APPENDIX A

ABHI concerns with existing NHS SC T&Cs
(excerpts from letter to NHS SC, dated 14th March 2008)

Contract price and payment

Clause 4.3 requires the Contractor to keep the Contract Price and any variation of it confidential. Suppliers are not allowed, therefore, to disclose to any Trust or third party, the price at which they sell to the Authority, unless prior written consent is given.

We object to this on the basis that it renders pricing by the Authority completely non-transparent. If the Contract Price remains confidential then there is no way for the Trusts to determine whether supplier discounts have been passed on to them.

Clause 4.8 fails to satisfactorily determine the due date for payments as it refers to 45 days “if the Authority or such Beneficiary so chooses”. In our view this provision is unreasonable and does not comply with the Late Payment Directive or the UK Late Payment of Commercial Debts (Interest) Act 1998 which implements it.

We suggest the payment term should be 30 days (as per the Late Payment Directive) but that this could be extended to up to 45 days where the parties agree ‘In Writing’.

NHS Supply Chain is an agent of an NHS body. As such, it would be reasonable to expect that the same fair terms of trade would apply as are promoted by HM Treasury and the Office of Government Commerce across the public sector generally. This is particularly relevant to SMEs with respect to the need to agree the term above in 4.8.

The OGC Guide to best ‘Fair Payment’ practices, published last year, was developed “To ensure effective and equitable cash flow for all those involved, all contracts will provide for regular payments and have payment periods not exceeding 30 days”. We see no reason why such a principle would not apply across the public sector generally.

The provision at Clause 4.8 is particularly unreasonable given that the penalty rate of interest proposed at Clause 4.14 is merely 4% above base rate. This represents half that fixed under the UK’s Late Payment of Commercial Debts (Interest) Act (8%).

In our view the interaction of Clauses 4.7 and 4.14 means that the conditions of contract fail to provide either a substantial remedy to suppliers for late payment and/or any effective deterrent for the Authority/Beneficiary not to delay payment.

We therefore propose, in addition to the changes regarding the due date for payment, that the interest provision be raised to the statutory rate of 8% above Bank of England base rate as determined from time to time.

Clause 4.15 provides that the Contract Price shall not be subject to any increase during the Contract Period. This does not take into account any unforeseen increases in input prices as a result of an event entirely beyond the supplier’s reasonable control. We would like an additional sentence to be inserted here to reflect that.

We suggest: “For the avoidance of doubt nothing in the Clause 4.15 shall preclude the Contractor from increasing the Contract Price during the Contract Period in connection with the occurrence of a Force Majeure Event”.

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Clause 4.18 provides, firstly, that "the Contractor agrees that it shall lower its prices or increase any discount applicable to the purchase of the Goods/Services as necessary to ensure market competitiveness".

What constitutes “market competitiveness” is ominously vague but the clause could be interpreted as requiring small and medium sized suppliers to match the price of larger suppliers which because of economies of scale are in a better position to offer bigger discounts.

With the market share that you currently have, neither our members nor this association can see how this condition can be justified. The potential consequences are very considerable and we doubt that the risks are fully understood by either the NHS or the Department of Health.

Taken together with the additional management and listing fees that NHS Supply Chain is reported by our members to be demanding, your role as an intermediary appears likely to have a range of long-term and undesirable effects not least the foreclosure of the market to small and medium sized firms who will be unable to absorb these additional costs, match the discount of larger suppliers and still continue to trade.

Secondly, Clause 4.18 provides that if the Contractor offers a lower price/discount to any other buyer the Authority is entitled to benefit automatically from a matching price/discount in respect of the Contract purchases. This has serious implications from both a commercial and a competition perspective. First, it creates a powerful disincentive on suppliers to discount and distorts the market by aligning prices on the buyer side. Second, the condition constitutes an inappropriate fetter on the suppliers’ right to negotiate freely other contracts. And third, it is likely to open up all manner of disputes in relation to the procurement of medical devices, which is complex and does not lend itself to list pricing.

Quality

Clause 13.1 states that "goods should be of first class quality...". What is first class? This should be clarified in relation to devices or medicines to state that goods must comply with the specification and legal requirements only. Otherwise it introduces an ambiguous non-objective, non-legal standard.

Innovative Products

Clause 15 sets a number of conditions in respect of 'innovative technology' (defined term). These are problematic in several ways:

- The exchange requirement and downward price pressure will tend to stifle the market and discourage entry for innovative products. This is likely to produce the opposite effect to what NHS Supply Chain intends and is certainly the opposite from what the NHS needs. This is particularly the case in the devices sector as, in contrast to the pharmaceutical sector:
  - pricing for medical device technology is generally highly competitive and rarely fixed before it enters the market;
  - there is very limited patent protection.

If therefore NHS healthcare is to continue to benefit from a stream of technological innovation, encouraging return on investment for manufacturers is important. Several manufacturers have withdrawn innovative products from the UK already, in other price-sensitive contexts, or are not selling those products into the UK.
– The terms depend on a non-objective standard (“product offerings that offer clinically proven incremental patient care, worker care or safety benefits”) which is subjectively determined by NHS Supply Chain or by a range of other DH agencies. This is unacceptably unclear, and is likely to lead to disputes in practice given the relatively underdeveloped state of health technology assessment for medical device technology. It is also likely to stifle innovation. This is not a small issue.

– There is also a suggestion that the contract can be terminated unless the contractor can upgrade the specification. The implication here is that if a new product comes along then the Authority is allowed to terminate the existing contract even though the contractor has supplied in good faith against a specification which was agreed at the time.

**Limitation of Liability and Insurance**

**Clause 19.2** sets the limit of £5m for any one incident in any one ‘Year’ (defined term).

This is problematic in the extreme for small companies which are unlikely to be able to secure the insurance for this risk which is required under Clause 20, taking into account that several different incidents could occur during a single ‘Year’ and that losses from a single incident could accrue across two Years resulting in insurance pay-outs each Year. These provisions arbitrarily and unilaterally change the previous NHS standard T&Cs.

**Arrangements on termination**

The **Clause 26** requirements concerning document retention, are mere irritants in comparison with the scale of concern about the points above but they are regarded as serious by our members. They impose a long-term administrative burden (which will prove onerous for many SMEs) and also raise concerns regarding the security and confidentiality of such documents where these may contain proprietary information but are required to be delivered up to the Authority/Beneficiaries.