agreement or otherwise, any amounts:

- (a) for which the Independent Monitor must reimburse the Government;
- (b) which the Government pay on the Independent Monitor's behalf; or
- (c) which are then due and payable by the Independent Monitor to the Government (whether or not such amounts are expressed to be a debt due from the Independent Monitor to the Government), under or in connection with this Agreement or arising out of or in respect of or in connection with the IM Services.

10.6 Not evidence

The payment of moneys to the Independent Monitor by the Project Parties is not evidence of the value of the IM Services provided, an admission of liability or evidence that the IM Services were executed properly but are paid on account only.

11. NOTIFICATION OF CLAIMS AND VARIATIONS

11.1 Variations

- (a) The Government may give a written direction entitled **Variation Direction** to the Independent Monitor to carry out a Variation. Subject to Clause 11.1(b), the Independent Monitor must comply with that direction. The Independent Monitor must not carry out a Variation except as directed by the Government under this Clause 11.1(a).
- (b) If the Independent Monitor believes a direction by the Government will involve a Variation, notwithstanding that it is not a 'Variation Direction', it must notify the Government accordingly within 2 (two) Business Days of receiving the direction and before complying with the direction. The Independent Monitor's notice must advise whether or not the direction constitutes a Variation and include the information required under Clause 11.2(b), if required. The Government may on receipt of the Independent Monitor's notice confirm or revoke the direction.
- (c) Subject to giving a notice in accordance with Clause 11.1(b), if applicable, and to any revocation of a direction under Clause 11.1(b), the Independent Monitor must continue to perform the IM Services in accordance with this Agreement and all directions, including any direction in respect of which notice has been given under this Clause, notwithstanding that the Independent Monitor has issued a notice under this Clause.

11.2 Prescribed notices

Without limiting Clause 11.1, if the Independent Monitor wishes to make a Claim (other than a claim for payment under Clause 10.2 for any part of the Professional Fee previously agreed or determined under this Agreement) against the Government under, arising out of, or in connection with, this Agreement, the IM Services or the Project, it must give the Government:

- (a) within 7 (seven) days of the first occurrence of the events on which the Claim is based, a notice by the Independent Monitor that it proposes to make the Claim and of the events upon which the Claim will be based; and
- (b) within 21 (twenty one) days of giving the notice under Clause 11.2(a), a written claim by the Independent Monitor including:
 - (i) detailed particulars concerning the events on which the Claim is based;
 - (ii) the legal basis for the Claim, whether based on a term of this Agreement or otherwise, and if based on a term of this Agreement, clearly identifying the specific term;
 - (iii) the facts relied upon in support of the Claim in sufficient detail to permit verification; and
 - (iv) details of the amount claimed and how it has been calculated.

11.3 Continuing events

If the events upon which the Claim under Clauses 11.1 or 11.2 is based or the consequences of the events are continuing, the Independent Monitor must continue to give the information required by Clause 11.2(b) every 28 (twenty eight) days after the written claim under Clauses 11.1 or 11.2(b) (as the case may be) was submitted or given, until after the events or the consequences have ceased.

11.4 Bar

If the Independent Monitor fails to comply with Clauses 11.1, 11.2 and 11.3 (as the case may be):

- (a) the Professional Fee will not be adjusted as a result of; and
- (b) the Government will not be liable upon any Claim by the Independent Monitor arising out of or in connection with,

the relevant direction or fact, matter or thing (as the case may be).

11.5 Cost of Variation

Subject to Clause 11.4, the Independent Monitor will be entitled to be paid the fee in respect of a Variation which shall be mutually agreed between the Government and the Independent Monitor.

11.6 Assistance in relation to technical advice

Subject to receipt of a Variation Direction, without limiting Clause 11.1, the Independent Monitor must if requested by the Government provide such specific technical advice, not otherwise required to be provided under this Agreement, on any matter relating to the Project within the time, in the form and covering such matters as may be required by the Government.

12. TERMINATION

12.1 Notice of breach

If the Independent Monitor commits a breach of this Agreement, the Government may give 10(ten) Business Days' notice to the Independent Monitor:

- (a) specifying the breach; and
- (b) directing its rectification within the period specified in the notice.

The Government will provide a copy of the notice to the Concessionaire for its information and knowledge of the breach in question and notice period availed to the Independent Monitor.

12.2 Termination for breach

If the Independent Monitor fails to rectify the breach within the period specified in the notice issued under Clause 12.1, the Government may, without prejudice to any other rights of the Project Parties, immediately terminate this Agreement.

12.3 Termination for insolvency

The Government may, without prejudice to any other rights which the Project Parties may have, terminate this Agreement immediately if an Insolvency Event occurs in relation to the Independent Monitor, whether or not the Independent Monitor is then in breach of this Agreement.

12.4 Termination for convenience

- (a) Notwithstanding anything to the contrary in this Agreement the Government may at any time, without prejudice to any other rights which the Project Parties may have, terminate this Agreement upon 10 (ten) Business Days' notice to the Independent Monitor and appoint another person to act as the independent monitor, subject to the terms of the Concession Agreement.
- (b) Notwithstanding anything to the contrary, if the Concession Agreement is terminated before the Term, then consequently this Agreement shall also stand terminated immediately.

12.5 Independent Monitor's rights upon termination as per Clauses 12.4

Upon a termination under Clause 12.4 the Independent Monitor will:

- (a) be entitled to be reimbursed by the Government:
 - (i) any amount already due to it (and not yet paid) under a payment claim submitted under Clause 10.2; and
 - (ii) a reasonable amount in respect of any work performed by it which is not covered by any such payment claim; and
- (b) be entitled to be reimbursed by the Concessionaire, any amount already due to it (and not yet paid) under a payment claim submitted in relation to Clause 10.4; and
- (c) not be entitled to make any other Claim against the Project Parties arising out of or in connection with the termination, this Agreement, the IM Services or the Project.

12.6 Procedure upon termination

- (a) Upon termination of this Agreement under Clauses 12.2, 12.3, or 12.4 or upon expiry of the Term, the Independent Monitor must (at its own cost):
 - (i) cooperate with the Project Parties and where required, the independent monitor appointed in place of the Independent Monitor;
 - (ii) hand to the Government's Representatives a copy of all Contract Material and all other information concerning the Project held by the Independent Monitor;
 - (iii) prepare and submit a written report to the Project Parties if requested by a Project Party covering the matters requested; and

- (iv) as and when reasonably required by the Project Parties' Representatives, meet with them and such other persons nominated by them with a view to providing them with sufficient information to enable the Project Parties to execute the Project or the persons nominated by them to provide the IM Services.
- (b) Prior to termination of this Agreement unless the Concession Agreement has also terminated, the Government must appoint another person to act as a replacement for the Independent Monitor on terms substantially similar to the terms of this Agreement, provided that there continue to be functions to be performed by the Independent Monitor under the Project Documents.

12.7 No Effect

Subject to Clause 12.5, nothing in this Clause 12 or that either Project Party does or fails to do pursuant to this Clause 12 will prejudice the right of that Project Party to exercise any right or remedy (including terminating this Agreement and or recovering damages) which it may have where the Independent Monitor breaches (including repudiates) this Agreement.

13. DISPUTE RESOLUTION

13.1 Amicable Settlement

In the event of any dispute, controversy or claim arising out of, relating to, or in connection with this Agreement, or the formation, existence, negotiation or interpretation of this Agreement, or the breach, termination, validity or enforceability of this Agreement (a **Dispute**), the representatives of the parties shall, within 10 (ten) Business Days of service of a written notice from one party to the other parties (**Dispute Notice**) hold a meeting (**Dispute Meeting**) in an effort to resolve the Dispute in good faith. In the absence of any agreement to the contrary, the Dispute Meeting shall be held at a mutually agreed venue in Suva, Fiji or any other location in Fiji, as mutually agreed by the parties.

13.2 Dispute Resolution by Arbitration

- (a) If a Dispute is not resolved within 20 (twenty) Business Days, or any such extended period as may be agreed upon between the parties, after the service of a Dispute Notice, whether or not a Dispute Meeting has been held, the relevant party to the Dispute shall be entitled to refer the Dispute to be finally settled by arbitration (**Notice of Arbitration**). This Agreement and the rights and obligations of the parties shall remain in full force and effect pending the award in such arbitration proceeding.
- (b) Unless otherwise agreed by the parties, the Dispute shall be determined by a sole arbitrator to be jointly appointed by the parties, and if the parties are unable to jointly appoint a sole arbitrator within 20 (twenty) Business Days from the date of service of the Notice of Arbitration, then the Chief Justice shall appoint a sole arbitrator (**Tribunal**). Each party shall be entitled to appoint an assessor to sit with the sole arbitrator but the sole arbitrator alone shall adjudicate the Dispute. The procedure in relation to the arbitration shall be governed by the provisions of the Arbitration Act.
- (c) ***Seat, Venue, Language and Rules of Arbitration***

The seat of the arbitration shall be Suva, Fiji. The parties are free to choose a venue which

may be convenient for different stages of the arbitration proceedings. The language of the arbitration shall be English. The arbitration shall be conducted in accordance with the arbitration law of the Republic of Fiji.

- (d) The award shall be rendered within 3 (three) months of the appointment of the Tribunal, unless the parties hereto agree that such limit be extended or the Tribunal, considering the nature of the Dispute, determines that such limit must be extended.
- (e) The arbitration award shall be final and binding on the parties hereto and the parties hereto hereby irrevocably waive their right to any form of appeal, review or recourse in so far as such waiver may be validly made.

13.3 Survival

The provisions contained in this Clause 13 shall survive the termination of this Agreement.

13.4 IM Services to continue

The Independent Monitor must continue to perform the IM Services in accordance with this Agreement notwithstanding the existence of a dispute referred to in Clause 13.1.

14. SEVERAL LIABILITY

- (a) Notwithstanding any other provision of this Agreement, the liability of the Project Parties under this Agreement is several and is not joint or joint and several.
- (b) If a provision of this Agreement binds two or more parties, that provision binds those parties severally and not jointly or jointly and severally.

15. NOTICES

- (a) Any notice or request in reference to this Agreement shall be written in the English language and shall be sent by e-mail, registered post or courier and shall be directed to the other party at the address mentioned below:

Government:

Attention: The Permanent Secretary for Economy

Address: Level 10, Ro Lalabalavu House,
370 Victoria Parade, Suva, Fiji

Tel: (679) 330 7011

E-mail: pppinfo@govnet.gov.fj

Concessionaire:

Attention: Mr. Paul Dyer

Address: C/- Lautoka Hospital, Hospital Road, Lautoka. Fiji
P.O. Box 131, Lautoka. Fiji.

Tel: (679) 998 4554

Email: pdyer@aspenmedical.com.fj

Independent Monitor:

Attention: [•]

Address: [•]

Tel: [•]

Email: [•]

- (b) Subject to Clause 15(c), a notice is received:
 - (i) in the case of delivery by hand, on delivery;
 - (ii) in the case of prepaid registered post, on the date of receipt of the registered post; and
 - (iii) in the case of e-mail, on delivery to the recipient's server and provided no error message is received by the sender.
- (c) Any notice received on a day that is not a Business Day, or after 17.00 hours local time at the recipient's location on a Business Day, is deemed received at 09.00 hours local time at the recipient's location on the following Business Day.
- (d) Each party may change the above address by prior written notice to the other parties. Provided however, that if a party fails to notify the other parties of such change in address, then any notice under this Agreement shall be sent at the earlier notified address.

16. GENERAL

16.1 Entire Agreement

The parties acknowledge, confirm and undertake that this Agreement and the Concession Agreement constitute the entire understanding between the parties regarding the rights and duties of the Independent Monitor and supersedes all previous written or oral representations and/or arrangements regarding such subject matter between the parties.

16.2 IM's Bid

- (a) The Independent Monitor must comply with any promises or representations made by it in the IM's Bid for the IM Services.
- (b) Without limiting the foregoing, the IM's Bid will not form part of this Agreement and nothing in the IM's Bid will limit, reduce or in any way modify the obligations of the parties

as set out in this Agreement except where directed or required by the Project Parties' Representatives under Clause 16.2(a).

16.3 Negation of employment

- (a) The Independent Monitor, its officers, employees, servants and agents and any other persons engaged by the Independent Monitor in the performance of the IM Services will not by virtue of this Agreement or the performance of the IM Services become in the service or employment of the Project Parties for any purpose.
- (b) The Independent Monitor will be responsible for all matters relating to its position as employer or otherwise in relation to such officers, employees, servants and agents and other persons who are so engaged.

16.4 Waivers and Consents

- (a) Any provision or breach of any provision of this Agreement may be waived before or after it occurs only if evidenced by an agreement in writing signed by the parties.
- (b) Any consent under or pursuant to any provision of this Agreement must also be in writing and given prior to the event, action or omission for which it is sought.
- (c) Any such waiver or consent may be given subject to any conditions thought fit by the party giving it and shall be effective only in the instance and for the purpose for which it is given.

16.5 Amendments

Any provision of this Agreement may be amended, supplemented or modified only by an agreement in writing signed by the parties.

16.6 Assignment

Except as expressly contemplated by this Agreement, the Independent Monitor may not assign or transfer any of its rights or obligations under this Agreement or as set out in the Concession Agreement.

16.7 Attorneys

Each of the attorneys executing this Agreement states that they have no notice of the revocation of their power of attorney.

16.8 Governing law

This Agreement shall be governed by and construed in accordance with the laws of the Republic of Fiji, and subject to the provisions contained in Clause 13, shall be subject to the exclusive jurisdiction of the courts in the Republic of Fiji.

16.9 Confidentiality

- (a) The Independent Monitor must ensure that:

- (i) neither it nor any of its officers, employees, servants and agents disclose, or otherwise make public, any Contract Material or any other information or material acquired in connection with or during the performance of the IM Services without the prior approval of the Project Parties; and
 - (ii) no Contract Material or any other information is used, copied, supplied or reproduced for any purpose other than for the performance of the IM Services under this Agreement.
- (b) The Project Parties may at any time require the Independent Monitor to give and to arrange for its officers, employees, servants and agents engaged in the performance of the IM Services to give written undertakings, in the form of confidentiality deeds on terms required by the Project Parties, relating to the non-disclosure of confidential information under Clause 16.9(a).
- (c) The Independent Monitor must promptly ensure for all undertakings under Clause 16.9(b) to be given.

16.10 Contract Material

- (a) All Contract Material falling within paragraph (a) of the definition of Contract Material remains the property of the Project Party providing the Contract Material.
- (b) The Independent Monitor retains any Intellectual Property Rights in any original ideas, equipment, processes or systems created outside the terms of this Agreement and used in performing the IM Services.
- (c) Subject to Clauses 16.10(a) and 16.10(b), all Intellectual Property Rights in respect of any Contract Material vests in the party which created it.

16.11 Waiver of sovereign immunity

The Government unconditionally and irrevocably:

- (a) agrees that the execution, delivery and performance by it of this Agreement constitutes commercial acts done and performed for commercial purpose;
- (b) agrees that, should any proceedings be brought against it or its assets, property or revenues in any jurisdiction in relation to this Agreement or any transaction contemplated by this Agreement, no immunity (whether by reason of sovereignty or otherwise) from such proceedings shall be claimed by or on behalf of the Government with respect to its assets; and
- (c) consents to the enforcement of any judgment or award against it in any such proceedings.

16.12 Intellectual Property Indemnity

The Independent Monitor will indemnify and keep indemnified the Project Parties, and persons authorised by the Project Parties (**Indemnified Persons**), against any Claim or liability, whether

direct or indirect, arising out of a Claim by a third party that the use of any Contract Material falling within paragraph (b) of the definition of Contract Material by the Indemnified Persons, or the use of any Intellectual Property licensed by the Independent Monitor to the Indemnified Persons in accordance with this Agreement, infringes any Intellectual Property Rights or Moral Rights.

16.13 Further obligations

The Independent Monitor must:

- (a) collect, use, disclose, store or otherwise handle personal information in a manner as directed by the Government and where required, the Concessionaire from time to time, provided that the direction does not cause the Independent Monitor to breach any legislation, principle, industry codes or policies by which the Independent Monitor is bound; and
- (b) consult with the Government and where required, the Concessionaire in developing any code of practice in connection with discharging its duty to comply with the Applicable Laws relating to data privacy and ensure that the code of practice satisfies the requirements of the Concession Agreement.

16.14 Further assurance

Each party must sign, execute, deliver and do all such acts and things as may reasonably be required of it to carry out and give full effect to the Project Documents and the rights and obligations of the parties to them.

16.15 Counterparts

This Agreement shall be executed in three counterparts, and each executed counterpart has the same force and effect as an original instrument.

16.16 Surviving Provisions

- (a) An indemnity given under this Agreement survives the termination of this Agreement.
- (b) The obligations of the parties under Clauses 16.9, 16.10, 16.11, and 16.12, and any obligations which are expressed to survive termination of this Agreement, will survive the termination of this Agreement.
- (c) Any rights or obligations accrued as a result of a breach of this Agreement survive termination of this Agreement.

16.17 Severability of provisions

- (a) If any provision of this Agreement is or becomes illegal, invalid or unenforceable in any respect under any Applicable Law, the legality, validity or enforceability of the remaining provisions will not, in any way, be affected or impaired.

- (b) The parties shall negotiate in good faith with a view to agreeing one or more provisions which may be substituted for any such invalid, illegal or unenforceable provision and which produce as nearly as is practicable in all the circumstances the appropriate balance of the commercial interests of the parties.

16.18 Contra proferentem

In the interpretation of this Agreement, no rule of construction applies to the disadvantage of one party on the basis that it put forward this Agreement or any part of it.

16.19 Cost of performing obligations

A party who has an obligation to do anything under this Agreement must perform that obligation at its own cost and expense, unless a provision of this Agreement expressly provides otherwise.

16.20 Representations and warranties

Each party represents and warrants to each other party that:

- (a) it has the power to execute, deliver and perform its obligations under or as contemplated by this Agreement and all necessary action has been taken to authorise its execution, delivery and performance;
- (b) this Agreement constitutes its valid and binding obligations enforceable against it in accordance with its terms, subject to applicable bankruptcy, reorganisation, insolvency, moratorium or similar laws affecting creditors' rights generally and subject to the availability of equitable remedies; and
- (c) the execution by it of, the performance by it of its obligations under, and the compliance by it with the provisions of, this Agreement does not and will not contravene any existing Applicable Law to which it is subject.

16.21 Relationship of the Government, Concessionaire and Independent Monitor

Nothing in, or contemplated by, this Agreement will be construed or interpreted as:

- (a) constituting a relationship between the Government and the Independent Monitor or Concessionaire, or any other person, of partners, joint venturers, fiduciaries, employer and employee or principal and agent;
- (b) imposing any general duty of good faith on the Government, the Independent Monitor or Concessionaire or any of their Associates in relation to or arising out of the Project, other than where this is expressly stated to be the case under the terms of the Concession Agreement and this Agreement.

SCHEDULE 1

CONTRACT PARTICULARS

1. Particulars

| Item | Reference | Details | |
|------|---|--|--------------------------------------|
| 1. | Government's Representative (Definitions) | [•] | |
| 2. | Independent Monitor's Representative (Definitions) | [•] | |
| 3. | Concessionaire's Representative (Definitions) | [•] | |
| 5. | Term (Definitions) | Subject to the terms of Clause 12, the period beginning on the date of this Agreement until the 5 th (fifth) anniversary of the Lautoka Hospital Commercial Completion Date | |
| 6. | Professional Indemnity Insurance (Clause 9.1(a)) | Amount equivalent to Total Contract Value | |
| 7. | Public Liability Insurance (Clause 9.2) | Amount equivalent to Total Contract Value | |
| 8. | Payment terms in respect of the Professional Fee (Clause 10.1(a)) | From the date of execution of this Agreement until the achievement of the Lautoka Hospital Commercial Completion Date | Construction Period Professional Fee |
| | | From the next date onwards from the Lautoka Hospital Commercial Completion Date until the end of the Term | O&M Period Professional Fee |

2. Key people

(a) **In-house Expert:** [•]

(b) **Expert(s):** [•]

SCHEDULE 2

Independent Monitor Terms of Reference

1 Scope

- 1.1 These terms of reference for the Independent Monitor (**IM ToR**) are being specified pursuant to the Concession Agreement dated 17 January 2019 (**Agreement**), which has been entered into between the Government and Health Care (Fiji) Pte Limited (**Concessionaire**) for the upgradation, development, operation and maintenance of the Lautoka Hospital and the Ba Hospital (**Project Hospitals**), and a copy of which is annexed hereto and marked as Annexure A to form part of this IM ToR.
- 1.2 This IM ToR shall apply to the Independent Monitor appointed for the Project.

2 Definitions and interpretation

- 2.1 In this IM ToR, unless the context otherwise requires, capitalised terms shall have the meaning given to them in the Agreement.
- 2.2 References to Clauses and Schedules in this IM ToR shall, except where the context otherwise requires, be deemed to be references to the Clauses and Schedules of the Agreement, and references to Paragraphs shall be deemed to be references to Paragraphs of this IM ToR.
- 2.3 The rules of interpretation stated in Clause 1.2 of the Agreement shall apply, *mutatis mutandis*, to this IM ToR.

3 Appointment, role and functions of the Independent Monitor

- 3.1 The Independent Monitor shall be appointed by the Government in accordance with the Agreement. In performing its role and carrying out its duties and responsibilities, the Independent Monitor shall work collaboratively with both parties to the Concession Agreement and should endeavour to form an effective positive working relationship with both the Concessionaire and the Government. The remuneration, cost and expenses of the Independent Monitor shall be solely borne and paid by the Government.
- 3.2 The role and functions of the Independent Monitor shall include the following:
- (a) review of the Designs and Drawings as set forth in Paragraph 4;
 - (b) review compliance, monitor, and where required in the Agreement and this IM ToR, approve environmental and social requirements and documentation and related implementation associated with the design, construction, and Operations and Maintenance of the Project Hospitals and Services to assess compliance by the Concessionaire and the Government with the Agreement (and its Schedules), Applicable Laws, the E&S Standards and GIIP;
 - (c) review and approve the Project Hospital Environmental Study Reports and all sub plans and procedures before their implementation, in accordance with the Applicable Laws, the E&S Standards and other requirements set out in the Agreement;

- (d) review qualifications of the selected L&FS Engineer hired by the Concessionaire, taking into account GIIP;
- (e) if land acquisition, and/or land clearing, and/or involuntary resettlement (physical and economic displacement) will result in respect of the Project Hospital, then the land acquisition and involuntary resettlement process including its implementation and related documentation, shall be reviewed by the Independent Monitor to verify that the activities are designed and implemented in accordance with Applicable Laws and the E&S Standards, whichever is more stringent. In case of non-compliance with the Applicable Laws and the E&S Standards, the Independent Monitor shall define corrective actions and timeline for implementation and then certify that these have been correctly implemented;
- (f) in the event of pre-existing land contamination at the Lautoka Hospital Site, the Independent Monitor shall direct the Concessionaire to undertake the Lautoka Hospital Land Contamination Assessment, and the Independent Monitor shall review compliance, define corrective actions and timelines, and approve the Lautoka Hospital Land Contamination Remediation Plan and review, monitor and approve its compliance by the Concessionaire, before the commencement of the Construction Works in respect of Lautoka Hospital;
- (g) review, inspection and monitoring of Construction Works as set forth in Paragraph 4;
- (h) inspect the Project Hospitals and oversee tests on completion of the Construction Works and issue the IM Completion Certificate as set forth in Paragraph 4;
- (i) review, inspection and monitoring of O&M Period as set forth in Paragraph 5;
- (j) determining, as required under the Agreement, the costs of any Construction Works or Services and/or their reasonableness;
- (k) determining, as required under the Agreement, the period or any extension thereof, for performing any duty or obligation;
- (l) assisting the Parties in resolution of disputes as set forth in Paragraph 8;
- (m) undertaking all other duties and functions in accordance with the Agreement;
- (n) review the data and information provided by the Concessionaire in accordance with this IM ToR;
- (o) monitor the compliance of the Concessionaire with its responsibilities under the Concession Agreement;
- (p) monitor the safety aspects of the Project Hospitals;
- (q) monitor the quality of Services provided at the Project Hospitals in accordance with the performance obligations set out in the Agreement and notify both parties of compliance and non-compliance;

- (r) monitor the equipment and staff employed at the Project Hospitals in accordance with the performance obligations set out in the Agreement and notify both parties compliance and non-compliance; and
- (s) review, inspection and monitoring of Hand-back Requirements and Hand-back Conditions as set forth in Paragraph 6,

in each case in accordance with the terms of the Agreement, Applicable Law, E&S Standards and GIIP.

- 3.3 The Independent Monitor shall discharge its duties in a fair, impartial and efficient manner, consistent with the highest standards of professional integrity, provisions of the Agreement and GIIP.

4 Construction Period and Observation Period

- 4.1 The Independent Monitor shall within 10 (ten) Business Days of the Concessionaire submitting the Project Hospital Asset Registers notify to the Concessionaire (with a copy to the Government): (i) any inaccuracies in the relevant Project Hospital Asset Register; or (ii) its acceptance of the contents of the Project Hospital Asset Register.
- 4.2 The Independent Monitor shall participate in consultations to resolve disagreements regarding the contents of the Project Hospital Asset Registers.
- 4.3 During the Construction Period, the Independent Monitor shall undertake a detailed review of the Designs and Drawings to be furnished by the Concessionaire. The Independent Monitor shall complete such review and send its comments/observations to the Government and the Concessionaire within 20 (twenty) Business Days of receipt of such Designs and Drawings. In particular, such comments shall specify the conformity or otherwise of such Designs and Drawings with the Specifications and Standards, the Applicable Laws, the Applicable Permits, the E&S Standards, the Best Construction Practices and the other provisions of the Agreement relevant to the design of the Project Hospitals.
- 4.4 The Independent Monitor shall review any modified Designs and Drawings sent to it by the Concessionaire and furnish its comments within 10 (ten) Business Days of receiving such Designs and Drawings.
- 4.5 The Independent Monitor shall review the progress report furnished by the Concessionaire once every 2 (two) months in accordance with the terms of the Agreement.
- 4.6 During the Construction Period, the Independent Monitor shall inspect the Project Hospitals, at least once a quarter and prepare an Inspection Report stating in reasonable detail the defects or deficiencies, if any, in the Construction Works from the requirements set out in the Agreement and with particular reference to the Specifications and Standards. The Independent Monitor shall send a copy of the Inspection Report to the Government and the Concessionaire within 5 (five) Business

Days of such inspection and upon receipt thereof, the Concessionaire shall Rectify and Repair the defects or deficiencies, if any, stated in the Inspection Report.

- 4.7 During the Lautoka Hospital Construction Period, the Independent Monitor shall inspect the construction areas semi-annually to verify that the activities are implemented in accordance with the E&S Standards, Lautoka Hospital ESIA Report, and environment & safety obligations contained in the Lautoka Hospital ESMP and verify that the standard operating procedures and good management practices are followed (in particular, but not limited to, OHS procedures and labour and working conditions).
- 4.8 For determining whether the Completion Conditions for a Project Hospital have been satisfied, the Independent Monitor shall inspect the Project Hospital upon receiving a notice from the Concessionaire in this regard and instruct and inspect the tests to be carried out in accordance with the Agreement. The Independent Monitor shall issue necessary directions to the Concessionaire for ensuring that the tests are conducted in a fair and efficient manner, and shall monitor and review the results thereof.
- 4.9 If the Independent Monitor is of the opinion that any of the Completion Condition has not been satisfied or if the Independent Monitor is not satisfied with the results of the tests or inspection, then the Concessionaire shall remedy any such defects or deficiencies in the Project Hospital as identified by the Independent Monitor or revealed through the tests and/or satisfy the relevant Completion Conditions identified by the Independent Monitor and the Project Hospital shall be re-inspected and re-tested upon Rectification and Repair of such defects or deficiencies and/or satisfaction of the relevant Completion Condition. This process shall be repeated until such time that the Independent Monitor is satisfied: (i) that all Completion Conditions have been achieved; and (ii) with the results of the tests and inspection of the Project Hospitals, in accordance with the Agreement.
- 4.10 If the Independent Monitor is satisfied: (i) that all Completion Conditions have been achieved; and (ii) with the results of the tests and inspection of the Project Hospitals, then within 5 (five) Business Days from the date of inspection and testing of the relevant Project Hospital, the Independent Monitor shall issue the IM Completion Certificate.
- 4.11 In the event that the Concessionaire carries out any Rectification and Repair, the Independent Monitor shall require the Concessionaire to carry out, or cause to be carried out, tests to determine that such remedial works have brought the Construction Works in conformity with the Specifications and Standards, and the provisions of this Paragraph 4 shall apply to such tests.
- 4.12 In the event that Construction Works for a new wing or building of a Project Hospital are completed prior to the Project Hospital CCD, then the Independent Monitor shall, subject to compliance with the terms of the Agreement, issue a no-objection certificate for the use of such new wing or building including certification that such new wing or building is Fit for the Intended Purposes in accordance with the Agreement.

- 4.13 Independent Monitor shall also be required to perform all obligations as set out in the Agreement in relation to the Student Hostel Building, including issuance of Student Hostel Building Completion Certificate.
- 4.14 To the extent not specifically set out in this Schedule, the Independent Monitor shall perform all such activities, functions and obligations as set out in the Agreement in relation to the Construction Period and Observation Period.

5 O&M Period

- 5.1 No earlier than 20 (twenty) Business Days prior to the end of the Transition Phase, the Concessionaire shall demonstrate to the reasonable satisfaction of the Independent Monitor that all Transition Phase Completion Conditions have been fulfilled. If the Independent Monitor is satisfied that all the Transition Phase Completion Conditions have been achieved, then within 5 (five) Business Days from the date of the notice issued by the Concessionaire in this regard in accordance with the terms of the Agreement, the Independent Monitor shall issue the Transition Phase Completion Certificate.
- 5.2 Independent Monitor shall also be required to perform all obligations as set out in the Agreement in relation to Transition Phase Construction Obligations, including issuance of Transition Phase Construction Obligations Completion Certificate.
- 5.3 The Independent Monitor shall receive and keep in safe custody copies of the Maintenance Manuals submitted by the Concessionaire in accordance with the Agreement. This duty shall apply to any revised and updated Maintenance Manuals furnished by the Concessionaire as well.
- 5.4 The Independent Monitor shall inspect each of the Project Hospitals at least once a quarter and submit the O&M Inspection Report stating in reasonable detail the defects or deficiencies, if any, with particular reference to the relevant Service Level Standards, and send a copy thereof to the Government and the Concessionaire within 5 (five) Business Days of such inspection.
- 5.5 The Concessionaire shall Rectify and Repair the defects or deficiencies, if any, set forth in the O&M Inspection Report and furnish a report in respect thereof to the Independent Monitor and the Government within 10 (ten) Business Days of receiving the O&M Inspection Report; provided that where the remedying of such defects or deficiencies is likely to take more than 10 (ten) Business Days, the Concessionaire shall submit progress reports of the Rectification and Repair works once every week until such works are completed in conformity with the Agreement.
- 5.6 The Independent Monitor shall issue the Payment Certificate in accordance with the terms of the Agreement.
- 5.7 The Independent Monitor, shall annually until 1 (one) year post the starting of the O&M Period for each of the Project Hospitals, review the environment & safety management, and the monitoring and reporting undertaken by the Concessionaire. In this regard, the Independent Monitor shall particularly review that:

- (a) procedures for handling medical waste and hazardous materials are known by responsible staff and correctly applied;
- (b) there is a proper record of waste generated, the facilities used for its treatment and disposal, and their permit is valid;
- (c) procedures in case of contingency/emergency are in place and known by responsible staff, and L&FS Standards are duly followed; and
- (d) complaints, if any, recorded in the Complaint Register, have been duly addressed.

At the end of the above specified period, in respect of each Project Hospital, the Independent Monitor shall assess and issue a report indicating whether:

- (a) the E&S Standards are duly followed and the Concessionaire has in place adequate procedures and practices to manage any environment & safety related risks and impacts; and
- (b) monitoring/enforcement by the competent authorities sufficiently covers the environment & safety related aspects of the Project Hospitals.

If both of the above conditions are met in respect of each of the Project Hospital, then there will be no need of further annual review to be conducted by the Independent Monitor. If at least one of the two conditions specified above is not met in any of the Project Hospital, then the Parties will agree on a review plan for the remaining years of the O&M Period in respect of such Project Hospital based on the risks associated to it.

- 5.8 To the extent not specifically set out in this Schedule, the Independent Monitor shall perform all such activities, functions and obligations as set out in the Agreement in relation to the O&M Period.

6 Duties on termination or Expiry of the Agreement

- 6.1 No later than 20 (twenty) Business Days from the Termination Date or 6 (six) months prior to the Expiry Date, as the case may be, the Government shall cause the Independent Monitor to carry out a survey of the Project Hospitals, to assess whether they have been maintained by the Concessionaire in accordance with its obligations under the Agreement, and are in working condition in accordance with the Hand-back Conditions.
- 6.2 If the survey carried out by the Independent Monitor shows that the Concessionaire has not or is not complying with its obligations under the Agreement, then the Independent Monitor shall notify the Concessionaire (with a copy to the Government) of the Rectification and Repair and/or maintenance work which is required to ensure that the condition of the Project Hospital, is restored to the Hand-back Conditions.

Upon completion of the Rectification and Repair and/or maintenance work as mentioned in Paragraph 6.2, the Concessionaire shall request the Independent Monitor to carry out a final survey and inspection of the Project Hospitals. The Independent Monitor shall carry out the final survey within 5 (five) Business Days of receipt of a notice from the Concessionaire in this regard in

accordance with the terms of the Agreement.

- 6.3 If the Independent Monitor is satisfied with the results of the final survey, then the Independent Monitor shall notify the Concessionaire and the Government within 5 (five) Business Days of carrying out the final survey that the Project Hospitals, comply with the Hand-back Conditions. If the Independent Monitor is not satisfied with the results of the final survey, then the Independent Monitor shall be required to estimate the cost of restoring the Project Hospitals to the Hand-back Conditions and notify the estimate to the Government and the Concessionaire.

7 Determination of costs and time

- 7.1 The Independent Monitor shall determine the costs, and/or its reasonableness, that are required to be determined by it under the Agreement.
- 7.2 The Independent Monitor shall determine the period, or any extension thereof, that is required to be determined by it under the Agreement.

8 Assistance in Dispute resolution

- 8.1 When called upon by either Party in the event of any Dispute, the Independent Monitor shall mediate and assist the Parties in arriving at an amicable settlement.
- 8.2 In the event of any disagreement between the Parties regarding the meaning, scope and nature of GIIP, as set forth in any provision of the Agreement, the Independent Monitor shall specify such meaning, scope and nature by issuing a reasoned written statement relying on good industry practice and authentic literature.

9 Other duties and functions

The Independent Monitor shall perform all other duties and functions specified in the Agreement.

10 Qualifications

- 10.1 The Independent Monitor shall have the required qualifications, expertise and technical competencies to carry out its duties and its responsibilities at a standard considered reasonable for a qualified person for an assignment of this nature. This includes but not limited to expertise in the following areas:
- (a) hospital construction including the review of designs, drawings and layout of facilities, engineering and costing, evaluation of building compliance with relevant standards and specifications;
 - (b) monitoring and reporting of progress and performance of larger contracts and experience with PPP concession agreements;
 - (c) monitoring and/or management of multispeciality and tertiary referral hospitals including both clinical and non-clinical services and monitoring of prescribed service level standards for patients and medical equipment;

- (d) understanding of Diagnosis Related Group (DRG) based classification and costing of health services; and

professionally qualified in all aspects regarding environmental and social (**E&S**) risk and impact assessment and management and E&S aspects associated with the design, construction and operation and maintenance of health facilities. The Independent Monitor shall have demonstrated in its previous experience as an independent E&S monitor/engineer for at least 5 (five) years its skill in reviewing, and monitoring environment and social impact assessments, environment and social management systems, effectiveness and relevant management plans prepared in accordance with the E&S Standards.

11 Miscellaneous

- 11.1 The Independent Monitor shall notify its programme of inspection to the Government and to the Concessionaire, who may, in their discretion, depute their respective representatives to be present during the inspection.
- 11.2 A copy of all communications, comments, instructions and, Design and Drawings sent by the Independent Monitor to the Concessionaire pursuant to this IM ToR, and a copy of all the test results with comments of the Independent Monitor thereon shall be furnished by the Independent Monitor to the Government forthwith.
- 11.3 The Independent Monitor shall obtain, and the Concessionaire shall furnish in 2 (two) copies thereof, all communications and reports required to be submitted, under this IM ToR, by the Concessionaire to the Independent Monitor, whereupon the Independent Monitor shall send 1 (one) of the copies to the Government along with its comments thereon.
- 11.4 The Independent Monitor shall retain at least 1 (one) copy each of all Designs and Drawings received by it, including “as-built” drawings, and keep them in its safe custody.
- 11.5 Upon completion of its assignment hereunder, the Independent Monitor shall duly classify and list all Design and Drawings, documents, results of tests and other relevant records, and hand them over to the Government or such other person as the Government may specify, and obtain written receipt thereof. Two copies of the said documents shall also be furnished in micro film form or in such other medium as may be acceptable to the Government.
- 11.6 In the event of any discrepancy between this Schedule and the Agreement, the provisions set out in the Agreement shall prevail.

12 Clarification: Base Line study will not form part of the scope of IM services.

- 12.1 It is hereby clarified that the requirement to conduct Base Line Study by the Independent Monitor as specified in the Concession Agreement (at Clause 3.3(c) of the Concession Agreement) will not form part of the scope of work for the Independent Monitor. The condition precedent at Clause 3.3(c) of the Concession Agreement has been waived by the Government and will not be required to be performed under the terms of the Concession Agreement.

ANNEX 1

IM'S BID

[•]

ANNEX 2

CONCESSION AGREEMENT

(enclosed separately)

SIGNATURE PAGE

IN WITNESS HEREOF, the below mentioned parties have hereunto set their hands on the day month and year first hereinabove mentioned.

GOVERNMENT OF THE REPUBLIC OF FIJI

Authorised Signatory

Name:

Designation:

HEALTH CARE (FIJI) PTE LIMITED

Authorised Signatory(ies):

Name:

Designation:

[.][*insert name of the Independent Monitor*]

Authorised Signatory(ies):

Name:

Designation: