

## Schedule 17: Change Compensation Principles

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### 1. General principles

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#### 1.1 Open book

Any Change or Change in Costs, in respect of which the Transport Agency has agreed or is obliged to pay the Contractor compensation, will only be approved and will only be payable by the Transport Agency if the calculation of charges proposed by the Contractor is disclosed to the Transport Agency on an Open Book Basis (including in relation to components of the price submitted by any Major Sub-contractor).

#### 1.2 Other considerations

In determining any Change in Costs or the amount of compensation payable in respect of a Change:

- (a) appropriate regard must be given to the timing of cash flow and all cash flows should be discounted or inflated to reflect when they occur (if appropriate);
- (b) the Contractor's share of any additional fees charged by the Independent Reviewer pursuant to the Independent Reviewer Agreement for providing any additional services as a result of a Transport Agency-initiated Change shall be included in the calculation of the applicable Contractor's costs when calculating the amount of compensation payable in respect of that Change;
- (c) the Contractor:
  - (i) must take, and require all Contractor Personnel to take, all proper and reasonable steps to mitigate the effect and consequences of the Change or event giving rise to the Change in Costs; and
  - (ii) will not be entitled to compensation under these Change Compensation Principles for any costs or Losses to the extent it, or any relevant Contractor Personnel, has failed to comply with paragraph 1.2(c)1.2(c)(i) of these Change Compensation Principles;
- (d) the compensation will be assessed in a manner that avoids double counting, particularly in relation to profits, margins, delay and prolongation costs; and
- (e) the compensation calculation will take full account of any insurance proceeds, damages, other compensation or amount paid or payable to the Contractor or any relevant Contractor Personnel or that would have been payable to the Contractor or any relevant Contractor Personnel had the Contractor or the relevant Contractor Personnel complied with the Contractor's insurance obligations under this Agreement and made a proper claim under the relevant Insurance Policies as a result of the occurrence of the relevant event.

#### 1.3 Omission of Services

Where the Transport Agency omits a Service by way of Change, deductions will be made from the Unitary Charge for any savings to the Contractor (including any profit on the amount of such savings).

## 2. Material Changes

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### 2.1 Generally

The entire compensation payable by the Transport Agency for the implementation of a Material Change that has not been, and will not be, tendered out pursuant to paragraph 2.9 of these Change Compensation Principles is to comprise only:

- (a) the Base Costs and (subject to paragraph 2.3) a Margin and not any separate fee, profit, element or uplift; and
- (b) any third party costs that the Transport Agency has agreed to pay for, subject to and in accordance with clause 45.2 (Withdrawn Change) of the Base Agreement.

### 2.2 Sub-contractor Margins

The Margin that a Sub-contractor may apply to its Base Costs for the implementation of any Material Change must not exceed the relevant Margin specified for Works Provisioning or Operational Services, as applicable, in Appendix 1 (Margin Allowances) to this Schedule 17. The relevant Sub-contractor may at its discretion select any Margin, for a Material Change, of less than or equal to the specified Margin Allowance.

### 2.3 Contractor Margin

The Contractor may not charge any Margin in connection with the management or implementation of any Material Change except as provided in this paragraph 2.3. The Contractor may charge a Margin up to (but not exceeding) the applicable Margin Allowance in connection with the implementation of any Material Change, but only in the following circumstances where the Contractor can demonstrate to the Transport Agency that due to the complexity of the Material Change:

- (a) it is necessary for the Contractor to deploy more significant additional or specialised resources into the processing or management of the Material Change when compared to the level or type of resource contemplated for the standard Change management service as set out in the Base Case that is then-current as at the date of the submission of the relevant Change Notice; and/or
- (b) due to the high value nature of the Material Change, the Contractor is being required to assume extraordinary risks in connection with the performance of the Sub-contractors in implementing the Change.

### 2.4 Base and lifecycle costs

- (a) The labour cost and professional fee cost components of the Base Costs for a Material Change (and any associated lifecycle or maintenance changes) are to be calculated on the basis of then-current market rates on a fair and reasonable basis, fully disclosed to the Transport Agency on an Open Book Basis and incorporating applicable comparator information.
- (b) Base Costs for a Material Change may include on-site allowances of no greater than:
  - (i) ■% prior to the Service Commencement Date; and
  - (ii) ■% on or after the Service Commencement Date,

in each case of the aggregate of all applicable Base Costs components excluding on-site allowances, subject to the Base Costs (but not the on-site allowances) being appropriately evidenced on an Open Book Basis and incorporating applicable comparator information. For the purposes of this paragraph 2.4(b), the Contractor or relevant Sub-contractor (as applicable) may at its discretion select any on-site allowances to be included in the Base Costs for a Material Change which are less than or equal to the on-site allowances specified in paragraphs 2.4(b)(i) or 2.4(b)(ii) as applicable.

- (c) Any lifecycle replacement and maintenance associated with additional works (or changes to the TG Project) shall be consistent with the lifecycle and maintenance profile of the TG Project envisaged in the Base Case, the Asset Management Plan and the Forward Works Plan (as applicable), provided that the Contractor shall reflect improvements in technology that can optimise whole of life costs for the Transport Agency. If any such additional works are specified to a higher quality compared with the TG Project, then the unit lifecycle replacement and maintenance costs shall be (in real terms) lower.

## 2.5 Costs or savings

- (a) The costs or savings applicable to any Material Change to be paid for or received by the Transport Agency and that has not been, and will not be, tendered out pursuant to paragraph 2.9 of these Change Compensation Principles are to be calculated as follows:

$$P = A - B$$

where:

**P** = the amount payable to or by the Contractor;

**A** = the amount payable to the Contractor or any Sub-contractor for implementing the Material Change, calculated in accordance with these Change Compensation Principles; and

**B** = the amount avoided or saved by the Contractor.

- (b) The calculation of A and B in the foregoing formula must take into account the Base Costs payable and any Margin payable in accordance with these Change Compensation Principles to the extent required to leave the Contractor in a 'no better and no worse' position on implementation of the Material Change.
- (c) Subject to paragraph 2.4(b), in determining Base Costs the Contractor will only be entitled to compensation for those costs:
  - (i) of design, construction, commissioning, operation, maintenance, repair, deferment, delay and financing costs (in each case, if any) properly and reasonably incurred and directly attributable to the implementation of the Material Change in question; and
  - (ii) excluding any Margin.
- (d) For the purposes of calculating any Margin Allowance, all Base Costs will exclude any financing, delay or prolongation costs that may otherwise be payable in accordance with these Change Compensation Principles.
- (e) In calculating B in the foregoing formula, the calculation of Base Costs must include all costs avoided by the Contractor or any Sub-contractor and Margins saved as a result

of the implementation of the Material Change. In the context of a Material Change that is an omission to the TG Project or the Services, this saving must include the same Margin Allowances that would apply as if there had been an increase in the TG Project or the Services.

- (f) The Contractor must use its best endeavours to ensure that its Sub-contractors minimise any increase in costs and maximise any reductions in costs.

## 2.6 Form of compensation

Subject to the terms of the Base Agreement, the amounts calculated in accordance with these Change Compensation Principles will be paid in a manner determined by the Transport Agency, by one or more lump sum payments, by increasing or decreasing the Unitary Charge or by a combination of these.

## 2.7 Payment of compensation

Any compensation payable by the Transport Agency in respect of a Material Change:

- (a) by means of adjustment to or reduction in the Unitary Charge, is to be calculated in accordance with clause 5 (Base Case and Base Case adjustments) of the Base Agreement; or
- (b) other than by means of adjustment to or reduction in the Unitary Charge, is to be made in accordance with and subject to clause 49.2 (Report and invoice) of the Base Agreement.

## 2.8 External funding of Material Changes

- (a) If the Transport Agency has specified in the applicable Change Notice that it requires the Contractor to use its best endeavours to obtain funding for a Material Change, and if the Change Proposal proposes Capital Expenditure due to a Material Change, then the Contractor is to use its best endeavours to obtain funding for:
  - (i) the whole of the additional Capital Expenditure; or
  - (ii) if that Change relates to a General Change in Law that is proposed after the Service Commencement Date, funding for such part of the additional Capital Expenditure remaining after the General Change in Law Contractor's Share has been deducted,

on terms reasonably satisfactory to it, the Senior Lenders and the Transport Agency.

- (b) Such external funding may be sourced from savings resulting from earlier Changes which have resulted in funding being available under the Financing Agreements, from additional funding under the Financing Agreements, funding from the Contractor itself and funding from other third party sources approved by the Transport Agency. The financing costs directly attributable to the funding of the Material Change in question may form part of the compensation payable by the Transport Agency, but only then subject to the terms of these Change Compensation Principles.
- (c) The Contractor must:
  - (i) advise the Transport Agency in writing as soon as practicable after being directed by the Transport Agency to use its best endeavours to obtain funding for additional Capital Expenditure:

- (A) of the Contractor's proposed method of funding the additional Capital Expenditure;
  - (B) of the adjustment proposed in the Quarterly Unitary Charge in the event that the Contractor is able to obtain funding for the additional Capital Expenditure; and
  - (C) of any upfront costs, payments or reimbursements required as costs arise or savings are realised; and
- (ii) keep the Transport Agency informed of the progress of its endeavours to obtain funding for the Capital Expenditure throughout the period from its receipt of the Change Notice until it is required to return the Change Notice to the Transport Agency pursuant to clause 40 (Initiation of Change Procedure) of the Base Agreement.
- (d) The Transport Agency may, at any time up to the end of the period the Contractor is required to return the Change Notice to the Transport Agency, notify the Contractor that the Transport Agency agrees to meet all or, to the extent that the Contractor has obtained funding for part of the Capital Expenditure, the remaining part of the Capital Expenditure.

## 2.9 **Process to follow if Transport Agency requires tendering of Significant Material Change**

- (a) If a Change is a Significant Material Change, the Transport Agency may, in its absolute discretion, require the Contractor to obtain competitive quotations for the work or for elements of the work entailed in implementing the Change in accordance with this paragraph 2.9 of these Change Compensation Principles.
- (b) The Contractor must obtain three separate quotations (or such other number of quotations as directed by the Transport Agency, acting reasonably) from experienced, independent and capable contractors that are acceptable to the Transport Agency, two of which must not be Contractor Related Persons, unless otherwise agreed by the Transport Agency (in its sole discretion).
- (c) The Contractor will be responsible for selecting a sub-contractor from this process in full consultation with (and subject to the prior agreement of) the Transport Agency (acting reasonably).
- (d) The Contractor must permit the Transport Agency to review all materials that are submitted in the tender process and provide any other information that the Transport Agency reasonably requires.
- (e) The Contractor must provide the Transport Agency with information that demonstrates to the reasonable satisfaction of the Transport Agency that the sub-contractor it intends to select and engage is the best choice having regard to:
  - (i) the price quoted in the prevailing market conditions;
  - (ii) the relevant experience and capability of that sub-contractor in the context of the Change;
  - (iii) the ability of the sub-contractor to carry out the work in the manner required by the Base Agreement;
  - (iv) the requirements of clause 16 (Sub-contractors) of the Base Agreement; and

- (v) the financial standing and credit worthiness of that sub-contractor.
- (f) The Transport Agency may (acting reasonably) within 10 Business Days from receipt of the material provided by the Contractor under paragraph 2.9(d), and the information provided by the Contractor under paragraph 2.9(e), advise the Contractor that it:
  - (i) does accept the tender and the terms of engagement, in which case the Contractor will appoint the sub-contractor to implement the Material Change on those terms; or
  - (ii) does not accept the sub-contractor because that sub-contractor:
    - (A) does not have the legal capacity, power and agency to become a party to and perform the obligations of the relevant sub-contractor under the relevant sub-contract;
    - (B) does not employ persons having the appropriate qualifications, experience and technical competence and having the resources available to it (including committed financial resources and sub-contracts) sufficient to enable it to perform the obligations of the relevant sub-contractor under the relevant sub-contract; or
    - (C) is a person whose activities, in the reasonable opinion of the Transport Agency, pose or could pose a threat to the reputation of the Transport Agency, if appointed as a sub-contractor by the Contractor; and/or
  - (iii) does not accept the terms of engagement.
- (g) In the event that the Transport Agency does not accept the sub-contractor and/or the terms of that tenderer's engagement, the Transport Agency may:
  - (i) direct the Contractor not to accept any tender offer;
  - (ii) in the case of a Significant Material Change that has been initiated by the Transport Agency sending a Change Notice, withdraw or not issue that Change Notice; or
  - (iii) proceed to implement the work that would otherwise have been performed in respect of the relevant Change itself through sub-contractors chosen by the Transport Agency in its sole discretion.
- (h) If the Transport Agency implements work in respect of the relevant Significant Material Change itself in accordance with paragraph 2.9(g), the Transport Agency may require that the Contractor provide the Operational Services in respect of any modification to the Works Provisioning for all or part of the remainder of the Contract Term pursuant to a subsequent Change initiated by the Transport Agency.

## Appendix 1: Margin Allowances

| Component                            | Margin Allowance   |  |  |
|--------------------------------------|--|--|--|
| Contractor Margin<br>(paragraph 2.3) | \$█████ to \$█████<br>(inclusive)  | >\$█████ to \$█████<br>(exclusive)   | >\$█████   |
|                                      | (Base Cost either by way of one off Capital Expenditure or annual Operating Expenditure) | (Base Cost either by way of one off Capital Expenditure or annual Operating Expenditure) | (Base Cost either by way of one off Capital Expenditure or annual Operating Expenditure) |
|                                      | █████ %  | █████ %  | █████ %  |

| Component                            | Margin Allowance |
|--------------------------------------|------------------|
| Works Provisioning (paragraph 2.2)   | █████ %          |
| Operational Services (paragraph 2.2) | █████ %          |