

**SCHEDULE 5-1**

**CONSTRUCTOR'S COLLATERAL AGREEMENT**

**THIS AGREEMENT** is made as of the \_\_\_\_\_ day of December, 2004

**AMONG:**

**ABBOTSFORD HOSPITAL AND CANCER CENTRE INC.**, a company incorporated under the laws of British Columbia

("Health Co")

**AND:**

**PCL CONSTRUCTORS WESTCOAST INC.**, a company incorporated under the laws of Alberta

("Constructor")

**AND:**

**PCL CONSTRUCTION GROUP INC.**, a company incorporated under the laws of Alberta

("Guarantor")

**AND:**

**AHA ACCESS HEALTH ABBOTSFORD LTD.**, a company incorporated under the laws of British Columbia

("Project Co")

**WHEREAS:**

- A Health Co and Project Co have entered into the Project Agreement, which requires Project Co to enter into, and to cause Constructor and Guarantor to enter into, this Agreement with Health Co.
- B. Project Co and Constructor have entered into the Construction Contract, which requires Constructor and Guarantor to enter into this Agreement with Health Co.

**NOW THEREFORE** in consideration of the mutual promises and agreements of the Parties herein expressed and for other good and valuable consideration the receipt and sufficiency of which are hereby acknowledged, the Parties covenant and agree as follows:

**1. Definitions and Interpretation**

In this Agreement unless the context otherwise requires:

- (a) "Agreement" means this Agreement.
- (b) "Approved Purposes" has the meaning given in the Project Agreement.

- (c) "Business Day" means a day other than a Saturday, Sunday or a statutory holiday in British Columbia.
- (d) "Construction Contract" has the meaning given in the Project Agreement.
- (e) "Constructor" has the meaning given on the first page of this Agreement.
- (f) "Default Notice" has the meaning given in Section 5(a).
- (g) "Design Data" has the meaning given in the Project Agreement.
- (h) "Facility Coordination Agreement" means the agreement made on or about the date hereof between Project Co, the Constructor and Johnson Controls L.P., as the same may be amended, supplemented or replaced from time to time.
- (i) "Governmental Authority" has the meaning given in the Project Agreement.
- (j) "Guarantor" has the meaning given on the first page of this Agreement.
- (k) "Health Co" has the meaning given on the first page of this Agreement.
- (l) "Party" means Health Co, Constructor, Guarantor or Project Co and "Parties" means Health Co, Constructor, Guarantor and Project Co.
- (m) "Project" has the meaning given in the Project Agreement.
- (n) "Project Agreement" means that certain agreement entitled "Project Agreement" and made on or about the date hereof between Health Co and Project Co, as the same may be amended from time to time in accordance with its terms.
- (o) "Project Co" has the meaning given on the first page of this Agreement.
- (p) "Project Data" has the meaning given in the Project Agreement.
- (q) "Senior Funders" has the meaning given in the Project Agreement.
- (r) "Step-In Notice" has the meaning given in Section 6(a).
- (s) "Subcontractors" has the meaning given in the Project Agreement.
- (t) "Substitute" has the meaning given in Section 6(a).
- (u) "Works" has the meaning given in the Project Agreement.

## **2. Interpretation**

This Agreement shall be interpreted according to the following provisions, unless the context requires a different meaning:

- (a) The headings in this Agreement are for convenience of reference only, shall not constitute a part of this Agreement, and shall not be taken into consideration in the interpretation of, or affect the meaning of, this Agreement.
- (b) Words importing persons or parties are to be broadly interpreted and include an individual, corporation, firm, partnership, joint venture, trust, unincorporated

organization, Governmental Authority, unincorporated body of persons or association and any other entity having legal capacity, and the heirs, beneficiaries, executors, administrators or other legal representatives of a person in such capacity.

- (c) Unless the context otherwise requires, wherever used herein the plural includes the singular, the singular includes the plural, and each of the masculine, feminine and neuter genders include all other genders.
- (d) References to any standard, principle, agreement or document include (subject to all relevant approvals and any other provisions of this Agreement concerning amendments) a reference to that standard, principle, agreement or document as amended, supplemented, restated, substituted, replaced, novated or assigned.
- (e) The words in this Agreement shall bear their natural meaning. The Parties have had the opportunity to take legal advice on this Agreement and no term shall, therefore, be construed contra proferentem.
- (f) References containing terms such as:
  - (i) "hereof," "herein," "hereto," "hereinafter," and other terms of like import are not limited in applicability to the specific provision within which such references are set forth but instead refer to this Agreement taken as a whole; and
  - (ii) "includes" and "including", whether or not used with the words "without limitation" or "but not limited to", shall not be deemed limited by the specific enumeration of items but shall in all cases be deemed to be without limitation and construed and interpreted to mean "includes without limitation" and "including without limitation".
- (g) In construing this Agreement, the rule known as the ejusdem generis rule shall not apply nor shall any similar rule or approach to the construction of this Agreement and accordingly general words introduced or followed by the word "other" or "including" or "in particular" shall not be given a restrictive meaning because they are followed or preceded (as the case may be) by particular examples intended to fall within the meaning of the general words.
- (h) Where this Agreement states that an obligation shall be performed "no later than" or "within" or "by" a stipulated date or event which is a prescribed number of days after a stipulated date or event the latest time for performance shall be 5:00 p.m. on the last day for performance of the obligation concerned, or if that day is not a Business Day, 5:00 p.m. on the next Business Day.
- (i) Where this Agreement states that an obligation shall be performed "on" a stipulated date the latest time for performance shall be 5:00 p.m. on that day, or if that day is not a Business Day, 5:00 p.m. on the next Business Day.
- (j) Whenever the terms "will" or "shall" are used in this Agreement they shall be construed and interpreted as synonymous and to read "shall".

**3. Conflict in Documents**

In the event of ambiguities, conflicts or inconsistencies between or among this Agreement, the Project Agreement, the Construction Contract and the Facility Coordination Agreement, this Agreement shall prevail.

**4. Agreements**

- (a) Project Co and Constructor shall not amend, modify, or depart from the terms of, the Construction Contract or the Facility Coordination Agreement without the prior written consent of Health Co acting reasonably, which consent shall not be withheld where such amendment modification or departure does not materially and adversely affect the ability of Project Co to perform its obligations under this Agreement and does not have the effect of increasing any liability of Health Co, whether actual or potential. Project Co and Constructor shall provide to Health Co a written copy of all such amendments, modifications or departures consented to by Health Co. The Parties acknowledge and agree that this Section 4(a) shall not apply to Variations provided for under the Project Agreement.
- (b) Each of the Parties acknowledges having received a copy of the Project Agreement, the Construction Contract and the Facility Coordination Agreement.
- (c) If Constructor gives Project Co any notice of any default(s) under the Construction Contract that may give the Constructor a right to terminate the Construction Contract and the Facility Coordination Agreement or to treat them as having been repudiated by Project Co or to discontinue Constructor's performance thereunder, then the Constructor shall concurrently provide Health Co with a copy of such notice and set out in reasonable detail the default(s).

**5. No Termination by Constructor without Default Notice**

Constructor shall not exercise any right it may have to terminate the Construction Contract and the Facility Coordination Agreement or to treat them as having been repudiated by Project Co or to discontinue Constructor's performance thereunder unless:

- (a) Constructor first delivers a written notice (a "Default Notice") to Health Co setting out in reasonable detail the default(s) on which Constructor intends to rely in terminating the Construction Contract and the Facility Coordination Agreement or to treat them as having been repudiated by Project Co or to discontinue Constructor's performance thereunder; and
- (b) within a period of 5 Business Days of Health Co receiving the Default Notice:
  - (i) the default(s) on which Constructor intends to rely in terminating the Construction Contract and the Facility Coordination Agreement or to treat them as having been repudiated by Project Co or to discontinue Constructor's performance thereunder have not been remedied; and
  - (ii) Constructor has not received a Step-In Notice from Health Co,

provided that if, within such period of 5 Business Days, Health Co agrees to pay for Constructor's reasonable costs of continued performance, such period of 5 Business Days shall be extended to 45 days.

**6. Step-In Rights**

- (a) Health Co may at any time:
- (i) within 45 days of Health Co receiving a Default Notice; or
  - (ii) if Health Co has not received a Default Notice and if Health Co's right to terminate the Project Agreement has arisen and is continuing,

deliver a notice (a "Step-In Notice") electing to replace Project Co under the Construction Contract and the Facility Coordination Agreement either with Health Co or a third party designated by Health Co in the Step-In Notice (the "Substitute"), provided that Health Co can demonstrate to the Constructor, acting reasonably, that the Substitute shall have sufficient financial resources, or shall be supported by a satisfactory guarantee, to carry out the obligations of the Substitute under the Construction Contract and the Facility Coordination Agreement.

- (b) Subject to Section 6(d), upon receipt by Constructor of a Step-In Notice:
- (i) Project Co and Constructor will be deemed to be released from their existing and future obligations under the Construction Contract and the Facility Coordination Agreement to each other (except with respect to any and all indemnities from Project Co or the Constructor to the other in respect of the period prior to the receipt of the Step-In Notice), and Health Co or the Substitute, as applicable, and Constructor will be deemed to assume those same existing and future obligations towards each other (except in respect of the aforesaid indemnities);
  - (ii) the existing and future rights of Project Co against Constructor under the Construction Contract and the Facility Coordination Agreement and vice versa will be deemed to be cancelled (except with respect to any and all indemnities from Project Co or the Constructor to the other in respect of the period prior to the receipt of the Step-In Notice), and Health Co or the Substitute, as applicable, and Constructor will be deemed to acquire those same existing and future rights against each other (except in respect of the aforesaid indemnities), subject to any applicable credit from the Constructor to Health Co if Health Co pays for Constructor's reasonable costs of continued performance pursuant to Section 5;
  - (iii) any guarantee, bond or covenant in favour of Project Co from any third party in respect of any term, provision, condition, obligation, undertaking or agreement on the part of Constructor to be performed, observed or carried out by Constructor as contained in, referred to, or inferred from the Construction Contract and the Facility Coordination Agreement shall be assigned, novated or granted, as required by Health Co or the Substitute, as applicable, in each case acting reasonably, to Health Co or the Substitute, as applicable, and Constructor shall cause such assignment, novation or grant on substantially the same terms and conditions as the original guarantee, bond or covenant, provided however that where Project Co shall continue to hold, or shall continue to be entitled to or have rights under, such guarantee, bond or covenant as security for any obligations of Constructor, the assignment, novation or grant of the guarantee, bond or covenant to the extent of any such obligations to Project Co shall be conditional on the satisfaction of those

obligations to Project Co. If the operation of this Section 6(b)(iii) results in the requirement for a new guarantee to be granted by the Guarantor to Health Co or the Substitute, as applicable, then such grant shall be conditional on the termination of the existing guarantee; and

- (iv) at Health Co's request, Constructor shall enter into, and shall cause the Guarantor and any other guarantor, covenantor or surety under any guarantee, bond or covenant referred to in Section 6(b)(iii) to enter into, and Health Co shall or shall cause Substitute to enter into, as applicable, all such agreements or other documents as reasonably necessary to give effect to the foregoing, including without limitation, an agreement between Health Co or the Substitute, as applicable, and Constructor, acceptable to Health Co and the Constructor, acting reasonably, on substantially the same terms as the Construction Contract and the Facility Coordination Agreement.
- (c) Subject to Section 6(d), Project Co shall, at its own cost, cooperate fully with Health Co and the Substitute in order to achieve a smooth transfer of the Construction Contract and the Facility Coordination Agreement to Health Co or the Substitute, as applicable, and to avoid or mitigate in so far as reasonably practicable any inconvenience, including the administration of the Construction Contract and the Facility Coordination Agreement, ongoing supervisory activities and scheduling.
- (d) The rights granted by Sections 6(b) and (c) shall be of no force or effect if, at any time Constructor receives a Step-In-Notice, Constructor has already received notice in writing from another entity entitled to the benefit of step-in rights relating to the Construction Contract and the Facility Coordination Agreement that it is or has validly exercised those step-in rights. If Constructor receives any such notice on the same day as a Step-In Notice, the Step-In Notice shall be effective, except where the other notice is given by the Senior Funders, in which case such other notice and not the Step-In Notice shall be effective.
- (e) If Health Co gives a Step-In Notice, within the time provided hereunder, at any time after the Constructor has terminated the Construction Contract and Facility Coordination Agreement or treated it as having been repudiated by Project Co or discontinued the Constructor's performance thereunder in accordance with the terms of this Agreement, the Constructor agrees that the Construction Contract shall be reinstated and deemed to have continued despite any termination or treatment as having been repudiated, and Health Co shall pay the Constructor's reasonable costs for re-commencing the obligations it has under the Construction Contract and the Constructor shall be entitled to reasonable compensation and/or relief for re-commencing such obligations, having regard to additional costs and delays incurred as a result of having terminated the Construction Contract or having treated them as being repudiated by Project Co or having discontinued its performance thereunder.

## **7. Constructor Liability**

- (a) The liability of Constructor hereunder shall not be modified, released, diminished or in any way affected by:
  - (i) any independent inspection, investigation or enquiry into any matter which may be made or carried out by or for Health Co, or by any failure or omission to carry out any such inspection, investigation or enquiry; or

- (ii) the appointment by Health Co of any other person to review the progress of or otherwise report to Health Co in respect of the Project, or by any action or omission of such person whether or not such action or omission might give rise to any independent liability of such person to Health Co,

provided always that nothing in this Section 7 shall modify or affect any rights which Constructor might have otherwise had to claim contribution from any other person whether under statute or common law.

- (b) In the event Health Co delivers a Step-In Notice, Constructor shall have no greater liability to Health Co or any Substitute than it would have had to Project Co under the Construction Contract and the Facility Coordination Agreement, and Constructor shall be entitled in any proceedings by Health Co or any Substitute to rely on any liability limitations in the Construction Contract and the Facility Coordination Agreement.

## **8. Project Co as Party**

Project Co acknowledges and agrees that Constructor shall not be in breach of the Construction Contract and the Facility Coordination Agreement by complying with its obligations hereunder.

## **9. Guarantor as Party**

Guarantor agrees with Health Co that Guarantor has entered into a guarantee or covenant referred to in Section 6(b)(iii), hereby consents to the assignment, novation or grant as provided therein, including any conditional assignment, novation or grant as provided therein, and agrees that Guarantor shall in accordance with Section 6 enter into all such agreements or other documents as reasonably necessary to give effect to the foregoing. As noted in Section 6(b)(iii), if the operation of Section 6(b)(iii) and this Section 9 results in the requirement for a new guarantee to be granted by the Guarantor to Health Co or the Substitute, as applicable, then such grant shall be conditional on the termination of the existing guarantee. The Guarantor enters into this Agreement solely for the purposes of this Section 9.

## **10. Assignment**

- (a) Project Co shall not, without the prior written consent of Health Co, assign, transfer, charge, subcontract, subparticipate or otherwise dispose of any interest in this Agreement except to the extent entitled to do so by the Project Agreement.
- (b) Health Co may assign or otherwise dispose of the benefit of the whole or part of this Agreement to any person to whom Health Co may assign or otherwise dispose of its interest in the Project Agreement pursuant to Section 59.2 of the Project Agreement but only in conjunction therewith, and shall provide written notice to Project Co and Constructor of such assignment or disposition.
- (c) Constructor shall not, without the prior written consent of Health Co, assign, transfer, charge, subcontract, subparticipate or otherwise dispose of any interest in this Agreement except as may be permitted under the Construction Contract or the Facility Coordination Agreement as the case may be.

**11. Notices**

Any notices required or permitted under this Agreement shall be in writing and (a) delivered personally, (b) sent by a recognized express mail or courier service, with delivery receipt requested, or (c) sent by confirmed facsimile transmission with telephonic confirmation, to the following addresses:

If to Health Co                      Abbotsford Hospital and Cancer Centre Inc.  
c/o West Annex, 2179 McCallum Road  
Abbotsford, BC V2S 3P1

Fax No.: 604 556 5077  
Attn.: Mike Marasco

If to Constructor                      PCL Constructors Westcoast Inc.  
310-13911 Wireless Way  
Richmond, BC V6V 3B9

Fax No.: 604 241 5301  
Attn.: John Haring

If to Guarantor                      PCL Construction Group Inc.  
5410-99 Street  
Edmonton, AB T6E 3P4

Fax No.:780 435 9777  
Attn.: Gordon Stephenson

If to Project Co                      AHA Access Health Abbotsford Ltd.  
Suite 2373  
595 Burrard Street  
PO Box 49127  
Three Bentall Centre  
Vancouver, BC V7X 1J1

Fax No.: 604 484 7165  
Attn.: President

- (a) Where any notice is provided or submitted to a Party via facsimile, an original of the notice sent via facsimile shall also promptly be delivered personally or sent by a recognized express mail or courier service, with delivery receipt requested.
- (b) A Party may at any time and from time to time change its nominated address or facsimile number by prior notice to the other Parties, and such change shall be effective on the day that next follows the recipient Parties' receipt of such notice.
- (c) Notices given by mail shall be effective upon the earlier of (i) actual receipt, and (ii) 7 days after mailing if mailed within Canada, and 21 days after mailing if mailed outside of Canada. Notices delivered personally shall be effective upon delivery. Notices given by facsimile shall be deemed to have been received where there is confirmation of uninterrupted transmission by a transmission report and where there has been no telephonic communication by the recipient to the senders (to be confirmed in writing) that the facsimile has not been received in legible form:



- (i) within 2 hours after sending, if sent on a Business Day between the hours of 9am and 4pm; or
  - (ii) by 11am on the next following Business Day, if sent after 4pm on a Business Day but before 9am on that next following Business Day.
- (d) If the Party giving the notice or communication knows or ought reasonably to know of difficulties or disruption with the postal system which might affect the delivery of mail:
- (i) any such notice shall not be mailed but shall be made or given by personal delivery or by facsimile transmission; and
  - (ii) where such difficulties or disruption arise after mailing but before the date of receipt as provided in this Section 11 the party giving such notice shall make or give such notice by personal delivery or by facsimile transmission.
- (e) To be effective, notices and all formal communications under this Agreement shall be in writing and delivered as provided in this Section 11, and shall be signed by an authorized representative of the Party giving the notice. E-mails shall not be used for and shall not constitute notices under this Agreement.
- (f) Oral communications shall not constitute formal communication under this Agreement and no Party has any obligation to act on any oral communication, instruction or assurance unless and until it is confirmed in writing. Any action taken by a Party based on oral communications, instructions or assurances shall be at that Party's sole risk and shall be without liability to or recourse against the other Parties.

## 12. Amendments

No oral or written amendment or modification of this Agreement, either before or after execution and delivery of this Agreement, shall be of any force or effect unless such amendment or modification is in writing and is signed by a duly authorized representative of each Party to be bound thereby.

## 13. Waiver

- (a) No waiver of any rights under this Agreement shall be binding or effective unless the waiver is in writing and signed by an authorized representative of the Party giving such waiver.
- (b) Any Party's waiver of any of its rights under this Agreement or of any breach or failure to enforce any of the terms, covenants, conditions, or other provisions of this Agreement at any time shall not in any way affect, limit, modify, or waive that Party's right thereafter to enforce or compel strict compliance with every term, covenant, condition, or other provision hereof, any course of dealing or custom of the trade notwithstanding.

## 14. Time is of the Essence

Time is of the essence of this Agreement and each provision herein.

**15. Independent Contractor**

The Parties are independent contractors. This Agreement is not intended to and does not create or establish between the Parties any relationship as partners, joint venturers, employer and employee, master and servant, or except as provided in this Agreement, of principal and agent. None of Project Co, Constructor, Guarantor or any of its or their representatives are or shall be deemed to be an employee of Health Co.

**16. Entire Agreement**

Except where provided otherwise in this Agreement, this Agreement constitutes the entire agreement between the Parties in connection with its subject matter and supersedes all prior representations, communications, negotiations and understandings, whether oral, written, express or implied, concerning the subject matter of this Agreement.

**17. Severability**

If any provision of this Agreement shall be declared invalid, unenforceable or illegal by the courts of any jurisdiction to which it is subject, such provision may be severed and such invalidity, unenforceability or illegality shall not prejudice or affect the validity, enforceability and legality of the remaining provisions of this Agreement.

**18. Enurement**

This Agreement shall enure to the benefit of and be binding on each of the Parties and their respective successors and permitted transferees and assigns.

**19. Governing Law and Jurisdiction**

- (a) This Agreement shall be governed by and construed in accordance with the laws of British Columbia and the laws of Canada applicable therein and shall be treated in all respects as a contract in the Province of British Columbia, without regard to conflict of laws principles.
- (b) The Parties agree that the courts of British Columbia shall have exclusive jurisdiction to hear and settle any action, suit, proceeding or dispute in connection with this Agreement and hereby irrevocably attorn to the jurisdiction of those courts.

**20. Further Assurance**

Each Party shall do all things and execute all further documents necessary to give full effect to this Agreement.

**21. Language of Agreement**

Each of the parties acknowledges having requested and being satisfied that this document and its accessories be drawn in English. Chacune des parties reconnaît avoir demandé que ce document et ses annexes soient rédigés en anglais et s'en declare satisfaite.

**22. Proof of Authority**

Health Co reserves the right to require everyone executing this Agreement on behalf of Project Co, Constructor or Guarantor to provide proof, in a form acceptable to Health Co, that they have the requisite authority to execute this Agreement on behalf of and to bind Project Co, Constructor or Guarantor, respectively.

**23. Counterparts**

This Agreement may be executed in one or more counterparts. Any single counterpart or a set of counterparts executed, in either case, by all the Parties shall constitute a full, original and binding agreement for all purposes. Counterparts may be executed either in original or faxed form provided that any Party providing its signature in faxed form shall, upon any other Party's request, promptly forward to such Party an original signed copy of this Agreement which was so faxed.

**IN WITNESS WHEREOF** the Parties have executed this Agreement as of the day and year first above written:

EXECUTED AND DELIVERED by	)	
<b>ABBOTSFORD HOSPITAL AND</b>	)	
<b>CANCER CENTRE INC.</b> acting by	)	
_____	)	_____
Authorized Signatory	)	Witness (Signature)
_____	)	_____
Full Name	)	Witness (Full Name)
	)	
_____	)	_____
Authorized Signatory	)	Witness (Signature)
_____	)	_____
Full Name	)	Witness (Full Name)
	)	

EXECUTED AND DELIVERED by **PCL  
CONSTRUCTORS WESTCOAST INC.**  
acting by )  
)  
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\_\_\_\_\_  
Authorized Signatory )  
\_\_\_\_\_  
Full Name )

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Witness (Signature)  
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Witness (Full Name)

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Witness (Signature)  
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Witness (Full Name)

EXECUTED AND DELIVERED by **PCL  
CONSTRUCTION GROUP INC.** acting by )  
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EXECUTED AND DELIVERED by **AHA  
ACCESS HEALTH ABBOTSFORD LTD.**  
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