

## **SCHEDULE 32 - CHANGE PROTOCOL**

### **PART 1**

#### **GENERAL PROVISIONS**

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## **Application of this Change Protocol**

This Schedule 32 is divided into six (6) Parts as follows:

- Part 1:** applies to all Councils' Changes and Contractor Changes;
- Parts 2, 3 and 4:** apply to Councils' Changes from the Service Commencement Date and thereafter throughout the Service Period;
- Part 5:** applies to Contractor Changes at any time during the Contract Period; and
- Part 6:** applies to Construction Changes (i.e. a Councils' Change which affects the Works and which takes effect during the period from the date of the Contract until the end of the Defects Liability Period and/or an Architectural Enhancement arising in accordance with Clause 20.17 (Architectural Enhancements) in each case as shall be processed in accordance with Part 6 (Construction Changes) of this Schedule 32.

For the avoidance of doubt, Qualifying Changes in Law shall be treated as Councils' Changes for the purposes of this Schedule 32 (but not for Clause 120 (Revision and Custody of Financial Model)).

In the event of any inconsistency between this Part 1 (General Provisions) and the other Parts of this Change Protocol, Part 1 (General Provisions) shall take precedence.

## **GENERAL PROVISIONS**

### **1 DEFINITIONS**

In each part of this Schedule 32 the following expressions (in addition to those specified in Clause 1 (Definitions)) shall, save where the context or the express provisions of the Contract otherwise requires or admits, have the following meanings:

**Agreed Abatement means:**

- (a) in the case of a Low Value Change twenty pounds (£20) (indexed);
- (b) in the case of a Medium Value Change fifty pounds (£50) (indexed); and
- (c) in the case of a High Value Change eighty pounds (£80) (indexed);

**Alterations** means any alteration, demolition, extension or addition to a Facility in each case of a structural nature;

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

- (a) compliance with the Councils' specifications for the Change;
- (b) evidencing value for money;
- (c) affordability to the Councils in terms of developing a final price within the Contractor's Stage 2 Response; and
- (d) compliance with all relevant Legislation, Guidance and Necessary Consents

and such Approval Criteria shall be reasonable and achievable taking into account Good Industry Practice and the scope and price of the required High Value Change;

**Benchmarking Process** means the process set out in paragraph 8 (Benchmarking Process) 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 8 (Benchmarking Process) of Part 4 (High Value Changes) (which shall, for the avoidance of doubt, include the information required by paragraph 8.2 (Benchmarking Process) of Part 4 (High Value Change)) of this Change Protocol;

**Change** means any change, variation, extension or reduction in the Facilities and/or the Service requested by the Contractor or Councils and/or deemed to be a Councils Change by virtue of an express provision of the Contract;

**Change Notice** means a Low Value Change Request, Councils Change Notice 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;

**Change Protocol** means the protocol for Changes as set out in this Schedule 32;

**Commercial Documents** shall mean the Contract and its Schedules, any Ancillary Documents, any Necessary Consent (or any new Necessary Consent), the Base Case Financial Model, the SRF Offtake Contract, the Baseline Collection Coverage, the Financing Agreements, the Direct Agreement, the SRF Offtaker Direct Agreement and any Collateral Warranty but excluding (for the purposes of this Schedule 32) the Technical Documents;

**Comparable Market** means local authority waste treatment facilities operated under:

- (a) the PFI; or
- (b) other forms of public private partnership projects;

**Competitive Tendering Process** means the process set out in paragraph 7 (Competitive Tendering) of Part 4 (High Value Changes) of the Change Protocol;

**Confirmation Notice** means a written notice issued by the Councils pursuant to the relevant provision of this Change Protocol (or pursuant to Clause 61 (Best Value)) setting out the agreed details of the Change including the agreed cost, method of payment and the times of its implementation which shall be in the form set out in Appendix 6 (Confirmation Notice) to this Change Protocol;

**Construction Change** means a Councils Change which affects the Works and which takes effect during the period from the date of the Contract until the end of the Defects Liability Period and/or an Architectural Enhancement arising in accordance with Clause 20.17 (Architectural Enhancements) in each case as shall be processed in accordance with Part 6 (Construction Changes) of this Schedule 32;

**Contractor Change** means a Change that is initiated by the Contractor by submitting a Contractor Change Notice to the Councils;

**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 Initial Response** means the written response of the Contractor referred to in paragraph 2.1 (Contractor Initial Response and Stage 1 Response) of Part 4 (High Value Changes) of this Change Protocol;

**Contractor Response** means the written response of the Contractor to a Councils 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 2.6 (Contractor Initial Response and Stage 1 Response) of Part 4 (High Value Changes) of this Change Protocol;

**Contractor Stage 2 Response** shall have the meaning given in paragraph 4.1 (Contractor Stage 2 Response) of Part 4 (High Value Changes) of this Change Protocol;

**Councils' Change** means a Change that is initiated by the Councils by submitting a Low Value Change Request or a Councils Change Notice to the Contractor. For the purpose of this Schedule 32 a Qualifying Change in Law shall also be treated as a Councils Change (subject to paragraph 10 (Qualifying Changes in Law) of this Part 1 (General Provisions));

**Councils' Change Notice** means a written notice submitted by the Councils requiring a Medium Value Change, a High Value Change or a Construction Change and setting out the information specified in the relevant paragraph of this Change Protocol or, in the case of Qualifying Changes in Law, a notice issued by either Party in the form specified in Clause 54.1 (Qualifying Change in Law);

**Councils' Initial Confirmation** has the meaning given in paragraph 2.4 (Contractor Initial Response and Stage 1 Response) of Part 4 (High Value Changes);

**Councils' Stage 1 Confirmation** has the meaning given in paragraph 3.2(a) (Councils Stage 1 Confirmation) of Part 4 (High Value Changes) of this Change Protocol;

**Councils' Stage 2 Confirmation** has the meaning given in paragraph 6.1(a) (Councils Stage 2 Confirmation) of Part 4 (High Value Changes) of this Change Protocol;

**Draft Monthly Payment Report** means a report for the Payment Period submitted in accordance with Clause 56 (Payment) of the Contract;

**Estimate** has the meaning given in paragraph 1.1.2 of Part 6 of this Schedule 32;

**High Value Change** means a Change which is not a Low Value Change or a Medium Value Change, and which is likely to either cost more than two hundred thousand pounds (£200,000) (indexed) to implement, or require an adjustment to the Unitary Charge in any one (1) Contract Year that is greater than two per cent (2%) of the maximum annual Unitary Charge (as the case may be for that Contract Year). Such Change shall also be deemed to include a Councils Change pursuant to Clause 20 (Planning Permissions) and Schedule 37 (Approach to Permit Risk);

**Independent Technical Adviser** means a person who is independent of the Councils or any Contractor Related Party who has:

- (a) not less than five (5) Years experience in projects operated under the PFI or other forms of public private partnership;
- (b) expertise in pricing works and/or services of the type required by the relevant High Value Change; and

- (c) has relevant experience in the waste treatment/management sector;

**Low Value Change** means a change which comprises only of:

- (a) works (or a series of related works) of a minor nature or the provision of plant and equipment having a capital cost (including installation) not exceeding twenty thousand pounds (£20,000) (indexed); or
- (b) any change or amendment (or series of related changes or amendments) (whether temporary or permanent) to the Service (or any of them) where the capital cost of each change or amendment (or series of related changes or amendments), in the reasonable opinion of the Councils, does not exceed twenty thousand pounds (£20,000) (indexed) and does not require adjustment of the Unitary Charge and does not affect the ability of the Contractor to achieve any Key Date

and in any case, does not involve any change or amendment to any Commercial Document;

**Low Value Change Request** means a request for a Low Value Change in the form set out in Appendix 5 (Low Value Change Request) to this Change Protocol;

**Medium Value Change** means a Change, which is not a Low Value Change, and which, in the reasonable opinion of the Councils, is likely to either cost less than two hundred thousand pounds (£200,000) (indexed) to implement, or require an adjustment to the Unitary Charge that is less than two per cent (2%) of the maximum annual Unitary Charge in the relevant Contract Year (as the case may be);

**Original Facilities** means the Facilities as at the Service Commencement Date (including any Changes incorporated into the Works);

**Project Management Fee** means a fee in respect of project management services calculated in accordance with paragraph 2.5 (Contractor Initial Response and Stage 1 Response) of Part 4 (High Value Changes) of this Change Protocol;

**Reference Price** means a high level price calculated by the Independent Technical Adviser 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 9.3 (Independent Technical Adviser) of Part 4 (High Value Changes) of this Change Protocol;

**Small Works Rates** has the meanings set out in Appendix 4 (Small Works Rates);

**Stage 1** means for the purposes of Part 4 (High Value Changes) of this Schedule 32 the period between the date of issue of the Councils Change Notice and the date of submission of the Councils Stage 1 Confirmation or the withdrawal of the Councils Change Notice;

**Stage 2** means for the purposes of Part 4 (High Value Changes) of this Schedule 32 the period between the date of issue of the Councils Stage 1 Confirmation and the date of submission of the Councils Stage 2 Confirmation or the withdrawal of the Councils Change Notice;

**Technical Documents** means the Works Delivery Plan, the Service Delivery Plan, the Annual Environmental Report, Design Data, the Independent Certifier's Appointment (other than any change to Schedule 1 (The IC Services) of the Independent Certifier's Appointment), any Substitute Waste Plan, Schedule 34 (Liaison Procedure), the Communication Protocol, the Off-Site Works and Schedule 43 (EPC Escalation) but excluding (for the purposes of this Schedule 32) the Commercial Documents;

**Tendering Report** means a report prepared by the Contractor which shall include the information required by paragraph 7.5 (Competitive Tendering) of Part 4 (High Value Changes) of this Change Protocol;

**Third Party Costs** means without double counting, the costs incurred by the Contractor in relation to the appointment of a third party (which shall include but not be limited to any Sub-Contractor, consultant or professional adviser, including the Operating Sub-Contractor when the Operating Sub-Contractor is an affiliate of the Contractor) to carry out activities or provide services under this Schedule 32; and

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

## **2 LIMITS ON CHANGES**

2.1 Neither Party may propose or implement a Councils Change or Contractor Change:

2.1.1 which requires the Works to be carried out and/or the Service to be performed or a Change to be implemented in a way that infringes any Legislation or Guidance or is inconsistent with Good Industry Practice or in the case of implementation by the Councils would infringe any Legislation or Guidance or would be inconsistent with Good Industry Practice;

- 2.1.2 which, where doing so, would cause any Necessary Consent to be breached, revoked or suspended (or cause any new Necessary Consent required to implement the relevant Change to be unobtainable) in accordance with the principles set out in paragraph 3 (Necessary Consents for Councils Changes) of this Part 1 (General Provisions);
  - 2.1.3 which would materially and adversely affect the Contractor's ability to carry out the Works and/or perform the Service in accordance with the terms of the Contract (except for that part of the Service or the Works which has been specified as requiring to be amended in the Change Notice) and/or the Operating Sub-Contractor's ability to perform its obligations under the SRF Offtake Contract and/or under any Off Take Contract and/or under any Third Party Waste Contract in a manner not compensated pursuant to this Change Protocol so as to put the Contractor in a no better and no worse position in accordance with Clause 120 (Revision and Custody of Financial Model);
  - 2.1.4 which would materially and adversely affect the health and safety of any person;
  - 2.1.5 which would require the Contractor to implement the Change in an unreasonable period of time;
  - 2.1.6 which would (if implemented) materially and adversely change the nature of the Project (including its risk profile) in a way which adversely impacts the Contractor or any Sub-Contractor or the SRF Offtaker; and/or
  - 2.1.7 whereby the Councils do not have the legal power or capacity to require the implementation of such Change.
- 2.2 The Contractor may, within ten (10) Business Days of receipt of a Low Value Change Request or Councils Change Notice (or such longer period as is reasonably set out by the Councils in the Councils Change Notice (in consultation with the Contractor and taking into account the characteristics of the Councils Change and/or any modification to the Councils Change)), state in writing whether it objects to the Low Value Change Request or Councils Change Notice on any of the grounds set out in paragraph 2.1 (Limits on Changes) of this Part 1 (General Provisions). The Councils shall, within ten (10) Business Days of receipt of such notice, provide written confirmation that either:

- 2.2.1 the Low Value Change Request or Councils Change Notice (as applicable) is withdrawn; or
- 2.2.2 the objection by the Contractor shall be referred for determination in accordance with the Dispute Resolution Procedure.

If no such notice is provided by the Councils, it shall be deemed to have withdrawn the Low Value Change Request or Councils Change Notice (as applicable) at the end of such ten (10) Business Day period.

- 2.3 A Councils Change Notice will not be valid if it does not state whether the Councils consider it to be a Medium Value Change, a High Value Change or a Construction Change. If at any time following the receipt of such notice the Contractor disagrees with such classification of the proposed Change it may refer such matter to dispute resolution in accordance with paragraph 11 (Disputes) of this Part 1 (General Provisions) and the relevant time periods in this Change Protocol shall be suspended pending the outcome of such dispute.
- 2.4 For the avoidance of doubt the Councils have an absolute discretion to accept or reject any Contractor Change unless such Change is required as a result of a Change in Law.

### **3 NECESSARY CONSENTS FOR COUNCILS CHANGES**

- 3.1 The Parties agree that where the implementation of any Councils Change involves a requirement for the Contractor to obtain new Necessary Consents or the modification of existing Necessary Consents the following overriding principles shall apply to the development and implementation of the relevant Change:
  - 3.1.1 the Parties shall from time to time (as may be necessary) agree the estimated costs (if any) or (as may be appropriate) the revised estimated costs likely to be incurred in obtaining the relevant new Necessary Consents or the modification of the existing Necessary Consents and in relation to such relevant Change;
  - 3.1.2 the Councils shall be entitled to withdraw that Change at any time on the basis that the estimated costs (or revised estimated costs as may be appropriate) are too high, subject to payment of any costs already incurred by the Contractor in accordance with this paragraph 3.1 (Necessary Consents for Councils Changes);

- 3.1.3 the Contractor shall not be obliged to proceed with that Change (including the preparation of any Contractor Stage 1 Response or Contractor Stage 2 Response) if, at any time, there is no agreement on costs;
- 3.1.4 the relevant Change shall establish a longstop date for obtaining the relevant new Necessary Consents or the modification of the existing Necessary Consents and a definition of a satisfactory consent;
- 3.1.5 the Contractor shall be obliged to use all reasonable endeavours to obtain a satisfactory consent or the modification of the existing Necessary Consents by the longstop date (all reasonable endeavours having the same meaning as "**All Reasonable Endeavours**" in Clause 20.2 (Meaning of All Reasonable Endeavours) and Schedule 37 (Approach to Permit Risk) (as applicable) and the mechanism for establishing the use of All Reasonable Endeavours being consistent with the terms of Clause 20 (Planning Permissions)) or Schedule 37 (Approach to Permit Risk) (as applicable));
- 3.1.6 subject to compliance with paragraph 3.1.5 (Necessary Consents for Councils Changes) of this Part 1 (General Provisions) and provided that the Parties have agreed an estimate of such costs in accordance with paragraph 3.1.1 (Necessary Consents for Councils Changes) of this Part 1 (General Provisions) any additional costs and expenses (or any required modifications to the Change) arising from any delay in obtaining the relevant new Necessary Consent or the modification or any existing Necessary Consent or any deviation in the terms of the relevant Necessary Consent from the assumed terms shall be for the account of the Councils; and
- 3.1.7 the Contractor shall not be required to implement the relevant Change in the event that, despite using such reasonable endeavours, the satisfactory Necessary Consents or the modification of the existing Necessary Consents cannot be obtained.

#### 4 CHANGE PROCESS

- 4.1 Either Party may serve a Change Notice proposing a Change and such Change Notice shall be processed in accordance with the following Parts of this Change Protocol:
  - 4.1.1 a Councils Change to the Works, the Service or any or both of the Facilities which is a Low Value Change (save where paragraph 4.1.5 (Change Process)

of this Part 1 (General Provisions) applies) shall be processed in accordance with Part 2 (Low Value Changes) of this Change Protocol;

4.1.2 a Councils Change to the Works, the Service or any or both of the Facilities which is a Medium Value Change (save where paragraph 4.1.5 (Change Process) of this Part 1 (General Provisions) applies) shall be processed in accordance with Part 3 (Medium Value Changes) of this Change Protocol;

4.1.3 a Councils Change to the Works, the Service or any or both of the Facilities which is a High Value Change (save where paragraph 4.1.5 (Change Process) of this Part 1 (General Provisions) applies) shall be processed in accordance with Part 4 (High Value Changes) of this Change Protocol;

4.1.4 a Contractor Change to the Works, the Service or any or both of the Facilities shall be processed in accordance with Part 5 (Contractor Changes) of this Change Protocol; and

4.1.5 a Councils Change relating to the period prior to the Service Commencement Date shall be processed in accordance with Part 6 (Construction Changes) of this Change Protocol and/or an Architectural Enhancement in accordance with Clause 20.17 (Architectural Enhancements).

## **5 FUNDING (CAPITAL EXPENDITURE)**

5.1 In the case of a Medium Value Change, a High Value Change or a Construction Change (including in any case Changes which arise from a Qualifying Change in Law) the Councils may request in the Councils Change Notice that the Contractor shall use its reasonable endeavours to obtain funding for the whole of the estimated Capital Expenditure required on terms reasonably satisfactory to the Councils and the Senior Lenders.

5.2 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 Councils issued a Councils Change Notice making such request, the Contractor shall inform the Councils in writing of what funding (if any) it has managed to obtain and the Contractor shall have no obligation to carry out the Councils Change, which shall be deemed to be withdrawn, unless the Councils confirm 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.

- 5.3 The Councils 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 required, the remaining part of the Capital Expenditure.
- 5.4 For the avoidance of doubt, subject to Clause 54 (Change in Law), the Councils shall pay the Capital Expenditure incurred in carrying out any Low Value Change required by the Councils.
- 5.5 In the case of a Contractor Change any funding shall (unless otherwise agreed) be provided by the Contractor except to the extent that such Change is a Qualifying Change in Law in which case the provisions of Clause 54 (Change in Law) shall apply.

## 6 DUE DILIGENCE

- 6.1 The Senior Lenders may carry out legal, financial, technical and insurance due diligence on any proposal for a Councils Change.
- 6.2 In the event that the Senior Lenders need to procure such legal, technical, financial or insurance due diligence the Parties shall agree a reasonable budget and capped cost for the due diligence exercise (having regard to the Senior Lenders' own experience of such costs on other projects and/or previously on this Project) provided that (subject to paragraphs 6.4 to 6.6 of this Part 1 (General Provisions) below in respect of changes or variations to the Administrative Area) the costs for the due diligence exercise shall not exceed the lower of (a) such actual due diligence costs; and (b) the caps set out in the following table:

<b>Change Type and Characteristics</b>	<b>Funder Due Diligence Cost Cap</b>
Low Value Change	Nil (£0)
Medium Value Change or High Value Change, where there is no change to the Commercial Documents (but there is a change to the Technical Documents)	Capped at fifteen thousand pounds (£15,000) (indexed)
Medium Value Change or High Value Change where there is a change to the Commercial Documents	Capped at the higher of (a) five per cent (5%) of the capital value of the Change and (b) one hundred thousand pounds (£100,000) (indexed)

<b>Change Type and Characteristics</b>	<b>Funder Due Diligence Cost Cap</b>
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Construction Change with a capital value of less than or equal to one hundred thousand pounds (£100,000) (indexed)	Nil (£0)
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Construction Change with a capital value of more than one hundred thousand pounds (£100,000) (indexed)	Five per cent (5%) of the capital value of the Change
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6.3 The Contractor shall:

6.3.1 use reasonable endeavours to procure that the Senior Lenders shall promptly give any consents to any Change which are required pursuant to the Financing Agreements and shall only withhold their consent on one (1) (or more) of the grounds set out in paragraph 2.1 (Limits on Changes) of this Part 1 (General Provisions); and

6.3.2 procure that the Contractor's insurance broker shall be notified by the Contractor promptly of any Change which is not a Low Value Change.

6.4 Where the Councils notify the Contractor of any Councils Change which is likely to result in any change or variation to the Administrative Area and the likely effect of such change or the aggregate of such change and subsequent changes is that the number of households within the Administrative Area (as the same is proposed to be amended) will increase or decrease by more than three per cent (3%) the funder due diligence costs will be capped at the higher of:

6.4.1 five per cent (5%) of the capital value of the Change; and

6.4.2 one hundred thousand pounds (£100,000) (indexed).

6.5 Paragraph 6.4 above applies each time changes to the Administrative Area (by way of a single change or changes in aggregate) result in the increase or decrease of more than three per cent (3%).

6.6 Where any change to the Administrative Area results in the number of households falling within the varied Administrative Area increasing or decreasing by less than or equal to three per cent (3%) the funder due diligence costs as set out in the table in paragraph 6.2 above will be capped at fifteen thousand pounds (£15,000) (indexed).

## 7 IMPLEMENTATION

7.1 Subject to paragraph 7.1A (Implementation) of this Part 1 (General Provisions), where the Councils have issued a Confirmation Notice in respect of a Change:

7.1.1 where applicable, the Parties shall execute any deed of amendment to the Contract;

7.1.2 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 Councils;

7.1.3 the Contractor shall notify the Councils when it believes the Change has been completed; and

7.1.4 where applicable, the Unitary Charge shall be revised in accordance with Clause 120 (Revision and Custody of Financial Model).

7.1A Where, at the time of the Confirmation Notice, the Councils and/or the Contractor would not have been entitled to propose the relevant Change under paragraph 2.1 (Limits on Changes) of this Part 1 (General Provisions), notwithstanding that when it was originally proposed it was agreed or determined that such Change could be proposed, paragraph 7 (Implementation) of this Part 1 (General Provisions) shall not apply and the Change shall be deemed to be withdrawn but provided always that the Councils shall not be responsible for the Contractor's costs in the event that the limitations in paragraph 2.1 (Limits on Changes) of this Part 1 (General Provisions) have subsequently been found to apply as a result of the actions of the Contractor.

7.2 Not Used.

7.3 If the Contractor does not:

7.3.1 respond to a Low Value Change Request within the period required under paragraph 2.1 (Contractor Response) of Part 2 (Low Value Changes) of this Change Protocol;

7.3.2 respond to a Councils Change Notice (in the case of a High Value Change either at Stage 1 or Stage 2) within the periods required pursuant to Part 4 (High Value Changes) or Part 6 (Construction Changes) of this Change Protocol; or

7.3.3 complete or implement the Change within the specified timescales (agreed or otherwise determined in accordance with the terms of this Change Protocol)

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) provided that the operation of this paragraph will be the sole financial remedy of the Councils (without prejudice to the Councils' rights under Clause 84 (Compensation on Termination for Contractor Default)), in respect of such non-compliance and provided that this paragraph will not apply where the cause of such non-compliance was the act or omission of the Councils or any Councils Related Party.

7.4 All Changes shall be implemented under the terms of the 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.

7.5 The Contractor shall keep a record of all Changes (both completed and outstanding) and provide the Councils with these records whenever reasonably required by the Councils.

## **8 IMPLEMENTATION OF A CHANGE BY THE COUNCILS**

8.1 The Councils may implement any Change themselves pursuant to paragraph 4.5 (Implementation) of Part 2 (Low Value Changes), paragraph 4.5 (Councils Confirmation) of Part 3 (Medium Value Changes) or paragraph 6.4 (Councils Stage 2 Confirmation) of Part 4 (High Value Changes) of this Change Protocol, provided that:

8.1.1 where the Change is an Alteration it may only be implemented by the Councils if:

- (a) it comprises the provision of separate facilities at the relevant Facility and does not require any Alteration to any existing buildings or other facilities (other than any Alterations comprising connection into utilities or other service media at the relevant Facility necessary to implement the relevant Change); and
- (b) the Councils reimburse the Contractor in relation to any Losses arising out of or in connection with any defects in such Alterations; and

8.1.2 the Councils shall undertake the Change in accordance with Good Industry Practice and shall reimburse the Contractor against all Direct Losses (including without limitation in relation to Third Party Revenue, as calculated in accordance with Clause 73.7 (Compensation for lost Third Party Revenue)) as a result of a failure to do so).

## 9 PAYMENT

9.1 Subject to paragraph 5 (Funding (Capital Expenditure)) of this Part 1 (General Provisions), the Councils shall pay the Contractor the agreed cost for carrying out or implementing any Councils Change:

9.1.1 which is a Low Value Change, in accordance with paragraph 5 (Payment) of Part 2 (Low Value Changes) of this Change Protocol; or

9.1.2 which is a Medium Value Change or a High Value Change or a Construction Change either by way of:

(a) an adjustment to the Unitary Charge, by incorporating the Change in Project Costs in accordance with Clause 120 (Revision and Custody of Financial Model); or

(b) subject to paragraph 9.2 (Payment) of this Part 1 (General Provisions), within twenty (20) Business Days of receipt of an invoice submitted by the Contractor for the agreed amount

provided that in the case of paragraph 9.1(b)(i) (Payment) of this Part 1 (General Provisions) no adjustment of the Unitary Charge shall take place until the aggregate value of the adjustment required exceeds the sum of fifteen thousand pounds (£15,000) (indexed) or, once a Year if the aggregate sum is not achieved in a Contract Year.

9.2 Where the Councils elect or are obliged to pay any Capital Expenditure incurred in carrying out a Change:

9.2.1 the Councils and Contractor shall agree:

(a) 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 Councils Change, to the extent borne by the Councils; and

- (b) where payment by the Councils is triggered by agreed milestone events, an objective means of providing evidence confirming that each milestone has been achieved;

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

9.2.2 the Councils shall make a payment to the Contractor within twenty (20) Business Days of receipt by the Councils of invoices presented to the Councils (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 Councils Change has been carried out; and

9.2.3 if payment is not made in accordance with paragraph 9.2.2 (Payment) of this Part 1 (General Provisions), the Councils shall pay interest at the Default Interest 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.

9.3 Where, pursuant to paragraph 6.1 (Due Diligence) of this Part 1 (General Provisions), due diligence has been carried out by the Senior Lenders then the Councils shall reimburse the Contractor for the actual costs of the Senior Lenders carrying out due diligence of a proposed Councils Change provided that the sums due shall never exceed the lower of the cap set out in paragraph 6.2 (Due Diligence) of this Part 1 (General Provisions) 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 Councils shall pay such costs within twenty (20) Business Days of receipt of an invoice submitted by the Contractor.

9.4 Notwithstanding any other provision of this Change Protocol:

9.4.1 the provisions of Clause 120 (Revision and Custody of Financial Model) shall apply to ensure that the Contractor is in a "**no better and no worse**" position as defined therein and in relation to the principles relating to Third Party

Revenue and nothing in this Schedule 32 nor in any estimate or cost calculated herein shall take precedence over the principles of Clause 120 (Revision and Custody of Financial Model); and

- 9.4.2 the provisions of Clause 54 (Change in 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.

## **10 QUALIFYING CHANGES IN LAW**

10.1 Where a Change resulting from a Qualifying Change in Law is referred to in this Change Protocol through the application of Clause 54 (Change in Law), the provisions relating to a Councils Change in this Change Protocol shall apply save that:

- 10.1.1 notwithstanding anything to the contrary elsewhere in this Schedule 32, the Councils Change relating to the Qualifying Change in Law may not be withdrawn by the Councils;
- 10.1.2 the provisions of Clause 54.2 (Change in Law) shall be taken into account and shall apply to the Contractor Response (Medium Value Changes), the Contractor Stage 2 Response (High Value Changes) and the Contractor Response (Construction Changes); and
- 10.1.3 the provisions of Clause 54 (Change in Law) (and the Contractor's Share) shall apply to funding of any Capital Expenditure.

## **11 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**

#### **1 NOTIFICATION AND SPECIFICATION**

- 1.1 Subject to paragraph 2 (Limits on Changes) of Part 1 (General Provisions) of this Change Protocol, the Contractor shall carry out any Low Value Change requested by the Councils.
- 1.2 If a Low Value Change is requested by the Councils, it shall submit to the Contractor a Low Value Change Request.

#### **2 CONTRACTOR RESPONSE**

- 2.1 Within five (5) Business Days of receipt of the Low Value Change Request the Contractor shall in writing provide a fixed price for implementing the required Low Value Change, which shall be calculated in accordance with paragraph 2.2 (Contractor Response) of this Part 2 (Low Value Changes), together with a period for completion or implementation.
- 2.2 The cost of implementing any Low Value Change shall be calculated on the basis that:
  - 2.2.1 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 Councils in respect of such works. Where the Low Value Change cannot 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
  - 2.2.2 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.
- 2.3 The Contractor shall make no additional charge to the Councils for processing, implementing or managing a Low Value Change unless the number of Low Value Changes in any Contract Year exceeds two (2) or the aggregate value of Low Value

Changes in any Contract Year exceeds two thousand five hundred pounds (£2,500) (indexed). Any Low Value Changes in excess of this limit shall be charged at a fee of fifty pounds (£50) (indexed) for each subsequent Change.

- 2.4 The Councils may, within five (5) Business Days of receipt, object in writing to the Contractor's response given pursuant to paragraph 2.1 (Contractor Response) of this Part 2 (Low Value Changes) 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 Councils may withdraw the Low Value Change Request or (if the Councils choose) carry out the Low Value Change itself or refer the matter to the Dispute Resolution Procedure in which case paragraph 4.4 (Implementation) of this Part 2 (Low Value Changes) shall apply.

### **3 DUE DILIGENCE**

The provisions of paragraph 6 (Due Diligence) of Part 1 (General Provisions) of this Change Protocol shall apply.

### **4 IMPLEMENTATION**

- 4.1 If the Councils have not objected pursuant to paragraph 2.4 (Contractor Response) of this Part 2 (Low Value Changes) the Contractor shall implement the required Low Value Change within the period specified in the Contractor Response or within such other period agreed between the Parties.
- 4.2 The Contractor shall implement the required Low Value Change so as to minimise any inconvenience to the Councils and shall notify the Councils when it believes the Low Value Change has been completed.
- 4.3 Paragraphs 7.3 and 7.4 (Implementation) of Part 1 (General Provisions) of this Change Protocol shall apply and any dispute pursuant to this Part 2 (Low Value Changes) 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 Councils, carry out or implement the Low Value Change within the prescribed timescales notwithstanding the dispute.
- 4.4 Any dispute pursuant to this Part 2 (Low Value Changes) 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 to do so by

the Councils, carry out or implement the Low Value Change within the prescribed timescales notwithstanding the dispute.

4.5 Where the Contractor has either:

4.5.1 failed to provide a response pursuant to paragraph 2.1 (Contractor Response) of this Part 2 (Low Value Changes) within fifteen (15) Business Days of the date of the Low Value Change Request; or

4.5.2 provided a response pursuant to paragraph 2.1 (Contractor Response) of this Part 2 (Low Value Changes) but has failed to fully implement the Low Value Change within ten (10) Business Days of the date that has been determined or agreed in accordance with paragraph 2.4 (Contractor Response) or paragraph 4.1 (Implementation) of this Part 2 (Low Value Changes) as being the date on which the Low Value Change should have been implemented

then the Councils may notify the Contractor that the Low Value Change Request is withdrawn and, following such notification, the Councils may procure the implementation of the Low Value Change without further recourse to the Contractor and the provisions of paragraph 8 (Implementation of Change by the Councils) of Part 1 (General Provisions) of this Change Protocol shall apply.

## **5 PAYMENT**

5.1 Following the implementation of a Low Value Change the Contractor shall include the costs of any Low Value Change in the next Monthly Invoice following completion or implementation of the relevant Low Value Change and the Councils shall pay such agreed costs as part of the following Monthly Unitary Charge unless paragraph 5.2 applies.

5.2 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 Contract Year and all relevant Low Value Changes that have occurred in the preceding Contract Year shall be aggregated together into a single cumulative adjustment and the adjustment as set out in Clause 120 (Revision and Custody of Financial Model).

## **PART 3**

### **MEDIUM VALUE CHANGES**

#### **1 NOTIFICATION AND SPECIFICATION**

- 1.1 If a Medium Value Change is required by the Councils it shall serve a Councils Change Notice on the Contractor.
- 1.2 The Councils Change Notice pursuant to this Part 3 (Medium Value Changes) shall, where applicable, include, but not be limited to, the following information:
  - 1.2.1 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;
  - 1.2.2 a description of any works (or alteration to a Facility) required in sufficient detail to allow the design and pricing of the Medium Value Change by the Contractor;
  - 1.2.3 whether, in respect of any additional works, the Contractor is expected to provide maintenance and life cycle services in respect of such additional works;
  - 1.2.4 the location for the works or services required;
  - 1.2.5 the timing of the works or services required together with any adjustments required to any fixed dates in the Contract;
  - 1.2.6 in respect of additional or varied services, a description of such service or variation to the 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;
  - 1.2.7 whether any Necessary Consents are required in order to implement the Change;
  - 1.2.8 either confirmation that the Councils will fund the Medium Value Change themselves and their proposals for payment (whether in stages or otherwise) or a request that the Contractor raises finance for the Councils Change as required by paragraph 5 (Funding for Capital Expenditure) of Part 1 (General Provisions) of this Change Protocol;

- 1.2.9 whether the Councils require the approval of any Third Party Costs relating to the preparation of the Contractor Response; and
- 1.2.10 the date by which the Contractor shall provide the Contractor Response to the Councils (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 Councils Change Notice) or forty (40) Business Days if the Councils request that the Contractor obtain funding of the Capital Expenditure under paragraph 5 (Funding for Capital Expenditure) of Part 1 (General Provisions) of this Change Protocol.

## **2 CONTRACTOR RESPONSE**

- 2.1 Subject to paragraph 2 (Limits on Changes) of Part 1 (General Provisions) of this Change Protocol within the period specified in the Councils Change Notice (or a further ten (10) Days if the Contractor requests the same because Senior Lender due diligence is required or such other period as the Parties may agree) the Contractor shall provide the Councils with a Contractor Response which shall include (where applicable) the following information:
  - 2.1.1 a detailed programme for the design, the Councils' review of the design, construction and/or installation of the Medium Value Change (including the procuring of any Necessary Consents);
  - 2.1.2 a detailed programme for commissioning and implementing any change in, or addition to, the Service (including the provision and/or training of any staff);
  - 2.1.3 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 the Contract;
  - 2.1.4 the proposed consultants, sub-contractors and suppliers the Contractor intends to appoint to process the Medium Value Change;
  - 2.1.5 details of any impact of the Medium Value Change on the carrying out of the Works or the provision of the Service and, in particular, details of any relief from compliance with any obligations of the Contract required during the implementation of the Medium Value Change;

- 2.1.6 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;
  - 2.1.7 where the Councils have specified in the Councils Change Notice that the Contractor shall raise finance for the Councils Change the steps the Contractor has or will take to secure such finance;
  - 2.1.8 actual and/or projected Third Party Costs relating to the Medium Value Change and the details of the third party activity that has been or will be involved in providing the Contractor Response including (where applicable pursuant to paragraph 6 (Due Diligence) of Part 1 (General Provisions) of this Change Protocol) the anticipated cost of the Senior Lenders carrying out due diligence (which shall be a capped sum) together with a proposed process for approval of such Third Party Costs by the Councils before they are incurred; and
  - 2.1.9 any amendment to the Contract or any Project Document, Ancillary Document or any Financing Agreement required as a result of the Medium Value Change.
- 2.2 In calculating the Estimated Change in Project Costs (including the Whole Life Costs) and/or Capital Expenditure the Contractor shall use all reasonable endeavours to ensure that:
- 2.2.1 any professional fees, contingencies, overheads and/or profit margins charged by any consultant, sub-contractor or supplier in respect of construction and/or installation and/or life cycle and/or service provision shall be the equivalent rates set out in Appendices 1 to 3 (Pricing Information) and Appendix 4 (Small Works Rates) of this Change Protocol. If the Contractor can demonstrate to the reasonable satisfaction of the Councils 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 Appendices 1 to 3 (Pricing Information) and Appendix 4 (Small Works Rates) of this Change Protocol then the Councils shall agree to amend the rates set out in Appendices 1 to 3 (Pricing Information) and Appendix 4 (Small Works Rates) of this Change Protocol to reflect current market rates; and

2.2.2 the value of any Medium Value Change other than in respect of those matters in paragraph 2.2.1 (Contractor Response) of this Part 3 (Medium Value Changes) above shall be calculated by reference to fair, reasonable and comparable market rates.

### **3 AGREEMENT OF CONTRACTOR RESPONSE**

3.1 If the Councils request to approve any Third Party Costs prior to that third party being appointed to prepare the Contractor's Response the time period for the Contractor to submit its response in accordance with paragraph 2.1 (Contractor Response) shall be suspended from the date on which such Third Party Costs are submitted for approval until approval is granted (or the Parties have otherwise agreed such Third Party Costs or they have been determined through the Dispute Resolution Procedure).

3.2 As soon as practicable, and in any event no later than ten (10) Business Days after the Councils receive the Contractor Response, the Parties shall discuss and endeavour to agree the issues set out in the Contractor Response and the Contractor shall:

3.2.1 provide evidence that the Contractor has used reasonable endeavours (including, where practicable, and without prejudice to the provisions of paragraph 8 (Competitive Tendering) of Part 4 (High Value Changes) 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;

3.2.2 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

3.2.3 demonstrate that any expenditure that has been avoided, which was anticipated to be incurred that has been affected by the Councils Change, has been taken into account in the Estimated Change in Project Costs.

3.3 If the Contractor has failed to use all reasonable endeavours to provide the information required by paragraph 2.1 (Contractor Response) of this Part 3 (Medium Value Changes) or satisfy the provisions of paragraphs 3.2(a) to 3.2(c) (Agreement of Contractor Response) (inclusive) of this Part 3 (Medium Value Changes) the Councils 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 Councils' rejection of the Contractor Response. The Contractor shall use reasonable endeavours to address the Councils' concern about the quality and content of the Contractor Response. In particular, the Contractor shall provide any additional information or documentation that the Councils shall reasonably require which relates to the contents of the Councils Change Notice and/or the Contractor Response and/or the information required by paragraph 2.1 (Contractor Response) and paragraphs 3.2(a) to 3.2(c) (Agreement of Contractor Response) (inclusive) of this Part 3 (Medium Value Changes). The Councils may require the Contractor to resubmit the Contractor Response amended to take account of, and address, the Councils' concerns and the Contractor shall submit such revised Contractor Response within twenty (20) Business Days of such request.

- 3.4 If the Parties cannot agree on the contents of the Contractor Response (as may be amended pursuant to paragraph 3.3 (Agreement of Contractor Response) of this Part 3 (Medium Value Changes)) then either Party may refer the dispute to the Dispute Resolution Procedure provided that no determination shall oblige the Councils to issue a Confirmation Notice in respect of the disputed Medium Value Change.

#### **4 COUNCILS' CONFIRMATION**

4.1 The Councils shall, in writing:

- 4.1.1 confirm the Councils Change Notice; or
- 4.1.2 withdraw the Councils Change Notice; or
- 4.1.3 reject the Contractor Response

and in the event that the Councils:

- (a) confirm the Councils Change Notice then the Councils shall issue a Confirmation Notice which shall set out the agreed scope of Third Party Costs, the agreed cap on Senior Lender costs, the agreed rates for the cost of Contractor time, the Change in Project Costs and the agreed timescales for implementation; or
- (b) withdraw a Councils Change Notice, paragraph 4.2 (Councils Confirmation) of this Part 3 (Medium Value Changes) shall apply; or

- (c) reject the Contractor Response, paragraph 4.3 (Councils Confirmation) of this Part 3 (Medium Value Changes) shall apply.

4.2 If the Councils do not issue a written notice pursuant to paragraph 4.1 (Councils Confirmation) of this Part 3 (Medium Value Changes) within twenty (20) Business Days of the contents of the Contractor Response having been agreed in accordance with paragraph 3.3 (Agreement of Contractor Response) of this Part 3 (Medium Value Changes) or determined pursuant to paragraph 3.4 (Agreement of Contractor Response) of this Part 3 (Medium Value Changes), then the Councils Change Notice shall be deemed to have been withdrawn.

4.3 Where a Councils Change Notice is withdrawn pursuant to paragraph 4.1 (Councils Confirmation) of this Part 3 (Medium Value Changes) or deemed to have been withdrawn pursuant to paragraph 4.2 (Councils Confirmation) of this Part 3 (Medium Value Changes) or paragraph 5 (Funding (Capital Expenditure)) of Part 1 (General Provisions) of this Change Protocol the Councils shall pay to the Contractor the cost of the Contractor's time reasonably incurred in preparing the Contractor Response and the Third Party Costs incurred by the Contractor (but without double counting) in preparing such Contractor Response provided that, in respect of the Third Party Costs:

4.3.1 such sums shall not exceed any agreed Third Party Costs; and

4.3.2 the Contractor included in the Contractor Response a cost breakdown of the Third Party Costs incurred by the Contractor in preparing the Contractor Response and the Councils have:

- (a) acting reasonably approved such estimate of Third Party Costs and the type of third party prior to any Third Party Costs being incurred;
- (b) acting reasonably 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;
- (c) been provided with such evidence as it may reasonably require in order to verify such Third Party Costs; and

(d) confirmed that 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.

4.4 The Councils shall not be responsible for payment of any costs incurred by the Contractor in preparing the Contractor Response where the Councils have, acting reasonably, rejected the Contractor Response on the grounds of non-compliance in any material respects with the requirements of this Change Protocol.

4.5 Where the Contractor has either:

4.5.1 failed to provide a Contractor Response in accordance with paragraph 2 (Contractor Response) within the time period specified in the Councils Change Notice or such other time period as agreed between the Parties; or

4.5.2 provided a Contractor Response in accordance with paragraph 2 (Contractor Response) but has failed to fully implement the Medium Value Change within ten (10) Business Days of the date set out in the Confirmation Notice referred to in paragraph 4.1(i) (Councils Confirmation) of this Part 3 (Medium Value Changes) as being the date by which the Medium Value Change should have been implemented; or

4.5.3 it is determined pursuant to paragraph 3.3 (Agreement of Contractor Response) that the Contractor has failed to submit a fair and reasonable Contractor Response

then the Councils may notify the Contractor that the Councils Change Notice is withdrawn and following such notification, may procure the implementation of the Medium Value Change without further recourse to the Contractor and the provisions of paragraph 8 (Implementation of a Change by the Councils) of Part 1 (General Provisions) shall apply.

## **5 DUE DILIGENCE**

The provisions of paragraph 6 (Due Diligence) of Part 1 (General Provisions) of this Change Protocol shall apply.

## **6 IMPLEMENTATION**

6.1 The provisions of paragraph 7 (Implementation) of Part 1 (General Provisions) of this Change Protocol shall apply.

6.2 Where the Medium Value Change:

6.2.1 is implemented at a 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; and/or

6.2.2 constitutes additional or varied services, the Payment Mechanism shall apply to determine whether the Medium Value Change has been properly implemented.

## **7 PAYMENT**

The provisions of paragraph 9 (Payment) of Part 1 (General Provisions) of this Change Protocol shall apply.

**PART 4 - HIGH VALUE CHANGES AND/OR A COUNCILS' CHANGE PURSUANT TO  
CLAUSE 20 (PLANNING PERMISSIONS) AND/OR SCHEDULE 37 (APPROACH TO  
PERMIT RISK)**

**1 NOTIFICATION AND SPECIFICATION**

- 1.1 The Councils 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 1.2 (Notification and Specification) of this Part 4 (High Value Changes), the Councils 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 Related Parties.
- 1.2 If the Councils request to approve any Third Party Costs under this Part 4 (High Value Changes) the relevant time period for the Contractor to submit a Contractor Response shall be suspended from the date on which such Third Party Costs are submitted for approval until such Third Party Costs have been agreed or determined through the Dispute Resolution Procedure.
- 1.3 The Councils may, at any time, issue a Councils Change Notice which shall state:
- 1.3.1 that it is a High Value Change and whether it is required as a result of a Change in Law; or
- 1.3.2 that the High Value Change shall be valued either:
- (a) by means of the Competitive Tendering Process; or
  - (b) by means of the Benchmarking Process and whether input should be obtained from a reputable source or the Comparable Market; or
  - (c) by means of valuation by an Independent Technical Adviser (with the agreement of the Contractor);
- 1.3.3 if applicable, affordability thresholds for the proposed works or services comprising the relevant High Value Change;
- 1.3.4 if applicable, a specification of any proposed works, in the same format and with similar detail as that provided in Part 2 (Construction Works Requirements) of the Output Specification wherever possible and, where not

possible, in sufficient detail to allow the design and pricing of a solution to the High Value Change;

- 1.3.5 if applicable, a specification of the proposed services (or any change to the Service), in the same format with similar detail as that provided in Part 3 (Service Requirements) of the Output Specification wherever possible and, where not possible, in sufficient detail to allow the pricing of the required works and/or additional services (or change to a Service);
- 1.3.6 the location for the works or services required;
- 1.3.7 the timing of the works or services required;
- 1.3.8 whether the Contractor is expected to provide maintenance and/or lifecycle services in respect of any additional works;
- 1.3.9 an outline risk allocation matrix setting out the Councils' preferred risk profile in respect of the High Value Change;
- 1.3.10 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 sixty (60) Business Days from the date of the Councils Initial Confirmation;
- 1.3.11 in the event that the Councils Change will require Capital Expenditure whether the Councils intend to pay for the Capital Expenditure involved in implementing the Change and their proposals for payment (whether in stages or otherwise) or whether the Councils require the Contractor to use its reasonable efforts to obtain funding in accordance with paragraph 5 (Funding (Capital Expenditure)) of Part 1 (General Provisions) of this Change Protocol;
- 1.3.12 the Approval Criteria; and
- 1.3.13 whether the Councils require the approval of any Third Party Costs relating to the preparation of the Contractor Response.

## **2 CONTRACTOR INITIAL RESPONSE AND STAGE 1 RESPONSE**

- 2.1 Subject to paragraph 2 (Limits on Changes) of Part 1 (General Provisions) of this Change Protocol within ten (10) Business Days of receipt of the Councils Change Notice (or such longer period as reasonably set out by the Councils in the Councils

Change Notice in consultation with the Contractor and taking into account the characteristics of the Councils Change and/or any modification to the Councils Change) the Contractor shall provide the Councils with a Contractor Initial Response which shall comprise:

- 2.1.1 an indication of the Estimated Change in Project Costs that will result from the implementation of the Councils Change;
  - 2.1.2 the Third Party Costs that will be incurred with respect to the activities referred to in paragraph 2.1(c) (Contractor Initial Response and Stage 1 Response) of this Part 4 (High Value Changes) below as a firm or capped sum;
  - 2.1.3 the details of the third party activity that will be incurred in providing (and discussing with the Councils) the Contractor Stage 1 Response;
  - 2.1.4 where applicable pursuant to paragraph 6 (Due Diligence) of Part 1 (General Provisions) of this Change Protocol the anticipated cost of the Senior Lenders carrying out due diligence, which shall be capped or a firm sum; and
  - 2.1.5 the Project Management Fee which shall be a capped sum calculated in accordance with paragraph 2.5 (Contractor Initial Response and Stage 1 Response) of this Part 4 (High Value Changes) that will be incurred in providing (and discussing with the Councils) the Contractor Stage 1 Response.
- 2.2 The time period for the initial response shall be extended by ten (10) Business Days (or such longer period agreed between the Parties) if the Contractor requests the same because Senior Lender due diligence is required.
- 2.3 The Councils shall consider in good faith the Contractor Initial Response. If the Councils find that any material aspects of the Contractor Initial Response are unsatisfactory they shall notify the Contractor of the same, giving reasons, and offer reasonable assistance to the Contractor to enable it to address such deficiencies and resubmit the Contractor Initial Response as soon as reasonably practicable.
- 2.4 The Councils shall, within ten (10) Business Days of receipt of the Contractor Initial Response (as may be amended pursuant to paragraph 2.3 (Contractor Initial Response and Stage 1 Response) of this Part 4 (High Value Changes)) confirm in writing (a "**Councils Initial Confirmation**") to the Contractor that either:

2.4.1 the Contractor should proceed with developing a Contractor Stage 1 Response and the Councils shall confirm in the Councils Initial Confirmation:

- (a) the agreed Project Management Fee in relation to the development of the Contractor Stage 1 Response and a reasonable period within which to discuss the same with the Councils pursuant to paragraph 3.1 (Councils Stage 1 Confirmation) of this Part 4 (High Value Changes);
- (b) the agreed Third Party Costs in relation to the development of the Contractor Stage 1 Response; and
- (c) the agreed date by which the Contractor Stage 1 Response shall be submitted which date shall reflect the complexity of the High Value Change and, where not agreed by the Parties (each acting reasonably) shall be not more than sixty (60) Business Days from the date of the Councils Initial Confirmation;

2.4.2 or that the Councils withdraw the Councils Change Notice.

2.5 The Contractor may charge a Project Management Fee for the time incurred by its employees (or relevant Sub-Contractor) in project managing the development, procurement and implementation of the High Value Change. The Project Management Fee shall:

- 2.5.1 be based on actual time spent (validated by timesheet records);
- 2.5.2 be calculated at the daily rates as set out in Appendix 3 (Pricing Information - Project Management Fee) of this Change Protocol but capped at ten thousand pounds (£10,000) indexed in relation to the Contractor Initial Response and the sum set out in the Councils Stage 1 Confirmation or Councils Stage 2 Confirmation as applicable to those stages;
- 2.5.3 not include the time of any person who is not an employee of the Contractor or relevant Sub-Contractor;
- 2.5.4 not include any mark-up or profit cost or additional overheads; or
- 2.5.5 be paid in two (2) stages as follows:

- (a) on the Councils issuing a Councils Stage 1 Confirmation pursuant to paragraph 3.2 (Councils Stage 1 Confirmation) of this Part 4 (High Value Changes); and
- (b) on the Councils issuing a Councils Stage 2 Confirmation pursuant to paragraph 6.1(a) or withdrawing the High Value Change pursuant to paragraph 6.1(b) (Councils Stage 2 Confirmation) of this Part 4 (High Value Changes)

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.

2.6 Subject to paragraph 2 (Limits on Changes) of Part 1 (General Provisions) of this Change Protocol within the period specified in the Councils 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 Councils to make an informed decision pursuant to paragraph 3 (Councils Stage 1 Confirmation) of this Part 4 (High Value Changes) and shall take account of the Councils' affordability thresholds set out in the Councils Change Notice:

- 2.6.1 an outline programme for implementation of the Change including time periods for design development, Councils 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;
- 2.6.2 a broad indication of the impact of carrying out and implementing of the High Value Change on the provision of the Service 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 and any fixed dates during the Service Period during the implementation of the High Value Change;
- 2.6.3 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;

- 2.6.4 any Capital Expenditure that is required or no longer required as a result of the High Value Change and where the Councils have specified in the Councils Change Notice that the Contractor shall use its reasonable endeavours to raise financing for the Councils Change the steps the Contractor has or will take to secure such financing;
  - 2.6.5 an estimate of any loss of, or increase in, Third Party Revenue that may result from the High Value Change;
  - 2.6.6 the proposed Project Management Fee to develop a Contractor Stage 2 Response which shall be a capped fee calculated in accordance with paragraph 2.5 (Contractor Initial Response and Stage 1 Response) of this Part 4 (High Value Changes);
  - 2.6.7 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 Lenders carrying out due diligence and independent certification) that may be required to be completed prior to agreement of the High Value Change in relation to the development of a Contractor Stage 2 Response together with a proposed process for approval of such costs by the Councils before they are incurred;
  - 2.6.8 a summary of any amendments required to the Contract or any Ancillary Document or the Financing Agreements as a result of the Change;
  - 2.6.9 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
  - 2.6.10 an estimate of the time period required by the Contractor to develop a Contractor Stage 2 Response for the High Value Change should the Councils notify the Contractor pursuant to paragraph 3.2(a) (Councils Stage 1 Confirmation) of this Part 4 (High Value Changes) of its requirements for a Contractor Stage 2 Response.
- 2.7 In preparing the outline Estimated Change in Project Costs, including the calculation of any Capital Expenditure, the Contractor shall (as specified by the Councils in the Councils Change Notice) either comply with:

- 2.7.1 the provisions of paragraph 7 (Competitive Tendering) of this Part 4 (High Value Changes) if the Competitive Tendering Process is to apply; or
  - 2.7.2 the provisions of paragraph 8 (Benchmarking Process) of this Part 4 (High Value Changes) if the Benchmarking Process is to apply; or
  - 2.7.3 the provisions of paragraph 9 (Independent Technical Adviser) of this Part 4 (High Value Changes) if an Independent Technical Adviser has been or will be appointed in accordance with paragraph 1.3 (b)(iii) (Notification and Specification) of this Part 4 (High Value Changes).
- 2.8 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 Service 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.
- 2.9 In developing a Contractor Stage 1 Response the Contractor shall liaise with the Councils and relevant end users (being such persons or organisations as the Contractor in consultation with the Councils considers appropriate). The Councils 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 Councils to the Contractor shall, unless expressly stated otherwise by the Councils, be provided without warranty and shall be without prejudice to the Councils' rights under this Change Protocol.

### **3 COUNCILS STAGE 1 CONFIRMATION**

- 3.1 The Councils shall consider, in good faith, the Contractor Stage 1 Response. If the Councils find that any material aspects of the Contractor Stage 1 Response are unsatisfactory to them they 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.
- 3.2 The Councils shall, within thirty (30) Business Days (or such longer period as the Parties may agree) of receipt of the Contractor Stage 1 Response (as may be amended

pursuant to paragraph 3.1 (Councils Stage 1 Confirmation) of this Part 4 (High Value Changes) confirm in writing to the Contractor that either:

3.2.1 the Contractor should proceed with developing a Contractor Stage 2 Response by a date fixed by reference to the time the Contractor has estimated in the Contractor Stage 1 Response (a "**Councils Stage 1 Confirmation**"); or

3.2.2 the Councils withdraw the Councils Change Notice

and in the event the Councils do not give such written confirmation within the specific time period then the Councils Change Notice shall be deemed withdrawn.

3.3 The Councils shall pay the Contractor the Project Management Fee and the Third Party Costs set out in the Councils Initial Confirmation and due at Stage 1 within twenty (20) Business Days of receipt of an invoice for the agreed sum submitted by the Contractor.

#### **4 CONTRACTOR STAGE 2 RESPONSE**

4.1 Within the time period specified in the Councils Stage 1 Confirmation (or if no time is specified within sixty (60) Business Days of receipt of the Councils 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:

4.1.1 (where applicable) a detailed design solution (at the minimum to RIBA Stage D);

4.1.2 the proposed consultants, sub-contractors and suppliers which the Contractor intends to appoint to process the High Value Change;

4.1.3 details of any Necessary Consents required in order to implement the High Value Change;

4.1.4 details of any impact (stoppage or changes) on the provision of the Service and in particular whether (and what) relief from compliance with obligations set out in the 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;

4.1.5 the proposed method of certification of any construction or operational aspects of the High Value Change if not covered by the procedures in the Contract;

- 4.1.6 a detailed timetable for implementation of the High Value Change;
- 4.1.7 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;
- 4.1.8 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;
- 4.1.9 any approval required from the insurers and/or the Senior Lenders together with details of the fixed or capped sum for the due diligence costs incurred or to be incurred in obtaining the same;
- 4.1.10 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 Councils' approvals given to sums already expended and confirmation that costs to be incurred are included in the Change in Project Costs;
- 4.1.11 a draft deed of amendment setting out any amendment(s) required to the Contract and/or any Ancillary Document and/or any Financing Agreement required as a result of the High Value Change;
- 4.1.12 the amount of any loss of or increase in Third Party Revenue that may result from the High Value Change;

- 4.1.13 if requested by the Councils 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;
- 4.1.14 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;
- 4.1.15 evidence that the Contractor has used reasonable endeavours (including, where practicable and without prejudice to the provisions of paragraph 7.4 (Competitive Tendering) of this Part 4 (High Value Changes) the use of competitive quotes) to oblige sub-contractors and suppliers to minimise any increase in costs and maximise any reduction in costs;
- 4.1.16 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;
- 4.1.17 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;
- 4.1.18 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
- 4.1.19 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:

- (a) if the Councils specified in the Councils Change Notice that paragraph 7 (Competitive Tendering) of this Part 4 (High Value Changes) will apply, the Tendering Report;

- (b) if the Councils specified in the Councils Change Notice that paragraph 8 (Benchmarking Process) of this Part 4 (High Value Changes) will apply, a Benchmarking Report demonstrating that the unit rates for construction, life cycle and maintenance services used to calculate the Change in Project Costs fall within reasonable ranges compared to industry benchmarks obtained from a reputable, independent source; or
- (c) if the Councils and the Contractor are agreed that paragraph 9 (Independent Technical Adviser) of this Part 4 (High Value Changes) 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 (appointed in accordance with paragraph 1.3(b)(iii) (Notification and Specification) of this Part 4 (High Value Changes) on the Change in Project Costs).

4.2 In developing a Contractor Stage 2 Response the Contractor shall continue to liaise with the Councils and relevant end users (being such persons or organisations as the Contractor in consultation with the Councils considers appropriate).

4.3 Without prejudice to paragraph 4.2 (Contractor Stage 2 Response) of this Part 4 (High Value Changes), the Councils shall co-operate with the Contractor in relation to any Contractor Stage 2 Response being developed by the Contractor, including (without limitation) promptly providing:

4.3.1 written confirmation of any change to the affordability thresholds and any amendment to the Councils' requirements both as set out in the Councils Change Notice;

4.3.2 changes to funding which the Councils receive or to the way in which funding may be applied (either or both of which may affect whether a High Value Change is affordable);

4.3.3 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 Councils incurring additional material expense); and

4.3.4 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 Councils to the Contractor shall be provided without warranty and shall be without prejudice to the Councils' rights under this Change Protocol.

4.4 The Contractor shall notify the Councils 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.

## **5 AGREEMENT OF CONTRACTOR STAGE 2 RESPONSE**

5.1 As soon as practicable, and in any event not more than twenty (20) Business Days after the Councils receive the Contractor Stage 2 Response, the Parties shall discuss and endeavour to agree the issues set out in the Contractor Stage 2 Response. The Councils may require (and the Contractor shall provide) further information it reasonably requires to enable the Councils 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:

5.1.1 provide evidence that the Contractor has used reasonable endeavours (including, where practicable (and without prejudice to the provisions of paragraph 5.4 of this Part 4 (High Value Changes) 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;

5.1.2 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

5.1.3 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 Councils for further information.

5.2 The Councils may, acting reasonably, modify the Councils 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 or such other period as the Parties may agree after receipt of any such modification, notify the Councils that:

5.2.1 either any such modification is sufficiently material as to amount to a new Councils Change Notice (and demonstrate why this is the case or otherwise);  
or

5.2.2 of any consequential changes to the Contractor Stage 2 Response (which shall be deemed accordingly amended).

In the event the Councils modify the Councils Change Notice the Contractor shall be entitled to request an increase in the Third Party Costs cap and Project Management Fee to the extent that any increase in such costs incurred are fair, reasonable and proper (taking into account the modification suggested) and provided always that the Contractor shall have a duty to mitigate any such increase in costs then the Third Party Cost cap shall be increased and the Councils shall be liable for such increased Third Party Costs and Project Management Fee in accordance with this Change Protocol.

5.3 If, acting reasonably, the Councils are of the view that any material aspect of the Contractor Stage 2 Response fails to meet the Approval Criteria the Councils shall notify the Contractor of the same and shall specify in writing and explain to the Contractor in which respects the Contractor Stage 2 Response does not meet the Approval Criteria. 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.

5.4 If the revised Contractor Stage 2 Response does not address the failures notified by the Councils pursuant to paragraph 5.3 and the Councils are of the view, acting reasonably, that the revised Contractor Stage 2 Response does not satisfy the Approval Criteria then paragraph 6.1(c) of this Part 4 (High Value Changes) of this Change Protocol shall apply.

5.5 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 Councils to issue a Stage 2 Confirmation in respect of the disputed High Value Change.

## 6 COUNCILS STAGE 2 CONFIRMATION

- 6.1 As soon as reasonably practicable after the receipt of the Contractor Stage 2 Response or the revised Contractor Stage 2 Response (as the case may be) the Councils shall either:
- 6.1.1 issue written confirmation (a "**Councils Stage 2 Confirmation**") and shall pay the Contractor the Project Management Fee and Third Party Costs and due diligence costs of the Senior Lenders due at Stage 2 within twenty (20) Business Days of the date of issue of the Councils Stage 2 Confirmation or, if later, receipt of a valid invoice for the agreed amounts; or
  - 6.1.2 issue a written notice withdrawing the Councils Change Notice in which case the provisions of paragraph 6.3 (Councils Stage 2 Confirmation) of this Part 4 (High Value Changes) shall apply; or
  - 6.1.3 issue a written notice rejecting the Contractor Stage 2 Response in which case the Councils 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 Lenders) provided that the Councils may only reject the Contractor Stage 2 Response on the grounds that the Contractor Stage 2 Response failed to meet the Approval Criteria in any material respect.
- 6.2 If the Councils do not issue a written notice pursuant to paragraph 6.1 (Councils Stage 2 Confirmation) of this Part 4 (High Value Changes) 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 three (3) Months from the date the Councils receive the Contractor Stage 2 Response) requiring the Councils either to confirm the Contractor Stage 2 Response or withdraw the Councils Change Notice then the Councils Change Notice shall be deemed to have been withdrawn.
- 6.3 Where a Councils Change Notice is withdrawn pursuant to paragraph 6.1(b) (Councils Stage 2 Confirmation) of this Part 4 (High Value Changes) or deemed to have been withdrawn pursuant to paragraph 6.2 (Councils Stage 2 Confirmation) of this Part 4 (High Value Changes) the Councils shall pay to the Contractor within twenty (20) Business Days of receipt of an invoice for such amount the reasonable Third Party Costs (which shall not be greater than that proposed in the Contractor Stage 1 Response including any costs incurred by the Senior Lenders 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:

- 6.3.1 the Contractor has satisfied the Approval Criteria and other requirements of this Change Protocol in all material respects;
- 6.3.2 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 Councils have:
  - (a) (acting reasonably) approved such estimate of third party costs and the type of third party prior to any Third Party Costs being incurred;
  - (b) 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;
  - (c) been provided with such evidence as they may reasonably require in order to verify such Third Party Costs; and
  - (d) no cap or fixed fee agreed with the Contractor (whether in the Contractor Stage 1 Response or otherwise) in respect of any Third Party Costs has been exceeded.

6.4 Where the Councils Change is either withdrawn or rejected, the Councils shall be entitled to implement the Change themselves and the provisions of paragraph 7 (Implementation of Change of the Councils) of Part 1 (General Provisions) of this Change Protocol shall apply.

## **7 COMPETITIVE TENDERING**

7.1 Where this paragraph 7 (Competitive Tendering) applies the Contractor shall in preparing the Contractor Stage 2 Response, as far as reasonably practicable, structure the works and/or services required by the High Value Change and/or a Councils Change pursuant to Clause 20 (Planning Permissions) and/or Schedule 37 (Approach to Permit Risk) into a number of discrete work packages (which may include the procurement of items of equipment only or be labour only package of works) and shall invite at least

three (3) competitive tenders for each work package. Where legally required, the Competitive Tendering process shall be conducted in accordance with the Public Contracts Regulations 2006 (as amended) and the principles of the Treaty of Rome.

7.2 The Contractor and the Councils shall agree:

7.2.1 the work packages to be priced through competitive tendering based on what is judged to provide best value for money;

7.2.2 the procurement process;

7.2.3 the evaluation criteria;

7.2.4 any additional interface risks between the carrying out of any additional works and/or services by a third party at the Facilities and/or carrying out of the Works and/or the delivery of the Service; and

7.2.5 that the preferred tenderer shall be selected on the basis of the most economically advantageous tender.

7.3 The Contractor shall be responsible for:

7.3.1 running the competition for the work packages;

7.3.2 evaluating and selecting the preferred tenderers;

7.3.3 negotiating and finalising appointment of the preferred tenderers; and

7.3.4 managing the implementation of the works and services required as part of the High Value Change

provided that the Councils shall approve the preferred tenderer(s) acting reasonably within twenty (20) Business Days following the conclusion of the tendering process and either appoint or object to the preferred tenderer(s) but no sub-contractor shall be appointed, until or unless, a Councils Stage 2 Confirmation is issued.

7.4 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.

7.5 The Tendering Report shall include, but not be limited to, the following information;

- 7.5.1 details of the companies which were asked to tender for each work package indicating whether a compliant bid was in fact submitted;
- 7.5.2 the basis upon which each company was invited to tender including their appropriate experience and expertise;
- 7.5.3 how details of how the evaluation process was carried out including the scoring for each tenderer;
- 7.5.4 the basis of the recommendation of the successful tenderer for each work package;
- 7.5.5 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
- 7.5.6 any other relevant information.

## **8 BENCHMARKING PROCESS**

- 8.1 Where this paragraph 8 (Benchmarking Process) applies the Contractor shall benchmark all construction, facilities management and life cycle costs (including professional fees, contingencies, overheads and profit margins) using benchmarks available from a reputable independent source that are generally recognised in the industry.
- 8.2 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 provide evidence that the construction costs, operating costs and financing costs included in the Change in Project Costs were supported by actual input from a reputable independent source and the Comparable Market as specified in the Councils Change Notice. In particular the Benchmarking Report shall include full supporting evidence of the assumptions, source of market price and information and conclusions reached including:
  - 8.2.1 the methodology and all assumptions by which the Estimated Change in Project Costs was determined;
  - 8.2.2 assumptions made in respect of the Comparable Market;

8.2.3 full details of sources of the information used including evidence as to reputation and independence of such sources; and

8.2.4 such other details as the Parties may agree.

## **9 INDEPENDENT TECHNICAL ADVISER**

9.1 Where this paragraph 9 (Independent Technical Adviser) applies upon issue of a Councils Change Notice or the Parties agreeing that a Councils Change Notice will shortly be issued in respect of a High Value Change the Councils (with the agreement of 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:

9.1.1 developing a Reference Price; and

9.1.2 commenting on the Estimated Change in Project Costs and the Change in Project Costs.

9.2 Upon appointment of the Independent Technical Adviser (or if later, upon service of the Councils Change Notice pursuant to paragraph 1.3 (Notification and Specification) of this Part 3 (High Value Changes)) the Councils and the Contractor shall instruct the Independent Technical Adviser to develop a Reference Price.

9.3 The Independent Technical Adviser shall develop a Reference Price in consultation with the Contractor and the Councils. The Reference Price shall include (as applicable) all finance, design development, construction, life cycle, 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 Councils 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 Costs or the Change in Project Costs.

9.4 The Independent Technical Adviser shall provide to the Contractor and the Councils 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 Councils and specified in the appointment of the Independent Technical Adviser.

9.5 The Councils shall be responsible for the payment of all fees payable to the Independent Technical Adviser. For the avoidance of doubt, any costs incurred by the Contractor pursuant to this paragraph 9 (Independent Technical Advisor) shall form part of the Project Management Fee or Third Party Costs and no additional sums shall be paid to the Contractor.

## **10 FUNDING**

The provisions of paragraph 5 (Funding (Capital Expenditure)) of Part 1 (General Provisions) of this Change Protocol shall apply.

## **11 DUE DILIGENCE**

The provisions of paragraph 6 (Due Diligence) of Part 1 (General Provisions) of this Change Protocol shall apply.

## **12 IMPLEMENTATION**

The provisions of paragraph 7 (Implementation) of Part 1 (General Provisions) of this Change Protocol shall apply.

## **13 PAYMENT**

The provisions of paragraph 9 (Payment) of Part 1 (General Provisions) of this Change Protocol shall apply.

## PART 5

### CONTRACTOR CHANGE

- 1 If the Contractor wishes to introduce a Contractor Change it shall serve a Contractor Change Notice on the Councils.
- 2 The Contractor Change Notice shall:
  - 2.1 set out the proposed Contractor Change in sufficient detail to enable the Councils to evaluate it in full;
  - 2.2 specify whether the Contractor Change is:
    - 2.2.1 a Low Value Change;
    - 2.2.2 a Medium Value Change;
    - 2.2.3 a High Value Change; and/or
    - 2.2.4 is required as a result of a Change in Law;
  - 2.3 specify the Contractor's reasons for proposing the Contractor Change;
  - 2.4 indicate any implications of the Contractor Change;
  - 2.5 indicate what savings, if any, will be generated by the Contractor Change:
    - 2.5.1 whether a revision of the Unitary Charge is proposed (and, if so, give details of such proposed revision); or
    - 2.5.2 whether such savings will be paid by a lump sum;
  - 2.6 if the Contractor Change is required as a result of a Qualifying Change in Law, which sums, if any, will be payable by the Councils;
  - 2.7 indicate if there are any critical dates by which a decision by the Councils is required;
  - 2.8 confirm all Necessary Consents have been obtained (or indicate the process for obtaining such consents) from the funders and the insurance brokers to the extent required; and

- 2.9 request the Councils to consult with the Contractor with a view to deciding whether to agree to the Contractor Change and, if so, what consequential changes the Councils require as a result.
- 3 The Councils shall evaluate the Contractor Change Notice in good faith, taking into account all relevant issues including whether:
  - 3.1 a revision of the Unitary Charge will occur;
  - 3.2 the Contractor Change may affect the quality of the Service and/or the Works or the likelihood of successful completion of the Works and/or delivery of the Service (or any of them);
  - 3.3 the Contractor Change may interfere with the relationship of the Councils with third Parties;
  - 3.4 the financial strength of the Contractor is sufficient to perform the Service after implementation of the Contractor Change;
  - 3.5 the value and/or life expectancy of any Facility and/or Assets are reduced; and
  - 3.6 the Contractor Change materially affects the risks or costs to which the Councils are exposed.
- 4 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 fifty per cent (50%) of the overall net saving being retained by the Contractor and fifty per cent (50%) of the overall net saving accruing for the benefit of the Councils.
- 5 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 Councils may propose modifications to, or accept or reject the Contractor Change Notice at its absolute discretion except in relation to Changes in Law.
- 6 If the Councils accept 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 Councils shall issue a Councils' Confirmation which shall set out the agreed Contractor Change and:

- 6.1 the Parties shall enter into any documents to amend the Contract or any relevant Ancillary Document which are necessary to give effect to the Contractor Change;
  - 6.2 if applicable, the Unitary Charge shall be revised in accordance with Clause 120 (Revision and Custody of Financial Model); and
  - 6.3 the Contractor Change shall be implemented within the period specified by the Councils in its notice of acceptance.
- 7 If the Councils reject 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 Councils of any of its costs.
  - 8 Unless the Councils' 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 54 (Change in Law), any funding shall be provided by the Contractor.
  - 9 The Councils shall not reject a Contractor Change which is required in order to conform to a Change in Law or a direction of a Relevant Authority requiring a variation or amendment to a Necessary Consent either as a result of a Change of Law or otherwise. 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 54 (Change in Law) and to the extent not dealt with therein all costs shall be borne by the Contractor.

## PART 6

### CONSTRUCTION CHANGES

#### 1 CONSTRUCTION CHANGES

- 1.1 The Councils may issue a Councils Change Notice relating to a Construction Change. The Councils Notice of Change shall:
- 1.1.1 state whether the Councils Change arises from a Qualifying Change in Law;
  - 1.1.2 set out the Change in sufficient detail to enable the Contractor to calculate and provide the Estimated Change in Project Costs in accordance with paragraph 1.2 (Construction Changes) of this Part 6 (Construction Changes) (the "**Estimate**"); and
  - 1.1.3 state whether the Councils shall require the Contractor to use its reasonable endeavours to obtain funding in accordance with paragraph 5 (Funding (Capital Expenditure)) of Part 1 (General Provisions) of this Change Protocol.
- 1.2 Within twenty-one (21) Business Days after having received the Councils Notice of Change (or such longer period as is reasonably agreed by the Parties having regard to the nature of the Change) the Contractor shall deliver to the Councils the Estimate. The Contractor may request a ten (10) Business Day extension to the agreed period if Senior Lender due diligence is required. The Estimate shall include the opinion of the Contractor on:
- 1.2.1 any necessary change in the Works or Service;
  - 1.2.2 whether relief from compliance with obligations is required including the obligation of the Contractor to achieve the Planned Readiness Date and/or Planned Service Commencement Date and/or meet the Output Specification, Works Delivery Plan and Service Delivery Plan during the implementation of the Councils Change;
  - 1.2.3 any loss of revenue (including subject to Clause 120.4 (Principles relating to Third Party Income)) that will result from the Councils Change;
  - 1.2.4 any Estimated Change in Project Costs that directly results from the Councils Change;

- 1.2.5 any Third Party Costs relating to the Construction Change including any costs incurred by the Senior Lenders in carrying out due diligence;
- 1.2.6 any amendment required to the Contract or an Ancillary Document resulting from the Councils Change;
- 1.2.7 any Capital Expenditure that is required or no longer required as a result of the Councils Change; and
- 1.2.8 any revised Tests and the proposed method of certifying completion of the construction if not covered by the procedures in Clause 35 (Certification and Completion of the Works)

in each case giving in full detail the procedure for implementing the Councils Change.

- 1.3 If the Councils request to approve any Third Party Costs prior to the Estimate being delivered the time period for the Contractor to submit the Estimate in accordance with paragraph 1.2 (Construction Changes) of this Part 6 (Construction Changes) shall be suspended from the date on which such Third Party Costs are submitted until agreed or determined through the Dispute Resolution Procedure.

## **2 PARTIES TO DISCUSS**

- 2.1 As soon as practicable after the Councils receive the Estimate the Parties shall discuss and agree the issues set out in the Estimate including:
  - 2.1.1 providing evidence that the Contractor has used reasonable endeavours (including (where practicable) the use of competitive quotes) to oblige the Sub-Contractors to minimise any increase in costs and maximise any reduction in costs;
  - 2.1.2 providing evidence that where the Contractor does not intend to use its own resources to implement the Councils Change it shall comply with Good Industry Practice with the objective of ensuring that it obtains the best value for money when procuring any works, supplies, materials or equipment;
  - 2.1.3 demonstrating 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, or would have been incurred, foreseeable Changes in Law at that time have been taken into account by the Contractor;

- 2.1.4 demonstrating that any expenditure that has been avoided, which was anticipated to be incurred to replace or maintain assets that have been affected by the Councils Change concerned, has been taken into account in the amount which in its opinion has resulted; and
- 2.1.5 providing evidence that the Contractor has used reasonable endeavours to pass any increase in costs to the existing or future customers of the Contractor or Operating Sub-Contractor as the case may be and has demonstrated to the reasonable satisfaction of the Councils that it is more likely than not able to pass any increase in costs to the customers of the Contractor other than the Councils.

### **3 CHANGE AGREED**

- 3.1 If the Parties cannot agree the contents of the Estimate then the dispute shall be determined in accordance with the Dispute Resolution Procedure.
- 3.2 As soon as practicable after the contents of the Estimate have been agreed (and in any event within twenty (20) Business Days or as otherwise determined) the Councils shall:
  - 3.2.1 issue a Confirmation Notice; or
  - 3.2.2 withdraw the Councils Notice of Change.
- 3.3 If the Councils do not issue a written notice pursuant to paragraph 3.2 (Change Agreed) of this Part 6 (Construction Changes) 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 three (3) Months from the date the Councils receive the Estimate requiring the Councils either to confirm the Estimate or withdraw the Councils Change Notice) then the Councils Change Notice shall be deemed to have been withdrawn.
- 3.4 Where a Councils Change Notice is withdrawn or deemed to have been withdrawn pursuant to paragraph 3.2 (Change Agreed) of this Part 6 (Construction Changes) or deemed to have been withdrawn pursuant to paragraph 3.3 (Change Agreed) of this Part 6 of this Change Protocol the Councils 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 Lenders in carrying out due diligence (which shall not be greater than that any proposed by the Contractor in preparing the Estimate) provided that:

3.4.1 the Contractor has satisfied the Approval Criteria and other requirements of this Change Protocol in all material respects; and

3.4.2 the Contractor has included in the Estimate a cost breakdown of the estimate of Third Party Costs to be incurred by the Contractor and the Councils have:

(a) been provided with such evidence as they may reasonably require in order to verify such Third Party Costs; and

(b) no cap or fixed fee agreed with the Contractor in respect of any Third Party Costs has been exceeded.

#### **4 ARCHITECTURAL ENHANCEMENTS**

4.1 If the provisions of Clause 20.17 (Architectural Enhancements) apply the Architectural Enhancement shall stand as a Councils Change Notice and, save as provided in paragraph 4.2 (Architectural Enhancements) of this Part 6 (Construction Changes), the principles set out in this Part 6 (Construction Changes) applying to the Contractor's Estimate shall apply to the estimates and evidence required of the Contractor.

4.2 Paragraph 3 (Change Agreed) of this Part 6 (Construction Changes) shall not apply to Architectural Enhancements and the Councils shall be entitled to take the action in Clause 20.17 (Architectural Enhancements) and the consequences that flow therein.

#### **5 FUNDING**

The provisions of paragraph 5 (Funding (Capital Expenditure)) of Part 1 (General Provisions) of this Change Protocol shall apply.

#### **6 DUE DILIGENCE**

The provisions of paragraph 6 (Due Diligence) of Part 1 (General Provisions) of this Change Protocol shall apply.

#### **7 IMPLEMENTATION**

The provisions of paragraph 7 (Implementation) of Part 1 (General Provisions) of this Change Protocol shall apply.

#### **8 PAYMENT**

The provisions of paragraph 9 (Payment) of Part 1 (General Provisions) of this Change Protocol shall apply.

## APPENDIX 1

### PRICING INFORMATION

#### Professional fees and profit margins (subject to RPIX indexation)

Professional fees to be quoted at the time but effective to be:

<b>Role</b>	<b>Rate in £, per hour, per person (all to be indexed)</b>
Legal adviser	Five hundred (500)
Financial adviser	Four hundred (400)
Technical adviser	One hundred and fifty (150)
Other consultants (General)	Eighty (80)
Plus disbursements	Pass through

#### Profit Margins:

Professional fees	Five per cent (5%) of construction cost
Contingency	Five per cent (5%) of construction cost
Contractor's IRR	Fifteen per cent (15%)
Operating Sub-Contract profit margin	Eight per cent (8%)
Operating Sub-Contractor central overheads	Two and one half per cent (2.5%) per annum

## APPENDIX 2

### PRICING INFORMATION

#### Contractor management costs (subject to RPIX indexation)

<b>Role</b>	<b>Rate in £, per hour, per person (all subject to indexation)</b>
Project director	Eighty (80)
Financial planning analyst	Sixty-five (65)
Operations manager	Sixty (60)
Construction manager	Sixty (60)
Community education liaison officer (CELO)	Thirty-five (35)
Administration manager	Twenty-five (25)
Small Works Rates	The rates identified in the most appropriate and current Spon's Price Books which currently consist of:  <ol style="list-style-type: none"><li>1 Spon's Architect's and Builders Price Book;</li><li>2 Spon's Mechanical and Electrical Services Price Book;</li><li>3 Spon's Civil Engineering and Highways Price Book; and</li><li>4 Spon's External Works and Landscape Price Book.</li></ol>
Plus disbursements	Pass through

## APPENDIX 3

### PRICING INFORMATION

#### Project Management Fee (all subject to RPIX indexation)

<b>Role</b>	<b>Rate in £, per hour, per person (all subject to indexation)</b>
Contractor director	One hundred and eighty (180)
Legal adviser	One hundred and fifty (150)
Technical director	One hundred and twenty (120)
Project director	Eighty (80)
Consultant (general)	Eighty (80)
Financial planning analyst	Sixty-five (65)
Construction manager	Sixty-five (65)
Administration manager	Thirty (30)
Plus disbursements	Pass through

## APPENDIX 4

### SMALL WORKS RATES

#### **Low Value Changes**

Means the rates identified in the most appropriate and current Spon's Price Books which currently consist of:

- 1 Spon's Architect's and Builders Price Book;
- 2 Spon's Mechanical and Electrical Services Price Book;
- 3 Spon's Civil Engineering and Highways Price Book; and
- 4 Spon's External Works and Landscape Price Book

plus twelve per cent (12%).

#### **Medium Value Changes**

Actual cost plus twelve per cent (12%).

**APPENDIX 5**

**LOW VALUE CHANGE REQUEST**

<b>Low Value Change Request</b>	<b>Dated .....</b>
<b>To be completed by Councils' Representative</b>	
Change number	
Brief description of the Change	
Change in Law?	
Budget for the Change	
Date for completion/implementation	
<b>To be completed by Contractor's Representative</b>	
Confirmation of price/time (if applicable)	
Can be carried out within existing on-site resources?	
If not, cost of labour rates	
Life cycle cost (if appropriate)	
Additional operating cost (if appropriate)	
Plant/equipment costs (if appropriate)	
<b>Total cost</b>	

**APPENDIX 6**

**CONFIRMATION NOTICE**

<b>Dated:</b>	
<b>To be completed by Councils' Representative</b>	
<b>General information</b>	
Change number:	
Change type:	
Brief description of Change:	
Change in Project Costs:	£
Third Party Costs:	£
Agreed cap on Senior Lenders' costs:	£
Agreed rates for cost of Contractor time:	£
Programme for implementation:	
Payment profile:	
<b>Payment:</b>	
Payment details to be provided (e.g. adjustment to Unitary Charge/payment of Capital Expenditure etc.):	