

CONTENTS

	Page
Chapter 1 Introduction and scope	3
Chapter 2 Issues to consider when agreeing a change protocol for operational projects	5
Chapter 3 Change protocol for operational projects	1

INTRODUCTION AND SCOPE

SCOPE OF OPERATIONAL TASKFORCE NOTE 3

1.1 The aim of this guidance note is to help public sector authorities with PFI contracts to put in place a voluntary protocol for managing variations during the operational phase of their PFI projects where they consider one may be necessary. Two of the main purposes of negotiating a change protocol are to put in place an appropriate change mechanism process and to establish transparency of pricing where these are not clear in the contract. This will help to achieve value for money for the public sector. This guidance note also sets out good practice and lessons learnt from commissioning and carrying out variations from a large number of projects.

1.2 The document “Standardisation of PFI Contracts Version 4 (SoPC 4)” published in March 2007¹ is applicable for all PFI projects which had not already been signed or appointed a preferred bidder prior to 1 May 2007. SoPC 4 guidance expands upon previous guidance to include the recommendation that bidders should assume that a service of change implementation is part of the Authority’s Requirements and that an appropriate amount of flexibility is designed into the initial bid solution and priced to cope with anticipated changes. SoPC 4 guidance also includes the requirement that a well-developed change protocol is put in place in the contract to cope with changes over the operational life of the contract². In August 2007 HM Treasury published a note of the key Change Protocol Principles³.

1.3 By entering into a PFI arrangement, the authority normally enters into a long-term arrangement (25–30 years) with an SPV. The PFI contract will set out the initial requirements of the public sector but changes to the assets and/or the services originally specified are likely to be required over the lifetime of a PFI contract. Accordingly, PFI contracts across all sectors acknowledge that changes in an authority’s long-term requirements and in the contractor’s method of delivering a service may occur and most PFI contracts include clauses which deal with authority initiated changes, contractor initiated changes and changes resulting from a change in law.

1.4 In practice, however, some authorities have experienced problems with the process for managing change. Discussions with contract managers in 2006/7 at the Operational Taskforce’s regional seminars revealed that contract managers were concerned about certain of the practical aspects of carrying out the change process and ensuring value for money from their change requests. Experience has shown that the contractual change mechanisms in existing contracts, but particularly in those signed some time ago, are not always adequate in practice, especially for high value changes or multiple low value changes.

1.5 Many existing operational projects have developed their own processes to deal with variations. In this guidance note, HM Treasury recommends that operational projects should develop a voluntary protocol with their private sector partners where the existing change mechanisms in their contracts are insufficient for their needs or would benefit from further clarification, explanation and detail. Section three provides an example of a pro forma protocol for an accommodation project. This deals with the

¹ Standardisation of PFI Contracts Version 4, HM Treasury, March 2007

² See above. SoPC 4 Chapter 13 pt 3 deals with Change Protocols

³ See http://www.hm-treasury.gov.uk/documents/public_private_partnerships/ppp_standardised_contracts.cfm

issues applicable to operational projects and is recommended as a precedent for those accommodation projects that do not already have SoPC4 protocols. It should provide a basis for agreement between authorities and their contractors to put in place better arrangements to deal with ongoing change in their projects where these are required. Where projects already have a protocol in place or have detailed provisions in their contracts which deal with the process, it may not be necessary to negotiate a new protocol, but it is recommended that the arrangements are nevertheless re-examined and if necessary, revised to take into account the matters dealt with in this guidance note.

1.6 This guidance is intended to consider the main issues to be covered in a protocol. This note is intended to help contract managers and their private sector partners to develop a variations protocol which takes account of the nature of their particular project and the coverage of their existing contract. There may be opportune times for Authorities to negotiate the introduction of a protocol, for example at the time of a Best Value Review or prior to a benchmarking/market testing exercise.

Terms used

1.7 In this document the term:

authority: describes the public sector body buying the service.

contract: describes the original contractual document or Project Agreement signed by the parties

contractor: describes the private sector party/sub contractor contracted by the authority to deliver various parts of the service

contract manager: describes the public sector manager responsible for managing the contract.

SoPC4: means Standardisation of PFI Contracts Version 4 (March 2007).

SPV: describes the Special Purpose Vehicle company established for the specific purpose of entering into the contract for a project. This is often referred to as the Project Company in respect of a particular project. There is an SPV for the majority of PFI projects and even for those corporate financed projects without an SPV, the principles are still relevant.

If contract managers require further advice or help in relation to variations requests, the Treasury has an Operational Taskforce helpdesk run by Partnerships UK which is available to provide assistance on 020 7273 8356 or email: operationaltaskforce@partnershipsuk.org.uk

2

ISSUES TO CONSIDER WHEN AGREEING A CHANGE PROTOCOL FOR OPERATIONAL PROJECTS

BACKGROUND PREPARATION

2.1 To date, most of the changes to requirements during the operational phase of projects have been initiated by the public rather than the private sector parties. Section three of this guidance note provides an example of a protocol for an accommodation project with Part five of the protocol covering contractor initiated changes. Many of the smaller value changes have been requested during the first 18 months of operation, with a slow down thereafter when a project is in a more steady state. In some instances, SPVs have been subject to extensive requests for changes or have been asked to price change requests which have subsequently been withdrawn, either because the price quoted back has been much higher than anticipated by the public sector or, very occasionally, because the change request was speculative. None of these situations are helpful to either the authority or the SPV. The impact on the project risk profile and the interface between the variations works and the existing contract will need to be considered in the design and costing of any variation. A transparent mechanism for pricing changes will be helpful for all parties. Examples of good practice and questions contract managers should consider include:

- Control the number of variations – you want to strike a balance between ensuring that multiple small changes are wherever possible batched and processed together but at the same time not overwhelming the contractor by the volume of change requests;
- Plan properly – are there better times in the year when you should be presenting your variations’ requests e.g. are there quieter times in the year; is the contractor due to carry out work on a particular area; can you group types of variations together?
- Are you really intending to go through with the variation? Have you had the necessary consents and gone through the correct internal processes?
- Do you know how much the variation is likely to cost before you have submitted your change request? Have you kept good records of the previous variations which you have requested and do you know the real cost now?
- Is there a transparent fee structure?
- Have you scoped the variation properly – have you given a full enough brief to the contractor?
- Have you kept stakeholders properly informed and do they have realistic timescales in their minds?
- Have you joint processes with the SPV so that the variation can be processed effectively and the same record kept by both parties?
- Have you thought through the governance process to make sure that the variation can be signed off?
- Are you aware of the likely cost to the SPV to develop and price the variation?
- Is your process designed to limit the number of disputes?

2.2 Preparatory work should be undertaken by the contract manager prior to commencing work on the protocol to identify the broad types of changes that may be required over the lifetime of the project and the adequacy of existing contractual arrangements. The changes can generally be broadly categorised into three distinct types as follows⁴:

Changes in use or functionality, for example:

- conversion of non-teaching to teaching areas;
- conversion of a general ward into an operating theatre.

Changes in capacity or throughput, for example:

- more prison places;
- increase in waste processing capability.

Changes in service specification or performance standards, for example:

- new nutritional requirements;
- introduction of new services.

By building up a profile of the type of changes which are likely to be requested, both parties will have a better idea of the types and frequency of the changes which may be requested in the future for their project. The contract manager should then collect together data on the costs and timescales for implementation of the changes that have already been agreed.

2.3 Alongside this work, the contract manager should ensure that there is a robust process for dealing with requests for changes from the stakeholders in the project who are entitled to request a change and who may be required to pay for the change. For example, in hospital projects users, such as matrons, may have the right to request low value changes; similarly, in MOD accommodation projects representatives of service users may request alterations to the service or facilities. Contract managers should make sure that there are clear levels of accountability built into the governance system for the project so that consent rights for large, medium and low value changes are dealt with at the appropriate level.

2.4 If the authority identifies a strategic priority or a significant change for its organisation, it should consider whether the SPV should be party to the preliminary discussions so that it can contribute to the debate and more practically have early notification of the scale and type of change which may result. Authorities should check the original OJEU notice to make sure that the variation does not come outside the scope of the works or services which were originally advertised.

2.5 To date, the vast majority of changes have been funded by the authority at the time of change – either in a lump sum (for asset changes) or over time through the unitary charge (for service changes). Where the Authority adopts the later approach, this is more likely to attract additional financial due diligence costs. This guidance assumes that the authority will pay for the change itself, but if this is not the case and the SPV is expected to raise funds which are reimbursed through the unitary charge, then the authority should explore at an early stage the contractor's ability to raise funds itself at a competitive rate.

⁴ See SoPC4. Chapter 13 pt 2 examines the various types of changes

2.6 For a well planned project there may be little need for changes to be made to the works during the build phase (and to the extent small changes are required these have sometimes been accommodated through existing design development procedures). This guidance concentrates therefore on changes which may be needed in the operational period.

OUTLINE FOR THE PROTOCOL

2.7 Good change mechanisms should achieve at least the following outcomes:

- A clear process with clearly defined roles, responsibilities and timescales;
- Quick and efficient procedures (appropriate to the scale and complexity of the change required), with transaction time and cost kept to a minimum;
- Transparent pricing; and
- Value for Money.

2.8 As a minimum, an operational project change protocol should cover:

- Notification and Specification of the change;
- Contractor's estimate;
- Authority Approval;
- Change Implementation;
- Funding and Payment;
- Due Diligence;
- Documentation and monitoring; and
- Relationship with the existing contractual provisions.

2.9 Authorities should also consider whether different procedures are required for low, medium and high value changes. These are discussed in more detail later in this document. pre-SoPC 4 contracts may not differentiate between different values of variations.

Rights of approval

2.10 The variations protocol will deal with the process after the official hand over of the facilities and the commencement of services. Authorities will generally have an unfettered right to request changes in the operational period but have a more restricted ability to do so during the construction period. An authority usually has the absolute right to approve or reject changes to the services instigated by the contractor unless the change is required to comply with a qualifying change of law, in which case both parties will be obliged to agree and implement the change.

2.11 The SPV generally will not unreasonably refuse requests but should have the right to refuse a change order on the following grounds:

- if it requires the service to be performed in a way that infringes any law or is inconsistent with good industry practice;

- if it would cause any consent to be revoked (or cause a new consent required to implement the relevant change in service to be unobtainable);
- if it would materially and adversely affect the contractor's ability to deliver the service;
- if it would materially and adversely affect the health and safety of any person;
- if it would require the SPV to implement the change in service in an unreasonable period of time; and/or
- if it would (if implemented) materially and adversely change the nature of the project, including its risk profile.

Low value changes

2.12 The first issue which parties will need to agree is “what value constitutes a low value change?” The definition of low, medium and high value changes should be relative to the overall value of the project. For example, parties may take the view that changes which have an individual total cost not exceeding £10,000 should qualify as a low value change. This amount has been used in the draft protocol but should be regarded as negotiable. Alternatively, projects may agree that a number of changes up to an agreed annual value could qualify as low value changes.

2.13 Low value changes are likely to be changes which are requested repeatedly over the life of a contract: e.g. putting up shelves; supplying and putting up notice boards. Wherever possible, a low value change to the facility should be carried out by a suitably qualified on-site employee of the contractor (e.g. a caretaker or janitor) so that specialist labour charges are avoided. Where a contractor has not bid on the basis of its existing staff working on low value changes as a routine part of their job authorities should see if the contractor can move to this basis of working. This in itself would be a contract variation and would need to be negotiated. If all else fails authorities should seek to negotiate a standard day rate by which any additional contractor staff time is priced. The contractor will need to make the case as to why the additional resource is necessary and why it cannot be carried out by on-site staff. The recommended approach for a low value change is that authorities should agree a detailed catalogue of prices and timescales for these small works and services. The catalogue can be derived from existing pricing schedules such as Spons pricing books or BMI Price book (Building Maintenance Index). Systems for revising the prices in the future should also be agreed. For example, RPIX or the indexation used in the Contract can be linked to the catalogue or projects could agree to re-tender the works with local contractors if appropriate. The price in the catalogue should be made up of:

- the cost of the materials (charged at cost to the authority);
- the cost of the labour (if the change is not to be carried out by an onsite employee of the contractor).

2.14 Authorities should agree a separate schedule of rates for specialist labour (e.g. design, construction, installation or commissioning). Where it is agreed that specialist contractors are required for a low value change, these rates should be used. It should be agreed that no due diligence should be needed for low value changes and that they should be processed without any additional SPV handling fee or mark-up (or that a handling fee should only apply beyond an agreed annual aggregate limit).

2.15 If a low value change results in a maintenance or lifecycle cost, this cost should be identified by the contractor in the response to the authority's initial request for a variation. However, it is unlikely that this type of variation will attract this additional cost.

Medium value changes

2.16 Medium value changes can encompass a very large variety of changes and bespoke works and services. Medium value changes are likely to cost either more than the amount agreed for low value changes but less than £200,000 to implement or may require an adjustment to the unitary charge which is less than 2%. As with low value changes, the sums should be negotiated. Unlike low value changes, these are neither standard enough to allow a pre-priced approach nor are they large enough to warrant the competitive tendering process suggested for high value changes.

2.17 Authorities are advised to adopt an approach with their SPV for medium value changes whereby there is recognition that this type of service will be required and there should be a standard way of pricing for and providing the service. Authorities will need to negotiate the cost of any materials necessary, with the prices based upon existing market rates (e.g. derived from their catalogue for small works or from standard market indexes such as the BMI price book). They will also need to agree a schedule of rates for specialist labour and standard schedules of allowances for the professional fees which may be incurred on some changes. SPVs and contractors should not seek to charge a standard mark-up or profit margin on medium value change, however Authorities should be prepared to pay for the SPV's own staff costs (ideally beyond an agreed annual floor) in preparing the estimates/change documents at agreed rates – and provided they have complied with their responsibilities under the change protocol.

2.18 Authorities should also try to agree with the SPV and its funders that no funder due diligence is required for medium value changes below an aggregate threshold. If there are lifecycle and maintenance costs resulting from this scale of change, the costs claimed should be consistent with the rates quoted in the original bid. Similarly, if there are increased FM costs from the change, the cost should be the current rate being paid by the authority unless there is an upgrade in the service or a cost saving from the change. If there are risks arising from the change e.g. a latent defects risk, the pricing of these should be done on an open book basis. The framework for costing and processing the medium value changes can be reviewed probably every five years or when value testing of services is to be carried out but should last for at least a two year period

High value changes

2.19 High value changes will generally be changes for which it is cost effective to go through an extensive due diligence process, for example competitive tendering, to ensure that the public sector achieves value for money. This type of variation is likely to be a "one off" change which may result in an increase in the unitary charge of at least 2% or more or a capital cost in excess of £200,000 (negotiable). Authorities will need to carry out substantial preparatory work in scoping this type of change before issuing a formal variation notice. For example, the authority's technical adviser should provide an estimate of the cost of the change before the variation process is started.

SoPC 4 suggests three options for pricing high value changes:

- benchmarking; or

- independent technical adviser approach; and/or
- competitive tendering/market testing

2.20 For operational projects, where contract managers wish to adopt the benchmarking approach, the contract manager will need to develop his/her own independent estimate of the cost of the change (this may need the assistance of technical advisers) so that he/she can act as intelligent client and, where necessary, query the contractor's estimate. The SPV should negotiate with one of its existing suppliers on an open book basis. This benchmarking approach can be quite useful and efficient where the types of works or services involved are relatively standard and there is sufficient data available in house to conduct the benchmarking. However, where such data is not readily available there is a risk that the approach could collapse into a dispute between technical advisers on either side, therefore the other alternatives outlined below should be considered.

2.21 An alternative option is that both parties jointly appoint an independent technical adviser who will advise on the pricing for the change. This jointly appointed adviser would be independent in the sense that he would not be contracted solely to either party and would not face a conflict of interest. The terms of reference could include:

- assisting the authority and the contractor in developing a high level Reference Price based on a clear specification for a change order as part of the Stage 1 approval, before the detailed design is done by the Contractor; and
- reviewing and signing off the Contractor's estimates for reasonableness as part of the Stage 2 approval.

The cost of the ITA's services would be borne by the Authority.

2.22 Where the option of market testing is chosen, the SPV should be able to:

- invite at least 3 competitive tenders and evaluate these on criteria agreed between the parties; and
- run the competitive tender process and select the preferred supplier on the basis of the economically most advantageous tender.

Parties will need to agree how the work packages are to be priced; the evaluation criteria for selecting the successful contractor; any interface risks between the existing facilities and or the services and the proposed works/services. The SPV will be responsible for running the competition; evaluating the bids and selecting the successful tenderer; carrying out the final negotiations with the preferred tenderers and managing the implementation of the revised works and/or services. The authority should have the right to approve the preferred tenderer. Although SPVs are private sector organisations and are therefore not required to follow the procedures set out in the EU Procurement Services Directive, the principles of fair and open competition and transparency should still apply. SPVs should present proposals to the Authority on how they intend to ensure that fair and effective competition is maintained in the tendering exercise and that there is transparency and equal treatment of bidders.

2.23 The authority and the SPV will need to approve an initial budget for carrying out the variation. SPVs should be asked to supply information on the following where appropriate:

- cost of any staff time incurred in preparing estimates of high value changes i.e. a “mark-up”;
- cost of any lifecycle implications resulting from the change;
- cost of any service changes resulting from the change;
- any latent defects risk costing;
- any additional insurance costs
- any change in performance risk. If the SPV has been required to raise additional finance for the change, the charge for bearing the Sub-contractor performance risk will be included in the rates of return required by the funders and will be reflected in the calculation of the revised unitary charge. Therefore, no separate mark-up should be included for this;
- interface risk pricing: i.e. any risks involved in linking the new facilities or services with the existing facilities and/or services. These should be considered on a case by case basis and contract managers may need specialist technical advice to advise on the impact and cost of the risk materialising.
- Due diligence (please see para 5 of pt 1 of Section 3 of this guidance)

2.24 Once the request for a high value change has been made by an authority, the SPV will need to provide full costing information, including any third party costs likely to be incurred, what the project management fee for managing this scale of variation is likely to be, and information on any interface risks and how they are priced. Authorities should agree in advance whether any financial, technical, legal and insurance costs for due diligence will arise required as a result of the high value change request, and agree the budget for these costs. The costs should only be re-imbursed by the authority where they have materialised. The change protocol should provide a mechanism to keep the contract manager informed of how much of the budget has already been used.

2.25 The protocol should address the role of the SPV in carrying out the variation; this could range from project management through to full wrapping i.e. where the SPV pays a fee for a third party to bear the consequences of the risks. This decision will be part of the overall VfM analysis and while construction wraps offer risk transfer benefits, they will often come at a price. There may be circumstances where the authority is considering the direct appointment of a construction contractor to undertake works under a JCT style arrangement. This is not recommended because:

- the authority will have to manage the interface between the new works and the existing PFI services
- the SPV may try to charge a high fee for providing services and dealing with latent defects arising from works provided from a third party outside their control.

2.26 Authorities will need to consider whether any relief from service deductions is appropriate as a result of a high value change. Relief could be given, for example, where the change results in an existing part of the facility being unavailable for a period. In such cases, the parties should agree the time period for which the relaxation of the payment mechanism for this space should take place. For high value changes,

authorities should contact the Operational Taskforce based at PUK if they require further advice.

Contractor estimates: mark-ups

2.27 Two of the main purposes of negotiating a change protocol are to achieve value for money for the public sector and to establish transparency of pricing. Key to achieving these aims is to establish what was originally bid by the contractor to cover requests for changes by the public sector, so that contract managers can be clear as to what costs should be reasonably included or excluded when the contractor prices a change request.

2.28 Contract managers may have found some of the following added on to the base cost of a change quoted by a contractor:

- Latent defects % risk premium
- SPV margin on Capex (Capital expenditure)
- SPV management fee
- Maintenance cost
- Lifecycle cost
- FM cost
- SPV margin on Opex (Operational expenditure)
- FM margin on Opex
- Change in law % risk premium

Many of these additional mark-ups are not acceptable and authorities should be careful to examine both the justification for these and the method of calculating. Contractors and SPVs should not be charging mark-ups on mark-ups for example.

2.29 Latent defects % risk premium; this is sometimes claimed where a change to the facilities involves new structural work which increases the risk of a latent defect occurring. Contract managers should not accept this cost as an automatic mark-up. For high value changes this risk premium may be appropriate for some construction based variations e.g. where there is new construction. However, authorities should be careful to protect risk transfer agreed in the original deal whereby the contractor will be taking risk on latent defects on the original facilities i.e. those handed over at service commencement. Where the benchmarking/independent technical adviser option is taken authorities should seek advice from the technical adviser. Where the competitive tendering option for high value changes is adopted, contract managers should review the tender documentation to identify whether this is to be priced (e.g. is this passed to the sub contractor?) to make sure that there is no double charging. If the sub contractor is responsible for managing both the Capex and the Opex, then there is no justification.

2.30 SPV margins in Capex and Opex: SPVs may also claim a separate fee or margin for accepting performance risk on the change and accepting an interface risk between the implementation of the change and the provision of the existing service. The Authority will also need to consider whether mark-ups for performance risk and interface risks are justified. It is unlikely that low value or medium value changes will

justify this type of mark-up and where these are asked for on high value changes, SPVs should demonstrate why these mark-ups are justified and where they were agreed to in the procurement. The % should be no higher than the original SPV cost %.

2.31 FM margin on Opex: sub contractors may also charge a margin that provides a contribution to overheads and profits at the sub-contractor level. The percentages quoted for these will vary from contractor to contractor and from project to project. Authorities should interrogate the detailed FM cost schedule from the original bid to see what levels were set in the original deal. Sub contractors may try to argue that this type of mark-up is agreed custom and practice which may have been introduced after the deal was signed.

2.32 SPV management fee: in addition to the costs for materials, SPVs may argue that the labour cost for undertaking a variation and for processing it was not costed in the SPV management fee originally bid (see Agreed Daily Rate in the attached protocol). Contract managers should consult the original bid to see if this is the case. SPVs may try to argue that this type of mark-up is agreed custom and practice which may have been introduced after the deal was signed. For low value changes, the SPV is probably only acting as a “middleman” and passing through the requests to the FM subcontractor and back again. For medium and high value changes, given the possible need for design management, procurement and project management, it is possible that the SPV will be carrying out a more extensive role and may need to bring in additional staff or third party support.

2.33 Maintenance and lifecycle fees: in addition to the capital cost of the change, the SPV will need to price in the cost of on-going maintenance of the item together with any lifecycle replacement cost. Because of the nature of low value changes, these costs are unlikely to apply. For medium and high value changes, contract managers should review maintenance and lifecycle fees on a case by case basis and not accept an automatic mark-up for all changes. When a change is requested late in the operational phase, it is unlikely to need a lifecycle contingency and similarly, the related maintenance cost should be low. Authorities will want to know that the lifecycle replacement has taken place, and should challenge the SPV if they are charging for lifecycle replacement in their estimates and not carrying this out.

2.34 FM cost: some changes will lead to an additional FM cost, e.g. the addition of a new space may lead to an increased cost in cleaning. Contract managers should look at this on a case by case basis. Provision should also be made in the protocol for any decrease in FM costs resulting from a change.

2.35 Change of law: a SPV may try to add a change of law risk percentage to reflect that some changes may be liable to attract a cost from a change in law which was not covered in the assumptions made in the original bid. The change in law provisions should already cover this eventuality and therefore an automatic mark-up should not be included in the estimate for a variation.

Incentivisation

2.36 Authorities will wish to incentivise the SPV to progress the variation in a timely manner and to complete it. Change protocols should include reasonable timescales for each party to respond to the other. For all types of variations, the authority will want to ensure that the work is then carried out and/or the change implemented. For high value changes, if the SPV does not progress the work within the specified timescale, or if a contractor does not complete any outstanding snagging, the authority should be

entitled to deduct a percentage of the capital charge for each additional business day in which the change remains unimplemented, up to a pre-agreed cap (this could be linked to the amount of any contractor mark-up which has been charged as staff time for implementing the change). When such deductions reach the level of the cap, the authority should be entitled to withdraw the change request and implement the change itself (after giving the contractor reasonable notice that it intends to do so). In this circumstance, the authority should be entitled to receive all the information relating to the variation (e.g. any designs) and the contractor should be responsible for any reasonable additional costs incurred by the authority up to a pre-agreed cap. Alternatively, authorities may wish to negotiate a standard rate of deduction for each type of change (the “Agreed Abatement”).

Withdrawal of change requests

2.37 In cases where the authority decides to withdraw a request for a change in service (other than as a result of a contractor failure), particularly after a first stage approval has been given for a high value change, costs will only be reimbursed if a budget for these third party costs has been agreed and where the SPV demonstrates that the expenditure has incurred. The budget should not be exceeded without prior permission of the authority.

Third party due diligence

2.38 Due diligence costs can be high and can make low value changes uneconomic if applied. Legal due diligence will generally be necessary where there is either a change in the terms of the contract or else where a separate deed of variation is necessary, as for some high value changes. Technical due diligence may be necessary if the variation results in additional design or construction risks or has a material effect on lifecycle and operations. The protocol should state where third party due diligence may be appropriate, but this should be limited to larger changes.

2.39 Financial due diligence may be required for adjustments to the financial model and the payment mechanism. For high value variations, senior lenders may wish to interrogate the financial model to make sure that cover ratios remain acceptable. Where possible, authorities will wish to avoid having to re-run the financial model because of the cost charged for doing so. For small value changes, it is preferable to adjust the financial model no more than once each contract year to reflect the changes which have taken part in the year. Where possible, authorities should look to group changes together to keep re-runs at a minimum. For high value changes, it is appropriate to pre-agree a fee for this work as per para 2.23 of this guidance. Where the mechanics for altering the financial model to calculate the new unitary charge are not covered in the original contract, the mechanics should be agreed and documented. Some of the older projects may rely only on a “no better, no worse” principle. Authority may wish to include the requirement to “optimise” the model. Some projects have developed a variations model with their contractor where the effect of a variation on the Unitary Charge is calculated outside the main model in order to save the time and cost of re running the main model.

Funding and Payment

2.40 The authority will need to agree how it is paying for the variation – whether this will be a one off payment (which may be appropriate for low value changes) or whether the cost of the variation will be included in a revised unitary charge and paid over time.

Where the authority is paying up front for a variation, authorities should consider all aspects of the project including protection under scenarios such as early termination or sub contractor failure.

2.41 It should generally be assumed that:

- the payment for any capital works will be made on the achievement of milestones or on completion through lump sum capital payments; and
- the payment for any change to facilities management services are made through an adjustment to the unitary charge.

2.42 Where a variation includes a cost for lifecycle, authorities should also seek to pay the lifecycle cost through the unitary charge paid over the life of the project.

2.43 In funding changes with public sector capital, there are a number of issues which authorities should consider. They key ones are:

EU Procurement Directives

2.44 The EU Public Procurement Directives covering procurement of Works specify values of contracts above which contracts should be advertised in the EU Journal. It is possible, therefore, that capital works funded by public authority capital and exceeding the EU Works Directive's threshold, should be advertised and subject to the requirements of the Directive. However, in many cases, changes involving the construction of an additional asset inside an existing PFI facility can be interpreted as "changes to service" and the associated capital works are only a means to achieving that change. Authorities should seek advice on this issue from the Operational Taskforce or their legal advisors.

In any case, even if there is no requirement to follow the procedures set out in the EU Procurement Directives, the principles of fair and open competition and transparency should still apply. SPVs should be required to present proposals to the authority on how they intend to ensure that fair and effective competition. Authorities should ensure that SPVs comply with the general principles of transparency and equal treatment.

Default with regard to the new construction

2.45 If the new works are to be funded by public sector capital, SPVs and their funders are likely to insist on a clause in the amended contract that a default with regard to the new construction could lead to termination of the new works but is not to be considered as default event for the main contract. In the case where the new works are funded by the SPV and the SPV is required to take full risk on the new works then there will need to be a discussion with the lender about the cost of the new loan.

Other considerations

2.46 There are a significant number of other issues which will need to be considered, including:

- the impact of the change on the risk profile;
- the interface between the new construction works and the existing contract, including any relaxation of performance measures during construction;
- drafting of an amending agreement to the main Project Agreement;

- changes to the payment mechanism, if appropriate, to make sure that any new services or works are delivered appropriately and that the contractor is incentivised to do so.
- construction sub-contractor collateral warranties;
- new/revised schedules covering the design and construction specifications;
- termination / default issues.

2.47 The implementation of high value changes involving change to the assets should be treated as a project in itself and Authorities will almost certainly need to engage legal and financial advisers to ensure that the change is well managed. Ideally, the legal and financial advisers employed for the original contract negotiations will have been retained by on a “call-off” basis and can be used.

Disputes

2.48 Either party can apply the formal dispute resolution procedure to a dispute arising from a variation; however, in the case of low value changes, the changes should still proceed within the agreed timescales. Further advice is available from the Operational Taskforce on 020 7273 8356.

Acknowledgement

We are grateful to 4Ps who have agreed that the protocol in Section three of this guidance can be based upon their standard form accommodation protocol.

3

CHANGE PROTOCOL FOR OPERATIONAL PROJECTS

Section 3: Change protocol for operational projects

Part 1 - General Provisions

- **Definitions**

In each part of this Schedule ♦ the following expressions have the following meanings:

Agreed Abatement means:

- in the case of a Low Value Change [£20] indexed;
- in the case of a Medium Value Change [£50] indexed; and
- in the case of a High Value Change [£80] indexed

Approval Criteria means the criteria against which any Contractor Stage 2 Response will be evaluated by the Authority and which will be specified by the Authority in the Authority Change Notice and which shall be based on:

- (a) compliance with the Authority's specifications for the Change;
 - evidencing value for money;
 - affordability to the Authority; and
 - compliance with all relevant Legislation, Guidance and Necessary Consents

Authority Change means a Change that is initiated by the Authority by submitting an Authority Change Notice to the Contractor

Authority Change Notice means a written notice submitted by the Authority requiring a Change and setting out the information specified in the relevant paragraph of this Change Protocol

Authority Stage 1 Confirmation has the meaning given in paragraph □ of Part 4 (High Value Changes) of this Change Protocol

Authority Stage 2 Confirmation has the meaning given in paragraph o(a) of Part 4 (High Value Changes) of this Change Protocol

Benchmarking Process means the process set out in paragraph □ of Part 4 (High Value Changes) of this Change Protocol

Benchmarking Report means the report produced by the Contractor in accordance with the requirements of paragraph □ of Part 4 (High Value Changes) (which shall, for the avoidance of doubt, include the information required by paragraph o of Part 4 (High Value Change)) of this Change Protocol

Best Value Change means a Change required by the provisions of clause ♦ (Best Value)

Capital Expenditure means any expenditure which falls to be treated as capital expenditure in accordance with generally accepted accounting principles in the UK from time to time

Catalogue of Low Value Changes and **Catalogue** means the schedule setting out:

- (b) the prices and time periods for Low Value Changes;
- (c) the Small Works Rates

as is set out in Appendix ♦ to this Change Protocol, as shall be amended from time to time in accordance with paragraph 2 of Part 2 (Low Value Changes) of this Change Protocol

Change means any change, variation, extension or reduction in the Facilities and/or the Services

Change Notice means an Authority Change Notice and/or Contractor Change Notice as the context shall require

Change in Project Costs means a fixed and final price for carrying out the relevant Change

Comparable Market means local authority ♦ [facilities] [projects] operated under PFI or other forms of PPP including Private Finance Transactions as defined in Regulation 16 of the Local Authorities (Capital Finance) Regulations 1997 (as amended) provided that where there are less than five (5) such [facilities] [projects] of similar content or less than three (3) contractors operating such contracts the **Comparable Market** shall be the market for operation of ♦ [facilities] [projects] by a private sector operator

Confirmation Notice means a written notice issued by the Authority pursuant to the relevant provision of this Change Protocol setting out the agreed details of the Change, including the agreed cost, method of payment and the times of its implementation **Contractor Change** means a Change that is initiated by the Contractor by submitting a Contractor Change Notice to the Authority

Contractor Change Notice means a written notice submitted by the Contractor requesting a change and setting out the information required by the relevant paragraph of this Change Protocol

Contractor Response means the written response of the Contractor to an Authority Change Notice which shall include the information listed in the relevant paragraph of this Change Protocol

Contractor Stage 1 Response shall have the meaning given in paragraph o of Part 4 (High Value Changes) of this Change Protocol

Contractor Stage 2 Response shall have the meaning given in paragraph o of Part 4 (High Value Changes) of this Change Protocol

Estimated Change in Project Costs means the aggregate of any estimated increased construction costs, operating costs and financing costs less the aggregate of any estimated reduced construction costs, operating costs and financing costs

High Value Changes means a Change, which is not listed in the Catalogue, and which, in the reasonable opinion of the Authority, is likely to either cost more than £[200,000] to implement, or require an adjustment to the Unitary Charge that is greater than [2]% of the annual Unitary Charge (as the case may be)

Independent Technical Advisor means a person who is independent of the Authority or any Contractor Party who has not less than [five (5)] years experience in PFI funded projects and expertise in pricing works and/or services of the type required by the relevant High Value Change and has relevant experience in the [♦] sector

Low Value Change means:

- (d) works of a minor nature, having a cost, in the reasonable opinion of the Authority, not exceeding [£10,000] (indexed linked); or
- (e) any change or amendment (whether temporary or permanent) of the Services or Original Facilities or any of them where the cost, in the reasonable opinion of the Authority, of the implementation does not exceed [£10,000] (indexed linked) [and does not require adjustment of the Unitary Charge]; or
- (f) provision of plant or equipment by the Contractor, the cost of which (including installation), in the reasonable opinion of the Authority, does not exceed [£2,000];

and, for the avoidance of doubt, includes those Low Value Changes listed in the Catalogue of Low Value Changes

Low Value Change Request means a request for a Low Value Change [in the form set out in Appendix ♦ to this Change Protocol]

Low Value Change Threshold means where the Low Value Changes in any Payment Year exceeds [♦] in number or cost in excess of the aggregate sum of [♦]

Medium Value Changes means a Change, which is not a Low Value Change, and which, in the reasonable opinion of the Authority, is likely to either cost less than £[200,000] to implement, or require an adjustment to the Unitary Charge that is less than [2] % of the annual Unitary Charge in the relevant Payment Year (as the case may be)

Medium Value Change Threshold means where the Medium Value Changes in any Payment Year exceeds [♦] in number or cost in excess of the aggregated sum of [♦]

Original Facilities means the Facilities as at the Service Commencement Date

Project Management Fee means a fee in respect of project management services calculated in accordance with paragraph o of Part 4 (High Value Changes) of this Change Protocol

Reference Price means a high level price calculated by the Independent Technical Advisor which is his estimate of the cost of implementing a proposed High Value Change and which shall include and show separately the information specified in paragraph o of Part 4 (High Value Changes) of this Change Protocol

Small Works Rates means the hourly rates for specified categories of labour set out in the Catalogue

Tendering Report means a report prepared by the Contractor which shall include the information required by paragraph o of Part 4 (High Value Changes) of this Change Protocol

Whole Life Cost means, in relation to any High Value Change, the estimated and (to the extent that such information is available) the actual cost of operating and maintaining such High Value Change over its intended design life (consistent with the Contractor Response)

- **Limits on Changes**

- Neither party may propose a Change:
 - which requires the Services to be performed or the Works carried out in a way that infringes any Legislation or Guidance or is inconsistent with Good Industry Practice;
 - which would cause any Necessary Consent to be revoked (or a new Necessary Consent required to implement the relevant Change to be unobtainable);
 - which would materially and adversely affect the Contractor's ability to deliver the Services (except for that part of the Service which has been specified as requiring to be amended in the Change Notice) in a manner not compensated pursuant to this Change Protocol;
 - which would materially and adversely affect the health and safety of any person;
 - which would require the Contractor to implement the Change in an unreasonable period of time;
 - which would (if implemented) materially and adversely change the nature of the Project (including its risk profile); and/or
 - whereby the Authority does not have the legal power or capacity to require the implementation of such Change.
 - The Contractor may, within [ten (10)] Business Days of receipt of an Authority Change Notice, state in writing whether it objects to the Authority Change Notice on any of the grounds set out in paragraph o. If the Change is required as a result of a Change in Law, the Contractor shall in its notice of objection, set out proposals for a Change which shall satisfy the Change in Law without, to the extent practicable, breaching any of the grounds set out in paragraph o. The Authority shall, within [ten (10)] Business Days of receipt of such notice provide written confirmation that either:
 - the Authority Change Notice is withdrawn (and where the Change required was as a result of a Change in Law, the Authority shall submit a new Authority Change Notice);
- or
- the objection by the Contractor shall be referred for determination in accordance with the Dispute Resolution Procedure.

- For the avoidance of doubt the Authority has an absolute discretion to accept or reject any Contractor Change unless such Change is required as a result of a Change in Law.

- **Change Process**

- Either party may serve a Change Notice proposing a Change and such Change Notice shall be processed in accordance with the following sections of this Change Protocol:
 - an Authority Change to the Services or the Original Facilities which is a Low Value Change shall be processed in accordance with Part 2 of this Change Protocol;
 - an Authority Change to the Services or the Original Facilities which is a Medium Value Change shall be processed in accordance with Part 3 of this Change Protocol;
 - an Authority Change to the Services or the Original Facilities which is a High Value Change shall be processed in accordance with Part 4 of this Change Protocol; and
 - a Contractor Change to the Services or the Original Facilities shall be processed in accordance with Part 5 of this Change Protocol.

- **Funding**

- In the case of a [Medium Value Change or] a High Value Change, the Authority may request in the Authority Change Notice that the Contractor shall use its reasonable endeavours to obtain funding for the whole of the estimated Capital Expenditure, on terms reasonably satisfactory to the Authority and the Senior Lenders.
- If the Contractor has used its reasonable endeavours to obtain funding for the whole of the estimated Capital Expenditure, but has been unable to do so within [forty (40)] Business Days of the date that the Authority issued an Authority Change Notice making such request the Contractor shall inform the Authority in writing of what funding (if any) it has managed to obtain. The Contractor shall have no obligation to carry out the Authority Change, which shall be deemed to be withdrawn, unless the Authority confirms in writing within [twenty (20)] Business Days of receipt of such notice by the Contractor, that it will pay the Capital Expenditure for which funding is not available.
- The Authority may, at any time notify the Contractor in writing that it will meet all or, to the extent the Contractor has obtained funding for part of the Capital Expenditure, the remaining part of the Capital Expenditure.

- For the avoidance of doubt, subject to clause [◆] (Change in Law), the Authority shall pay the Capital Expenditure incurred in carrying out any Low Value Change required by the Authority.
- In the case of a Contractor Change, any funding shall (unless otherwise agreed) be provided by the Contractor except to the extent a Qualifying Change of Law applies in which case the provisions of clause [◆] (Change in Law) shall apply.
- **Due Diligence**
 - The Senior Lender may carry out legal, financial, technical and insurance due diligence on any proposal for a High Value Authority Change as required.
 - In the event that the Senior Lender needs to procure legal, technical, financial or insurance due diligence, the parties shall agree a budget and capped cost for the due diligence provided that the costs for the due diligence shall not exceed [2%] of the overall value of the relevant Authority Change.
 - The Contractor shall procure that:
 - the Senior Lenders shall promptly give any consents which are required pursuant to the Financing Agreements to any Change and shall only withhold its consent on one (or more) of the grounds set out in paragraph 2.1;
 - the Insurance Broker shall be notified by the Contractor promptly of any material Change (materiality being judged in relation to the size and nature of the scope of the Change and any necessary authorisation obtained).
- **Implementation**
 - Where the Authority has issued a Confirmation Notice in respect of a Change:
 - where applicable, the parties shall execute any deed of amendment to this Contract;
 - the Contractor shall promptly implement any Change within the timescales set out in the Confirmation Notice and shall do so in a manner which minimises any inconvenience to the Authority;
 - the Contractor shall notify the Authority when it believes the Change has been completed;
 - in the case of a Medium Value Change or a High Value Change only, and where applicable, the Unitary Charge shall be revised in accordance with Schedule ◆ (Adjustment of Base Case).
 - No amendments of this Contract shall be made as a result of a Low Value Change [or a Medium Value Change,] unless otherwise agreed between the parties.
 - If the Contractor does not:

- respond to an Authority Change Notice (in the case of a High Value Change either at Stage 1 or Stage 2); or
- complete or implement the Change within the specified timescales,

then the Unitary Charge shall be abated at the rate of the Agreed Abatement for every day of delay from the date the Contractor Response should have been submitted or the Change should have been completed or implemented until the date the Contractor Response is submitted or the Change is completed or implemented (as the case may be).

- All Changes shall be implemented under the terms of this Contract and in particular all provisions applying to the Works shall apply to the carrying out of any additional works or changes to the Works.
- The Contractor shall keep a record of all Changes (both completed and outstanding) and provide the Authority with these records whenever reasonably required by the Authority.

- **Payment**

- The Authority shall pay the Contractor the agreed cost for carrying out or implementing any Authority Change:
 - which is a Low Value Change, in accordance with paragraph 6 of Part 2 (Low Value Changes); or
 - which is a Medium Value Change or a High Value Change either by way of:
 - an adjustment to the Unitary Charge, by incorporating the Change in Project Costs in accordance with Schedule ♦ (Adjustment of Base Case); or
 - subject to paragraph o, within twenty (20) Business Days of receipt of an invoice submitted by the Contractor for the agreed amount.
- Where the Authority agrees to pay any Capital Expenditure incurred in carrying out a Change:
 - the Authority and Contractor shall agree:
 - a payment schedule in respect of the payment of the Capital Expenditure reflecting the amount and timing of the costs to be incurred by the Contractor in carrying out the Authority Change, to the extent borne by the Authority; and
 - where payment for part of the Authority Change reflects the carrying out of, or specific progress towards, an element within the Authority Change, an objective means of providing evidence confirming that the part of the Authority Change corresponding to

each occasion when payment is due under the payment schedule has been duly carried out,

and such payment schedule and evidence shall be determined in accordance with the Dispute Resolution Procedure in the event of the Authority and Contractor failing to agree as to its terms;

- the Authority shall make a payment to the Contractor within [twenty (20)] Business Days of receipt by the Authority of invoices presented to the Authority (complete in all material respects) in accordance with the agreed payment schedule (as may be varied by agreement from time to time) accompanied by the relevant evidence (where applicable) that the relevant part of the Authority Change has been carried out; and
 - if payment is not made in accordance with paragraph □, the Authority shall pay interest at the Prescribed Rate to the Contractor on the amount unpaid from the date [twenty (20)] Business Days after receipt of the relevant invoice until the date of payment.
- Where, pursuant to paragraph 5.1, due diligence has been carried out by the Senior Lender, then the Authority shall reimburse the Contractor for the actual costs of the Senior Lender carrying out due diligence of a proposed Authority Change, provided that:
 - in the case of a Low Value Change, the Low Value Change Threshold has been exceeded; or
 - in the case of a Medium Value Change, the Medium Value Change Threshold has been exceeded; and

the sums due shall never exceed the lower of the cap set out in to paragraph 5.2 and the caps or fixed sum set out in the relevant Contractor Response

and, where the costs of the due diligence have not been included in the Change in Project Costs, the Authority shall pay such costs within [twenty (20)] Business Days of receipt of an invoice submitted by the Contractor for the agreed amount.

- Notwithstanding any other provision of this Change Protocol:
 - the provisions of clause ♦ (Change of Law) shall apply to the payment of any costs incurred or any savings made in carrying out or implementing any Change which is required as a result of a Qualifying Change in Law; and
 - the provisions of clause ♦ (Best Value) shall apply to the payment of any costs incurred or any savings made in carrying out or implementing any Change which is required as a result of a Best Value Change.

• Disputes

Any dispute arising in respect of this Change Protocol will be resolved in accordance with the Dispute Resolution Procedure.

- **Part 2 - Low Value Changes**

- 2 **Notification and Specification**

- The Contractor shall carry out any Low Value Change requested by the Authority.
- If a Low Value Change is required by the Authority, it shall submit to the Contractor a Low Value Change Request.

- **Agreeing a Catalogue**

- Within [xx] Business Days, the Provider shall propose a catalogue of small value changes to the Facilities and Services to the Authority (the "**Proposed Catalogue**").
- The Authority shall respond to the Proposed Catalogue within [20] Business Days following receipt either:
 - to confirm its agreement with the Proposed Catalogue, or
 - to request a meeting with the Provider to discuss the Proposed Catalogue,
- Where the Authority requests a meeting the parties shall meet in good faith to discuss the Proposed Catalogue and seek to agree any amendments to the Proposed Catalogue within [15]Business Days following such request. Any failure by the parties to agree shall be referred for determination in accordance with the disputes resolution procedure.
- Following agreement of the Proposed Catalogue (together with any amendments agreed or determined) such catalogue shall be the Catalogue applicable for the [then current and the immediately following] Year
- The parties acknowledge that the resulting Catalogue shall include:
 - a unit price for purchase and installation in respect of each change listed, and derived (where possible) from [the BMI Price Book;]
 - standard timescales for implementation of each change listed;

and

- a schedule of rates for any Specialist Services which may be required by the Provider to implement such changes provided that the parties agree that it is anticipated that the need for Specialist Services is likely to arise in respect of only a limited number of Catalogue Changes.

3 Contractor Response

- Within [five (5)] Business Days of receipt of the Low Value Change Request, the Contractor shall in writing either:
 - where the Low Value Change is set out in the Catalogue, confirm the cost of implementing the required Low Value Change which shall not exceed the price specified in the Catalogue and the time period for completing or implementing the Low Value Change which shall not exceed the period specified in the Catalogue; or
 - where the Low Value Change is not set out in the Catalogue, provide a fixed price for implementing the required Low Value Change which shall be calculated in accordance with paragraph 3.2 together with a period for completion or implementation.
- The cost of implementing any Low Value Change which is not set out in the Catalogue shall be calculated on the basis that:
 - wherever practicable the Contractor shall procure that such works are carried out by an existing on-site and suitably qualified employee of a Sub-Contractor and no labour element shall be charged to the Authority in respect of such works. Where the Low Value Change can not be carried out by an existing on-site and suitably qualified employee of a Sub-Contractor, the cost of the labour element shall be calculated in accordance with the Small Works Rates or, where such rates are not applicable, in accordance with rates which are fair and reasonable; and
 - the materials element shall be charged at the cost of materials to the Contractor or to the contractor carrying out the work (net of all discounts) and there shall be no management fee, margin, overhead, contingency or other cost applied to such costs.
- The Contractor shall make no additional charge to the Authority for processing, implementing or managing a Low Value Change unless the number of Low Value Changes in any Payment Year exceeds [♦]. Any unless the Contractor can demonstrate that this service was not priced for in the original bid. Where this is proven, then the Project Management Fee should apply. Low Value Changes in excess of this limit, shall be charged at a fee of £[50] (indexed) for each subsequent [♦] Change].
- The Authority may, within [five (5)] Business Days of receipt, object in writing to the Contractor's response given pursuant to paragraph o and in such circumstances the parties shall act reasonably to agree, as soon as practicable, how the Low Value Change is to be priced and/or implemented. If the parties cannot agree the Low Value Change, the Authority may withdraw the Low Value Change Request and (if the Authority chooses) carry out the Low Value Change itself or refer the matter to the Dispute Resolution Procedure [in which case paragraph 5.3 shall apply].

4 Due Diligence

- The provisions of paragraph 5 of Part 1 (General Provisions) shall apply.

5 Implementation

- If the Authority has not objected pursuant to paragraph 3.4, the Contractor shall, within [five (5)] Business Days of receipt of the Low Value Change Request, proceed to implement the required Change within the timescales specified in the Catalogue. Where no timescales are specified in the Catalogue, the Contractor shall implement the required Low Value Change within [fifteen (15)] Business Days or such other period agreed between the parties.
- The Contractor shall implement the required Low Value Change so as to minimise any inconvenience to the Authority and shall notify the Authority when it believes the Low Value Change has been completed.
- Paragraph □ of Part 1 shall apply and any dispute pursuant to this Part 2 may be referred by either party to the Dispute Resolution Procedure. Provided that the Contractor shall, where such dispute concerns the cost of the Low Value Change and if instructed so to do by the Authority, carry out or implement the Low Value Change within the prescribed timescales notwithstanding the dispute.

6 Payment

- Following the implementation of a Low Value Change, the Contractor shall include the costs of any Low Value Change in the next [Draft Monthly Payment Report] following completion or implementation of the relevant Low Value Change.
- No adjustment of the Unitary Charge shall be made as a result of any Low Value Change unless agreed between the parties. Where it is agreed that an adjustment of the Unitary Charge is required, the Base Case shall be adjusted to give effect to such Low Value Changes once each Payment Year and all relevant Low Value Changes that have occurred in the preceding Payment Year shall be aggregated together into a single cumulative adjustment as set out in [Para / Schedule ♦]

7 Update of Catalogue

- From the Contract Date the Catalogue shall be that set out in Appendix 1 to this Change Protocol and, subject to paragraph o, the rates set out therein shall be [indexed on each anniversary of the Contract Date].
- On each [second] anniversary of the Contract Date, the parties shall review the Catalogue with the intention of:
 - including in the Catalogue unit prices for any Low Value Change or any Change which does not affect the risk profile of the Project which the parties anticipate could occur during the life of the Project;
 - including time periods for the carrying out of any works or implementation of any Change referred to in paragraph o(a);
 - [reviewing the unit pricing for the works and services specified in the Catalogue to ensure that unit rates continue to provide value for money

- with reference to prices prevailing for similar items in the market at the time;]
- [reviewing the rates for any administrative services required to process a Change;]
- [reviewing any labour rates included in the Catalogue;]
- taking account of any Low Value Changes which took place in the preceding Payment Year and which may occur again and should properly be included in the Catalogue.
- No later than [February] of each relevant Payment Year, the Contractor shall submit to the Authority any amendments to the Catalogue as required by the Authority or agreed by the parties pursuant to paragraph o together with evidence that the unit pricing set out in the Catalogue (or proposed as an amendment to the Catalogue) offers the Authority value for money;
- The parties shall meet and endeavour, in good faith, to agree any amendments to the Catalogue. Any dispute shall be referred to the Dispute Resolution Procedure and any price determined as providing good value for money with reference to prices prevailing for similar items in the market at the time of determination shall be included in the Catalogue.
- No later than [March] of each relevant Payment Year, the Contractor shall issue to the Authority an updated Catalogue which shall set out the agreed or determined amendments and shall constitute the Catalogue for the purposes of this Contract.

Part 3 - Medium Value Changes

8 Notification and Specification

- If a Medium Value Change is required by the Authority, it shall serve an Authority Change Notice on the Contractor.
- The Authority Change Notice shall, where applicable, include, but not be limited to, the following information:
 - a statement that it is a Medium Value Change and whether or not the Change is required as a result of a Change in Law or is a Best Value Change;
 - a description of any works required in sufficient detail to allow the design and pricing of the Medium Value Change by the Contractor;
 - whether, in respect of any additional works, the Contractor is expected to provide maintenance and lifecycle services in respect of such additional works;
 - the location for the works or services required;
 - the timing of the works or services required;

- in respect of additional or varied services, a description of such service or variation to a Service together with the anticipated date of implementation of the variation or commencement of the new service in sufficient detail to allow the pricing of the Medium Value Change by the Contractor;
- the date by which the Contractor shall provide the Contractor Response to the Authority (which shall be appropriate to the complexity of the Change required and shall not be less than [ten (10)] Business Days from the date of the Authority Change Notice);
- either confirmation that the Authority will fund the Medium Value Change itself and its proposals for payment (whether in stages or otherwise) or a request that the Contractor raises finance for the Authority Change as required by paragraph □ of Part 1 (Payment) of this Change Protocol.

9 Contractor Response

- Subject to paragraph □ of Part 1 (Limits on Changes) of this Change Protocol, within the period specified in the Authority Change Notice (or such other period as the parties may agree), the Contractor shall provide the Authority with a Contractor Response which shall include (where applicable) the following information:
 - a detailed programme for the design, Authority review of the design, construction and/or installation of the Medium Value Change (including the procuring of any Necessary Consents);
 - a detailed programme for commissioning and implementing any change in, or addition to the Services, including the provision and/or training of any staff;
 - the proposed method of certification of any construction or operational aspects of the Medium Value Change if not covered by the procedures set out in this Contract.
 - the proposed consultants, sub-contractors and suppliers the Contractor intends to appoint to process the Medium Value Change;
 - details of any impact of the Medium Value Change on the provision of the Services and in particular, details of any relief from compliance with any obligations of the Contract required during the implementation of the Medium Value Change;
 - any Estimated Change in Project Costs that result from the Medium Value Change, taking into account any Capital Expenditure that is required or no longer required as a result of the Medium Value Change;
 - where the Authority has specified in the Authority Change Notice that the Contractor shall raise finance for the Authority Change, the steps the Contractor has or will take to secure such finance;

- [any loss of or increase in third-party revenue that may result from the Medium Value Change;]
 - [an estimate of any third-party costs and the details of the third-party activity that will be incurred in providing the Contractor Response including (where applicable pursuant to paragraph 5 of Part 1) the anticipated cost of the Senior Lender carrying out due diligence (which shall be a [capped][fixed] sum) together with a proposed process for approval of such costs by the Authority before they are incurred;]
 - any amendment to this Contract or any Project Document or any Financing Agreement required as a result of the Medium Value Change.
- In calculating the Estimated Change in Project Costs and/or Capital Expenditure the Contractor shall apply the following principles wherever applicable:
- the unit cost of any construction or installation works (excluding any temporary or demolition works, professional fees, contingencies, overheads and profit margins) required to implement the Medium Value Change shall be the equivalent unit rates set out in Part 1 of Appendix ♦ of this Change Protocol. If the Contractor can demonstrate to the reasonable satisfaction of the Authority that such works are designed to a higher quality as compared to the Works, then the unit rates may be increased to reflect such increase in quality;
 - any lifecycle maintenance associated with additional works (or changes to the Works) shall be consistent with the maintenance profile of the Original Facilities (for example, but without limitation, in terms of the replacement cycles for equipment). Provided that the Contractor shall reflect improvements in technology that can optimise whole life costs for the Authority. The unit costs to be applied to the pricing of the lifecycle maintenance shall be the equivalent unit rates set out in Part 2 of Appendix ♦ of this Change Protocol. If any additional works are designed to a higher quality as compared to the Works, then the unit lifecycle maintenance costs shall be (in real terms) lower;
 - any professional fees, contingencies, overheads and/or profit margins charged by the any consultant, sub-contractor or supplier in respect of construction and/or installation and/or lifecycle and/or service provision shall be the equivalent rates set out in Part 3 of Appendix ♦ of this Change Protocol. If the Contractor can demonstrate to the reasonable satisfaction of the Authority that the fees, overheads and profit margins being charged by consultants, sub-contractors and/or suppliers in current market conditions have changed significantly from those set out in Part 3 of Appendix ♦ of this Change Protocol, then the Authority may agree to amend the rates set out in Part ♦ of Appendix ♦ of this Change Protocol to reflect current market rates;

- the unit cost of any extension of, or change to, any Service (either in scope or area) shall be consistent with the equivalent unit rates set out in Part 4 of Appendix ♦ of this Change Protocol. If the Contractor can demonstrate, to the reasonable satisfaction of the Authority, that as a result of the Medium Value Change, the relevant Service will be of a higher quality than required by the relevant Service Specification then the Authority may agree to increase such rates to reflect any increase in quality;
- the cost of Contractor time, reasonably incurred in preparing the estimate for the Medium Value Change (or proposed Medium Value Change) may be charged for at the rates set out in Part 4 of Appendix ♦ of this Change Protocol (and no additional mark-up or management fee shall be charged by the Contractor over and above the costs it will be liable to pay its sub-contractors in carrying out the works and/or services (as the case may be));
- where the parties agree that paragraph □ to 2.2(e) are not applicable the value of any Medium Value Change shall be calculated in accordance with rates which are fair and reasonable and reflect market rates.

Agreement of Contractor Response

- As soon as practicable after the Authority receives the Contractor Response, the parties shall discuss and endeavour to agree the issues set out in the Contractor Response, and the Contractor shall:
 - provide evidence that the Contractor has used reasonable endeavours (including, where practicable, and without prejudice to the provisions of paragraph □ of Part 4 (Competitive Tendering) of this Change Protocol, the use of competitive quotes) to oblige sub-contractors and suppliers to minimise any increase in costs and maximise any reduction in costs;
 - demonstrate how any Capital Expenditure to be incurred or avoided is being measured in a cost effective manner, including showing that when such expenditure is incurred, foreseeable Changes in Law at that time would be taken into account by the Contractor; and
 - demonstrate that any expenditure that has been avoided, which was anticipated to be incurred that has been affected by the Authority Change, has been taken into account in the Estimated Change in Project Costs.
- If the Contractor fails to provide the information required by paragraph o or satisfy the provisions of paragraphs □ - □ (inclusive) the Authority may (in writing) reject the Contractor Response, in which event the parties shall meet within ten (10) Business Days of the notice of rejection to discuss the reason for the Authority's rejection of the Contractor Response. The Contractor shall use all reasonable endeavours to address the Authority's concern about the quality and content of the Contractor Response. In particular, the Contractor shall provide any additional information or documentation that the Authority shall reasonably require which relates to the contents of the Authority Change Notice and/or the

Contractor Response and/or the information required by paragraphs □ - □ (inclusive). The Authority may require the Contractor to resubmit the Contractor Response amended to take account of, and address, the Authority's concerns and the Contractor shall submit such revised Contractor Response within [twenty (20)] Business Days of such request.

- If the parties cannot agree on the contents of the Contractor Response (as may be amended pursuant to paragraph o), then either party may refer the dispute to the Dispute Resolution Procedure, provided that no determination shall oblige the Authority to issue an Authority Confirmation in respect of the disputed Medium Value Claim.

Authority Confirmation

- The Authority shall, in writing, either confirm or withdraw the Authority Change Notice or reject the Contractor Response and in the event that the Authority:
 - confirms the Authority Change Notice then the Authority shall issue a Confirmation Notice which shall set out the Change in Project Costs and agreed timescales for implementation [and attach the agreed Contractor Response]; or
 - withdraws an Authority Change Notice, paragraph o shall apply; or
 - rejects the Contractors Response, paragraph o shall apply.
- If the Authority does not issue a written notice pursuant to paragraph o within [twenty (20)] Business Days of the contents of the Contractor Response having been agreed in accordance with paragraph o or determined pursuant to paragraph o then the Authority Change Notice shall be deemed to have been withdrawn.
- Where an Authority Change Notice is withdrawn pursuant to paragraph o or deemed to have been withdrawn pursuant to paragraph o or paragraph o of Part 1 (General Provisions), the Authority shall pay to the Contractor the reasonable additional third-party costs incurred by the Contractor in preparing such Contractor Response provided that:
 - the Contractor has used all reasonable endeavours to submit a reasonably priced Contractor Response;
 - the Contractor included in the Contractor Response a cost breakdown of the estimate of third-party costs to be incurred by the Contractor in preparing the Contractor Response and the Authority has:
 - approved such estimate of third-party costs and the type of third-party prior to any third-party costs being incurred; and

- agreed that, given the nature of the proposed Medium Value Change, it was reasonable for the relevant third-party to incur costs in preparing the Contractor Response on the basis of the extent of the proposed Medium Value Change and the work required in submitting an accurate Contractor Response in compliance with this Change Protocol;
 - provided with such evidence as it may reasonably require in order to verify such third-party costs;
 - no cap or fixed fee given by the Contractor (whether in the Contractor Response or otherwise) in respect of any third-party cost has been exceeded.
- The Authority shall not be responsible for payment of any costs incurred by the Contractor in preparing the Contractor Response where the Authority has rejected the Contractor Response on the grounds of non-compliance with the requirements of this Protocol.
 - Where the Authority Change is withdrawn or the Contractor Response is rejected, the Authority shall be entitled to implement the Change itself.
- **Due Diligence**
 - The provisions of paragraph 5 of Part 1 (General Provisions) shall apply.
- **Implementation**
 - The provisions of paragraph 6 of Part 1 (General Provisions) shall apply.
 - Where the Medium Value Change:
 - is implemented at a Facility after the Services Availability Date for that Facility, and constitutes works, the procedure set out and agreed in the Contractor Response for certifying the completion of the Medium Value Change shall apply to determine whether the Medium Value Change has been completed appropriately.
 - constitutes additional or varied Services, the Payment Mechanism shall apply to determine whether the Medium Value Change has been properly implemented.
- **Payment**
 - The provisions of paragraph 7 of Part 1 (Payment) shall apply.

Part 4 - High Value Changes

10 Notification and Specification

- The Authority and the Contractor shall co-operate and collaborate to ensure that each party has early notification of the prospect of a High Value Change. Without prejudice to paragraph o, the Authority shall involve the Contractor as early as is practicable in the specification of the High Value Change to ensure that the developed specifications reflect input from the Contractor and/or the relevant Contractor Parties.
- The Authority may, at any time, issue a Authority Change Notice which shall state:
 - that it is a High Value Change and whether it is required as a result of a Change in Law or is a Best Value Change; or
 - that the High Value Change shall be valued either:
 - by means of the Competitive Tendering Process;
 - by means of the Benchmarking Process; or
 - by means of valuation by an Independent Technical Adviser;
 - if applicable, affordability thresholds for the proposed works or services comprising the relevant High Value Change;
 - if applicable, an output specification of the proposed works, in the same format and with similar detail as that provided in the Authority Construction Requirements wherever possible, and where not possible, in sufficient detail to allow the design and pricing of a solution to the High Value Change;
 - if applicable, a specification of the proposed services (or any change to the Services), in the same format with similar detail as that provided in the Service Specifications wherever possible and, where not possible, in sufficient detail to allow the pricing of the required additional service (or change to a Service);
 - the location for the works or services required;
 - the timing of the works or services required;
 - whether the Contractor is expected to provide maintenance and/or lifecycle services in respect of any additional works;
 - an outline risk allocation matrix setting out the Authority's preferred risk profile in respect of the High Value Change ;
 - a time period for submission of the Contractor Stage 1 Response which shall be reasonable, taking into account the complexity of the High Value Change and, in any event, shall not be less than [thirty (30)] Business Days; and

- in the event that the Authority Change will require Capital Expenditure, whether the Authority intends to pay the Capital Expenditure involved in implementing the Change or whether the Authority requires the Contractor to use its reasonable efforts to obtain funding in accordance with paragraph □ of Part 1 (Funding) of this Change Protocol.
- **Contractor Stage 1 Response**
 - Subject to paragraph □ of Part 1 (Limits on Changes) of this Change Protocol, within the period specified in the Authority Change Notice (or if no time is specified within [thirty (30)] Business Days) the Contractor shall submit a report (a **Contractor Stage 1 Response**), which shall (where applicable) include, but not be limited to, the following information which shall contain sufficient detail to enable the Authority to make an informed decision pursuant to paragraph 4 and shall take account of the Authority's affordability thresholds set out in the Authority Change Notice:
 - an outline programme for implementation of the Change including time periods for design development, Authority review of the design, anticipated dates of any applications for Necessary Consents (including planning applications) and time periods for the provision and training of staff;
 - a broad indication of the impact of carrying out and implementing of the High Value Change on the provision of the Services and in particular whether relief from compliance with any obligations set out in the Contract is likely to be required, including the obligations of the Contractor to meet the performance regime during the implementation of the High Value Change;
 - an outline of the Estimated Change in Project Costs that will result from implementing the High Value Change, taking into account any Capital Expenditure that is required or no longer required as a result of the High Value Change;
 - any Capital Expenditure that is required or no longer required as a result of the High Value Change and where the Authority has specified in the Authority Change Notice that the Contractor shall raise financing for the Authority Change, the steps the Contractor has or will take to secure such financing;
 - [an estimate of any loss of, or increase in, third-party revenues that may result from the High Value Change;]
 - the proposed Project Management Fee which shall be a capped fee calculated in accordance with paragraph o;
 - a budget (or budgets) [together with a capped or fixed fee] for third-party costs and details of the third-party activity likely to be incurred by the Contractor, such as, third-party advice, the carrying out of surveys, obtaining Necessary Consents, the Senior Lender carrying out due diligence and independent certification that may be required to be

- completed prior to agreement of the High Value Change together with a proposed process for approval of such costs by the Authority before they are incurred;
- a summary of any amendments required to this Contract or any Project Document or the Financing Agreements as a result of the Change; and
 - a value for money assessment explaining why the Contractor's proposals represent value for money taking into account both the proposed Capital Expenditure and Whole Life Cost.
- The Contractor may charge a Project Management Fee for the time incurred by its employees in project managing the development, procurement and implementation of the High Value Change. The Project Management Fee shall:
- be based on actual time spent (validated by timesheet records);
 - be calculated at the daily rates as set out in Part 5 of Appendix ♦ (Project Management Fee) of this Change Protocol but capped at the sum set out in the Contractor Stage 1 Confirmation;
 - not include the time of any person who is not an employee of the Contractor; or
 - not include any mark-up or profit cost or additional overheads;
 - be paid in two stages as follows:
 - on the Authority issuing an Authority Stage 1 Confirmation pursuant to paragraph 3.2; and
 - on the Authority issuing an Authority Stage 2 Confirmation pursuant to paragraph 6.1(a) or withdrawing the High Value Change pursuant to paragraph 6.1(b).

and at each stage, the Contractor shall charge (subject to the applicable cap) only for the time incurred by its staff up to completion of that stage.

- In preparing the outline Estimated Change in Project Costs, including the calculation of any Capital Expenditure, the Contractor shall, as specified by the Authority in the Authority Change Notice) either comply with the:
- provisions of paragraph 7 if the Competitive Tendering Process is to apply;
 - provisions of paragraph 8 if the Benchmarking Process is to apply; or
 - provisions of paragraph 9 if an Independent Technical Advisor has been or will be appointed.

- The Contractor shall ensure that the performance risk involved in implementing the High Value Change and any interface risks involved in linking new facilities or services with the Facilities and/or the Services are reflected (depending on the risk profile of the High Value Change) in the Estimated Change in Project Costs and not priced separately over and above the Estimated Change in Project Costs. The Contractor shall not include any separate charge or fee payable to the Contractor or any sub-contractor of the Contractor in the costs included in the Estimated Change in Project Costs.
 - In developing a Contractor Stage 1 Response the Contractor shall liaise with the Authority [and relevant end users (being such persons or organisations as the Contractor in consultation with the Authority considers appropriate)]. The Authority shall provide to the Contractor such information as to its requirements as the Contractor may reasonably require and shall assist the Contractor in the review of any draft designs in relation to the Contractor Stage 1 Response. Any and all information and other input or feedback provided by the Authority to the Contractor shall, unless expressly stated otherwise by the Authority, be provided without warranty and shall be without prejudice to the Authority's rights under this Change Protocol.
- **Authority Stage 1 Confirmation**
 - The Authority shall consider in good faith, the Contractor Stage 1 Response. If the Authority finds that any material aspects of the Contractor Stage 1 Response are unsatisfactory to it, it shall notify the Contractor of the same and offer reasonable assistance to the Contractor to enable it to address such deficiencies and resubmit the Contractor Stage 1 Response as soon as reasonably practicable.
 - The Authority shall, within [thirty (30)] Business Days of receipt of the Contractor Stage 1 Response (as may be amended pursuant to paragraph o), confirm in writing to the Contractor that either:
 - the Contractor should proceed with developing a Contractor Stage 2 Response and shall confirm the agreed Project Management Fee, specify the Approval Criteria and set out the date by which the Contractor Stage 2 Response shall be submitted (which date shall reflect the complexity of the High Value Change and shall not be less than sixty (60) Business Days) (an **Authority Stage 1 Confirmation**); or
 - the Authority withdraws the Authority Change Notice. No compensation (including payment of any part of the Project Management Fee) shall be paid to the Contractor by the Authority if the Authority Change Notice is withdrawn at this Stage 1;
 - If the Authority serves an Authority Stage 1 Confirmation, the Authority shall pay the Contractor the Project Management Fee due at Stage 1 within [twenty (20)] Business Days of receipt of an invoice for the agreed sum submitted by the Contractor.

- Where paragraph 4.2 of Part 1 (General Provisions) applies and the Authority Change Notice is deemed withdrawn, then no compensation (including payment of any part of the Project Management Fee) shall be paid to the Contractor by the Authority.
- **Contractor Stage 2 Response**
 - Within the time period specified in the Authority Stage 1 Confirmation (or if no time is specified within [sixty (60)] Business Days of receipt of the Authority Stage 1 Confirmation), the Contractor shall submit a report (a **Contractor Stage 2 Response**) which shall where applicable, include but not be limited to the following information:
 - (where applicable) a detailed design solution (at the minimum to RIBA Stage D);
 - the proposed consultants, sub-contractors and suppliers which the Contractor intends to appoint to process the High Value Change;
 - details of any Necessary Consents required in order to implement the High Value Change;
 - details of any impact (stoppage or changes) on the provision of the Services and in particular whether (and what) relief from compliance with obligations set out in this Contract is required, including the obligations to meet the performance regime during the implementation of the High Value Change and the duration of such relief;
 - the proposed method of certification of any construction or operational aspects of the High Value Change if not covered by the procedures in this Contract;
 - a detailed timetable for implementation of the High Value Change;
 - any surveys and investigations and associated reports that are reasonably necessary to ascertain (in relation to a High Value Change which involves the construction of additional buildings) information as to the nature, location and condition of the relevant land (including hydrological, geological, geotechnical and sub-surface conditions) together with information relating to archaeological finds, areas of archaeological, scientific or natural interest and (in relation to the refurbishment of any existing buildings) information on the condition and quality of existing structures and, in particular, the presence of any latent defects;
 - a completed risk register showing the potential risks identified in relation to the delivery of the High Value Change the occurrence of which are capable of adversely affecting the time for completion, cost and/or quality of the Project, the probability of such risks occurring and a financial estimate of the most likely consequences of each risk occurring together with the prioritisation of all continuing risks and an action plan in respect of, and risk owners for, all risks prioritised as serious risks;

- any approval required from the insurers and/or the Senior Lenders together with details of the [fixed] [capped] sum for the due diligence costs incurred or to be incurred in obtaining the same;
- details of any third-party costs incurred in preparing the Contractor Stage 2 Response and/or to be incurred in implementing the High Value Change together with details of Authority approvals given to sums already expended and confirmation that costs to be incurred are included in the Change in Project Costs.
- a draft deed of amendment setting out any amendment(s) to this Contract and/or any Project Document and/or any Financing Agreement required as a result of the High Value Change;
- [the amount of any loss of or increase in third-party revenues that may result from the High Value Change and confirmation that the effect is included in the Change in Project Costs];
- if requested by the Authority, details of any funding obtained and the adjustments required to the Unitary Charge together with a proposed revised financial model including the detailed price estimates;
- a final Change in Project Costs that result from the High Value Change, taking into account any Capital Expenditure that is required or no longer required as a result of the High Value Change, all reasonable third-party costs incurred or likely to be incurred by the Contractor and any increase or decrease in operating costs and any loss of or increase in third-party revenue that results from the High Value Change;
- evidence that the Contractor has used reasonable endeavours (including, where practicable and without prejudice to the provisions of paragraph o, the use of competitive quotes) to oblige sub-contractors and suppliers to minimise any increase in costs and maximise any reduction in costs;
- a demonstration of how any Capital Expenditure to be incurred or avoided is being measured in a cost effective manner, including showing that when such expenditure is incurred, foreseeable Changes in Law at that time would be taken into account by the Contractor;
- a demonstration that any expenditure that has been avoided, which was anticipated to be incurred that has been affected by the High Value Change, has been taken into account in the Capital Expenditure and/or Estimated Change in Project Costs;
- a value for money assessment explaining why the Contractor's proposals represent value for money taking into account both the proposed Capital Expenditure and Whole Life Cost; and
- an explanation (together with appropriate supporting evidence) as to why the Contractor Stage 2 Response meets the Approval Criteria.

- The Contractor shall also include in the Contractor Stage 2 Response the following information:
 - if the Authority specified in the Authority Change Notice that paragraph 7 will apply, the Tendering Report;
 - if the Authority specified in the Authority Change Notice that paragraph 8 will apply, a benchmarking report demonstrating that the unit rates for construction, lifecycle and maintenance services used to calculate the final and fixed Change in Project Costs fall within reasonable ranges compared to [benchmarks derived from the [♦ Benchmarking System] or (where such benchmarks are not available)] industry benchmarks obtained from [a reputable, independent source] [the Comparable Market]; or
 - if the Authority specified in the Authority Change Notice that paragraph 9 will apply, the Reference Price with details of how the Reference Price was used to calculate the Change in Project Costs and any comments made by the Independent Technical Adviser on the Change in Project Costs.
- In developing a Contractor Stage 2 Response, the Contractor shall continue to liaise with the Authority [and relevant end users (being such persons or organisations as the Authority in consultation with the Contractor considers appropriate)]. .
- Without prejudice to paragraph o, the Authority shall co-operate with the Contractor in relation to any Contractor Stage 2 Response being developed by the Contractor, including (without limitation) promptly providing:
 - written confirmation of any change to the affordability thresholds and any amendment to the Authority's requirements both as set out in the Authority Change Notice;
 - changes to funding which the Authority receives or to the way in which funding may be applied, either or both of which may affect whether a High Value Change is affordable;
 - any information reasonably required by the Contractor to enable the Contractor to submit a full and complete Contractor Stage 2 Response and any such other information as the Contractor may reasonably require and shall assist the Contractor in the review of any draft designs and in the development of other aspects of the Contractor Stage 2 Response (but not where this would involve the Authority incurring additional material expense); and
 - reasonable assistance to the Contractor in relation to procurement by the Contractor of all relevant Necessary Consents

provided that any and all information and other input or feedback provided by the Authority to the Contractor shall be provided without warranty and shall be without prejudice to the Authority's rights under this Change Protocol.

- The Contractor shall notify the Authority as soon as it becomes aware of any matter which may have a reasonably foreseeable material adverse effect on the viability of any High Value Change including any planning issues likely to cause a material delay in the anticipated programme for the High Value Change or material cost increases.

- **Agreement of Contractor Response**

- As soon as practicable after the Authority receives the Contractor Stage 2 Response, the parties shall discuss and endeavour to agree the issues set out in the Contractor Stage 2 Response. The Authority may require (and the Contractor shall provide) further information it reasonably requires to enable the Authority to evaluate the Contractor Stage 2 Response and, in particular, decide whether the Contractor Stage 2 Response meets the Approval Criteria. In particular, the Contractor shall:
 - provide evidence that the Contractor has used reasonable endeavours (including, where practicable (and without prejudice to the provisions of paragraph o), the use of competitive quotes) to oblige sub-contractors and suppliers to minimise any increase in costs and maximise any reduction in costs;
 - demonstrate how any Capital Expenditure to be incurred or avoided is being measured in a cost effective manner, including showing that when such expenditure is incurred, foreseeable Changes in Law at that time would be taken into account by the Contractor; and
 - demonstrate that any expenditure that has been avoided, which was anticipated to be incurred that has been affected by the High Value Change, has been taken into account in the Change in Project Costs,

and the Contractor shall reply promptly and fully to all requests by the Authority for further information.

- The Authority may modify the Authority Change Notice (which modification shall be in writing). The Contractor shall, as soon as practicable and in any event not more than ten (10) Business Days after receipt of such modification, notify the Authority of any consequential changes to the Contractor Stage 2 Response (which shall be deemed accordingly amended).
- If acting reasonably, the Authority is of the view that any material aspect of the Stage 2 Response fails to meet the Approval Criteria [and/or otherwise fails to satisfy any requirement of this Change Protocol] the Authority shall notify the Contractor of the same and shall specify in writing and explain to the Contractor in what respects the Contractor Stage 2 Response does not meet the Approval Criteria [and/or fails to comply with this Change Protocol]. The Contractor shall, within twenty (20) Business Days (or such other period as is agreed by the parties) of such notification, revise and re-submit the Contractor Stage 2 Response.
- If the revised Contractor Stage 2 Response does not address the shortcomings notified by the Authority pursuant to paragraph o and the revised Contractor

Stage 2 Response does not satisfy the Approval Criteria [or other requirement of this Change Protocol] then paragraph shall apply.

- If the parties cannot agree on the contents of the Contractor Stage 2 Response, then either party may refer the dispute to the Dispute Resolution Procedure, provided that no determination shall oblige the Authority to issue a Stage 2 Confirmation in respect of the disputed High Value Change.

- **Authority Stage 2 Confirmation**

- As soon as reasonably practicable after receipt of the Contractor Stage 2 Response or the revised Contractor Stage 2 Response (as the case may be) the Authority shall either:
 - issue written confirmation (an **Authority Stage 2 Confirmation**) and shall pay the Contractor the Project Management Fee due at Stage 2 within [twenty (20)] Business Days of the date of issue of the Authority Stage 2 Confirmation or, if later, receipt of a valid invoice for the agreed amount; or
 - issue a written notice withdrawing the Authority Change Notice in which case provisions of clause o shall apply; or
 - issue a written notice rejecting the Contractor Stage 2 Response in which case the Authority shall not be responsible for any costs incurred by the Contractor in preparing the Contractor Stage 2 Response (including any outstanding part of the Project Management Fee or any due diligence costs incurred by the Senior Lender). Provided that the Authority may only reject the Contractor Stage 2 Response on the grounds that the Contractor Stage 2 Response has failed to meet one or more of the Approval Criteria [or the Contractor has failed to comply with any requirement of this Change Protocol].
- If the Authority does not issue a written notice pursuant to paragraph o within [twenty (20)] Business Days of receipt of a written notice served by the Contractor (which notice may only be served after expiry of a period of [3] months from the date the Authority receives the Contractor Stage 2 Response) requiring the Authority either to confirm the Contractor Stage 2 Response or withdraw the Authority Change Notice then the Authority Change Notice shall be deemed to have been withdrawn.
- Where an Authority Change Notice is withdrawn pursuant to paragraph or deemed to have been withdrawn pursuant to paragraph o, the Authority shall pay to the Contractor within [twenty (20)] Business Days of receipt of an invoice for such amount, the reasonable third-party costs (including any costs incurred by the Senior Lender in carrying out due diligence) incurred by the Contractor in preparing the Contractor Stage 2 Response together with the outstanding balance of the Project Management Fee provided that:
 - the Contractor has satisfied the Approval Criteria [and other requirements of this Change Protocol];

- the Contractor has included in the Contractor Stage 1 Response a cost breakdown of the estimate of third-party costs to be incurred by the Contractor in preparing the Contractor Stage 2 Response and the Authority has:
 - approved such estimate of third-party costs and the type of third-party prior to any third-party costs being incurred;
 - agreed that, given the nature of the proposed High Value Change, it was reasonable for the relevant third-party to incur costs in preparing the Contractor Stage 2 Response on the basis of the extent of the proposed High Value Change and the work required in submitting an accurate Contractor Stage 2 Response in compliance with this Change Protocol;
 - been provided with such evidence as it may reasonably require in order to verify such third-party costs; and
 - no cap or fixed fee given by the Contractor (whether in the Contractor Stage 1 Response or otherwise) in respect of any third-party costs has been exceeded.
- Where the Authority Change is either withdrawn or rejected, the Authority shall be entitled to implement the Change itself.
- **Competitive Tendering**
 - Where this paragraph 7 applies, the Contractor shall, in preparing the Contractor Stage 2 Response, structure the works and/or services required by the High Value Change into a number of discrete work packages, and shall invite at least three (3) competitive tenders for each work package.
 - The Contractor and the Authority shall agree:
 - the work packages to be priced through competitive tendering based on what is judged to provide best value for money;
 - the evaluation criteria;
 - any additional interface risks between the carrying out of any additional works and/or services, and the Facilities and/or carrying out of the Works and/or the delivery of the Services; and
 - that the preferred tenderer shall be selected on the basis of the most economically advantageous tender.
 - The Contractor shall be responsible for:
 - running the competition for the work packages;
 - evaluating and selecting the preferred tenderers;

- negotiating and finalising appointment of the preferred tenderers; and
- managing the implementation of the works and services required as part of the High Value Change,

provided that the Authority shall approve the preferred tenderer(s) following the conclusion of the tendering process but no sub-contractor shall be appointed, until or unless, an Authority Stage 2 Confirmation is issued.

- On conclusion of the tendering process, the Contractor shall submit with the Contractor Stage 2 Response a Tendering Report and the Change in Project Costs shall be based on the prices determined through the tendering process.
 - The Tendering Report shall include, but not be limited to, the following information.
 - details of the companies which were asked to tender for each work package, indicating whether a compliant bid was in fact submitted;
 - the basis upon which each company was invited to tender including their appropriate experience and expertise;
 - how details of how the evaluation process was carried out including the scoring for each tenderer;
 - the basis of the recommendation of the successful tenderer for each work package;
 - confirmation that the tendered price is a fixed price which includes all costs, overheads, risks and contingencies and will not be liable to change or adjustment; and
 - any other relevant information.
- **Benchmarking Process**

- Where this paragraph 8 applies, the Contractor shall benchmark all construction, facilities management and lifecycle costs (including professional fees, contingencies, overheads and profit margins) [using benchmark figures from the ♦ Benchmarking System wherever available and applicable, and where not] using benchmarks available from a reputable independent source that are generally recognized in the industry.
- The Contractor shall submit with the Contractor Stage 2 Response a detailed Benchmarking Report which shall set out details of how the benchmarking exercise was carried out and providing evidence that the construction costs, operating costs and financing costs included in the Change in Project Costs has [been benchmarked against the ♦ Benchmarking System and/or] supported by actual input from [a reputable independent source] [the Comparable Market]. In particular the Benchmarking Report shall include full supporting evidence of the assumptions, source of market price and information's and conclusions reached including:

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- the methodology and all assumptions by which the Estimated Change in Project Costs was determined;
 - [assumptions made in respect of the Comparable Market];
 - full details of sources of the information used including evidence as to reputation and independence of such sources;
 - such other details as the parties may agree.
- **Independent Technical Adviser**

Joint Appointment of Independent Technical Adviser

- Where this paragraph 9 applies, upon issue of an Authority Change Notice or the parties agreeing that an Authority Change Notice will shortly be issued in respect of a High Value Change, the Authority and the Contractor shall jointly appoint an Independent Technical Adviser to assist in the processing of the High Value Change. The terms of reference for the Independent Technical Adviser shall include:
 - developing a Reference Price; and
 - commenting on the Estimated Change in Project Costs and the Change in Project Costs.
 - Upon appointment of the Independent Technical Advisor (or if later, upon service of the Authority Change Notice pursuant to paragraph o), the Authority and the Contractor shall instruct the Independent Technical Adviser to develop a Reference Price.
 - The Independent Technical Adviser shall develop a Reference Price in consultation with the Contractor and the Authority. The Reference Price shall include (as applicable) all finance, design development, construction, lifecycle, maintenance and operating costs and savings (including professional fees and charges, overheads, profits and contingencies and explicitly including the pricing for any performance risks associated with implementing the change based on the outline risk allocation matrix included in the Authority Change Notice). The parties agree that the Reference Price shall include the pricing of performance risk and that no separate Contractor mark up should be included in the Estimated Change in Project Cost or the Change in Project Costs.
 - The Independent Technical Adviser shall provide to the Contractor and the Authority the Reference Price. The Contractor shall use the Reference Price to produce the Estimated Change in Project Costs and, subsequently, the Change in Project Costs. The Independent Technical Adviser shall comment on the Estimated Change in Project Costs and the Change in Project Costs within the time periods to be agreed by the Contractor and the Authority and specified in the appointment of the Independent Technical Adviser.
- **Funding**
 - The provisions of paragraph 4 of Part 1 (General Provisions) shall apply.

- **Due Diligence**
 - The provisions of paragraph 5 of Part 1 (General Provisions) shall apply.
- **Implementation**
 - The provisions of paragraph 6 of Part 1 (General Provisions) shall apply.
- **Payment**
 - The provisions of paragraph 7 of Part 1 (General Provisions) shall apply.

Part 5 -Contractor Change

- If the Contractor wishes to introduce a Contractor Change, it shall serve a Contractor Change Notice on the Authority.
- The Contractor Change Notice shall:
 - set out the proposed Contractor Change in sufficient detail to enable the Authority to evaluate it in full;
 - specify whether the Contractor Change is:
 - a Low Value Change;
 - a Medium Value Change;
 - a High Value Change; and/or
 - is required as a result of a Change in Law;
 - specify the Contractor's reasons for proposing the Contractor Change;
 - indicate any implications of the Contractor Change;
 - indicate what savings, if any, will be generated by the Contractor Change:
 - whether a revision of the Unitary Charge is proposed (and, if so, give details of such proposed revision); or
 - whether such savings will be paid by a lump sum;
 - if the Contractor Change is required as a result of a Qualifying Change of Law, what sums, if any, will be payable by the Authority;
 - indicate if there are any critical dates by which a decision by the Authority is required; and
 - request the Authority to consult with the Contractor with a view to deciding whether to agree to the Contractor Change and, if so, what consequential changes the Authority requires as a result.
- The Authority shall evaluate the Contractor Change Notice in good faith, taking into account all relevant issues, including whether:

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- a revision of the Unitary Charge will occur;
 - the Contractor Change may affect the quality of the Services or delivery of the Services (or any of them);
 - the Contractor Change may interfere with the relationship of the Authority with third parties;
 - the financial strength of the Contractor is sufficient to perform the Services after implementation of the Contractor Change;
 - the value and/or life expectancy of any of the Existing Facilities [and/or Assets] is reduced; or
 - the Contractor Change materially affects the risks or costs to which the Authority is exposed.
 - If the Contractor Change causes, or will cause, the Contractor's costs or those of a sub-contractor to decrease, there shall be a decrease in the Unitary Charge such that any cost savings (following deduction of costs reasonably incurred by the Contractor in implementing such Contractor Change) shall be shared on the basis of ♦ per cent (♦%) of the saving being retained by the Contractor and ♦ per cent (♦%) of the saving being paid to the Authority.
 - As soon as practicable after receiving the Contractor Change Notice, the parties shall meet and discuss the matters referred to in it. During discussions the Authority may propose modifications to, or accept or reject, the Contractor Change Notice.
 - If the Authority accepts the Contractor Change Notice (with or without modification) the parties shall consult and agree the remaining details as soon as practicable and upon agreement of the Contractor Change, the Authority shall issue an Authority Confirmation which shall set out the agreed Contractor Change and:
 - the parties shall enter into any documents to amend this Contract or any relevant Project Document which are necessary to give effect to the Contractor Change;
 - if applicable, the Unitary Charge shall be revised in accordance with Schedule ♦ (Revision of Base Case and Custody);
 - if applicable, the Contractor shall pay to the Authority a sum equal to the amount calculated in accordance with clause ♦ (Best Value) or paragraph 4 within twenty (20) Business Days of receipt of an invoice for such amount; and
 - the Contractor Change shall be implemented within the period specified by the Authority in its notice of acceptance.
 - If the Authority rejects the Contractor Change Notice, it shall not be obliged to give its reasons for such a rejection and the Contractor shall not be entitled to reimbursement by the Authority of any of its costs.
 - Unless the Authority Confirmation expressly agrees to an increase in the Unitary Charge, there shall be no increase in the Unitary Charge as a result of a Contractor Change and, subject to clause ♦ (Change in Law), any funding shall be provided by the Contractor.

- The Authority shall not reject a Contractor Change which is required in order to conform to a Change in Law. The costs of introducing a Contractor Change resulting from a Qualifying Change in Law (including any resulting revision of the Unitary Charge) shall be dealt with in accordance with clause ♦ (Change in Law) and to the extent not dealt with therein, all costs shall be borne by the Contractor.