

FOREWORD - IMPORTANT NOTICE

Important Notice

This paper provides information on the principles and procedures which PFUs/Authorities may wish to consider when producing their own Variation provisions to comply with the requirements of SoPC4 – and is drafted with a school project in mind. It is not intended as a contractual document but as an aid to help Authorities consider relevant issues. It is not a replacement for independent specialist advice and those who use it should ensure that they take appropriate legal, financial and technical advice when considering this document. HMT and its advisers accept no liability whatsoever for any expense, liability, loss, claim or proceedings arising from reliance placed upon this paper or any part of it. Users must always satisfy themselves as to the applicability of the relevant principles to their sector.

SECTION I: INTRODUCTION

1.1 Changes may be required at various stages of the Contract, and this Change Protocol specifies principles and procedures that should be taken into account to implement all Changes¹. These cover:

- Notification and Specification;
- Contractor Response;
- Authority Confirmation;
- Change Implementation;
- Funding and Payment;
- Due diligence and
- Documentation and Monitoring.

This protocol does not provide full contractual drafting and, in particular, Authorities will need to use definitions suitable to their own projects.

1.2 This Protocol covers all types of Change, whether initiated as a result of:

- **Authority Change:** defined as a change in Service or Works that is initiated by the Authority, by providing a Change Notice to the Contractor, and which is not a Change in Law Change;
- **Contractor Change:** defined as a change in Service or Works that is initiated by the Contractor, by providing a Change Notice to the Authority, and which is not a Change in Law Change; or
- **Change in Law Change:** defined as a Change in Service or Works that is required in order to comply with a Change in Law.

1.3 Changes are classified into:

- **Small Value Catalogue Changes:** defined as those Changes in the Works or the Services listed in the Catalogue of Small Works and Services², or as otherwise agreed from time to time between the parties;
- **Medium Value Changes:** defined as those Changes in the Works or the Services that are not listed in the Catalogue of Small Works and Services but are, in the reasonable opinion of the Authority, likely to either cost less than £[200,000] to implement, or require an adjustment to the Unitary Charge that is less than [2]%;
- **High Value Changes:** defined as those Changes in the Works or the Services that are not listed in the Catalogue of Small Works and Services and which, in the reasonable opinion of the Authority, are likely to either cost more than

¹ To be defined. Definition to allow for changes in Works as well as Services.

² These should generally have an individual cost not exceeding £[10,000] Indexed, and are assumed not to be relevant in the Construction Period.

£[200,000]³ to implement, or require an adjustment to the Unitary Charge that is greater than [2] %.

1.4 The Contractor will be entitled to refuse to carry out a Change (that is not a Change in Law Change) only:

- if it requires the Service or Works 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 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 or Works;
- if it would materially and adversely affect the health and safety of any person;
- if it would require the Contractor to implement the Change in Service or Work in an unreasonable period of time;
- if it would (if implemented) materially and adversely change the nature of the Project (including its risk profile); and/or
- the Authority does not have the legal power or capacity to enter into the legal documentation to implement such Change.

1.5 The Authority has an absolute discretion to accept or reject any Contractor Change, but may only reject a Change in Law Change pending agreement of any technical or commercial issues with the Contractor.

1.6 Save as allowed in paragraph 1.5 above, the Contractor will promptly implement any Change in Service required by the Authority in accordance with the provisions of this protocol.

1.7 Any dispute arising in relation to any aspect of this protocol may be resolved in accordance with the Dispute Resolution Procedure.

³ A limit for Medium Changes and High Value Changes may be agreed on a project by project basis.

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SECTION 2: CHANGES IN THE CONSTRUCTION PERIOD

Where Changes are required during the Construction Period, the following protocol will apply for the processing of such Change.⁴

2.1 Notification and Specification

If a Change is required by the Authority, it will serve an Authority Change Notice on the Contractor.

If a Change is desired by the Contractor, it will serve a Contractor Change Notice on the Authority.

If a Change is required to comply with a Change in Law, then either party may serve a Change Notice on the other.

The Change Notice will contain at least the following information:

- An output specification of the works required, in the same format and with similar detail as that provided in the Authority's Requirements wherever possible, and where not possible, in sufficient detail to allow the design and pricing of a solution to the Change Notice;
- The location for the works or services required;
- The timing of the work required (and any impact these have on the handover date);
- whether, in respect of additional works, the Contractor is to provide FM and lifecycle maintenance services in respect of the additional works and
- whether, (in the case of a notice provided by the Authority) the Authority requires the Contractor to raise additional finance to fund the Change, or alternatively if it would prefer to fund the change itself and

2.2 Contractor Estimate

Within [10]⁵ business days (or, in the case of Changes with an estimated capital value over [£] [] days of the Contractor submitting or receiving a Change Notice (as the case may be), the Contractor will provide the Authority with an [Estimate], which shall include notice of

- timescales for implementation;
- whether relief from compliance with obligations is required, including the obligations of the Contractor to achieve the Planned Service Commencement Date;
- any impact on the provision of the Service or Works;

⁴ During the Construction Period Changes should be kept to a minimum unless a long period of time is scheduled to elapse before the Service Commencement Date. Authorities may, if they wish, state this intention in the protocol or put parameters or expectations around Construction period changes in the protocol. Depending on the approach taken, the Authority may, if it prefers, cover construction period changes within the other protocols (rather than having its own separate protocol).

⁵ The timescales for the Contractor's response should be appropriate to the complexity of the change requested.

- any amendment required to the Contract and/or any Project Document as a result of the Change (including, without limitation, any change needed to the [Planned Service Commencement Date]);
- any Estimated Change in Project Costs that result from the Change, taking into account any Capital Expenditure that is required or no longer required as a result of the Change;
- any loss of revenue that results from the Change;
- any approval required from insurers;⁶
- any regulatory approvals which are required; and
- the proposed method of certification of any construction or operational aspects of the Service or Works required by the Change if not covered by the service commissioning procedure in the Contract,

and the Authority and Contractor shall, if required by the Authority, promptly, and in any event within [] days, agree any cap on reimbursable costs required under paragraph 2.3 below.

In preparing the [Estimate], the Contractor shall apply the following principles as applicable:

- The unit cost of any construction works (not including abnormals, overheads and profit margins) required to implement any Medium Value Change Notice will be consistent with unit construction cost of the original facility, uplifted using the BCIS index for construction cost inflation in the intervening period. However, if any additional works are to be delivered to a demonstrably higher quality as compared to the original facility (see below for optimal whole life costing), then the parties may agree for the unit rates to be higher. For the avoidance of doubt, the unit cost of construction of the original facility is specified below:

[insert figure]

- The unit cost of any extension or reduction to existing [Soft FM] services (to new areas) will similarly be consistent with the existing unit cost of provision (e.g. the rate per sq.m. for an extended cleaning service should be consistent with the existing rate). However, if services are required to be at a higher quality, then the parties may agree a higher unit rate;

[insert figures for each service]

⁶ Changes in Service (particularly where they involve a change to the insured assets) may require authorisation from the insurers, in which case this also should be dealt with in the Contractor's response. Whilst project specific insurance provides a greater level of protection than group insurance, and hence represents the preferred insurance solution, it is worth noting that a change in the scope of the Works is much less likely to have an impact on the insurance programme if a group policy is used. The same point applies, albeit to a lesser extent, to project specific insurances where the cover provided is also on a first loss basis, and so routine operational changes in scope are unlikely to impact on the assessment of the first loss limit. Underwriters will normally expect to be notified immediately of any material change in the scope of the Project. Materiality will to a large extent depend on the size and nature of the scope change. The insurance arrangements can be structured to give the Contractor a degree of flexibility in processing changes without any additional insurance due diligence. For instance: A capital additions Clause in the material damage insurance will cover the Contractor for 'modest' changes in the scope of the Project leading to a change in the capital value of the insured assets. Typically the amount is capped at a relatively low level (e.g. c. £100,000). The insurer will still need to be advised of the material change, though this can be when the insurance is renewed, rather than at the time of the scope change. A contract works extension could be included in the insurance package which will cover the Contractor for works undertaken during the operational period.

- Any lifecycle maintenance associated with additional works should similarly be consistent with the maintenance profile of the original facility (e.g. in terms of the replacement cycles for equipment) provided that the Contractor should reflect improvements in technology that can optimise whole life costs for the Authority. If the additional works are carried out to a higher standard than the original works, then it is expected that the unit lifecycle maintenance costs for the former may be (in real terms) lower than those for the latter.

[insert unit lifecycle costs – per sq.m or as % of construction – for the original facility]

- Any professional fees, contingencies, overheads and/or profit margins charged by the Contractor's sub-contractors in respect of construction, lifecycle and/or FM service provision will be consistent with the professional fees, contingencies, overheads and profit margins charged by the sub-contractors for the original facility, which for the avoidance of doubt, are specified below:

[insert professional fees, contingencies, overheads and profit margin figures (as % of construction cost) from original facility.]

However, if either party can demonstrate to the other party's reasonable satisfaction that overheads and margins being charged by sub-contractors in current market conditions have changed significantly from the original assumptions, then the parties shall agree to use current market rates.

- No additional mark-up or management fee shall be charged by the Contractor over and above the costs that it will be liable to pay its sub-contractors in carrying out the works and/or services (as the case may be).⁷ However, the Contractor may include the costs of any time reasonably incurred by its own staff in preparing the Estimate at an hourly rate set out below:

[insert hourly rate for costing SPV time, fixed but uplifted at RPI each year]

2.3 Authority Confirmation

Within 20 Days of receiving the Contractor Estimate pursuant to paragraph 2.2 above, the Authority will give its confirmation, rejection or withdrawal of the Change Notice.⁸

If the Authority rejects the Change Notice it shall give reasons for doing so and the parties shall meet to resolve the issue.

If the Authority withdraws an Authority Change Notice, then provided the Contractor has not failed in its obligations to provide the Contractor Estimate under paragraph 2.2 above, it will reimburse the Contractor for its third party costs reasonably incurred by the Contractor in preparing the Contractor Estimate, subject to any applicable cap. The Authority may (at the time of requesting any such Change) require the Contractor to

⁷ Reference should be made to the Change Management Service here. In addition, in the bid period, bidders should be encouraged to bid on the basis that the construction contractor (or, if preferred, the FM provider) will provide a support package for implementing Medium Value Changes for at least 24 months following Service Commencement. This framework can then be renewed every [x] years or else put out to competition. Reference to these provisions should then be made here.

⁸ In the case of Small Value Catalogue Changes (see paragraph 3.1.1 below), the Authority may in the case of a school wish the Head teacher or another local representative (e.g. Head teachers) to agree, or to be involved in, these changes. This may need to be considered in the Governing Body Agreement between the School and the Authority.

agree a cap on these costs, and, if applicable, on the costs of funder due diligence referred to in paragraph 2.4 below, (the amount to be agreed between the parties acting reasonably). The Contractor will not be reimbursed costs under any other circumstances.

Any dispute in relation to the Change Notice may be referred to the Dispute Resolution Procedure.

2.4 Funding and Payment

Where the Authority requires the Contractor to seek any additional finance required to fund the works or service required in the Change Notice, the Contractor will use its best endeavours to raise the necessary finance.⁹ However, if despite best endeavours the Contractor is unable to raise the necessary finance, the Authority will either fund the Change itself, or will withdraw the Change Notice.

Where third party funding is obtained for an Authority Change, compensation will be made to the Contractor for implementing the Change Notice through an adjustment to the Unitary Charge, by incorporating the [Revised Project Costs] agreed pursuant to paragraph 2.3 above, and following the procedure in [Schedule/ Clause [] - Adjustment to the Financial Model].

In the case of a Qualifying Change in Law, the costs will be shared between the parties in accordance with clause [Insert cross reference to change in law clause in Contract].

In the case of a Contractor Change, funding shall be provided by the Contractor (except to the extent a Qualifying Change of Law applies, in which case the provisions of clause [] shall apply).

2.5 Due Diligence

No due diligence procedures will be required, unless otherwise agreed between the parties, for Medium Value Changes¹⁰.

For High Value Changes, the Senior Lender will have the right to carry out third party legal, technical or financial due diligence. The Contractor may seek to recover the cost of these, only in respect of Authority changes which are withdrawn, and provided they are pre-agreed on a reasonable basis with the Authority. Such costs will be reimbursed by the Authority within [10] Business Days of the Contractor submitting an invoice for such costs subject to the invoices being within the overall budget for due diligence agreed by the Contractor with the Authority in advance of the due diligence being commissioned.

2.6 Change Implementation

The Contractor shall implement the agreed changes within the timescales agreed as part of the Authority's Confirmation of the Change Notice above, provided that (a) Where Authority funding is provided the parties shall agree procedures for disbursement of Authority funds, and (b) for High Value Changes, the Authority should develop its own independent estimate of the cost, using an Independent Technical

⁹ This will need to be modified in the event the initial finance solution included stand-by credit facilities and/or variation bonds. In such cases, the Contractor can be required to raise the necessary finance rather than just use best endeavours.

¹⁰ Small Value Catalogue Changes may not be relevant in the Construction phase. Alternatively it could be provided that they would be accommodated as part of the Review procedure.

Adviser to adjudicate where there is a dispute on the cost. The two-stage approval procedure set out in Section 3.3 Option A should be followed.

If the Contractor does not submit its Contractor's Estimate when required by paragraph 2.2 or implement the change within the agreed timescales, then the Contractor will be required to pay liquidated damages to the Authority at the rate of £50 (indexed) per day of delay¹¹.

Any dispute between the Parties relating to the implementation of the Works may be determined using the Disputes Resolution Procedure.

2.7 Documentation and Monitoring

All such Changes will be implemented under the terms of the Contract (as the same may have been amended pursuant to the provisions of this paragraph 2)¹² and all the various provisions of the Project Agreement applying to the Works will apply to the carrying out of any additional works involved in changes under this Section 2.

The Contractor will keep a record of all changes commissioned during the Construction Period (both completed and outstanding) and provide the Authority with these records whenever reasonably required by the Authority.

¹¹ Authorities may wish to deal with this as a service failure through the performance regime which may for example, specify deductions for (a) failures to respond to requests within time limits (b) failure to provide change proposals to the required standard and (c) failure to implement agreed changes.

¹² It is not expected that any separate form of contract should be needed for Construction period works changes, since they should follow a similar risk profile to the other works already being performed, though any larger changes could, have some impact on the Service Commencement Date or require other variations to it.

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SECTION 3: CHANGES IN THE OPERATIONAL PERIOD

3.1 Small Value Catalogue Changes

3.1.1 Catalogue of Small Works and Services (“the Catalogue”)

The Authority and the Contractor will agree, at the commencement of [each Academic Year] in the Operational Period, a catalogue of small value items (Schedule XX) with pre-agreed all-inclusive unit prices (for purchase and installation), as well as standard timescales (wherever practicable) for implementation, for the Catalogue of Small Works and Services. [Refer also to Building Contractor support package]¹³¹⁴.

The Authority and the Contractor will agree, at the commencement of each [Academic Year] in the Operational Period, and insert in the Catalogue, a schedule of rates for any specialist services that may be required by the Contractor to process Catalogue [or Medium] Changes in works or services. A typical list of specialist services is provided in schedule [Authority to provide]

The Contractor will demonstrate value for money for the unit pricing in the catalogue to the Authority with reference to prices prevailing for similar items in the market at the time, for instance by comparing with standard pricing schedules such as the BMI price book.

3.1.2 Notification and Specification

If a works or service change listed in the Catalogue is desired by the Authority, it will notify the Contractor by filling out and submitting the attached Catalogue Order Form (attached as [Appendix one]).

3.1.3 Contractor Response

On receiving the Authority’s Catalogue Order Form, the Contractor will within 5 Business Days confirm the cost of implementing the Small Value Change requested. For the avoidance of doubt, the final cost to the Authority shall consist of:

- The Catalogue price; and/or
- [If relevant, any specialist labour charges reasonably incurred by the Contractor to carry out the necessary Small Value Change (charged for at the rates set out in the Catalogue, or where no rates are specified in the Catalogue, at rates reasonable in comparison to the market price for such specialist labour).]
- [Any Contractor handling charge, as allowed below]

¹³ As an alternative, the parties could agree a reference to a standard schedule of rates for materials and labour such as the BMI Price Book (which is updated for each year). If Authorities wish greater initial certainty on catalogue prices from the outset, a schedule could be produced as part of the tender documents and pricing worked up as part of the bids. In addition, in the bid period, bidders should be encouraged to bid on the basis that the construction contractor will provide a support package for implementing Medium Value changes for at least 24 months following Service Commencement. This framework can then be renewed every [x] years or else put out to competition. Reference to these provisions should then be made here.

¹⁴ Authorities may also consider extending the catalogue to other small value changes (beneath a value limit) beyond the categories stated, which will not increase the likelihood of the Contractor failing to meet the Authority’s Requirements or Materially adversely affect the Contractor’s ability to perform its obligations under the PFI Contract.

Catalogue Changes shall be priced taking into account the change management service provided to the Authority by the Contractor, through which up to [] number of Catalogue Changes per annum can be processed free of SPV handling charge to the Authority. No Contractor mark-up or margin should be charged for changes processed within these limits. For Catalogue Changes in excess of these limits, the Contractor may charge a processing fee of £[50] per Catalogue Change. This rate will be indexed to RPI-X over the life of the Contract.

3.1.4 Authority Confirmation

No Authority Confirmation (following the initial Catalogue Order Form) will be required for Small Value Catalogue Changes.

3.1.5 Change Implementation

The Contractor will, on receiving the Catalogue Order Form, proceed to implement the required change in works or services within the timescales specified in the Catalogue. Where no timescales are specified in the Catalogue, the Contractor will implement the required change within 15 Business Days.

If the Contractor does not complete the work within the timescales specified in the Catalogue (or within 15 (fifteen) Business Days as applicable), then the Contractor will suffer a payment mechanism deduction of £20 (indexed) for every day of delay¹⁵.

If there is any dispute about costs, this may be referred by either party to the Dispute Resolution Procedure, but the Contractor will nevertheless be required to implement the Catalogue Change within the prescribed timescales even if the costs are indispute. If the Contractor fails to do so, the Authority may step in and complete the change, and charge the Contractor for any additional cost.

3.1.6 Funding and Payment

Following the implementation of a Small Value Catalogue Change, the Contractor will notify the Authority of the amount payable, and all amounts payable for Small Value Catalogue Changes carried out in a Contract Month will be invoiced together with the Contract invoice for that Contract Month (in accordance with the invoicing procedure described in clause [Authority to provide cross-reference to the Contract]).

In the case of a Qualifying Change in Law, the costs will be shared between the parties in accordance with clause [Authority to insert cross reference from change in law clause in the Contract]

3.1.7 Due Diligence and Documentation

All Catalogue Changes must be implemented in accordance with the terms of the Contract.¹⁶

¹⁵ This can be dealt with under the Performance Regime for the Change Service.

¹⁶ No additional special provisions should be needed. Where changes pose any additional (and material) design or construction risks, or may have a material impact on the operating and life-cycle costs of providing the original Service, technical due diligence be provided for here, but for most projects this is unlikely to be applicable for Catalogue Changes, save as provided later in paragraph 3.1.7.

The financial model/unitary charge may be adjusted to give effect to Catalogue Changes (if necessary) once every year so that all the Catalogue Changes that have occurred can be 'bundled' together into a single cumulative adjustment as necessary. This would only occur in exceptional circumstances where agreed by the parties (e.g. for exceptional life-cycle costs as outlined in footnote 17)¹⁷

No changes should be necessary to the Payment Mechanism as a result of Catalogue Changes, save that, in exceptional situations, changes to the Payment Mechanism may be agreed between the parties.

The Contractor will procure that no funder due diligence will be required on Small Value Catalogue Changes [up to a threshold of £[insert value] or [insert number] per annum.]¹⁸

3.1.8 Documentation and Monitoring

No changes will be made to the Contract as a result of Small Value Catalogue Changes, unless otherwise agreed between the parties.

The Contractor will keep a record of all Small Value Catalogue Changes processed, completed and outstanding and provide the Authority with these records whenever reasonably required by the Authority.

3.2 Medium Value Changes

3.2.1 Notification and Specification

If a Medium Value Change is required by the Authority, it will serve an Authority Medium Value Change Notice on the Contractor.

If a Medium Value Change is desired by the Contractor, it will serve a Contractor Medium Value Change Notice on the Authority.

If a Medium Value Change is required to comply with a Change in Law, then either party may serve a Medium Value Change Notice on the other.

The Medium Value Change Notice will contain at least the following information: An output specification of the works or services required, in the same format and with similar detail as that provided in the Authority's Requirements wherever possible, and where not possible, in sufficient detail to allow the design and pricing of a solution to the Change Notice;

- the location for the works or services required;
- the timing of the works or services required;
- whether, in respect of additional works, the Contractor is expected to provide FM and lifecycle maintenance services in respect of any additional works
- whether the Authority required the Contractor to raise additional finance to fund the Change, or alternatively if it would prefer to fund the change itself.

¹⁷ However no adjustment should ordinarily be needed to the Financial Model or Unitary Charge provided all payments are made through Authority lump sum payments.

¹⁸ The cost of any such funder due diligence could be left with the Contractor or reimbursable by the Authority in accordance with the second paragraph of 2.5 mutatis mutandis.

and the Authority and Contractor shall, if required by the Authority, promptly, and in any event within [] days, agree any cap on reimbursable costs required under paragraph [] below.

3.2.2 Contractor Estimate

Within 10 Business Days¹⁹ of the Contractor submitting or receiving (as the case may be) an Medium Value Change Notice, the Contractor will provide the Authority with an Estimate which shall include notice of:

- a detailed development programme for principal design development, Authority review and sign-off, construction/FM pricing, and any planning issues (including planning approval strategy if applicable) and necessary consents;
- proposed consultants and contractors which the Contractor intends to appoint to process the Change
- whether relief from compliance with obligations is required, to meet the performance regime during the implementation of the change in Service;
- any impact on the provision of the Service;
- any amendment required to the Contract and/or any Project Document as a result of the Change;
- any [Estimated Change in Project Costs]²⁰ that results from the Change, taking into account any Capital Expenditure that is required or no longer required as a result of the Change;
- any loss of revenue that results from the Change;
- any approval required by the insurers
- costs and details for other inputs, such as any regulatory approvals, funder review and legal review of the proposed changes that may be required to be completed prior to the variations proceeding (as applicable);
- the proposed method of certification of any construction or operational aspects of the Service or Works required by the Change not covered by the service commissioning procedure in the Contract;
- a detailed timetable for implementation.²¹

In preparing the Estimate, the Contractor shall apply the following principles as applicable:

- The unit cost of any construction works (not including abnormals, professional fees, contingencies, overheads and profit margins) required to implement the Medium Value Change Notice will be consistent with the equivalent unit construction cost of the original facility, uplifted using the

¹⁹ This period may be increased if it is a complex change, and agreed between the parties at the time.

²⁰ Definition to be extended to cover Service Changes.

²¹ The timetable shall identify the different phases of the development period, such as technical, pricing, planning, legal etc, and indicate which of the deliverables will be issued in which phase, and the points at which the Contractor will require the Authority to issue any further confirmations to proceed, to trigger the activities necessary to deliver the next phase of the implementation programme.

BCIS index for construction cost inflation in the intervening period. However, if any additional works are to be delivered to a demonstrably higher quality as compared to the original facility (see below for optimal whole life costing), then for the parties may agree for the unit rates to be higher. For the avoidance of doubt, the unit cost of construction of the original facility is specified below:²²

[provide figure]

- The unit cost of any extension or reduction to existing [Soft FM] services (to new areas) will similarly be consistent with the existing unit cost of provision (e.g. the rate per sq.m. for an extended cleaning service should be consistent with the existing rate). However, if services are required to be at a higher quality, then the parties may agree a higher unit rate

[provide figures for each service]

- Any lifecycle maintenance associated with additional works should similarly be consistent with the maintenance profile of the original facility (e.g. in terms of the replacement cycles for equipment) provided that the Contractor should reflect improvements in technology that can optimise whole life costs for the Authority. If the additional works are carried out to a higher standard than the original works, then it is expected that the unit lifecycle maintenance costs for the former may (in real terms) be lower than those for the latter.

[provide unit lifecycle costs – per sq.m or as % of construction– for the original facility]²³

- Any professional fees, contingencies, overheads and/or profit margins charged by the Contractor's sub-contractors in respect of construction, lifecycle and/or FM service provision will be consistent with the professional fees, contingencies, overheads and profit margins charged by the sub-contractors for the original facility, which for the avoidance of doubt, are specified below:

[provide professional fees, contingencies, overheads and profit margin figures (as % of construction cost) from original facility. For FM services, this should be updated if there is change to these numbers following benchmarking/market testing]

However, if either party can demonstrate to the other party's reasonable satisfaction that overheads and margins being charged by sub-contractors in current market conditions have changed significantly from the original assumptions, then the parties shall agree to use current market rates.

- No additional mark-up or management fee shall be charged by the Contractor over and above the costs that it will be liable to pay its sub-contractors in carrying out the works and/or services (as the case may be). However, the Contractor may include the costs of any time reasonably

²² In the bid period, Bidders should be encouraged to bid on the basis that the construction contractor will provide a support package for implementing Medium changes for at least 24 months following Service Commencement. This framework can then be renewed every [x] years or else put out to competition. Reference to these provisions should then be made here.

²³ These may need to be updated, as per the Financial Model.

incurred by its own staff in preparing the Estimate at an hourly rate set out below:

[provide hourly rate for costing SPV time to be uplifted at RPI each year, and reviewed [x] years between the parties]

and the Authority and Contractor shall, if required by the Authority, agree any cap on reimbursable costs as provided in paragraph 3.2.2 above

3.2.3 Authority Confirmation

Within 20 Business Days of receiving the Contractor Estimate from the Contractor, the Authority will signal its confirmation, rejection or withdrawal of the Medium Value Change Notice.

If the Authority rejects the Contractor Estimate it shall give reasons for doing so and the parties shall meet to resolve the issue.

If the Authority withdraws an Authority Change Notice, then provided the Contractor has not failed in its obligations to provide the Contractor Estimate under paragraph 3.2.2 above, it will reimburse the Contractor for its third party costs reasonably incurred by the Contractor in preparing the Contractor Estimate, subject to any applicable cap. The Authority may (at the time of requesting any such Change) require the Contractor to agree a cap on these costs, and, if applicable, on the costs of funder due diligence referred to in paragraph [] below, (the amount to be agreed between the parties acting reasonably). The Contractor will not be reimbursed costs under any other circumstances.

Any dispute in relation to a Medium Value Change Notice may be referred to the Dispute Resolution Procedure.

3.2.4 Funding and Payment

It is expected that the Authority will fund any Medium Value Change (not arising from a Change in Law) requested by the Authority. Any lump sum payments made by the Authority will be reflected in adjustments to the Financial Model.

Unless otherwise agreed, compensation in respect of changes in Service will be made to the Contractor through an adjustment to the Unitary Charge by incorporating the Revised Project Costs agreed above, and following the procedure in [Schedule - Adjustment to the Financial Model]²⁴

In the case of a Qualifying Change in Law, the costs will be shared between the parties in accordance with clause [Authority to insert cross reference from change in law clause in PA]

In the case of a Contractor Change, funding shall be provided by the Contractor (except to the extent a Qualifying of Law applies, in which case the provisions of clause [] shall apply).

3.2.5 Due Diligence

²⁴ Pursuant to this any cost increase or decrease will end up being reflected in the Unitary Charge. Parties may, if they wish, provide that a percentage of cost savings arising from Contractor changes (but not Authority Changes) can be retained by the Contractor – in order to incentivise him to consider improvements by way of Contractor Changes.

Medium Value Changes, [above [specify limit]] the Senior Lender will have the right to carry out third party legal, technical or financial due diligence. The Contractor may seek to recover the cost of these, only in respect of Authority changes which are withdrawn, and provided they are pre-agreed on a reasonable basis with the Authority. Such costs will be reimbursed by the Authority within [10] Business Days of the Contractor submitting an invoice for such costs subject to the invoices being within the overall budget for due diligence agreed by the Contractor with the Authority in advance of the due diligence being commissioned. The due diligence costs as a percentage of the overall value of the Medium Value Change should in no case exceed [2%]²⁵.

3.2.6 Change Implementation

The Contractor shall implement the agreed changes within the timescales agreed as part of the Authority's Confirmation of the Change Notice above and in any case shall not exceed 6 months.

If the Contractor does not respond to the Change Notice, or implement the change within the agreed timescales once it has received the Authority's Confirmation, then the Contractor will suffer deductions under the payment mechanism at the rate of £50 (indexed) per day of delay.

Any dispute between the Parties relating to the implementation of the Medium Change Notice may be determined using the Disputes Resolution Procedure. If the Contractor fails to implement the Change, the Authority may step in and complete the Change and charge the Contractor for any additional cost.

3.2.7 Documentation and Monitoring

All changes wherever practicable will be implemented under the existing terms of the Contract and all the various provisions of the Contract applying to the Works will apply to the carrying out of any additional works involved in processing changes during the Service period. However, the parties may need to agree a deed of amendment to the Contract to deal with bespoke terms and conditions associated with more complex changes, and these could include:

- Land/site issues;
- Statutory permissions;
- Warranties from construction or services sub-contractors;
- Protections against failure to complete (liquidated damages, deductions, termination rights);
- Relief and compensation events (including the interface with the existing Project);
- Indemnities and insurance issues; and
- Procedures for disbursing Authority Funds.
- Ancillary Documents may also need amendment.

²⁵ Figure to be agreed between the parties.

3.3 High Value Changes

The Authority may wish to adopt either:

- A) A Benchmarking Approach; or
- B) An Independent Technical Adviser Approach; or
- C) A Competitive Tendering Approach

The Authority must (at the time of requesting an Authority Change, responding to a Contractor Change or agreeing to a Change in Law Change) indicate to the Contractor which of the three methods it wishes to adopt in relation to evidencing value for money from the Contractor.

Option A

OPTION A – BENCHMARKING APPROACH

3.3.1 Notification and Specification

The Authority and the Contractor will co-operate and collaborate to ensure that each party has early notification of the prospect of a High Value Change. The Authority will involve the Contractor early in the specification of the High Value Change to ensure that the developed specifications reflect the inputs from the Contractor and/or its sub-contractors.

If a High Value Change is required by the Authority, it will serve an Authority High Value Change Notice on the Contractor.

[If a High Value change is desired by the Contractor, it will serve a Contractor High Value Change Notice on the Authority.]²⁶

If a High Value change is required to comply with a Change in Law, then either party may serve a High Value Change Notice on the other.

The High Value Change Notice will contain at least the following information:

- An output specification of the works/services required, in the same format and with similar detail as that provided in the Authority's Requirements wherever possible, and where not possible, in sufficient detail to allow the design and pricing of a solution to the Change Notice (with the Contractor having been consulted early on in respect of the drawing up of the specification);
- the location for the works or services required;
- the timing of the works or services required;
- whether, in respect of additional works, the Contractor is expected to provide FM and lifecycle maintenance services in respect of the additional works
- an outline risk allocation matrix setting out the Authority's preferred risk profile in respect of the High Value Change²⁷;

²⁶ Authorities should consider if these should be provided for or not

²⁷ In other words, whether the Authority wishes to adopt a DBFOM risk profile for the High Value Change, or a more conventional D&B/JCT arrangement for construction, followed by the 'adoption' by the Contractor of the new facilities or services into the existing PFI contract for the purposes of FM and lifecycle maintenance. Alternative in some cases, the Authority

- the time period for the Contractor's response if the change is a complex one; and
- whether the Authority requires the Contractor to raise additional finance to fund the change, or alternatively if it would prefer to fund the change itself.

3.3.2 Contractor Stage 1 Response

- Within 30 Business Days (or such longer period in the case of complex changes as may be agreed) of receiving the Authority's High Value notice (or the Authority's agreement to proceed in the case of a Contractor Change or a Change in Law), the Contractor will submit an Estimate, including in it the following information:
 - an outline timetable and development programme for design development, Authority review and sign-off, construction/FM pricing, and any planning issues (including planning approval strategy if applicable) and necessary consents²⁸;
 - whether relief from compliance with obligations is likely to be required, including the obligations of the Contractor to meet the performance regime during the implementation of the change in Service, and wherever possible, a broad indication of the scale of the impact on the provision of the existing Service ;
 - an outline Estimate of the 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, together with any loss or gain in third party revenue that may result from the change in Service; and
 - a budget (or budgets) for other inputs, such as any project management costs likely to be incurred by the Contractor, the project management fee (referred to in paragraph (a) below) third party advice, obtaining regulatory approvals, funder due diligence and independent certification that may be required to be completed prior to the High Value Change proceeding to construction (as applicable);

In preparing the outline Estimate, the Contractor will apply the following principles:

- a) it will benchmark all construction, facilities management and lifecycle costs using benchmark figures from the Pfs Benchmarking system wherever available and applicable, and where not, using benchmarks available from a reputable independent source that are generally recognized in the industry. This should include professional fees, contingencies, overheads and profit margins;
- b) it will charge a project management fee (PMF) for the time incurred by its own staff in project managing the development, procurement and implementation of the Change. The PMF will be based on actual time spent

may wish simply to have the construction works carried out without any ongoing obligations on the Contractor. This is however recommended only in exceptional situations where the new facilities are discrete and independent from the existing Service.

²⁸ The timetable should identify the different phases of the development period, such as technical, pricing, planning, legal etc, and indicate which of the deliverables will be issued in which phase, and the points at which the Contractor will require the Authority to issue any further confirmations to proceed, to trigger the activities necessary to deliver the next phase of the implementation programme.

(validated by timesheet records) but capped at the budget agreed at Stage 1 with the Authority. The charges will be at daily rates set out below:

[insert daily rate for different grades of Contractor staff – to be reviewed every two years and indexed to RPI];

The Contractor will be paid the PMF at two milestones:

- if the Authority provides an Authority Stage 1 Confirmation; and
- if the Authority provides a Stage 2 Confirmation.

At each stage, the Contractor will charge for the time incurred by its staff up to that stage.

The Contractor should not (other than the above) separately cost any processing mark-ups into the Estimate.

The performance risk involved in implementing the change and any interface risks involved in linking the new facilities or services with the Existing Service will be reflected (depending on the risk profile of the Change required by the Authority) in a change to Project Costs (i.e. construction, lifecycle or FM costs) rather than being priced as a separate mark-up over and above the change in Project Costs. There should not therefore be any separate Contractor mark-up in the Estimate.

3.3.3 Authority Stage 1 Confirmation

Having received the Contractor Stage 1 Response, the Authority shall, within 30 Business Days, either confirm to the Contractor that it should proceed with developing a Contractor Stage 2 Response, or else it shall withdraw the High Value Change Notice. No compensation will be paid to the Contractor by the Authority if the High Value Change Notice is withdrawn at this stage.

If the Authority confirms to the Contractor that it should proceed with developing a Contractor Stage 2 Response, it shall:

pay the Contractor the PMF due at Stage 1 (based on an invoice submitted by the Contractor); and

set the Approval Criteria which will govern acceptance or rejection of the Contractor Stage 2 Response.

The Approval Criteria will be based on:

- compliance with the Authority's specifications for the High Value Change;
- evidencing value for money;
- affordability to the Authority (in terms of developing a final price within the Estimate set at Stage 1); and
- compliance with laws and regulations, including planning permission.

3.3.4 Contractor Stage 2 Response

- Within 60 (or such longer period as may be agreed if it is a complex change) Business Days of receiving the Authority's Stage 1 confirmation, the

Contractor will submit a response to the High Value Change Notice, including the following information:

- (where applicable) a detailed design solution (at the minimum to RIBA Stage D);
- proposed consultants and contractors the Contractor intends to appoint to process the Change; whether (and what) relief from compliance with obligations is required, including the obligations to meet the performance regime during the implementation of the change in Service;
- details of any impact (stoppage or changes) on the provision of the existing Service;
- any amendment(s) required to the Contract and/or any Project Document as a result of the change in Service;
- a final statement of the [Change in Project Costs] that result from the change in Service, taking into account any [Capital Expenditure] that is required or no longer required as a result of the change in Service, and including any loss or gain in third party revenue that results from the change in Service;
- a benchmarking report demonstrating that unit rates for construction, lifecycle and FM fall within reasonable ranges compared to benchmarks derived from the PfS Benchmarking system or (where such benchmarks are not available) from industry benchmarks obtained from a reputable, independent source;
- an invoice for the PMF payable at Stage 2;
- any authorisation required from insurers;
- any necessary consents
- the proposed method of certification of any construction or operational aspects of the Service required by the change in Service if not covered by the service commissioning procedure in the Contract; and
- a detailed timetable for implementation.²⁹

3.3.5 Authority Stage 2 Confirmation

Within 30 Business Days of receiving the Contractor Response, the Authority will signal its Stage 2 confirmation, rejection or withdrawal of the High Value Change Notice.

If the Authority issues a Stage 2 Confirmation, it will pay the Contractor the PMF due at Stage 2 within 20 Business Days of issuing the Stage 2 Confirmation. Following receipt of the Authority Stage 2 Confirmation, the Contractor will promptly and effectively proceed with the implementation of the High Value Change in line with the timetable and implementation programme agreed with the Authority at Stage 2.

²⁹ The timetable shall identify the different phases of the detailed design development, and indicate which of the deliverables will be issued in which phase, and the points at which the Contractor will require the Authority to issue any further confirmations to proceed, to trigger the activities necessary to deliver the next phase of the implementation programme.

If the Authority rejects a Stage 2 Confirmation as a result of the Contractor's failure to meet the Authority's Approval Criteria, it will explain to the Contractor in what respects its Stage 2 Response falls short of the Approval Criteria, and the Contractor will have another 30 Business Days in which to revise and re-submit its Stage 2 Response and demonstrate how its response provides value for money. If this revised Stage 2 Response addresses the shortcomings identified by the Authority in the initial response, the Authority shall issue a Stage 2 Confirmation. If it does not, the Authority will have the right to reject the Contractor Stage 2 Response (without reimbursing the PMF costs). The Authority may then seek to implement the High Value Change itself by tendering the work out to the market.

If the Authority withdraws a High Value Change Notice (instigated by the Authority) at stage 2, it will reimburse the Contractor for any third party costs reasonably incurred by the Contractor in preparing the Contractor Response, together with the Contractor's PMF due at stage 2.

Any dispute in relation to a High Value Change Notice may be referred to the Dispute Resolution Procedure.

3.3.6 Funding and Payment

Depending on the choice exercised by the Authority in para 3.3.1, it will either fund the Change itself, or it will ask the Contractor to seek additional finance from its funders.

The Authority will pay the Contractor for implementing the Change Notice by making lump sum milestone payments (for construction works) or through an adjustment to the Unitary Charge (for FM and lifecycle costs, or if the construction costs are funded using additional private finance). Changes to the Unitary Charge will be computed by incorporating the Estimated Change in Project Costs agreed at Stage 2 above, and following the procedure in [Schedule/clause [] - Adjustment to the Financial Model]. Any lump sum payments made by the Authority must be clearly reflected in the adjustments to the Financial Model.

In the case of a Qualifying Change in Law, the costs will be shared between the parties in accordance with clause [Authority to insert cross reference from change in law clause in the Contract]

3.3.7 Due Diligence

The Senior Lenders will have the right to carry out legal, financial, technical and insurance due diligence on the proposals for a High Value Change. In the event that the Senior Lender needs to procure legal, technical or financial due diligence, any such reasonable due diligence costs incurred by the Contractor will, in the case of Authority Changes only, be reimbursed by the Authority within [10] Business Days of the Contractor submitting an invoice for such costs, subject to the invoices being within an overall budget for due diligence agreed by the Contractor with the Authority in advance of the due diligence being commissioned. The due diligence costs as a % of the overall value of the High Value Change should in no case exceed [2%]³⁰.

³⁰ Figure to be agreed between the parties.

3.3.8 Change Implementation

The Contractor shall implement the agreed changes within the timescales agreed as part of the Authority's Confirmation of the Change Notice above.

If the Contractor does not respond (at both Stage 1 and Stage 2) to the Change Notice, or implement the change within the agreed timescales once it has received the Authority's Confirmation, then the Contractor will suffer deductions under the payment mechanism at the rate of £50 (indexed) per day of delay.

Any dispute between the Parties relating to the implementation of the High Value Change Notice may be determined using the Disputes Resolution Procedure.

3.3.9 Documentation and Monitoring

All changes wherever practicable will be implemented under the existing terms of the Contract and provisions of the Contract applying to the Works will apply to the carrying out of any additional works involved in processing changes during the Service period. The parties may however agree a deed of amendment to the Contract to deal with bespoke terms and conditions associated with more complex changes, and these could include (without limitation) matters such as:

- Land/site issues;
- Statutory permissions;
- Warranties from construction or services sub-contractors;
- Protections against failure to complete (liquidated damages, deductions, termination rights);
- Relief and compensation events (including the interface with the existing Project);
- Indemnities and insurance issues; and
- Disbursement of any Authority funds.
- Ancillary Documents may also need amendment.

Option B

OPTION B – Independent Technical Advisor³¹

3.3.1 Notification and Specification

The Authority and the Contractor will co-operate and collaborate to ensure that each party has early notification of the prospect of an High Value Change. The Authority will involve the Contractor early in the specification of the High Value Change to ensure that the developed specifications reflect the inputs from the Contractor and/or its sub-contractors.

³¹ As an alternative, the Authority could also simply opt for a technical and cost audit of the estimate prepared by the Contractor carried out by its own technical advisers. This approach will work well where the works and/or services in question are relatively straightforward and good comparative data exist for pricing them. For more complex changes, the Independent TA route may offer a better solution.

If a High Value Change is required by the Authority, it will serve an Authority High Value Change Notice on the Contractor.

[If a change is desired by the Contractor, it will serve a Contractor High Value Change Notice on the Authority.]

If an High Value change is required to comply with a Change in Law, then either party may serve a High Value Change Notice on the other.

The High Value Change Notice will contain at least the following information:

- An output specification of the works required, in the same format and with similar detail as that provided in the Authority's Requirements wherever possible, and where not possible, in sufficient detail to allow the design and pricing of a solution to the Change Notice (with the Contractor having been consulted early on in respect of the drawing up of the specification);
- the location for the works or services required;
- the timing of the works or services required;
- whether, in respect of additional works, the Contractor is expected to provide FM and lifecycle maintenance services in respect of the additional works
- an outline risk allocation matrix setting out the Authority's preferred risk profile in respect of the High Value Change³²;
- a timeframe for the Contractor stage 1 response (following the receipt of the Reference Price from the Independent Technical Adviser – see below); and
- whether the Authority required the Contractor to raise additional finance to fund the change, or alternatively if it would prefer to fund the change itself

3.3.2 Joint Appointment of Independent Technical Adviser

The Authority and the Contractor will jointly appoint an Independent Technical Adviser to assist in the processing of the High Value Change Notice. The terms of reference for the Independent TA will include:

- Assist the Authority and the Contractor in developing a high level Reference Price based on a clear specification for the change order as part of the Stage 1 approval (see below), before detailed design or pricing work is done by the Contractor;
- Review and sign off the Contractor's estimates for reasonableness as part of the Stage 2 approval (see below); and
- Responsibility for the ITA's costs (which should normally be for the Authority).

³² In other words, whether the Authority wishes to adopt a DBFOM risk profile for the High Value Change, or a more conventional D&B/JCT arrangement for construction, followed by the 'adoption' by the Contractor of the new facilities or services into the existing PFI contract for the purposes of FM and lifecycle maintenance. Alternative in some cases, the Authority may wish simply to have the construction works carried out without any ongoing obligations on the Contractor. This is however recommended only in exceptional situations where the new facilities are discrete and independent from the existing Service.

After serving the High Value Change Notice, the Authority and the Contractor will instruct the Independent TA to develop a Reference Price for the works and/or associated services required to meet the requirements of the High Value Change Notice. The Reference Price will be developed in consultation with the Contractor, and will include (as applicable) all design development, construction, lifecycle and FM costs (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 risk profile indicated by the Authority in paragraph 3.3.1).

3.3.3 Contractor Stage 1 Response

Within 30 (or such longer period in the case of complex changes as may be agreed) Business Days of receiving the Reference Price from the ITA, the Contractor will submit a response, including in it the following information:

- an outline timetable and development programme for design development, Authority review and sign-off, construction/FM pricing, and any planning issues (including planning approval strategy if applicable)³³;
- whether relief from compliance with obligations is likely to be required, including the obligations of the Contractor to meet the performance regime during the implementation of the change in Service, and wherever possible, a broad indication of the scale of the impact on the provision of the existing Service ;
- an outline Estimate of the 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, together with any loss or gain in third party revenue that may result from the change in Service; and
- a budget (or budgets) for other inputs, such as any project management costs likely to be incurred by the Contractor, third party advice, obtaining regulatory approvals, funder due diligence and independent certification that may be required to be completed prior to High Value Change proceeding to construction (as applicable);

In preparing the outline Estimate, the Contractor will apply the following principles:

- it will use the Reference Price to compute the basic costs of construction, lifecycle and FM;
- it will charge a project management fee (PMF) for the time incurred by its own staff in project managing the development, procurement and implementation of the Change. The PMF will be based on actual time spent (validated by timesheet records) but capped at the budget agreed at Stage 1 with the Authority. The charges will be at daily rates set out below:

[insert daily rate for different grades of Contractor staff – to be reviewed every two years and indexed to RPI];

³³ The timetable should identify the different phases of the development period, such as technical, pricing, planning, legal etc, and indicate which of the deliverables will be issued in which phase, and the points at which the Contractor will require the Authority to issue any further confirmations to proceed, to trigger the activities necessary to deliver the next phase of the implementation programme.

The Contractor will be paid the PMF at two milestones:

- if the Authority provides an Authority Stage 1 Confirmation; and
- if the Authority provides a Stage 2 Confirmation.

At each stage, the Contractor will charge for the time incurred by its staff up to that stage.

The Contractor should not (other than the above) separately cost any processing mark-ups into the Estimate.

The Reference Price should already include within it the pricing of any performance risks involved in implementing the change and any interface risks involved in linking the new facilities or services with the Existing Service There should not therefore be any separate Contractor mark-up included within the Estimate.

3.3.4 Authority Stage 1 Confirmation

Having received the Contractor Stage 1 Response, the Authority shall, within 30 Business Days, either confirm to the Contractor that it should proceed with developing a Contractor Stage 2 Response, or else it shall withdraw the High Value Change Notice. No compensation will be paid to the Contractor by the Authority if the High Value Change Notice is withdrawn at this stage.

If the Authority confirms to the Contractor that it should proceed with developing a Contractor Stage 2 Response, it shall:

- pay the Contractor the PMF due at Stage 1 (based on an invoice submitted by the Contractor); and
- set the Approval Criteria which will govern acceptance or rejection of the Contractor Stage 2 Response.

The Approval Criteria will be based on:

- compliance with the Authority's specifications for the High Value Change;
- evidencing value for money;
- affordability to the Authority (in terms of developing a final price within the Estimate set at Stage 1); and
- compliance with laws and regulations, including planning permission.

3.3.5 Contractor Stage 2 Response

Within 60 (or such longer period in the case of complex changes as may be agreed) Business Days of receiving the Authority's Stage 1 confirmation, the Contractor will submit a response to the High Value Change Notice, including the following information:

- (where applicable) a detailed design solution (at the minimum to RIBA Stage D);
- proposed consultants and contractors the Contractor intends to appoint to process the Change;

- whether (and what) relief from compliance with obligations is required, including the obligations to meet the performance regime during the implementation of the change in Service;
- details of any impact (stoppage or changes) on the provision of the existing Service;
- any amendment(s) required to the Contract and/or any Project Document as a result of the change in Service;
- a final (and fixed) Estimate of the Change in Project Costs that result from the change in Service, taking into account any Capital Expenditure that is required or no longer required as a result of the change in Service, including all reasonable third party costs incurred or likely to be incurred by the Contractor and including any loss or gain in third party revenue that results from the change in Service;
- an invoice for the PMF payable at Stage 2;
- any authorisation required from insurers;
- any necessary consents;
- the proposed method of certification of any construction or operational aspects of the Service required by the change in Service if not covered by the service commissioning procedure in the Contract; and
- a detailed timetable for implementation³⁴

3.3.6 Authority Stage 2 Confirmation

Within 30 Business Days of receiving the Contractor Response, the Authority will signal its Stage 2 confirmation, rejection or withdrawal of the High Value Change Notice.

If the Authority issues a Stage 2 Confirmation, it will pay the Contractor the PMF due at Stage 2 within 20 Business Days of issuing the Stage 2 Confirmation. Following receipt of the Authority Stage 2 Confirmation, the Contractor will promptly and effectively proceed with the implementation of the High Value Change in line with the timetable and implementation programme agreed with the Authority at Stage 2.

If the Authority rejects a Stage 2 Confirmation as a result of the Contractor's failure to meet the Authority's Approval Criteria, it will explain to the Contractor in what respects its Stage 2 Response falls short of the Approval Criteria, and the Contractor will have another 30 Business Days in which to revise and re-submit its Stage 2 Response. If this revised Stage 2 Response addresses the shortcomings identified by the Authority in the initial response, the Authority shall issue a Stage 2 Confirmation. If it does not, the Authority will have the right to reject the Contractor Stage 2 Response, and seek to implement the High Value Change itself by tendering the work out to the market.

³⁴ The timetable shall identify the different phases of the detailed design development, and indicate which of the deliverables will be issued in which phase, and the points at which the Contractor will require the Authority to issue any further confirmations to proceed, to trigger the activities necessary to deliver the next phase of the implementation programme.

If the Authority withdraws the High Value Change Notice at stage 2, it will (if it was instigated by the Authority) reimburse the Contractor for any third party costs reasonably incurred by the Contractor in preparing the Contractor Response, together with the Contractor's PMF due at stage 2.

Any dispute in relation to a High Value Change Notice may be referred to the Dispute Resolution Procedure.

3.3.7 Funding and Payment

Depending on the choice exercised by the Authority in para 3.3.1, it will either fund the Change itself, or it will ask the Contractor to seek additional finance from its funders.

The Authority will pay the Contractor for implementing the Change Notice by making lump sum milestone payments (for construction works) or through an adjustment to the Unitary Charge (for FM and lifecycle costs, or if the construction costs are funded using additional private finance). Changes to the Unitary Charge will be computed by incorporating the Estimated Change in Project Costs agreed at Stage 2 above, and following the procedure in [Schedule/clauses [] - Adjustment to the Financial Model]. Any lump sum payments made by the Authority must be clearly reflected in the adjustments to the Financial Model.

In the case of a Qualifying Change in Law, the costs will be shared between the parties in accordance with clause [Authority to insert cross reference from change in law clause in Contract].

3.3.8 Due Diligence

The Senior Lenders will have the right to carry out legal, financial, technical and insurance due diligence on the proposals for a High Value Change. In the event that the Senior Lender needs to procure legal, technical or funder due diligence, any due diligence costs incurred by the Contractor will, in the case of Authority Changes only, be reimbursed by the Authority within [10] Business Days of the Contractor submitting an invoice for such costs, subject to the invoices being within an overall budget for due diligence agreed by the Contractor with the Authority in advance of the due diligence being commissioned. The due diligence costs as a % of the overall value of the High Value Change should in no case exceed [2%]³⁵.

3.3.9 Change Implementation

The Contractor shall implement the agreed changes within the timescales agreed as part of the Authority's Confirmation of the Change Notice above.

If the Contractor does not respond (at both Stage 1 and Stage 2) to the Change Notice, or implement the change within the agreed timescales once it has received the Authority's Confirmation, then the Contractor will suffer deductions under the payment mechanism at the rate of £50 (indexed) per day of delay.

³⁵ Figure to be agreed between the parties.

Any dispute between the Parties relating to the implementation of the High Value Change Notice may be determined using the Disputes Resolution Procedure.

3.3.10 Documentation and Monitoring

All changes wherever practicable will be implemented under the existing terms of the Contract and the provisions of the Contract applying to the Works will apply to the carrying out of any additional works involved in processing changes during the Service period. The parties may however agree a deed of amendment to the Contract to deal with bespoke terms and conditions associated with more complex changes, and these could include:

- Land/site issues;
- Statutory permissions;
- Warranties from construction or services sub-contractors;
- Protections against failure to complete (liquidated damages, deductions, termination rights);
- Relief and compensation events (including the interface with the existing Project);
- Indemnities and insurance issues; and
- Disbursement of any Authority funds.

Ancillary documents may also need amendment

Option C

OPTION C – Competitive Tendering

3.3.1 Notification and Specification

The Authority and the Contractor will co-operate and collaborate to ensure that each party has early notification of the prospect of a High Value Change. The Authority will involve the Contractor early in the specification of the High Value Change to ensure that the developed specifications reflect the inputs from the Contractor and/or its sub-contractors.

If a High Value Change is required by the Authority, it will serve an Authority High Value Change Notice on the Contractor.

[If a change is desired by the Contractor, it will serve a Contractor High Value Change Notice on the Authority.]

If a High Value change is required to comply with a Qualifying Change in Law, then either party may serve a High Value Change Notice on the other.

The High Value Change Notice will contain at least the following information:

- An output specification of the works required, in the same format and with similar detail as that provided in the Authority's Requirements wherever possible, and where not possible, in sufficient detail to allow the design and pricing of a solution to the Change Notice (with the Contractor having been consulted early on in respect of the drawing up of the specification);
- the location for the works or services required;

- the timing of the works or services required;
- whether, in respect of additional works, the Contractor is expected to provide FM and lifecycle maintenance services in respect of the additional works; and
- whether the Authority requires the Contractor to raise additional finance to fund the change, or alternatively if it would prefer to fund the change itself

3.3.2 Contractor Stage 1 Response

Within 30 (or such longer period as may be agreed if it is a complex change) Business Days of receiving the Reference Price from the Authority's Stage 1 Confirmation, the Contractor will submit a response, including in it the following information:

- an outline timetable and development programme for design development, Authority review and sign-off, construction/FM pricing, and any planning issues (including planning approval strategy if applicable)³⁶;
- whether relief from compliance with obligations is likely to be required, including the obligations of the Contractor to meet the performance regime during the implementation of the Change, and wherever possible, a broad indication of the scale of the impact on the provision of the existing Service ;
- an outline Estimate of the 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, together with any loss or gain in third party revenue that may result from the change in Service; and
- a budget (or budgets) for other inputs, such as any project management costs likely to be incurred by the Contractor, third party advice, obtaining regulatory approvals, funder due diligence and independent certification that may be required to be completed prior to High Value variations proceeding to construction (as applicable);

In preparing the outline Estimate, the Contractor will apply the following principles:

a) it will benchmark all construction, facilities management and lifecycle costs using benchmark figures from the PFS Benchmarking system wherever available and applicable, and where not, using benchmarks available from a reputable independent source that are generally recognized in the industry. This should include professional fees, contingencies, overheads and profit margins.

b) it will charge a project management fee (PMF) for the time incurred by its own staff in project managing the development, procurement and implementation of the Change. The PMF will be based on actual time spent (validated by timesheet records) but capped at the budget agreed at Stage 1 with the Authority. The charges will be at daily rates set out below:

³⁶ The timetable should identify the different phases of the development period, such as technical, pricing, planning, legal etc, and indicate which of the deliverables will be issued in which phase, and the points at which the Contractor will require the Authority to issue any further confirmations to proceed, to trigger the activities necessary to deliver the next phase of the implementation programme.

[insert daily rate for different grades of Contractor staff – to be reviewed every two years and indexed to RPI];

The Contractor will be paid the PMF at two milestones:

- if the Authority provides an Authority Stage 1 Confirmation; and
- if the Authority provides a Stage 2 Confirmation.

At each stage, the Contractor will charge for the time incurred by its staff up to that stage.

The Contractor should not (other than the above) separately cost any processing mark-ups into the Estimate.

The Estimate should include within it (as change to Project Costs) the pricing of any performance risks involved in implementing the change and any interface risks involved in linking the new facilities or services with the Existing Service. There should not therefore be any separate Contractor mark-up included within the Estimate.

3.3.3 Authority Stage 1 Confirmation

Having received the Contractor Stage 1 Response, the Authority shall, within 30 Business Days, either confirm to the Contractor that it should proceed with developing a Contractor Stage 2 Response, or else it shall withdraw the High Value Change Notice. No compensation will be paid to the Contractor by the Authority if the High Value Change Notice is withdrawn at this stage.

If the Authority confirms to the Contractor that it should proceed with developing a Contractor Stage 2 Response, it shall:

- pay the Contractor the PMF due at Stage 1 (based on an invoice submitted by the Contractor); and
- set the Approval Criteria which will govern acceptance or rejection of the Contractor Stage 2 Response.

The Approval Criteria will be based on:

- compliance with the Authority's specifications for the High Value Change;
- evidencing value for money;
- affordability to the Authority (in terms of developing a final price within the Estimate set at Stage 1); and
- compliance with laws and regulations, including planning permission

3.3.4 Contractor Stage 2 Response

In preparing its Stage 2 response, the Contractor will structure the works and/or services involved in the change into a number of discrete work packages, and will invite at least 3 competitive tenders for each work packages wherever practicable.

The Contractor will agree the work packages to be priced through competitive tendering with the Authority based on what is judged to provide best value for money. Evaluation criteria will also be agreed between both parties before

commencing the market test, and it is agreed that the preferred supplier(s) will be selected on the basis of the most economically advantageous tender. It is also agreed that the tendering process will need to recognise any additional interface risks between the carrying out of any additional works and/or services, and the delivery of the original Service.

For the avoidance of doubt, the Contractor will be responsible for:

- Running the competition for sub-contract work packages;
- Evaluating and selecting the preferred suppliers;
- Negotiating and finalising appointments; and
- Managing the implementation of the works and services required

The Authority will have the right to approve the selection of the preferred supplier(s) following the conclusion of the competitive tendering exercise (and should do so prior to the Contractor preparing his priced response) .

On conclusion of the tendering exercise, the Contractor shall submit a response to the Authority based on the prices determined through the tenders. In addition, the Contractor shall include the following information:

- (where applicable) a detailed design solution (at the minimum to RIBA Stage D);
- whether (and what) relief from compliance with obligations is required, including the obligations to meet the performance regime during the implementation of the change in Service;
- details of any impact (stoppage or changes) on the provision of the existing Service;
- any amendment(s) required to the Contract and/or any Project Document as a result of the change in Service;
- a final (and fixed) Estimate of the Change in Project Costs that result from the change in Service, based on the prices tendered in competition by the preferred supplier. The Estimate should take into account any Capital Expenditure that is no longer required as a result of the change in Service, all reasonable third party costs incurred or likely to be incurred by the Contractor and include any loss or gain in third party revenue that results from the change in Service;
- any authorisation required from insurers;
- any necessary consents;
- an invoice for the PMF payable at Stage 2;
- the proposed method of certification of any construction or operational aspects of the Service required by the change in Service if not covered by the service commissioning procedure in the Contract; and

- a detailed timetable for implementation³⁷.

3.3.5 Authority Stage 2 Confirmation

Within 30 Business Days of receiving the Contractor Stage 2 Response, the Authority will signal its Stage 2 confirmation, rejection or withdrawal of the High Value Change Notice.

If the Authority issues a Stage 2 Confirmation, it will pay the Contractor the PMF due at Stage 2 within 20 Business Days of issuing the Stage 2 Confirmation. Following receipt of the Authority Stage 2 Confirmation, the Contractor will promptly and effectively proceed with the implementation of the High Value Change in line with the timetable and implementation programme agreed with the Authority at Stage 2.

If the Authority rejects a Stage 2 Confirmation as a result of the Contractor's failure to meet the Authority's Approval Criteria, it will explain to the Contractor in what respects its Stage 2 Response falls short of the Approval Criteria, and the Contractor will have another 30 Business Days in which to revise and re-submit its Stage 2 Response. If this revised Stage 2 Response addresses the shortcomings identified by the Authority in the initial response, the Authority shall issue a Stage 2 Confirmation. If it does not, the Authority will have the right to reject the Contractor Stage 2 Response, and seek to implement the High Value Change itself without any re-imburement or compensation paid to the Contractor.

If the Authority withdraws the High Value Change Notice at stage 2, it will (if it was instigated by the Authority) reimburse the Contractor for any third party costs reasonably incurred by the Contractor in preparing the Contractor Response, together with the Contractor's PMF due at stage 2.

Any dispute in relation to a High Value Change Notice will be referred to the Dispute Resolution Procedure.

Depending on the choice exercised by the Authority in para 3.3.1, it will either fund the Change itself, or it will ask the Contractor to seek additional finance from its funders.

The Authority will pay the Contractor for implementing the Change Notice by making lump sum milestone payments (for construction works) or through an adjustment to the Unitary Charge (for FM and lifecycle costs, or if the construction costs are funded using additional private finance). Changes to the Unitary Charge will be computed by incorporating the Estimated Change in Project Costs agreed at Stage 2 above, and following the procedure in [Schedule/clause [] - Adjustment to the Financial Model]. Any lump sum payments made by the Authority must be clearly reflected in the adjustments to the Financial Model.

In the case of a Qualifying Change in Law, the costs will be shared between the parties in accordance with clause [Authority to insert cross reference from change in law clause in PA]

³⁷ The timetable shall identify the different phases of the detailed design development, and indicate which of the deliverables will be issued in which phase, and the points at which the Contractor will require the Authority to issue any further confirmations to proceed, to trigger the activities necessary to deliver the next phase of the implementation programme.

3.3.6 Due Diligence

The Senior Lenders will have the right to carry out legal, financial, technical and insurance due diligence on the proposals for a High Value Change. In the event that the Senior Lender needs to procure legal, technical or funder due diligence, any due diligence costs incurred by the Contractor will, in the case of Authority Changes only be reimbursed by the Authority within [10] Business Days of the Contractor submitting an invoice for such costs, subject to the invoices being within an overall budget for due diligence agreed by the Contractor with the Authority in advance of the due diligence being commissioned. The due diligence costs as a % of the overall value of the High Value Change should in no case exceed [2%]³⁸.

3.3.7 Change Implementation

The Contractor shall implement the agreed changes within the timescales agreed as part of the Authority's Confirmation of the Change Notice above.

If the Contractor does not respond (at both Stage 1 and Stage 2) to the Change Notice, or implement the change within the agreed timescales once it has received the Authority's Confirmation, then the Contractor will suffer deductions under the payment mechanism at the rate of £50 (indexed) per day of delay.

Any dispute between the Parties relating to the implementation of the High Value Change Notice will be determined using the Disputes Resolution Procedure.

3.3.8 Documentation and Monitoring

All changes wherever practicable will be implemented under the existing terms of the Contract and the provisions of the Contract applying to the Works will apply to the carrying out of any additional works involved in processing changes during the Service period. The parties may however agree a deed of amendment to the Contract to deal with bespoke terms and conditions associated with more complex changes, and these could include (without limitation) matters such as:

- Land/site issues;
- Statutory permissions;
- Warranties from construction or services sub-contractors;
- Protections against failure to complete (liquidated damages, deductions, termination rights);
- Relief and compensation events (including the interface with the existing Project);
- Indemnities and insurance issues; and
- Disbursement of any Authority funds.

Ancillary documents may also need amendment.

³⁸ Figure to be agreed between the parties.