

Standardisation of  
PFI Contracts

Version 3  
Addendum

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Further Guidance and Permitted Derogations and  
Clarifications

December 2005

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## **Introduction and Application**

In April 2004 Her Majesty's Treasury ("HMT") published Version 3 of Standardisation of PFI Contracts ("SoPC 3") and in July 2004 confirmed that derogations from the required drafting sections specified in Section 1.4.4 of SoPC 3, or from core principles, would need clearance on a project specific basis. HMT now wish to provide further guidance in a number of areas and also to publicise a number of permitted derogations and clarifications to the provisions of SoPC 3.

The further guidance is set out in Part 1 and covers capital contributions, payments in advance, change of ownership, insurance, confidentiality and freedom of information, and Direct Agreement priority/subordination arrangements with Senior Lenders.

The guidance on capital contributions and payments in advance constitutes core principle. The drafting on insurance and transfer of beneficial ownership and confidentiality are required drafting for all PFI projects which are still in competitive procurement (i.e. where final bids have not yet been submitted) as at 1 February 2006<sup>1</sup>. The Senior Lender priority/subordination provisions and freedom of information provisions constitute guidance immediately available for use, but are not required drafting.

A number of permitted derogations and clarifications, together with background explanation in each case, are set out in Part 2, being derogations and clarifications of a general nature, and Part 3, being derogations and clarifications of a largely clerical nature. Many of these derogations appear in approved sector standard forms already published. These derogations may be adopted by Authorities immediately (in the form specified) as permitted derogations without need for referral to HMT or PUK.

For the most part, and depending on how advanced Authorities may be with their individual procurements, Authorities would be encouraged to use the derogations set out in Parts 2 and 3. They are designed to clarify anomalies in the text of SoPC 3, to update drafting in the light of new legislation, and to offer different options to Authorities in specified areas.

The HMT derogations procedure, against required drafting and core principles, continues to apply and, for ease of reference, a consolidated chart setting out the application and derogations procedure for SoPC 3 (including this Addendum) is attached as Appendix 4.

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<sup>1</sup> See HMT letter of December 2005

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**Part 1 – SoPC 3 Further Guidance**

N.B. References to SoPC 3 section numbers are shown thus – 1.8 – and to SoPC 3 model clause numbers thus – Clause 1.8.1

SoPC Page	SoPC 3 Reference	Explanation	Permitted Derogation
33	3.8 Capital Contributions (New)	This is a new section, clarifying HMT's approach to capital contributions.	<p>A new section 3.8 is inserted, as a core principle, as follows:</p> <p><b>3.8 Capital Contributions</b></p> <p>In the ordinary course of events no public sector capital contributions should be made to the project, and no Unitary Charge should be payable until the Works have been completed and accepted. In certain exceptional circumstances however (for instance where the project frees up surplus land and the Authority is able to sell this and use the proceeds) an Authority may want to make a capital contribution of its own to the project or may have some other form of co-financing proposal. Authorities should always discuss any such proposal at an early stage with HMT. Any capital contributions, if approved, should be kept to a modest size. Classic PFI is about payments for services and is not about public sector capital financing. A large contribution may upset the risk transfer balance and incentives of the project (especially where the project gets into difficulty). Any contributions should be back-end loaded and linked to acceptance of the Service or other important milestones (e.g. Completion of whole schools on a grouped school project). In any event it is important that any Authority payments are not paid towards advisers' fees or working capital or other similar costs.</p> <p>If there is any rescheduling of senior debt drawdowns, Authority capital contributions should be withheld until the Authority is satisfied that no payments of senior debt or equity are retired behind those of the Authority and that the ratio of private capital to Authority capital is not adversely effected. Where there is an equity bridge facility, Authorities should ensure that the full equity investment remains at risk on a termination (such that normal risk-allocation principles are maintained). Authorities should also ensure that levels of subcontract security (bonds, liquidated damages, etc.) remain at the same levels regardless of any public-sector capital contribution (i.e. if there is a 10% Authority contribution, subcontract security levels should still be gauged against 100% costs and not just against the 90% private sector contribution). Authority's financial advisers should also be asked to confirm whether the balance sheet treatment of the project would be affected. No amendment of the core drafting sections listed in Section 1.4.4 should be made, except that an allowance may be made for future capital</p>

SoPC Page	SoPC 3 Reference	Explanation	Permitted Derogation
			contributions as set out in the base case when calculating the amount of any termination payment under section 20.2.9 where the “no retendering” termination route is used.
77	10.2.1 Payment Mechanism	Additional drafting is inserted to clarify that payments of Unitary Charge may not be made in advance.	The third bullet point of section 10.2.1. is amended by the insertion of wording in bold to read as set out below:  the single Unitary Charge should only be paid to the extent that the Service is available (e.g. proportionate to the number of available places or units) <b>and should never be paid in advance of the period to which it relates.</b>
119	17 Change of Ownership	SoPC 3 Chapter 17 is clarified to ensure that, in order to preserve the intent of any restrictions on transfer of shares in Contractor / Holdco, such provisions should also cover transfers of the economic interest in those shares.  The Authority should be entitled to know at any time the identity of the Shareholders and, where	The market has developed so that restrictions on the transfers of shares in the Contractor (usually through the use of a definition of “Change of Ownership”) are now incorporated in PFI Contracts. HMT is concerned that, in order to preserve the spirit of the Change of Ownership restrictions which the parties may agree, transfers of the economic interest in share ownership (e.g. the right to receive dividends and related to this the right to instruct how the legal owner of shares in the Contractor may exercise its voting rights) should also be restricted. In order to address this concern any definition of Change of Ownership which is agreed by the parties in the Contract should include the following limb at the end of such definition:  <b>[ ] any other arrangements that have or may have or which result in the same effect as paragraphs [ ] above of this definition of Change of Ownership.</b>  Furthermore the current change of ownership notification provisions at section 17.1.2 should be amplified to provide for a representation from the Contractor concerning the identity of its Shareholders at the date of entering into the Contract and also to provide the Authority with the right to request the Contractor to supply it with details concerning the identify of its shareholders during the life of the Contract. The following provisions should replace the drafting currently set out at section 17.1.2:  <b>(a) The Contractor represents and warrants to the Authority that at the date of the Contract the legal and beneficial ownership of the Contractor [and Holdco] is as set out in Schedule [ ] and that [, other than any Shareholder pre-emption rights,] no arrangements are in place that have or may have or result in any sale, transfer or disposal</b>

SoPC Page	SoPC 3 Reference	Explanation	Permitted Derogation
		<p>relevant, Holdco. In this regard SoPC 3 already provides for an obligation on the Contractor to notify the Authority of any change in ownership. It is considered appropriate that the Authority should have a further specific right to request the Contractor to supply it with details concerning the identity of its Shareholders.</p> <p>The Change of Ownership default should now catch any transfer of economic interest in breach of the Contract.</p>	<p><b>of any legal, beneficial, equitable or other interest in any or all of the shares in the Contractor [or Holdco].</b></p> <p>(b) <b>The Contractor shall inform the Authority as soon as reasonably practicable (and in event, within [30] days) of any Change of Ownership occurring.</b></p> <p>(c) <b>The Authority may, not more than [twice] in any Contract Year, or at any time when a Contractor Default is outstanding, request that the Contractor inform it as soon as reasonably practicable and in any event within 30 days of receipt of the Authority’s request for details of any Change of Ownership.</b></p> <p>(d) <b>The Contractor’s obligations under (b) and (c) above shall, except where a legal transfer of shares has occurred, be limited to the extent of the Contractor’s awareness having made all reasonable enquiry.</b></p> <p>The drafting in 17.4.4 shall, if a Holdco structure is used, be revised by the insertion of the words in bold below, so as to read as follows:</p> <p>(b) The Contractor shall obtain the Authority’s prior written consent (which may be given subject to conditions) to any Restricted Share Transfer of the Contractor <b>[or Holdco]...</b></p> <p>Paragraph (i) of the definition of Contractor Default at paragraph 20.2.2.1 applies where a restriction on the transfer of shares is included in the Contract, and any transfer of a share or a beneficial or economic interest in a share, in breach of any transfer restrictions, is a Contractor Default.</p> <p>It is however up to the parties to agree whether or not to extend this Contractor Default event to the notification provisions set out at section 17.1.2 above.</p> <p>Both the drafting in relation to the additional limb to any Change of Ownership provisions and the new drafting replacing that set out at section 17.1.2 is new required drafting and will apply for all projects where final bids have not yet been submitted as at 1<sup>st</sup> February 2006. Authorities may however choose to adopt these provisions immediately.</p>

SoPC Page	SoPC 3 Reference	Explanation	Permitted Derogation
189	24 Insurance	New Chapter 24: Insurance	Please refer to HMT's letter of December 2005 dealing with (a) the application of new Guidance on insurance (comprising a new Chapter 24) to all PFI projects where final bids have not yet been submitted as at 1 February 2006, and (b) the application of current Guidance on insurance to PFI projects already at preferred bid stage. The new Chapter 24 has been comprehensively revised following a consultation process and contains, in particular, new required drafting for premium risk sharing and for relief against terms and conditions which cannot be placed in the market. It also provides a form of Insurance Schedule. HMT's letter and the new Guidance can be accessed through the HMT or PUK websites.
203	25.5.3 (Clause 25) Information and Confidentiality	Clause 25 dealing with information and confidentiality should be revised in the light of the Freedom of Information Act 2000.	Revised information and confidentiality provisions are required as a result of the coming into force of relevant provision of the Freedom of Information Act 2000. Revised clauses 25 and 25A, and a note on their applicability, are set out in Appendix 2.
228	30.5.1 Direct Agreement Subordination provisions	Authorities have sought clarification on suitable positions to take if Senior Lenders seek to insert subordination provisions in the Direct Agreement.	Appendix 3 provides guidance on subordination and related issues. Authorities may find this helpful when negotiating such provisions with Senior Lenders.
246	33.3.1 Commitment Letter (insurance)	See note at Section 24 (Insurance)	As part of the new Insurance Guidance (applicable to PFI projects where final bids have not yet been submitted as at 1 February 2006), the Commitment Letter should be expanded by the inclusion of the words in bold dealing with the fixing of insurance costs, so as to read as

SoPC Page	SoPC 3 Reference	Explanation	Permitted Derogation
		above	<p>follows:</p> <p>Subject to receiving confirmation from you and [LENDER] on the points addressed in this letter, the decision has been taken by the Authority to appoint [BIDDER] as preferred bidder.</p> <ol style="list-style-type: none"> <li>1. The unitary payments set out within your bid are fixed by reference to your design and services proposals (subject, of course, to any significant client changes) and on the assumption that financial close occurs on or before [•] (“<b>Expected Date of Financial Close</b>”). If financial close occurs after that date then your construction price will be increased only by movements in the [•] index from (<b>but excluding the Expected Date of Financial Close</b>) up to (<b>but including</b>) [•] and thereafter increased in accordance with your proposal included in [REFERENCE] of your Bid submission of [DATE]. The Authority will take the risk of any movement in [LIBOR][applicable interest rates] [relevant index] between [DATE OF BID SUBMISSION] and financial close. The benefit of any reduction in [LIBOR][applicable interest rates] [relevant index] (including the buffer) will be passed in full to the Authority.</li> <li>2. (a) <b>Subject to paragraph (b) below the unitary payments set out within your bid as representing the price payable for taking out and maintaining the [Required Insurances] as that term is used in the draft contract terms (“Insurance Costs”) is fixed up to and including the Expected Date of Financial Close. From but excluding the date of Expected Financial Close Insurance Costs may be increased but only to the extent required as a consequence of any increase in the sum insured following any increase in the construction price allowed in accordance with paragraph 1 above. Any adjustment will be at the following rate [Bidder to specify].</b>                       (b) <b>Insurance Costs may also be revised if (i) any risk to be insured under the Required Insurances becomes Uninsurable (as such terms are used in the draft contract terms) or (ii) following any significant client changes by the Authority to the scope of the project.</b></li> <li>3. As regards the draft contract terms, we are pleased that, [subject to the points discussed below], you have confirmed your acceptance to these terms. Again, we would ask for your confirmation by way of countersignature of this letter that, subject to the one point set out below, you have accepted the draft Project Contract [refer to version and date] [and [refer to other relevant project documents]] as issued to you, so that the only issues which will require</li> </ol>

SoPC Page	SoPC 3 Reference	Explanation	Permitted Derogation
			<p>negotiation between now and contract signature are matters of detail which are project-specific and which remain to be agreed.</p> <p>4. The issue(s) that remain to be agreed relate to [•].</p> <p>5. <b>[As regards the draft payment mechanism, we would ask you to confirm, again by counter signature of this letter, that you have accepted the current draft in its entirety [subject only to [•]]].</b></p>

**Part 2 - SoPC 3 Permitted Derogations and Clarifications – General**

N.B. References to SoPC 3 section numbers are shown thus – 1.8 – and to SoPC 3 model clause numbers thus – Clause 1.8.1

<b>SoPC Page</b>	<b>SoPC 3 Reference</b>	<b>Explanation</b>	<b>Permitted Derogation</b>
10	1.3.4 Assumptions (New)	This clarifies that if a bid falls outside the standard assumptions on which SoPC3 is based, derogations from core drafting are likely to arise.	A new section 1.3.4 is inserted as follows;  1.3.4 Where a project does not fall within the standard assumptions in section 1.3.1, adjustments will be needed to required drafting provisions (see, for example, footnote 20 in Clause 35.8 (Refinancing)) and Authorities should seek guidance at an early stage.
12	1.8 (Clause 1.8.1: Definition of “Additional Permitted Borrowing”)		See Appendix 1
14	1.8 (Clause 1.8.1: Definition of “Base Senior Debt Termination Amount”)		See Appendix 1
18	1.8 (Clause 1.8.1: Definition of “Revised Senior Debt Termination Amount”)		See Appendix 1
46	5.2 and 5.3 Delays in Service Commencement due to a Compensation Event	Additional drafting (as specified) may be inserted to clarify (a) that Compensation	Clauses 5.2 and 5.3 (b) and (c) may be amended by the addition of new drafting set out in bold below so as to read as follows:  (a) If, on or before the Service Commencement Date, as a direct result of the occurrence of a Compensation Event.

Part 2 – Permitted Derogations and Clarifications -  
General

		<p>Event compensation may cover loss of revenue and (b) that relief may still be available for events occurring after Planned Service Commencement but prior to the Long Stop Date.</p>	<ul style="list-style-type: none"> <li>(i) the Contractor is unable to achieve Service Commencement on or before the Planned Service Commencement Date, <b>or, following the Planned Service Commencement Date, the Long Stop Date;</b></li> <li>(ii) the Contractor is unable to comply with its obligations under this Contract; and/or</li> <li>(iii) the Contractor incurs costs or loses revenue</li> </ul> <p>(b) <b>Subject to sub clause (d) below</b>, to obtain relief and/or claim compensation the Contractor must:</p> <ul style="list-style-type: none"> <li>(i) as soon as practicable, and in any event within [21] days after it became aware that the Compensation Event has caused or is likely to cause delay, breach of an obligation under this Contract and/or the Contractor to incur costs or lose revenue, give to the Authority a notice of its claim for an extension of time for Service Commencement, payment of compensation and/or relief from its obligations under the Contract;</li> <li>(ii) within [14] days of receipt by the Authority of the notice referred to in paragraph (b)(i) above, give full details of the Compensation Event and the extension of time and/or any Estimated Change in Project Costs <b>and/or loss of revenue</b> claimed; and</li> <li>(iii) demonstrate to the reasonable satisfaction of the Authority that: <ul style="list-style-type: none"> <li>(A) the Compensation Event was the direct cause of the Estimated Change in Project Costs <b>and/or loss of revenue</b> and/or any delay in the achievement of the Planned Service Commencement Date <b>and/or breach of the Contractor’s obligations under this Contract; or, following the Planned Service Commencement date, delay in achieving Service Commencement before the Long Stop Date</b> and</li> <li>(B) the Estimated Change in Project Costs <b>and/or loss of revenue</b>, time lost, and/or relief from the obligations under the Contract claimed, could not reasonably be expected to be mitigated or recovered by the Contractor acting in accordance with good industry practice.</li> </ul> </li> </ul> <p>(c) In the event that the Contractor has complied with its obligations under paragraph (b) above, then:</p>
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			<p>(i) the Planned Service Commencement Date <b>or, following the Planned Service Commencement Date, the Long Stop Date</b>, shall be postponed by such time as shall be reasonable for such a Compensation Event, taking into account the likely effect of delay;</p> <p>(ii) in the case of an additional cost being incurred <b>or revenue being lost</b> by the Contractor:</p> <p>(A) on or before the Service Commencement Date; or</p> <p>(B) as a result of Capital Expenditure being incurred by the Contractor at any time</p> <p>the Authority shall compensate the Contractor for the actual Estimated Change in Project Costs as adjusted to reflect the actual costs reasonably incurred <b>and, without double counting, for revenue actually lost (to the extent it could not reasonably have been mitigated)</b>, within [30] days of receipt of a written demand by the Contractor supported by all relevant information;</p> <p>(iii) in the case of a payment of compensation for the Estimated Change in Project Costs <b>and/or without double counting, loss of revenue</b> that does not result in Capital Expenditure being incurred by the Contractor referred to in paragraph (B) above but which reflects a change in the costs being incurred by the Contractor after the Service Commencement Date, the Authority shall compensate the Contractor in accordance with paragraph (f) below by an adjustment to the Unitary Charge; and /or</p> <p>(iv) the Authority shall give the Contractor such relief from its obligations under the Contract, as is reasonable for such a Compensation Event.”</p> <p>(d) In the event that information is provided after the dates referred to in paragraph (b) above, then the Contractor shall not be entitled to any extension of time, compensation, or relief from its obligations under the Contract in respect of the period for which the information is delayed.</p> <p>(e) If the parties cannot agree the extent of any compensation, delay incurred, relief from the Contractor’s obligations under the Contract, or the Authority disagrees that a Compensation Event has occurred (or as to its consequences), or that the Contractor is entitled to any relief under this Clause, the parties shall resolve the matter in accordance with Clause 27 (Dispute Resolution).</p> <p>(f) Any payment of compensation referred to in paragraph (c) (iii) above shall be calculated</p>
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			<p>in accordance with [Section 5.2.3 (Calculation of Compensation) above].</p> <p><b>5.3 Consequences of a Relief Event</b></p> <p>(a) If and to the extent that a Relief Event:</p> <ul style="list-style-type: none"> <li>(i) is the direct cause of a delay in Service Commencement; and/ or</li> <li>(ii) adversely affects the ability of the Contractor to perform any of its obligations under this contract,</li> </ul> <p>then the Contractor is entitled to apply for relief from any rights of the Authority arising under Clause 20.2 (Termination on Contractor Default) [and its obligations under this Contract].</p> <p>(b) To obtain relief, the Contractor must:</p> <ul style="list-style-type: none"> <li>(i) as soon as practicable, and in any event within [14] days after it became aware that the Relief Event has caused or is likely to cause delay and/ or adversely affect the ability of the Contractor to perform its other obligations give to the Authority a notice of its claim or relief from its obligations under the Contract, including full details of the nature of the Relief Event, the date of occurrence and its likely duration;</li> <li>(ii) within [7] days of receipt by the Authority of the notice referred to in paragraph (b) (i) above, give full details of the relief claimed; and</li> <li>(iii) demonstrate to the reasonable satisfaction of the Authority that: <ul style="list-style-type: none"> <li>(A) the Contractor and its Sub-contractors could not have been avoided such occurrence or consequences by steps which they might reasonably be expected to have taken, without incurring material expenditure;</li> <li>(B) the Relief Event directly caused the delay to the Planned Service Commencement Date <b>or, following the Planned Service Commencement Date, delay in achieving Service Commencement by the Long Stop Date</b> [or the need for relief from other obligations under the Contract],</li> <li>(C) the time lost and/ or relief from the obligations under the Contract claimed could not reasonably be expected to be mitigated or recovered by the Contractor acting in accordance with good industry practice, without incurring material expenditure; and</li> <li>(D) the Contractor is using reasonable endeavours to perform its obligations</li> </ul> </li> </ul>
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			<p>under the Contract.</p> <p>(c) In the event that the Contractor has complied with its obligations under paragraph (b) above, then:</p> <p>(i) the Planned Service Commencement Date, <b>or following the Planned Service Commencement Date, the Long Stop Date</b>, shall be postponed by such time as shall be reasonable for such a Relief Event, taking into account the likely effect of delay; and/ or</p> <p>(ii) the Authority shall not be entitled to exercise its rights to terminate the Contract under Clause 20.2 (Termination on Contractor Default) [and, subject to paragraph (d) below, shall give such other relief as has been requested by the Contractor].</p> <p>(d) [Nothing in paragraph (c) above shall affect any entitlement to make deductions or any deductions made as a result of [Section 9 (Payment and Performance Mechanism)] during the period in which the Relief Event in Subsisting].</p> <p>(e) In the event that information required by paragraph (b) above is provided after the dates referred to in that paragraph, the Contractor shall not be entitled to any relief during the period for which the information is delayed.</p> <p>(f) The Contractor shall notify the Authority if at any time it receives or becomes aware of any further information relating to the Relief Event, giving details of that information to the extent that such information is new or renders information previously submitted materially inaccurate or misleading.</p> <p>(g) If the parties cannot agree the extent of the relief required, or the Authority disagrees that a Relief Event has occurred or that the Contractor is entitled to any [extension of the Planned Service Commencement Date <b>or the Long Stop Date</b> and/ or relief from other obligations under this Contract], the parties shall resolve the matter in accordance with Clause 27 (Dispute Resolution).</p>
52	5.4.1.2 Force Majeure Event	Additional drafting (as specified) may be inserted to show that force majeure	<p>Paragraph (b) of the definition of Force Majeure Event may be amended by insertion of wording in bold as shown below:</p> <p>(b) nuclear, chemical or biological contamination unless the source or the cause of the contamination is [the result of the actions <b>or breach</b> of the Contractor <b>or its sub-contractors of any tier</b>]</p>

		contamination protection does not extend to contamination caused by subcontractors or to contamination caused by the breach of the contractor or subcontractors.	
80	10.6 (new) Payment Mechanism: No Double Remedy	It is a principle of SoPC3 that the Authority should not seek compensation in damages in addition to levying deductions for service failures.  Suitable drafting for this is now provided opposite.	A new section 10.6 is inserted as follows:  <b>10.6 The payment mechanism provides a mechanism for the Authority to calibrate the financial consequences of service failures. The Authority should not seek compensation in damages in addition to levying its deductions for service failures. Suitable drafting to achieve this is set out below. Please note that this does not limit the Authority from pursuing other rights expressly given to it in the Contract (such as, for instance, termination rights, step-in rights or specific indemnity rights) and does not limit any claim for specific performance or injunctive relief. Suitable drafting for this is as follows:</b>  <b>10.6 <u>Payment Mechanism: No double remedy</u></b> <b>(a) Subject to:</b> <b>(i) any other express right of the Authority pursuant to this Contract; and</b>  <b>(ii) the Authority's right to claim, on or after termination of this Agreement, the amount of its reasonable costs, losses, damages and expenses suffered or incurred by it as a result of rectifying or mitigating the effects of any breach of this Contract by the Contractor, save to the extent that the same has already been recovered by the Authority pursuant to this Contract or has been taken into account to calculate any compensation payable by the Authority pursuant to clauses 20.3.2 (Compensation on Termination for Force Majeure), 20.2 (Compensation on Termination for Contractor Default), 20.1.3</b>

			<p><b>(Compensation on Termination for Authority Default/Voluntary Termination) or 20.4.3 (Compensation on Corrupt Gifts, Fraud) and 20.6.1 (Compensation on Termination for Breach of Refinancing Provisions);</b></p> <p><b>the sole remedy of the Authority in respect of a failure to provide the Services in accordance with this Contract shall be the operation of Schedule [ ] (Payment Mechanism).</b></p> <p><b>(b) Nothing in this clause 10 (Payment Mechanism: No Double Remedy) shall prevent or restrict the right of the Authority to seek injunctive relief or a decree of specific performance or other discretionary remedies of the court.</b></p>
89	12.4.3 (Clause 12.4 (h)) Authority Changes	SoPC3 already sets out principles to cover the withdrawal of Authority changes. Suitable drafting for this is now provided opposite.	<p>Clause 12.4 (h) may be amended by the insertion of the words in bold to read as set out below :</p> <p>If the Authority does not confirm in writing the Estimate (as modified) within 30 days of the contents of the Estimate having been agreed in accordance with paragraph (d) above or determined pursuant to paragraph (e) above, then the Authority Notice of Change shall be deemed to have been withdrawn. <b>Where there is such a withdrawal (either pursuant to this paragraph (h) or paragraph (g) above) the Authority shall pay to the Contractor the reasonable additional third-party costs incurred by the Contractor in preparing such Estimate provided that:</b></p> <ul style="list-style-type: none"> <li><b>(i) the Contractor has used all reasonable endeavours to submit a reasonably priced Estimate;</b></li> <li><b>(ii) the Contractor has made available to the Authority a cost breakdown of the Estimate including an estimate of third-party costs to be incurred by the Authority if the Authority Notice of Change is withdrawn or deemed to be withdrawn;</b></li> <li><b>(iii) the Authority has:</b> <ul style="list-style-type: none"> <li><b>(a) approved the estimate of third-party costs referred to in paragraph (ii) above and the type of third-party prior to any third-party costs being incurred; and</b></li> <li><b>(b) agreed that, given the nature of the proposed Change, it is reasonable to expect the relevant third party to incur costs in preparing the Estimate on the basis of the extent of the proposed change to the Services or the Works and the work required in submitting an accurate Estimate in compliance with this Clause 12.4;</b></li> </ul> </li> </ul>

			<p style="text-align: center;"><b>and</b></p> <p style="text-align: center;"><b>(v) the Contractor has provided the Authority with such evidence as it may reasonably require in order to verify the additional third party costs incurred by the Contractor.</b></p>
115	<p style="text-align: center;">16.3.2 (Clause 16.3(A)) Restrictions on Transfer of a Contract by the Authority in Central Government Projects</p>	<p>The market has found the precise meaning of the public-sector transfer provisions slightly unclear. The amendments specified opposite may be made to clarify the provisions.</p>	<p>The words “other than any person” in line 4 may be removed and additional wording added as shown in bold below so as to read as follows :</p> <p style="text-align: center;"><b>16.3(A) Restrictions on Transfer of the Contract by the Authority in Central Government Projects</b></p> <p>The rights and obligations of the Authority under this Contract shall not be assigned, novated or otherwise transferred (whether by virtue of any Legislation or any scheme pursuant to any Legislation or otherwise) to any <b>person</b> other than <b>to any public body</b> (being a single entity) <b>[acquiring the whole of the Contract and]</b> having the legal capacity, power and authority to become a party to and to perform the obligations of the Authority under this Contract being:.....</p>
116	<p style="text-align: center;">16.3.2 (Clause 16.3(B)) Restrictions on Transfer of a Contract by the Authority in Non -Central Government Projects</p>	<p>The market has found the precise meaning of the public sector transfer provisions slightly unclear. The amendments specified opposite may be made to clarify the provisions.</p>	<p>The same changes are made.</p>
140	<p style="text-align: center;">20.2.2.1 “Contractor Default”</p>	<p>Where a Holdco structure is used, this should be reflected in the default provisions. Amendments may be made as specified opposite to reflect this.</p>	<p>Paragraphs (c), (d) , (e) and (f) should be amended by the insertion of the wording shown in bold below, if a Holdco structure is used, to read as follows:</p> <p>(c) a court makes an order that the Contractor <b>[or Holdco]</b> be wound up or a resolution for a voluntary winding-up of the Contractor <b>[or Holdco]</b> is passed;</p> <p>(d) any receiver or manager in respect of the Contractor <b>[or Holdco]</b> is appointed or possession is taken by or on behalf of any creditor of any property that is the subject of a charge;</p>

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		Sub paragraph (f) may be updated to reflect new legislation as specified opposite.	<p>(e) any voluntary arrangement is made for a composition of debts or a scheme of arrangement is approved under the Insolvency Act 1986 or the Companies Act 1985 <b>in respect of the Contractor [or Holdco];</b></p> <p>(f) an administration order is made, <b>or an administrator is appointed in respect of the Contractor [or Holdco]</b>".</p> <p>The amendment to paragraph (f) is to catch the Contractor entering into administration either on the making of a court order or on the appointment of an administrator through the filing of specific documents at court (under the relevant Enterprise Act provisions.)</p>
142	20.2.3.3 Termination for Persistent Breach by the Contractor	The required drafting for persistent breach operates in the build phase as well as the operational phase. The amendment opposite however allows a discretion to the Authority to decide whether or not it wishes to have this protection in the build phase.	<p>The first paragraph of this section may be amended by the insertion of the words in bold to read as set out below:</p> <p>The Contract should therefore include a warning procedure which provides that the Contractor is served a formal preliminary notice that a certain type of breach has been persistently occurring during the Service Period <b>and/or the build phase (unless the Authority does not require compliance during the build phase). The concerns of the Authority in the works phase are likely to be greater where the Authority shares the overall site during the build phase.</b> The Contractor should in any case be aware of such breaches already. If such breach continues to occur persistently in, say, the 12 months following such notice (allowing a short rectification period), a final notice is served warning the Contractor that any further single occurrence of such breach in, say, the following 6 months will entitle the Authority to terminate the contract.</p>
142	20.2.3.3 (Clause 20.2.3) Persistent Breach	The market has found the wording which disappplies the persistent breach regime from breaches for which deductions may be made unclear, and this may be clarified as specified opposite.	<p>The words "(other than any breach for which Performance Point Deductions could have been awarded and/or Unavailability Deductions could have been made)" may be removed from the "Persistent Breach" definition in section 20.2.3.3 and reinserted in the first line of clause 20.2.3, so that the clause reads as follows (new wording in bold):</p> <p>(a) If a <b>particular breach, other than any breach for which performance point deductions could have been awarded and/or unavailability deductions could have been made,</b> has occurred more than [ ] times in any [ ] month period then the Authority may serve a notice on the Contractor:</p> <p>The definition of Persistent Breach at section 20.2.3.3 may be amended to read (new wording in bold):</p>

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			<p><b>“Persistent Breach”</b></p> <p>means a breach <b>for which a Final Warning Notice</b> (referred to in paragraph (g) of Clause 20.2.3 (Persistent Breach)) has been issued, which has continued or recurred [ ] or more times within [6] months after the date on which <b>such Final Warning Notice</b> is served on the Contractor;”</p>
143	<p>20.2.3.3 (Clause 20.2.3(c)) “Persistent Breach”</p>	<p>The market has found the wording avoiding double counting of warning notices unclear, and this may be clarified as specified opposite.</p>	<p>Clause 20.2.3(c) may be amended with the following wording in bold:</p> <p>A warning notice may not be served in respect of any breach <b>which has previously been counted in the making of a separate warning notice.</b></p>
154	<p>20.2.8 (k)</p>	<p>New wording may be added to clarify the treatment of disputed Termination Payment amounts.</p>	<p>The following new wording <b>may</b> be added to the end of Clause 20.2.8 (k):</p> <p><b>For the avoidance of doubt, where there is an agreed amount and a disputed amount in respect of the Adjusted Highest Compliant Tender Price the Authority shall (where it is agreed that the Adjusted Highest Compliant Tender Price is a positive number) pay to the Contractor the agreed amount no later than the date specified in paragraph (l) below, with the disputed amount being dealt with in accordance with this paragraph (k),</b></p>
171	<p>21.2.1 Gross Up</p>	<p>HMT do not consider a gross-up provision on a Contractor default to be appropriate.</p>	<p>Footnote 1 should be deleted. Further to section 21.2.1, HMT do not consider a gross up on a Contractor Default to be appropriate.</p>
173	<p>21.3.8 (Clause 21.3) Changes to Finance Documents and subcontracts</p>	<p>Authorities may specify that amendments to subcontracts made without their consent will not have the effect of increasing their liability on a</p>	<p>See Appendix 1.</p>

175	21.5 (Clause 21.5) Method of Payment	<p>termination.</p> <p>Amendments may be made to provide a more precise working of the instalment provisions as set out opposite. These recognise that the amount of compensation to be spread over the remaining period of the loan may be different to the remaining principal outstanding under the Senior Finance Agreements.</p>	<p>Clause 21.5(a) may be amended by the insertion of the words in bold below (and deletion of words “unless it elects to pay” in the last line) to read as follows:</p> <p><b>21.5 Method of Payment</b></p> <p>(a) The Authority shall pay to the Contractor the Termination Sum , <b>together with interest on any Senior Debt Termination Sum or Revised Senior Debt Termination Sum element of the Termination Sum at the Senior Debt Rate</b> on or before the date falling 60 days after the Notice Date <b>provided that it may elect to pay the Adjusted Estimated Fair Value of the Contract or the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount (as relevant) element of the Termination Sum</b> in accordance with paragraph (b) below.</p> <p>Clause 21.5 (b) is revised to read as follows:</p> <p>(b) The Authority may, <b>other than on an Authority Default</b>, elect to pay the Adjusted Estimated Fair Value of the Contract or the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount (as relevant) element of the Termination Sum:</p> <p>(i) in instalments <b>as follows:</b></p> <p><b>(A) in respect of that element of the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount or the Adjusted Estimated Fair Value of the Contract (as relevant) representing the Outstanding Principal (where the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount or the Adjusted Estimated Fair Value of the Contract (as relevant) is greater than or equal to the Outstanding Principal) on the dates (the “Instalment Dates”)</b> and in the amounts that the Contractor would have been required to pay principal to the Senior Lenders under the terms of the Senior Financing Agreement had the Termination Date not occurred and the sum remaining after deducting the Outstanding Principal from the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount or the Adjusted Estimated Fair Value of the Contract (as relevant) shall be paid in equal instalments on the Instalment Dates;</p> <p><b>(B) where the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount or the Adjusted Estimated Fair Value of the</b></p>
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			<p><b>Contract (as relevant) is less than the Outstanding Principal, on the Instalment Dates pro rata to the amounts that the Contractor would have been required to pay as principal to the Senior Lenders under the terms of the Senior Financing Agreement had the Termination Date not occurred;</b> or</p> <p>(ii) as the parties may otherwise agree</p> <p><b>“Outstanding Principal” means the principal amount outstanding at the Termination Date of each borrowing (other than any borrowing under any equity bridge facility) under the Senior Credit Agreement.</b></p> <p>The definition of Notice Date may be amended by replacing the word “Vale” with “Value” in line 2 to read as follows:</p> <p><b>“Notice Date”</b></p> <p>means the later of the Termination Date and (if applicable) the date that the Adjusted Estimated Fair <b>Value</b> of the Contract is agreed between the parties pursuant to Clause 20.2.9 (No Retendering).</p> <p>The definition of “Termination Sum” may be amended by the deletion of the words following “Adjusted Highest Compliant Tender Price, so as to read as follows:</p> <p><b>“Termination Sum”</b></p> <p>means any compensation payable by the Authority to the Contractor on an early termination of the Contract under [Section 20] (excluding the Adjusted Highest Compliant Tender Price).</p> <p>Footnote 14 may be deleted by the deletion of the words “be immediately due and payable” and their replacement by the words in bold to read as follows :</p> <p><sup>14</sup> See Section 20.1.2.1 and the definition of “Authority Default”. If the Authority is in breach of its obligations and the Contract is terminated, the compensation payable by the Authority to the Contractor should <b>not be payable by instalments</b>. The Authority should be entitled to pay by instalments if there is a voluntary termination of the Contract.</p>
176	21.5 (Clause 21.5) Method of Payment (Instalments)	Wording may be inserted to deal with accrued interest on the termination sum.	<p>Section 21.5 (e) may be amended by insertion of wording in bold below so as to read as follows:</p> <p>If the Authority:</p> <p>(i) fails to make a payment to the Contractor in accordance with paragraphs (a) and/or (b) <b>and/or (c)</b> above; or</p>

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			<p>(ii) breaches Clause 16.3 (Restrictions on Transfer of Contractor by the Authority), the Contractor may issue a notice to the Authority declaring any unpaid and outstanding element of (as applicable) the Adjusted Estimated Fair Value of the Agreement, the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount (as relevant) element of the Termination Sum <b>and any accrued but unpaid interest</b> to be immediately due and payable.</p>
184	23.3.4 Indemnities	Additional drafting is inserted to clarify the appropriate use of caps on indemnities.	<p>The following is added to the end of paragraph 23.3.4:</p> <p><b>Authorities may therefore, only if they believe it offers value for money, provide for the Contractor to cap its liabilities in respect of Authority Property or under Clause 23.3.(a) (ii), but they should not offer this cap as a matter of course. A Contractor enjoys no cap on the actions, claims, etc., made directly against it by third parties, and should set its insurance at whatever level it feels necessary to protect itself. It may not always therefore provide any additional value for money to allow a Contractor to cap the identical liability which it may suffer indirectly through the Authority, in circumstances where the claimant makes its claim against the Authority and the Authority seeks to recoup its loss from the Contractor. In any event, if any cap is put forward (on a value for money basis), any such cap must not be used as a device to undermine the agreed insurance risk allocation position (e.g., by transferring responsibility for any deductible which would otherwise lie with the Contractor). The indemnities should not be used to subvert core risk allocation principles.</b></p>
186			<p>Square brackets are put around clause 23.3 (b) (iii) so that it reads as follows:</p> <p>[(iii) any claims made under Clause 23.3(a)(ii) in respect of Authority Property or 23.3(a)(iv) in excess of [                    ].]</p> <p>Footnote 7 is revised to read as follows:</p> <p><b>Please see paragraph 23.3.4 as to whether to include this cap.</b></p>
212	27.5.3 Clause 27(b) and (c) Dispute Resolution	In order to allow better matched procedures for related subcontract disputes,	<p>In line 2 of clause 27(b) the word “first” may be deleted , prior to the word “consult”, to read as follows:</p> <p>if a dispute arises in relation to any aspect of this Contract, the Contractor and the Authority shall consult in good faith in an attempt to come to an agreement in relation to the disputed matter.</p>

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		Authorities to allow consultation may be concurrent with, rather than prior to, the start of the adjudication procedure.	The first two lines of paragraph (c) may be amended to read as follows:  <b>Without prejudice to paragraph (b) above, either party may give the other notice of intention to refer the dispute to adjudication and the adjudicator shall be selected in accordance with paragraph (d) below</b>
213	27.5.3 Clause 27(f) Dispute Resolution	If the parties prefer that the adjudicator should state reasons for his decision this clause may be amended accordingly.	The second sentence of sub clause 27 (f) may be amended so as to read as follows (new wording in bold):  In any event, the Adjudicator shall provide to both parties his written decision on the dispute, within 28 days of appointment (or such other period as the parties may agree after the reference, or 42 days from the date of reference if the party which referred the dispute agrees). <b>Unless the parties otherwise agree, the Adjudicator shall give</b> reasons for his decision. Unless and until revised, cancelled or varied by the Arbitrator, the Adjudicator's decision shall be binding on both parties who shall forthwith give effect to the decision.
219	28.4.5 and 28.5.1 Authority Step-in	Clarification is made to Guidance to show that indemnity protection to a Contractor on Authority step in is only appropriate where there is no Contractor breach.	Section 28.4.5 is amended and the words in bold below inserted so as to read as follows:  <b>28.4.5</b> The Authority should behave in a reasonable manner, taking into account the relevant circumstances (e.g., it should try to avoid action which would detrimentally affect any compensation payable to the Contractor on a termination) <b>but an indemnity is only appropriate where the Contractor is not in breach.</b>
220			Wording in bold is inserted as set out below:  28.5.1 <b>Having stepped-in</b> , in circumstances where there is no breach by the Contractor, the Authority should act in accordance with good industry practice and to the extent there is a failure to do so, then it should indemnify the Contractor for any effects (including for any detrimental effect on any termination payment). Liability amounts should be outside any indemnity cap (for both parties).
223	29 (Clause 29.8) Contractor's Records	An Authority may wish to have automatic rights to receive copies of Projectco's annual report and accounts and of the Senior	Clause 29.8 (a) (iv) should be amended by the insertion of the words in bold to read as follows:  (iv) <b>(A)</b> at the request of the Authority, provide to the Authority any information provided by it to the Senior Lenders during the term of the Contract <b>and (B) provide to the Authority copies of its annual report and accounts within 30 days of publication and (C) provide to the Authority a copy of the [Senior Lenders' Financial Model] at Financial Close and (as the same may be amended) within 30 days of any amendment thereto</b>

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		<p>Funders' financial model.</p> <p>Change made to clarify the intent of sub-paragraph (b) line 2</p>	<p>The Bidders Financial model may be defined by reference to the Senior Financing Agreements.</p> <p>Clause 29.8 (b) is amended by the insertion of the words in bold as follows:</p> <p>(b) Compliance with the above shall require the Contractor to keep (and where appropriate shall procure that the Sub-contractors shall keep) books of account in accordance with best accountancy practice with respect to the Contract showing in detail:</p> <p>(i) administrative overheads;</p> <p>(ii) payments made to Sub-contractors <b>and by Sub-contractors to sub-contractors</b>;</p> <p>The third sentence of footnote 7 may be deleted so the footnote now reads as follows:</p> <p><sup>7</sup> This enables financial information such as audited accounts to be obtained. Alternatively, the precise financial information required can be listed.</p>
228	30 Direct Agreement	<p>Authorities may need to make consequential amendments to the Direct Agreement in the light of other changes which they make to the body of their PFI Contracts</p>	<p>In clause 1 (Interpretation) the definition of "Enforcement Event" may not be needed (see footnote 22).</p> <p>In clause 1 (Interpretation) in the definition of Representative, sub paragraph (c) should be deleted and (b) expanded by the insertion of the words in bold below to read as follows:</p> <p>"an <b>administrator</b>, administrative receiver, receiver or receiver and manager of the Contractor appointed under the Security Documents"</p> <p>In clause 1 (Interpretation) the Definition of Liquid Market should be amended to read as follows:</p> <p><b>"Liquid Market" shall bear the meaning given to it in the Contract."</b></p> <p>Clause 3 should be clarified, to show that it only applies on a default termination, by insertion of words in bold to read as follows:</p> <p>"The Authority shall not terminate or give notice terminating the Contract <b>on the grounds of Contractor Default</b> without giving to the Agent:"</p> <p><b>"Contractor Default" shall have the meaning given to it in the Contract."</b></p> <p>Clause 8 (d) (ii) should be clarified by the insertion of the words in bold to read as follows:</p> <p>"any accrued <b>[performance points and/or warning notices]</b> incurred under the Contract</p>

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			<p>shall, <b>for the purposes of termination only, and without prejudice to the rights of the Authority to make financial deductions</b>, be cancelled”</p> <p>Clause 10 (d) (iv) should be amended by the insertion of the words in bold to read as follows:</p> <p>“on the first Business Day of each calendar month during which any Additional Permitted Borrowing is, or may be, subsisting, the amount outstanding under the Senior Financing Agreements <b>(as the same may be amended (whether or not with the approval of the Authority))</b>, and, to the extent it is aware (having made reasonable and proper enquiry):”</p>
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**Part 3 - SOPC 3 Permitted Derogations and Clarifications – Clerical**

N.B. References to SoPC 3 section numbers are shown thus – 1.8 – and to SoPC 3 model clause numbers thus – Clause 1.8.1

SoPC Page	SoPC 3 Reference	Explanation	Permitted Derogation
13	1.8	Clerical Change	Reference to Holdco should only be made if a Holdco structure is used.  “Associated Company”  means in respect of a relevant company, a company which is a subsidiary, a Holding Company or a company that is a subsidiary of the ultimate Holding Company of that relevant company and in the case of the Contractor shall include [Holdco and] each of the Shareholders.
15	1.8  (Clause 1.8.1)  “Estimated Change in Project Costs” (Definition)	Clerical change	The definition may be amended by the addition of the word in bold as shown below:  <b>“Estimated Change in Project Costs”</b>  means in relation to Clause 5.2 (Delays in Service Commencement Due to a Compensation Event), Clause 12 (Change in Service) and Clause 13 (Change in Law), the aggregate of any estimated increased construction costs, operating costs and financing costs less the aggregate of any <b>estimated</b> reduced construction costs, operating costs and financing costs;
16	1.8  (clause 1.8)  Definition of Holdco	Explanatory Change	The definition of Holdco is amended by insertion of the square brackets around it and the addition of a footnote and the addition of the figure in bold so as to read as follows  “Holdco”  means [insert detail’s of the Contractor’s <b>100%</b> holding company if any] <sup>1</sup>  <sup>1</sup> <b>If there is no 100% holding company used as part of the project structure then this definition should not be used and reference to Holdco in the definition of Associated Company or elsewhere should be deleted. References to “Holding Company” however must remain.</b>
18	1.8  (Clause 1.8.1)  Footnote 26 to definition of Project Documents	Explanatory change	The footnote is amended by the addition of the words in bold as shown below:  <sup>26</sup> These will usually be listed in a schedule and include contracts the Contractor has with its main Sub-Contractors, usually:  (a) the Construction Sub-Contractor; and

SoPC Page	SoPC 3 Reference	Explanation	Permitted Derogation
			<p>(b) the Operating Sub-Contractor. The definition should not, however, be extended to include contracts between the main Sub-Contractors and their sub-contractors (i.e. those without a direct contractual relationship with the Contractor) <b>or Finance Documents.</b></p>
18	<p>1.8 (Clause 1.8.1) “Qualifying Variation” (omitted definition)</p>	<p>Clerical change (to provide a missing definition)</p>	<p>A new definition should be used as follows :</p> <p><b>“Qualifying Variation“ means either:</b></p> <p><b>(a) a change in [the Works and/or] the Service in respect of which either an Authority Notice of Change or a Contractor Notice of Change has been served and, in the case of</b></p> <p><b>1) an Authority Notice of Change, the Authority has confirmed the Estimate and, where the Contractor is not funding all or part of the required Capital Expenditure, the Authority has agreed to meet all or the remaining part (as appropriate) of such Capital Expenditure; and</b></p> <p><b>2) a Contractor Notice of Change, the change has been accepted by the Authority; or</b></p> <p><b>(b) a Qualifying Change in Law</b></p> <p><b>and in respect of which any documents or amendments to the Project Documents which are required to give effect to such change in [the Works and/or] Service or Qualifying Change in Law have become unconditional in all respects”</b></p> <p>N. B References to Works (in square brackets in above drafting) should only be included if variations in the build phase are to be allowed.</p>
19	<p>1.8 (Clause 1.8.1) Definition of Sub-Contractor and Sub-Contracts</p>	<p>Clerical change</p>	<p>The definition of Sub-Contracts may be amended by deleting references to “contracts entered into by” in line 1 and inserting the word in bold so as to read as follows:</p> <p><b>“Sub-Contracts”</b></p> <p>means the contracts entered into <b>between</b> the Contractor and the Sub-Contractors;</p> <p>The definition of Sub-Contractors may be amended by deleting references to the Counterparties of the Contractor to the Project Documents and inserting the words in bold to read as follows:</p>

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SoPC Page	SoPC 3 Reference	Explanation	Permitted Derogation
			<p><b>“Sub-contractors”</b> means <b>each of [insert description of Sub-contractors] or any other person engaged by the Contractor from time to time as may be permitted by this Contract to procure the provision of the Works and/or the Services (or any of them);</b></p>
21	1.8.2 (Clause 1.8.2 (a)(iv)) Reference to documents	Clerical change	<p>Additional language in bold may be inserted so as to read as follows :</p> <p><b>Save where stated to the contrary</b>, any reference to this Contract or to any other documents shall include any permitted variation, amendment or supplement to such document</p>
21	1.8.2 Clause 1.8.2 (c) Indexation Formula	Clerical change	<p>The line between the numerator and the denominator is inserted in the fraction below.</p> <p>References to amounts expressed to be “indexed” are references to such amounts multiplied by:</p> $\frac{\text{Index}_1}{\text{Index}_2}$
41	5.2.1.2 Compensation Events	Clerical change	<p>The cross reference in final paragraph of section 5.2.1.2 is amended from 5.1.5 to 5.1.4 to read as follows:</p> <p>As mentioned in <b>Section 5.1.4.....</b></p>
49	5.3.2.1 Definition of “Relief Events”	Clerical change	<p>The formatting error in the final sentence is rectified as set out below:</p> <p>“Relief Event” means:</p> <ul style="list-style-type: none"> <li>(a) fire, explosion, lightning, storm, tempest, flood, bursting or overflowing of water tanks, apparatus or pipes, ionising radiation (to the extent it does not constitute a Force Majeure Event), earthquakes, riot and civil commotion;</li> <li>(b) failure by any statutory undertaker, utility company, local authority or other like body to carry out works or provide services;</li> <li>(c) any accidental loss or damage [to the development or any roads servicing it];</li> </ul>

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			<p>(d) any failure or shortage of power, fuel or transport;</p> <p>(e) any blockade or embargo which does not constitute a Force Majeure Event; and</p> <p>(f) any:</p> <ul style="list-style-type: none"> <li>(i) official or unofficial strike;</li> <li>(ii) lockout;</li> <li>(iii) go–slow; or</li> <li>(iv) other dispute,</li> </ul> <p>generally affecting the [ ] industry or a significant sector of it,</p> <p>unless any of the events listed in paragraphs (a) to (f) inclusive arises (directly or indirectly) as a result of any wilful default or wilful act of the Contractor or any of its sub-contractors.</p> <p>Footnote 33 may be deleted (from paragraph (c) of Relief Event).</p>
72	9.5.3 Replacement of Sub-contractors	Clerical change	<p>The wording in bold should be inserted in the final bullet point of 9.5.3:</p> <p>...cancel any performance points <b>or warning notices, in so far as they count towards any termination threshold only</b>, accrued by the Contractor under the Contract...</p>
87	12.4 (Clause 12.4 (Change in Service))	Clerical change	<p>The format is revised by deleting “(iii)” and moving the wording following that to the left margin so as to read as set out below:</p> <p><b>Authority Changes</b></p> <p>(a) The Authority has the right to propose changes in Service (other than Small Works Changes) in accordance with this Clause. The Authority shall not propose a change in Service which [ ]. If the Authority requires a change in Service, it must serve an Authority Notice of Change on the Contractor.</p> <p>(b) The Authority Notice of Change shall:</p> <p>set out the change in Service required in sufficient detail to enable the Contractor to calculate and provide the Estimated Change in Project Costs in accordance with paragraph (c) below (the “<b>Estimate</b>”);</p> <p>in the event that the change will require Capital Expenditure, state whether the Authority intends to pay to the Contractor the costs involved in implementing the</p>

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			<p>change or whether the Authority requires the Contractor to use its reasonable efforts to obtain funding in accordance with paragraph (i) below; and</p> <p>require the Contractor to provide the Authority within [21] days of receipt of the Authority Notice of Change with the Estimate.</p>
87	Clause 12.4, Footnote 9	Clerical change	<p>The former sub-paragraphs (c) and (d) are deleted and the wording in bold inserted to read as set out below:</p> <p>Limits on the Authority’s ability to request changes to the Service may be appropriate in some circumstances. What is appropriate will depend on the Project, but there will be a point at which what is proposed is no longer the same Service (or incidental or ancillary to it) and the Authority should have no difficulty with the principle of limiting its ability to suggest changes in this way. Examples of appropriate limits include, in general terms changes that:</p> <ul style="list-style-type: none"> <li>(a) require the Service to be performed in a way that infringes any law or is inconsistent with good industry practice;</li> <li>(b) would cause any consent to be revoked (or a new consent required to implement the relevant change in Service to be unobtainable)</li> <li>(c) would materially and adversely affect the Contractor’s ability to deliver the Service;</li> <li>(d) materially and adversely affect the health and safety of any person;</li> <li>(e) would increase the Contractor’s capital costs by more than [10]% (in aggregate);</li> <li>(f) require the Contractor to implement the change in Service in an unreasonable period of time;</li> <li>(g) would (if implemented) materially and adversely change the nature of the Project (including its risk profile);</li> <li>(h) would represent a departure from good industry practice; and/or</li> <li>(i) the Authority does not have the legal power or capacity to require the implementation of <b>such Authority Change</b>.</li> </ul>
90	Clause 12.4 (m) (ii)	Clerical change	Clause 12.4 (m) may be amended as shown in bold below:

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SoPC Page	SoPC 3 Reference	Explanation	Permitted Derogation
			(ii) the Authority shall make a payment to Contractor within fifteen (15) Business Days of receipt by the Authority of invoices presented to the Authority ( <b>complete</b> in all material respects) in accordance with the agreed payment schedule.....
99	13.8.4 (General Change in Law)	Clerical change	The penultimate sentence is amended as set out in bold below:  The levels of Cumulative Capital Expenditure (see Section 13.8.10) are not indexed (as the totals are cumulative, indexation can lead to unnecessary complication). The Contractor's total liability should generally be between 2% to 5% of the initial capital cost of the Project. A cap by reference to time is not recommended.
101	13.8 (General Change in Law)  (Clause 13.8 (a) (Qualifying Change in Law))	Clerical change	Final sentence of clause 13.8 (a) is amended as shown in bold below:  Responsibility for the costs of implementation (and any resulting variation to the Unitary Charge) shall be dealt with in accordance with paragraphs (b) to (f) below.
136	20.1.3.9  (Clause 20.1.3 (Authority Default Termination))	Clerical change	Clause 20.1.3 may be revised to clarify that the Authority Default Termination Sum shall become payable on the Termination Date, by inserting the new wording bold below.  <b>20.1.3 Compensation on Authority Default</b>  (a) On termination of the Contract under Clause 20.1.2 (Termination on Authority Default) the Authority shall pay the Contractor the "Authority Default Termination Sum" in accordance with [Section 21 (Calculation and Payment of Early Termination Payments)] <b>on the Termination Date.</b>
139	20.2.2.1  (Definition of "Contractor Default")	Clerical change	Square brackets are removed from around (g), (h) and (i) so that they read as below:  (g) a breach of Clause 15 (Sub-contractors and Employees) occurs; (h) a breach by the Contractor of its obligations in Clause 16 (Assignment) occurs; (i) a breach of Clause 17 (Change of Ownership) occurs;  Footnote 22 to the long stop default is amended by adding the words in bold so as to read as follows:

SoPC Page	SoPC 3 Reference	Explanation	Permitted Derogation
			<p>(k) a failure to achieve the Service Commencement Date by [date];<sup>22</sup></p> <p><sup>22</sup> A sufficiently distant date will normally be necessary to render such a provision bankable. See Sections 2 (Duration of Contract) and 4.5 (Long-Stop Date) <b>which allow the long stop date to be based on the Planned Service Date (and therefore be self adjusting). If this is done however, no allowance should be made for the possible occurrence of Relief Events, Compensation Events or force majeure when setting the base line long stop period (prior to any adjustment).</b></p>
144	<p>20.2.4 (Rectification) (Clause 20.2.4 (Rectification))  Footnote 36</p>	Clerical change	<p>Footnote 36 is amended by deleting reference to sub paragraph (b) (Persistent Breach) so that it reads as follows:</p> <p>It is possible to provide either for actual rectification or for an agreed rectification programme to be introduced, during which termination will not occur provided that the rectification programme is followed. Paragraphs (a), (g), (h), (i) and (o) of the definition of Contractor Default can be rectified, but only in the case of paragraph (a) is a rectification programme a suitable way of dealing with the breach.</p>
148	<p>20.2.7.6 (Clause 20.2.7)  Retendering election and Liquid Market</p>	Clerical change	<p>In the last line of the definition of Liquid Market, “bidders” should be replaced by “parties” (consistent with the first line), and references to “Agreement “ replaced by references to “Contract”, and in clause 22.2.7 (a) and (b) references to “Services” replaced by reference to “Project” as set out below:</p> <p><b>Liquid Market</b>”.....provided always that any vehicle controlled and established by the Senior Lenders specifically for the purposes of this Project and to which this <b>Contract</b> may be novated shall be discounted in assessing whether there are sufficient willing <b>parties</b> in the market for such purposes.</p> <p><b>20.2.7 Retendering Election</b></p> <p>(a) Subject to paragraph (b), the Authority shall be entitled either to:</p> <p>(i) retender the provision of the <b>Project</b> in accordance with Clause 20.2.8 (Retendering Procedure); or</p> <p>(ii) require an expert determination in accordance with Clause 20.2.9 (No Retendering Procedure).</p> <p>(b) The Authority shall be entitled to retender the provision of the <b>Project</b> in accordance with Clause 20.2.8 (Retendering Procedure) if.....</p>

SoPC Page	SoPC 3 Reference	Explanation	Permitted Derogation
148	20.2.7.6 (Clause 20.2.7 (Retendering Election))	Clerical change	<p>In clause 20.2.7 (b) (B) the reference to “Company” should be replaced by reference to “Contractor”, and the cross-reference to the Direct Agreement corrected, as set out in bold below:</p> <p>(b) The Authority shall be entitled to retender the provision of the <b>Project</b> in accordance with Clause 20.2.8 (Retendering Procedure) if:</p> <p>(i) the Authority notifies the Contractor on or before the date falling 20 Business Days after the Termination Date; and</p> <p>(ii) there is a Liquid Market; and either:</p> <p>(A) the Senior Lenders have not exercised their rights to step-in under Clause <b>5</b> of the Direct Agreement; or</p> <p>(B) the Contractor or Senior Lenders have not procured the transfer of the <b>Contractor’s</b> rights and liabilities under this Contract to a Suitable Substitute Contractor and have failed to use all reasonable efforts to do so.</p>
152	20.2.8 (Clause 20.2.8 (Retendering Procedure))	Clerical change	<p>“Service” should be replaced by ”Project” as shown in bold below:</p> <p><b>20.2.8 Retendering Procedure</b></p> <p>If the Authority elects to retender the provision of the <b>Project</b> under Clause 20.2.7 (Retendering Election), then the following provisions shall apply:...</p>
152	20.2.8 (Definition of “New Contract”)	Clerical change	<p>Sub-section (b) should be amended as shown in bold below:</p> <p>(b) any accrued [<b>performance points and/or warning notices</b>] shall, <b>for the purposes of termination only, and without prejudice to the rights of the Authority to make financial deductions</b>, be cancelled;”</p> <p>This recognises that performance points and warning notices are not defined terms in SoPC 3 and that the dispensation here is only intended to apply towards points/notices accruing towards any termination threshold, but is not a dispensation against the Authority’s ability to make financial deductions.</p>
155	20.2.8 (Clause 20.2.8 (m)) (Retendering Procedure)	Clerical Change	<p>Clause 20.2.8 (m) is revised to correct cross references to (k) and (l) as shown below:</p> <p>(m) The discharge by the Authority of its payment obligations in paragraphs <b>(k)</b> and <b>(l)</b>....</p>

SoPC Page	SoPC 3 Reference	Explanation	Permitted Derogation
159	20.2.9 (No Retendering Procedure)  (Definitions and clause 20.2.9 (No Retendering Procedure))	Clerical change	<p>Wording may be inserted as shown in bold in the provisions below, and references to "Services" replaced by references to "Project":</p> <p><b>“Adjusted Estimated Fair Value of the Contract”</b> means the Estimated Fair Value of the Contract, less an amount equal to the aggregate of:</p> <p>(a) <b>where relevant any</b> Post Termination Service Amounts <b>paid to the Contractor</b> (if a positive number);]</p> <p>...to the extent that:</p> <p>(1) (i), (ii) and (iii) have not been directly taken into account in calculating the Estimated Fair Value <b>of the Contract</b>; and...</p> <p><b>“Deemed New Contract”</b></p> <p>(a) any accrued [performance points <b>and/or warning notices</b>] shall, <b>for the purposes of termination only, and without prejudice to the rights of the Authority to make financial deductions</b>, be cancelled;...</p> <p><b>Clause 20.2.9</b></p> <p><b>20.2.9 No Retendering Procedure</b></p> <p>If either the Authority is not entitled to retender the provision of the <b>Project</b> under Clause 20.2.7 (Retendering election) or the Authority elects to require an expert determination in accordance with this Clause 20.2.9 (No Retendering Procedure) then the following procedure shall apply...</p> <p>(c)...</p> <p>(iii): the total of all costs forecast to be incurred by the Authority as a result of termination shall be calculated and discounted at the Termination Date Discount Rate and deducted from the payment calculated pursuant to sub-paragraph (ii) above, such costs to include (without double counting):</p> <p>(A) a reasonable risk assessment of any cost overruns that will arise, whether or not forecast in the relevant base case;</p> <p>(B) the costs of the service forecast to be incurred by the Authority <b>in providing the Project</b> to the standard required; and</p>

SoPC Page	SoPC 3 Reference	Explanation	Permitted Derogation
			<p>(C) any rectification costs required to deliver <b>the Project</b> to the standard required (including any costs forecast to be incurred by the Authority to complete construction or development work and additional operating costs required to restore operating services standards),...</p> <p>(f) The discharge.....(but not from the termination itself) that has <b>not</b> been taken into account in determining the Adjusted Estimated Face Value of the Contract.</p>
160	20.2.10 (Clause 20.2.10 (Transfer of Assets))	Clerical Change	<p>A new Clause 20.2.10 may be inserted as shown in bold below :</p> <p><b>20.2.10 Transfer of Assets on Contractor Default</b></p> <p><b>On termination under Clause 20.2 (Contractor Default), the Authority shall have the option to require the Contractor to transfer to the Authority all of its right, title and interest in and to the Assets.</b></p>
160	20.3 (Clause 20.3 (Termination on Force Majeure))	Clerical change	<p>Wording may be added at the end of sub-clause (a) shown in bold below to clarify that the Authority cannot terminate for default to the extent it arises from a force majeure:</p> <p>(a) No party shall be entitled to bring a claim for a breach of obligations under the Contract by the other party or incur any liability to the other party for any losses or damages incurred by that other party to the extent that a Force Majeure Event occurs and it is prevented from carrying out obligations by that Force Majeure Event. <b>For the avoidance of doubt, the Authority shall not be entitled to terminate this Agreement for a Contractor Default if such Contractor Default arises from a Force Majeure Event (but without prejudice to clauses 20.3 (e) or 20.3(g)).</b></p>
162	20.3.2.2 (Clause 20.3.2 (Force Majeure Compensation))	Clerical change	<p>The second paragraph of clause 20.3.2 (a) (ii) may be amended by deleting “and principal” as set out in bold below:</p> <p>“Subject to paragraphs (c) to (e) below the Force Majeure Termination Sum shall be the amount equal to the aggregate of:</p> <p>(i) the Base Senior Debt Termination Amount;</p> <p>(ii) the Junior Debt less an amount equal to the aggregate of payments of interest <b>[N.B. delete “and principal”]</b> made by the Contractor under the Subordinated Financing Agreements”</p>

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SoPC Page	SoPC 3 Reference	Explanation	Permitted Derogation
			<p>A new paragraph (g) may be added to clause 20.3.2 as set out in bold below ;</p> <p style="text-align: center;"><b>(g) On termination, the Authority shall have the option to require the Contractor to transfer to the Authority all of its right, title and interest in and to the Assets.</b></p>
166	<p>20.4.2 (Clause 20.4.3) Termination for Corrupt Gifts and Fraud</p>	Clerical change	<p>Wording in bold should be added as shown below:</p> <p>(c) If the Prohibited Act is committed by an employee of the Contractor acting independently of the Contractor, then the Authority may give notice to the Contractor of termination and the Contract will terminate, unless within [30] days of receipt of such notice the Contractor terminates the employee’s employment and (if necessary) procures the performance of such part of the <b>Works and /or</b> Service by another person.</p> <p>(d) If the Prohibited Act is committed by a Sub-contractor or by an employee of that Sub-contractor not acting independently of that Sub-contractor, then the Authority may give notice to the Contractor of termination and the Contract will terminate, unless within [30] days of receipt of such notice the Contractor terminates the relevant Project Document and procures the performance of such part of the <b>Works and/or</b> Service by another person.</p> <p>(e) If the Prohibited Act is committed by an employee of a Sub-contractor acting independently of that Sub-contractor, then the Authority may give notice to the Contractor of termination and the Contract will terminate, unless within [30] days of receipt of such notice the Sub-contractor terminates the employee’s employment and (if necessary) procures the performance of such part of the <b>Works and/or</b> Service by another person.</p> <p>(f) If the Prohibited Act is committed by any other person not specified in paragraphs (b) to (e) above, then the Authority may give notice to the Contractor of termination and the Contract will terminate unless within [30 days] of receipt of such notice, the Contractor procures the termination of such person’s employment and of the appointment of their employer (where not employed by the Contractor or the Sub-contractors) and (if necessary) procures the performance of such part of the <b>Works and/or</b> Service by another person.</p>
177	21.7.2	Clerical change	Wording in bold should be added, and the word “and” may be deleted as set out below:

SoPC Page	SoPC 3 Reference	Explanation	Permitted Derogation
	Exclusivity of Remedy		<p>“Any payment of compensation shall be in full satisfaction of any claim which can be made against the Authority by the Contractor in relation to termination of this Contract or any Project Document. The compensation payable under Clauses 20.1.3 (Compensation on Authority Default), 20.3.4 (Compensation on Termination for Force Majeure), [Clauses 20.4.3 (Compensation for Termination for Corrupt Gifts and Fraud)], 20.5 (Compensation on Voluntary Termination by the Authority) <b>and 20.6 (Termination for Breach of Refinancing provisions)</b> shall be the sole remedy of the Contractor against the <b>Authority in respect of termination of the Contract.</b>”</p>
181	<p>22.5 (Clause 22 (i) (iii)) Surveys on Termination</p>	Clerical change	<p>This clause may be amended as shown in bold below (since “Termination Notice” is not a defined term in SoPC 3)</p> <p>(i) If:</p> <p>(i) all the rectification and/or maintenance work identified by [the Authority] has been carried out to the Authority’s reasonable satisfaction; and</p> <p>(ii) all such work has been paid for by the Contractor; and</p> <p>(iii) <b>no termination notice given in accordance with this Contract</b> is outstanding, [ + Drafting note: please note in subparagraph (iii) above the word “other” has been deleted after the word “no” + ]</p>
185	<p>23.3.8 (Clause 23.3) Indemnity</p>	Clerical change	<p>In the last line of paragraph (a) reference to Sub-contractor should be deleted and replaced by the words in bold to read as follows :</p> <p><b>23.3 Indemnity</b></p> <p>(a) The Contractor shall, subject to paragraph (b), be responsible for, and shall release and indemnify the Authority, its employees, agents and contractors on demand from and against, all liability for:</p> <p>(i) death or personal injury;</p> <p>(ii) loss of or damage to property (including property belonging to the Authority or for which it is responsible “Authority Property”);</p> <p>(iii) breach of statutory duty; and</p> <p>(ii) actions, claims, demands, costs, charges and expenses (including legal expenses on an indemnity basis),</p>

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			<p>which may arise out of, or in consequence of, the design, construction, operation or maintenance of the assets or the performance or non-performance by the Contractor of its obligations under this Contract or the presence on the Authority's property of the Contractor, <b>a sub-contractor of the Contractor (of any tier)</b>, their employees or agents.</p>
186	23.4.1 Collateral Warranties	Clerical change	<p>The words in bold is inserted to read as follows:</p> <p><b>23.4.1</b> An Authority may seek a collateral warranty (i.e. a direct contractual undertaking) from each of the Sub-contractors <b>or other key sub-contractors</b> giving direct claims in some circumstances. This does not undermine the limited recourse nature of the Project, provided that the content of any undertakings requested dovetail with the overall approach to the Project structure. That is:</p> <ul style="list-style-type: none"> <li>• they should not be used to increase levels of liability or impose obligations where none would otherwise exist (see Sections 23.3 (Indemnities) and 23.6 (Claim for Damages));</li> <li>• they should not be used to undermine the rights of Senior Lenders (see Section 23.5 (Financiers' Security)); and</li> <li>• they should not grant rights to the Authority prior to early termination (see Section 20 (Early Termination)).</li> </ul>
214	27.5.3 (Clause 27) Dispute Resolution	Clerical change	<p>Footnote 15 to clause 27 (l) is revised to read as follows (new wording in bold):</p> <p><sup>15</sup> <b>The parties may incorporate provisions</b> to go to court instead of arbitration <b>if appropriate</b>. In addition, the parties may wish to address expressly the right to apply to the courts for interlocutory relief at any stage in support of the adjudication or arbitration (assuming the arbitrator does not have such powers). If so, the need to appoint agents for service of process on overseas parties will arise.</p>
263	35.8 Model Refinancing Provisions	Clerical change	<p>The words "(other than any Subordinated Financing Agreement)" may be deleted from the definition of "Exempt Refinancing" section (d) so that it reads as follows:</p> <p>(d) any amendment, variation or supplement of any agreement approved by the Authority as part of any Qualifying Variation under this Agreement;"</p> <p>Reference to Holdco, if relevant, should be inserted in section (e) as shown in bold below:</p> <p>(e) any sale of shares in the Contractor <b>[or Holdco]</b> by the shareholders or securitisation</p>

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264			<p>of the existing rights and/or interests attaching to shares in the Contractor <b>[or Holdco]</b> provided that this paragraph (e) shall, in respect of shares in Holdco, only apply for so long as Holdco holds 100% if the issued share capital of the Contractor];</p> <p>The words in bold are inserted in the definitions of “Pre-Refinancing Equity IRR” (as envisaged by Footnote 17) so as to read as follows:</p> <p>“Pre-Refinancing Equity IRR” means the nominal post-tax <b>(i.e. post Contractor tax pre Shareholder tax for the Contractor but pre-tax for the Shareholders)</b> Equity IRR calculated immediately prior to the Refinancing.</p>
265			<p>The definition of “Qualifying Bank” may be deleted (as it is no longer used).</p>
265	35.8 Model Refinancing Provisions	Clerical change	<p>In the definition of “Qualifying Bank Transaction” reference to Holdco should be inserted in paragraph (c) (if a Holdco structure is used) as shown in bold below:</p> <p>the grant by a Senior Lender of any other form of benefit or interest in either the Senior Financing Agreements or the revenues or assets of the Contractor <b>[or Holdco]</b>, whether by way of security or otherwise, in favour of (i) any other Senior Lender (ii) any institution specified in paragraphs (b)(ii) to (vii) above (iii) any Qualifying Institution or (iv) any other institution in respect of which the prior written consent of the Authority has been given.;</p>
269	Annex 1 Guidance note on Calculation of Authority’s Share of a Refinancing gain	Clerical change	<p>A new paragraph 1.1.4 is inserted as follows :</p> <p>Please note that HMT issued an application note dated 9 February 2005 entitled “Value for Money in Refinancing” which can be viewed on the HMT web site.</p>
281	Annex 3 Corporate Finance – provisions for compensation on termination	Clerical change	<p>Paragraph (c) (Force Majeure): the first two paragraphs of this definition is revised to read as follows (new wording in bold):</p> <p>“Base Case capital costs <b>(in nominal cash terms) as projected to be incurred to the date of termination</b> as set out in the Base Case</p> <p>minus</p> <p>Recoveries of capital to the date of termination as calculated (in nominal cash terms) from: (a) total Unitary Charges paid <b>to the date of termination</b> less (b) operating costs projected to be incurred to the date of termination as shown in the Base Case (where operating costs include the provision for corporate overhead costs made in the Base</p>

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			Case).
283	Annex 4 (Permitted Borrowing) 4.1.2 Footnote 1	Clerical change	Footnote 1 is amended by the insertion of the words in bold as shown below :  <sup>1</sup> If no Distributions are made during this period but monies are kept in reserved accounts, the Permitted Borrowings will not be reduced, however the amount of the <b>Base Senior Debt Termination Amount or Revised Senior Debt Termination Amount</b> payable by the Authority on an early termination of the project is reduced, under sub-paragraph (b) (i) of the definition of <b>Base Senior Debt Termination Amount or (c) (i) of Revised Senior Debt Termination Amount</b> . It will be a matter for the Senior Lenders and the Equity to decide whether surplus funds are used to repay Senior Debt, or are distributed or reserved.  Footnote 1 on page 284 should be renumbered footnote 2

## Appendix 1

### Permitted Borrowing

#### Termination Sums and Permitted Borrowings

The revisions set out below are produced, and should be used, in response to a number of requests for clarification, in order (a) to clarify the distinction between the Base Senior Debt Termination Amount (which does not include Additional Permitted Borrowings) and the Revised Senior Debt Termination Amount (which does include Additional Permitted Borrowings) (b) to clarify the use of the definition of Senior Financing Agreements (in particular, as referred to in the definition of Additional Permitted Borrowings), (c) to clarify that Additional Permitted Borrowings may be advanced without consent from the Authority (d) to make the termination payment provisions simpler to follow and (e) to reflect better the fact that the definition of Permitted Borrowing already includes Senior Financing Agreements.

#### **“Additional Permitted Borrowing”**

means on any date, the amount equal to any amount of principal outstanding under the Senior Financing Agreements **(as the same may from time to time be amended, whether or not with the approval of the Authority)** in excess of the amount of principal scheduled under the Senior Financing Agreements at Financial Close to be outstanding at that date,

but only to the extent that:

- (a) this amount is less than or equal to the Additional Permitted Borrowings Limit; and
- (b) in respect of any Additional Permitted Borrowing the Agent is not in material breach of its obligations under Clause 10(d)(iii) of the Direct Agreement as it applies to such Additional Permitted Borrowing

and provided further that any such excess amount of principal which is **(i) invested as part of any Qualifying Variation or (ii) outstanding from time to time as a result of any drawing under the Senior Finance Agreements as entered into at the date of this Contract, disregarding any subsequent amendment or (iii) outstanding from time to time as a result of any amendment to the Senior Finance Agreements in respect of which the Authority has agreed that its liabilities on a termination may be increased pursuant to clause 21.3 (a),** shall not be counted as Additional Permitted Borrowing;

[+ Drafting Note : please note reformatting of final paragraph above +]

#### **"Base Senior Debt Termination Amount"**

means, **subject to Clause 21.3 (Changes to Financing Agreements):**

- (a) all amounts outstanding at the Termination Date, including interest and Default Interest accrued as at that date, from the Contractor to the Senior Lenders in respect of Permitted Borrowing **(other than in respect of Additional Permitted Borrowing)** and

- (b) all amounts including costs of early termination of interest rate hedging arrangements and other breakage costs<sup>1</sup>, payable by the Contractor to the Senior Lenders as a result of a prepayment in respect of Permitted Borrowing **(other than in respect of Additional Permitted Borrowing)** subject to the Contractor and the Senior Lenders mitigating all such costs to the extent reasonably possible;

less, to the extent it is a positive amount, the aggregate of (without double counting in relation to the calculation of the Base Senior Debt Termination Amount or the amounts below) :

- (i) all credit balances on any bank accounts (but excluding the Joint Insurance Account) held by or on behalf of the Contractor on the Termination Date;
- (ii) any amounts claimable on or after the Termination Date in respect of Contingent Funding Liabilities;
- (iii) all amounts, including costs of early termination of interest rate hedging arrangements and other breakage costs, payable by the Senior Lenders to the Contractor as a result of prepayment of amounts outstanding in respect of Permitted Borrowing **(other than in respect of Additional Permitted Borrowing)**; and
- (iv) all other amounts received by the Senior Lenders on or after the Termination Date and before the date on which any compensation is payable by the Authority to the Contractor as a result of enforcing any other rights they may have;

[+ Drafting note : please note (a) references to Senior Financing Agreements have been deleted in paragraph (b) line 3 and in sub paragraph (iv) line 4 and (b) former subparagraph (iv) is deleted + ]

**“Permitted Borrowing”**

means, without double-counting, any:

- (a) advance to the Contractor under the Senior Financing Agreements, provided that such advance is not made under any Committed Standby Facility;
- (b) Additional Permitted Borrowing;
- (c) advance to the Contractor under **any** Committed Stand-by Facility which is made solely for the purpose of funding any cost overruns, increased expenses or loss of revenue which the Contractor incurs, provided that such funds are not used in substitution for other sources of committed funding designated for those purposes. and
- (d) interest and, in respect of the **original Senior** Financing Agreements only (**as entered into at the date of this Contract**, prior to any subsequent amendment),

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<sup>1</sup> Authorities may consider whether they should exclude any future profit element from the calculation of costs of early termination of interest hedging arrangements where the termination is for force majeure, breach of refinancing, corrupt gifts and uninsurability.

other amounts<sup>2</sup> accrued or payable under the terms of **such original** Senior Financing Agreements,

except where the amount referred to in paragraphs (a) to (d) above is or is being used to fund a payment of Default Interest on any Additional Permitted Borrowing;

**“Revised Senior Debt Termination Amount”**

means, subject to Clause 21.3 (Changes to Financing Agreements)

- (a) all amounts outstanding at the Termination Date, including interest and **(other than in respect of Additional Permitted Borrowing)** Default Interest accrued as at that date, from the Contractor to the Senior Lenders in respect of Permitted Borrowing;
- (b) all amounts including costs of early termination of interest rate hedging arrangements and other breakage costs<sup>3</sup>, payable by the Contractor to the Senior Lenders as a result of a prepayment in respect of Permitted Borrowing, subject to the Contractor and the Senior Lenders mitigating all such costs to the extent reasonably possible,

less, to the extent it is a positive amount, the aggregate of (without double counting in relation to the calculation of the Revised Senior Debt Termination Amount or the amounts below) :

- (i) all credit balances on any bank accounts (but excluding the Joint Insurance Account held by or on behalf of the Contractor) on the Termination Date;
- (ii) any amounts claimable on or after the Termination Date in respect of Contingent Funding Liabilities;
- (iii) all amounts, including costs of early termination of interest rate hedging arrangements and other breakage costs, payable by the Senior Lenders to the Contractor as a result of prepayment of amounts outstanding in respect of Permitted Borrowing;
- (iv) all other amounts received by the Senior Lenders on or after the Termination Date and before the date on which any compensation is payable by the Authority to the Contractor as a result of enforcing any other rights they may have; and
- (v) all APB Distributions;

[ + Drafting note : please note (a) text relating to Senior Financing Agreements and Additional Permitted Borrowings is deleted from subparagraph (a) and (b) reference to Senior Financing Agreements is deleted from subparagraph (b) (iii) + ]

**“Senior Financing Agreements”**

means [ ] as at the date of this Contract or as amended with the prior written approval of the Authority **pursuant to clause 21.3 (a)**;<sup>4</sup>

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<sup>2</sup> It is vital that the Authority’s advisers satisfy themselves as to the appropriateness of the senior finance terms (especially any possibly unusual fees or indemnities) in the light of this potential liability. If the Authority is not so satisfied, it should either ask the senior lenders to revise their terms or alternatively restrict the Authority’s exposure under sub clause (d) of Permitted Borrowings above to those fees which it is willing to pay on a relevant termination.

<sup>3</sup> See footnote 1 above

<sup>4</sup> Where referred to in the Contract, Senior Financing Agreements should mean those agreements as at the date of the Contract as they may be amended with the approval of the Authority **pursuant to clause 21.3(a)**. This is particularly important if Senior Debt is paid on early

### 21.3 Changes to Financing Agreements and Ancillary Documents

No amendment, waiver or exercise of a right under any Financing Agreement **or Ancillary Document** shall have the effect of increasing the Authority's liabilities on early termination of this Contract unless:

- (a) the Contractor has obtained the prior written consent of the Authority **to such increased liability for the purposes of this Clause 21.3**; or
- (b) it is an **Additional Permitted Borrowing**

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termination of the Contract. On signature of the Contract, the Authority has an assumed exposure to termination liabilities (based on the financing structure in place at financial close); the Authority should therefore have the right to approve any amendments to its termination liability (see Section 21.3 (Certainty of Compensation Payments)). **If the Contractor makes changes to the Senior Financing Agreements which have not been approved by the Authority for the purposes of Clause 21.3 they will be disregarded for the purposes of calculating termination sums unless they qualify as Additional Permitted Borrowing.**

## **Appendix 2**

### **Freedom of Information**

This supplementary note to the Information and Confidentiality section of SoPC3 (Chapter 25) has been produced in view of the coming into force on 1 January 2005 of relevant provisions of the Freedom of Information Act 2000 (“FOIA”).

This supplementary note does not seek to provide guidance on the FOIA itself. Such guidance is available elsewhere (see for example guidance issued by the Department of Constitutional Affairs and the Office of Government Commerce (“OGC”)<sup>1</sup>). This supplementary note does, however, set out changes to the required drafting in Section 25.5.3 of SoPC version 3 which are necessary as a consequence of the coming into force of the FOIA.

The drafting set out below as clause 25 (with related definitions) is required drafting for projects which, as at 1 February 2006, have not yet received final bids.<sup>2</sup> The drafting set out below as clause 25 A, together with its footnotes, is, at present, only recommended drafting; however parties would need good reasons to depart from it.

#### **25 Freedom of Information and Confidentiality<sup>3</sup>**

- (a) (i) The parties agree that provisions of this Contract and each Project Document<sup>4</sup> shall, subject to sub-paragraph (11) below, not be treated as Confidential Information and may be disclosed without restriction.
- (ii) Sub-paragraph (i) above shall not apply to provisions of this Contractor or a Project Document designated as Commercially Sensitive Information and listed in Part I of Schedule [ ] (Commercially Sensitive Information) to this Contract<sup>5</sup> which shall, subject to sub-paragraph (b) below, be kept confidential for the periods specified in that Part.
- (iii) The parties shall keep confidential all Confidential Information received by one party from the other party relating to this Contract and Project Documents or the Project and shall use all reasonable endeavours to prevent their employees and agents from making any disclosure to any person of any such Confidential Information.

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<sup>1</sup> See, in particular: Freedom of Information (Civil Procurement) Policy and Guidance, on the OGC website.

<sup>2</sup> This Section only deals with Confidentiality and provision of information under FOIA and does not cover any other provision of information requirements which the Authority may have for the Contract.

<sup>3</sup> Please note: Sub-paragraphs (i) and (ii) deal with the Contract and Project Documents themselves and Sub-paragraph (iii) deals with the provision of other information. In each case confidential provisions or materials can, subject to footnote 5 below, be specified by agreement in a schedule (see definition of Commercially Sensitive Information).

<sup>4</sup> See definition in clause 1.8.1

<sup>5</sup> Authorities should keep this exemption strictly limited and should be mindful of FOIA and OGC guidance (see footnote 1 above) when agreeing what parts of the documents should be treated as Commercially Sensitive Information. Proper due diligence is required here in order to avoid the Authority being in a position where it is required to disclose information under FOIA which has been designated as Commercially Sensitive.

- (b) Paragraphs (a) (ii) and (iii), shall not apply to:
- (i) any disclosure of information that is reasonably required by any person engaged in the performance of their obligations under the Contract for the performance of those obligations;
  - (ii) any matter which a party can demonstrate is already or becomes generally available and in the public domain otherwise than as a result of a breach of this Clause;
  - (iii) any disclosure to enable a determination to be made under Clause 27 (Dispute Resolution) or in connection with a dispute between the Contractor and any of its subcontractors;
  - (iv) any disclosure which is required pursuant to any statutory, legal (including any order of a court of competent jurisdiction) or Parliamentary obligation placed upon the party making the disclosure or the rules of any stock exchange or governmental or regulatory authority having the force of law or if not having the force of law, compliance with which is in accordance with the general practice of persons subject to the stock exchange or governmental or regulatory authority concerned;
  - (v) any disclosure of information which is already lawfully in the possession of the receiving party, prior to its disclosure by the disclosing party;
  - (vi) any provision of information to the parties' own professional advisers or insurance advisers or to the Senior Lenders or the Senior Lenders' professional advisers or insurance advisers or, where it is proposed that a person should or may provide funds (whether directly or indirectly and whether by loan, equity participation or otherwise) to the Contractor to enable it to carry out its obligations under the Contract, or may wish to acquire shares in the Contractor [and/or Holdco] in accordance with the provisions of this Contract to that person or their respective professional advisers but only to the extent reasonably necessary to enable a decision to be taken on the proposal;
  - (vii) any disclosure by the Authority of information relating to the design, construction, operation and maintenance of the Project and such other information as may be reasonably required for the purpose of conducting a due diligence exercise, to:
    - (A) any proposed new contractor, its advisers and lenders, should the Authority decide to retender the Contract; or
    - (B) any person in connection with [Clause 14.4 (Benchmarking)] or Clause 14.5 (Market Testing);
  - (viii) any registration or recording of the Consents<sup>6</sup> and property registration required;
  - (ix) any disclosure of information by the Authority to any other department, office or agency of the Government or their respective advisers or to any person engaged in providing services to the Authority for any purpose related to or ancillary to the Contract; or
  - (x) any disclosure for the purpose of :
    - (A) the examination and certification of the Authority's or the Contractor's accounts;

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<sup>6</sup> For example, any planning permission application.

- (B) any examination pursuant to [Section 6(1) of the National Audit Act 1983<sup>7</sup>] of the economy, efficiency and effectiveness with which the Authority has used its resources;
  - (C) complying with a proper request from either party's insurance adviser, or insurer on placing or renewing any insurance policies; or
  - (D) (without prejudice to the generality of paragraph (b)(iv) above) compliance with the FOIA and/or the Environmental Information Regulations,  
provided that, for the avoidance of doubt, neither paragraph (x) (D) nor paragraph (iv) above shall permit disclosure of Confidential Information otherwise prohibited by paragraph (a) (iii) above where that information is exempt from disclosure under section 41 of the FOIA.
- (c) Where disclosure is permitted under paragraph (b), other than paragraphs (ii), (iv), (v), (viii) and (x), the party providing the information shall procure that the recipient of the information shall be subject to the same obligation of confidentiality as that contained in this Contract.
  - (d) For the purposes of the [National Audit Act 1983 the Comptroller and Auditor General] may examine such documents as he may reasonably require which are owned, held or otherwise within the control of the Contractor and any Sub-contractor and may require the Contractor and any Sub-contractor to produce such oral or written explanations as he considers necessary. For the avoidance of doubt it is hereby declared that the carrying out of an examination under [Section 6(3)(d) of the National Audit Act 1983] in relation to the Contractor is not a function exercisable under this Agreement.
  - (e) The Contractor shall not make use of the Contract or any information issued or provided by or on behalf of the Authority in connection with the Contract otherwise than for the purpose of the Contract, except with the written consent of the Authority.
  - (f) Where the Contractor, in carrying out its obligations under the Contract, is provided with information relating to [people/users e.g. prisoners, patients, pupils], the Contractor shall not disclose or make use of any such information otherwise than for the purpose for which it was provided, unless the Contractor has sought the prior written consent of that [person/user e.g. prisoner, pupil, patient] and has obtained the prior written consent of the Authority.<sup>8</sup>
  - (g) On or before the Expiry Date, the Contractor shall ensure that all documents or computer records in its possession, custody or control, which contain information relating to [people/users e.g. prisoners/patients/pupils] including any documents in the possession, custody or control of a Sub- Contractor, are delivered up to the Authority.
  - (h) The parties acknowledge that the [National Audit Office] has the right to publish details of the Contract (including Commercially Sensitive Information) in its relevant reports to Parliament.

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<sup>7</sup> The National Audit Office are the auditors for central government. The Audit Commission appoint auditors for local authorities and NHS Trusts in England and Wales (with the Accounts Commission performing the equivalent role to the Audit Commission in Scotland). Where the National Audit Office is not the appropriate auditor, all references to the National Audit Office in Clause 25 should be substituted with a reference to the appropriate auditor.

<sup>8</sup> See also Clause 29.1 (Data Protection).

- (i) The provisions of this Clause 25 are without prejudice to the application of the Official Secrets Acts 1911 to 1989

“Commercially Sensitive Information” means the sub set of Confidential Information listed in column 1 of Part 1 (Commercially Sensitive Contractual Provisions) and column 1 of Part 2 (Commercially Sensitive Material) of Schedule [ ] (Commercially Sensitive Information) in each case for the period specified in column 2 of Parts 1 and 2 of Schedule [ ];

“Confidential Information” means:

- (a) information that ought to be considered as confidential (however it is conveyed or on whatever media it is stored) and may include information whose disclosure would, or would be likely to, prejudice the commercial interests of any person, trade secrets, Intellectual Property Rights and know-how of either party and all personal data and sensitive personal data within the meaning of the Data Protection Act 1988 and
- (b) Commercially Sensitive Information.<sup>9</sup>

“FOIA” means the Freedom of Information Act 2000 and any subordinate legislation (as defined in section 84 of the Freedom of Information Act 2000) made under the Freedom of Information Act 2000 from time to time together with any guidance and/or codes of practice issued by the Information Commissioner or relevant Government Department in relation to such Act.

“Information” has the meaning given under Section 84 of the Freedom of Information Act 2000;

“Environmental Information Regulations” means the Environmental Information Regulations 2004 together with any guidance and/or codes of practice issued by the Information Commissioner or relevant Government Department in relation to such regulations

“Fees Regulations” means The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004

“Requests for Information” shall have the meaning set out in the FOIA or the Environmental Information Regulations as relevant (where the meaning set out for the term “request” shall apply).

## **25 A Freedom of Information**

- (a) The Contractor acknowledges that the Authority is subject to the requirements of the FOIA and the Environmental Information Regulations and shall facilitate the Authority’s compliance with its Information disclosure requirements pursuant to the same in the manner provided for in paragraphs (b) to (g) (inclusive) below.
- (b) Where the Authority receives a Request for Information in relation to Information that the Contractor is holding on its behalf<sup>10</sup> and which the Authority does not hold itself<sup>11</sup>

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<sup>9</sup> Any information or classes of information that the parties agree should be treated as Commercially Sensitive Information should be included in Part 2 of the Schedule entitled Commercially Sensitive Material. The Authority should be mindful of guidance on this issue when agreeing which information should be categorised as commercially sensitive. This can cover specific bid information (for specific periods) or other types of generic information but broad blanket categorisations are not appropriate – see footnotes 1 and 4 above.

the Authority shall refer to the Contractor such Request for Information that it receives as soon as practicable and in any event within [five] Business Days of receiving a Request for Information and the Contractor shall:

- (i) provide the Authority with a copy of all such Information in the form that the Authority requires as soon as practicable and in any event within [ten] Business Days (or such other period as the Authority acting reasonably may specify) of the Authority's request; and
  - (ii) provide all necessary assistance as reasonably requested by the Authority in connection with any such Information, to enable the Authority to respond to a Request for Information within the time for compliance set out in section 10 of the FOIA or Regulation 5 of the Environmental Information Regulations.
- (c) Following notification under clause 25 A (b), and up until such time as the Contractor has provided the Authority with all the Information specified in Clause 25 A (b) (i), the Contractor may make representations to the Authority as to whether or not or on what basis Information requested should be disclosed, and whether further information should reasonably be provided in order to identify and locate the information requested, provided always that the Authority shall be responsible for determining at its absolute discretion:-
- (i) whether Information is exempt from disclosure under the FOIA and the Environmental Information Regulations;
  - (ii) whether Information is to be disclosed in response to a Request for Information, and

in no event shall the Contractor respond directly, or allow its Subcontractors to respond directly, to a Request for Information unless expressly authorised to do so by the Authority.

- (d) The Contractor shall ensure that all Information held on behalf of the Authority is retained for disclosure for at least [ ] years (from the date it is acquired) and shall permit the Authority to inspect such Information as requested from time to time.
- (e) The Contractor shall transfer to the Authority any Request for Information received by the Contractor as soon as practicable and in any event within 2 Business Days of receiving it.
- (f) The Contractor acknowledges that any lists provided by him listing or outlining Confidential Information, are of indicative value only and that the Authority may nevertheless be obliged to disclose Confidential Information in accordance with the requirements of the FOIA and the Environmental Regulations.
- (g) In the event of a request from the Authority pursuant to clause 25 A (b) above, the Contractor shall as soon as practicable, and in any event within [5] Business Days of

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<sup>10</sup> This should enable the Authority to comply with its obligations under the FOIA. If the Authority wished to go beyond this, for instance by referring in addition to other information or to information held by first tier subcontractors on behalf of the Contractor, this can be specified – but this may have cost/vfm implications.

<sup>11</sup> Authorities may wish to retain responsibility where they themselves already have the relevant information.

receipt of such request, inform the Authority of the Contractor's estimated costs of complying with the request to the extent these would be recoverable if incurred by the Authority under Section 12(1)<sup>12</sup> of the FOIA and the Fees Regulations. Where such costs (either on their own or in conjunction with the Authority's own such costs in respect of such Request for Information) will exceed the appropriate limit referred to in Section 12(1) of the FOIA and as set out in the Fees Regulations (the "Appropriate Limit") the Authority shall inform the Contractor in writing whether or not it still requires the Contractor to comply with the request and where it does require the Contractor to comply with the request the 10 Business Days period for compliance shall be extended by such number of additional days for compliance as the Authority is entitled to under Section 10 of the FOIA. In such case, the Authority shall notify the Contractor of such additional days as soon as practicable after becoming aware of them and shall reimburse the Contractor for such costs as the Contractor incurs in complying with the request to the extent it is itself entitled to reimbursement of such costs in accordance with its own FOIA policy from time to time<sup>13 14</sup>

- (h) The Contractor acknowledges that (notwithstanding the provisions of Clause 25) the Authority may, acting in accordance with the Department of Constitutional Affairs' Code of Practice on the Discharge of Functions of Public Authorities under Part I of the Freedom of Information Act 2000 (the "Code"), be obliged under the FOIA, or the Environmental Information Regulations to disclose Information concerning the Contractor or the Project:-
- (i) in certain circumstances without consulting with the Contractor; or
  - (ii) following consultation with the Contractor and having taken their views into account,

provided always that where (i) above applies the Authority shall, in accordance with the recommendations of the Code, draw this to the attention of the Contractor prior to any disclosure.

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<sup>12</sup> If the Authority intends also to charge in respect of copying costs etc under section 8 FOIA and paragraph 6 of the Fees Regulations and wishes to pass through the benefit of such charging to the Contractor, the Authority may consider extending these provisions to accommodate this. The Fees Regulations currently allows a rate of £25 per hour to be taken into account in determining whether the relevant threshold for costs under paragraph 4 of the Fees Regulations has been reached.

<sup>13</sup> It is up to the parties to decide whether costs associated with any future change in the Authority's FOIA cost recovery policy should go through the Change procedure.

<sup>14</sup> If the Environmental Information Regulations are relevant to the project, the parties may include broadly equivalent provisions in the Contact dealing with costs and based upon the Authority's policy towards reimbursement of such costs under Section 8 of the Environmental Information Regulations.

Schedule [ ]  
Commercially Sensitive Information

Part 1

Column 1  
Commercially Sensitive Contractual Provisions

Column 2  
For period ending on date below

Part 2

Column 1  
Commercially Sensitive Material

Column 2  
For period ending on date below

### **Appendix 3**

#### **Direct Agreement : Subordination and Related Provisions**

1. A number of projects have been closing in the PFI market where Senior Lenders have sought to add blanket subordination provisions to the form of Authority/Senior Lender's Direct Agreement which, in extreme cases, might act to negate the benefit of the Authority's own Direct Agreements with key sub-contractors and consultants. Authorities have asked for guidance in deciding what provisions may be appropriate.
2. An Authority should have no wish to upset the normal arrangements which Senior Lenders enter into or to upset the Senior Lenders' incentives to take responsibility for monitoring the Contractor (and where necessary to take control of its affairs and subcontracts); equally however it will wish to be able to preserve continuity of services and build, and will not want the benefit of its own step in arrangements negated. There should ordinarily be no conflict between the interests of the banks and of the Authority - both of whom will want to ensure continued service provision.
3. If, however, for some reason Senior Lenders do not choose to exercise their rights under their direct agreements with key sub-contractors and consultants, or having exercised such rights have stepped out, the Authority may wish to exercise its own rights under its own direct agreements to preserve continuity of service, for instance, with a valued non-defaulting sub-contractor. Blanket subordination provisions, preventing the Authority from exercising its rights until the Senior Debt is fully paid out, might preclude this.
4. Set out below is some specimen drafting which Authorities may find helpful. For periods after project termination, where notice periods allowing Senior Funders to step in have elapsed and they have chosen not to step in to sub-contracts, the Authority may step in (though the Senior Funders' own claims against subcontractors may be preserved). In the period prior to project termination before the notice period to Funders may have elapsed, the Authority may agree not to step in to subcontracts but may still wish to be able to fund them to prevent their termination. This is likely to be a remote and short term contingency prior to project termination.
5. An Authority will also wish to ensure that the operational assets which the Authority needs to complete or operate the project pass across from the Contractor to the Authority on a termination – so as to ensure continuity of service. These principles are set out in SoPC 3 and the Senior Lenders' security arrangements should not overturn them. This should not be a concern for the Senior Lenders (whose main interest is in the Termination Sum or the cash sum paid in the market for the project on a default). It is in the interests of the Senior Lenders that the project remains operational and can be sold in the market for its maximum value. Their real security is in the cash flow (or termination sum) rather than in assets. The operational assets involved are not likely to be major items in most projects.

**Subordination Provisions and Related Provisions for Direct Agreement**

**1. AUTHORITY RIGHTS UNDER DIRECT AGREEMENTS [AND APPOINTMENTS]**

**1.1** Notwithstanding any provision in the Authority Direct Agreements [and/or the Appointments] to the contrary, the Authority agrees that, subject to Clauses 1.2 and 1.3, it will not, in respect of any particular Authority Direct Agreement [or Appointment], exercise or seek to exercise any of its step-in rights or other rights under such agreement or until the earlier of:

1.1.1 the Senior Debt Discharge Date; or

1.1.2 the date on which the Agent has given its written consent to such exercise; or

1.1.3 the time when in respect of any such Authority Direct Agreement [or Appointment] either:

(a) the Senior Lenders have failed to exercise any corresponding right to such Authority Direct Agreement [or Appointment] under their own Security Documents and the time for exercising such right has ended in accordance with the terms thereof; or

(b) the Agent has confirmed in writing to the Authority (following any request from the Authority for such confirmation, to which the Agent shall be obliged to respond promptly) that it does not intend to exercise any of its rights under the relevant Security Document or that it has no further claim thereunder; or

(c) the Senior Lenders have stepped in to, or otherwise, directly or indirectly, taken control over the rights of the Contractor under, such agreement (in accordance with their rights under their Security Documents) and then stepped out from, or otherwise relinquished control of such rights under or in connection with such agreement.

**1.2** In addition to its rights under Clause 1.1, where the Contract has not been terminated but a counterparty has a right to terminate its Sub-Contract [or Appointment] for breach by the Contractor of the terms of such Sub-Contract [or Appointment], the Authority may pay directly, or undertake to make a payment directly to the counterparty concerned, amounts due pursuant to the Sub-Contract [or Appointment] and may set off any such sums against any payments payable by the Authority to the Contractor under the Contract, so as to satisfy them pro tanto, provided always that the Authority shall not exercise its rights under this clause 1.2 in respect of any particular such Sub-Contract [or Appointment] in circumstances where the Senior Lenders have

stepped in to ,or otherwise, directly or indirectly, taken control over, the relevant Sub-Contract [or Appointment] and not stepped out of it or otherwise relinquished such control<sup>1</sup>

**1.3** In addition to its rights under Clause 1.1, where the Contract has been terminated, the Authority shall from the Termination Date be able to exercise any of its step-in rights or other rights under or in respect of any of the Authority Direct Agreements [or the Appointments; however, notwithstanding the terms of the Authority Direct Agreements [or Appointments] or any other provisions of this clause [1], each of the relevant Sub-Contractors [or the counterparties to the relevant Appointment] (and any guarantors thereof as relevant) shall remain responsible, and be liable, to the Contractor in respect of all costs, claims, damages, losses and liabilities which shall have arisen out of or in connection with the relevant Sub-Contracts [or Appointments] in respect of the period prior to the Termination Date in relation to which the Agent acting on behalf of the Contractor or the Senior Lenders shall retain the benefit of all and any rights to all such costs, claims, damage, losses and liabilities.

**1.4** Except in accordance with the provisions of Clauses 1.1 to 1.3 (inclusive) and 1.6 the Authority shall not, prior to the Senior Debt Discharge Date:

1.4.1 claim, recover, retain or receive (or seek to claim, recover, retain or receive) any amount under the Authority Direct Agreements [or the Appointments] in respect of a loss for which a Sub-Contractor or relevant counterparty is also liable to the Senior Lenders;

1.4.2 take any action to wind-up, appoint an administrator, seek an interim order appointee (under paragraph 3(b) (Schedule B1) of the Insolvency Act 1986 (as amended)), or sanction a voluntary arrangement (or similar) in relation to the Contractor; or<sup>2</sup>

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<sup>1</sup> This provision deals with the period prior to any project termination, and may include, for instance, a period when the Authority wishes to terminate and has given the required period of notice to Senior Lenders (e.g. 90 or 120 days) under Clause 3. It will be for Authorities or Departments (as relevant) to determine on a Project or sector basis the provisions of this Clause 1.2 and whether or not they think it appropriate to further qualify or limit their ability to set off such payments. Clearly the preferred position for the public sector will be to retain the ability to “set off” any such payment to subcontractors so as to reduce the unitary charge, (and avoid “double payment”) and Authorities will want to achieve this. Senior lenders, may however argue that set off should be limited or qualified, for example, by reference to a period, or made dependent on the Senior Lenders’ own attempts to preserve continuity of service (see below).

“[or unless the Authority reasonably believes that the Senior Lenders are not seeking to preserve continuity of service or build obligation (as relevant) under the relevant Sub-Contract [or continuity of [ ] under the Appointment] with reasonable diligence (or under any equivalent service or build obligation under the Contract)]”

Any further subordination protection in any event should never extend beyond senior debt service (so as to benefit junior lenders or equity) or to impinge on the Authority’s rights to step into the Project Agreement under Chapter 28.

For periods after project termination Authorities will have the benefit of the standard netting and rectification cost provisions of the SoPC 3 termination provisions.

<sup>2</sup> Note: this would be instead of clause 10(b) of the Direct Agreement at Chapter 30 of SoPC3.

- 1.4.3 save with the prior written consent of the Agent, compete on grounds (whether in whole or in part) relating to the Project (by virtue of a claim under any of the Authority Direct Agreements, [the Appointments], the Contract or any other Project Document or otherwise) with the rights of the Senior Lenders on any formal insolvency of any Sub-Contractor, [any counterparty to any Appointment] or the Contractor, nor claim to be subrogated to any rights of any Senior Lenders.
- 1.5 The Authority agrees and undertakes that if it receives any amount in contravention of the provisions of Clause 1.4 above, it will promptly turn the same over to the Agent and pending such payment, hold the same on trust for the Agent and the Senior Lenders.
- 1.6 Notwithstanding the terms of the Contract and Security Documents, the Agent agrees that the Authority may exercise its rights to have transferred to it or its nominee any Unrestricted Assets following the Termination Date and the Agent will not exercise or seek to exercise any enforcement rights, and shall, on or before the date any Unrestricted Assets are transferred to the Authority or its nominee as the case may be release its security, over them.
- 1.7 Notwithstanding any terms of the Financing Agreements, the parties agree and shall, to the extent it is within their power, direct that all insurance proceeds receivable or received by the Contractor under the insurances referred to in Clause [ ] of the Contract (Insurance) shall be paid directly into the Insurance Proceeds Account and applied in accordance with the Contract

## Definitions

### "Authority Direct Agreements"

means [ • ];

### "Senior Debt Discharge Date"

means the date on which all amounts owing by the Contractor to the Senior Secured Creditors under the Senior Financing Agreements have been irrevocably paid in full;

### "Unrestricted Assets"

means those Assets, excluding any revenues or cash balances or claims outstanding at the date of transfer under any Sub-Contract [or Appointment], which are required by the Authority or its nominee or any replacement of the Contractor for the purposes of the construction, operation or maintenance of the Facilities following termination assuming such construction, operation or maintenance is carried out on terms substantially the same as the terms of the Contract;

The following terms have the meaning given to them in the Contract:

### ["Appointments"]

**[“Facilities”]**

The following term shall have the meaning given to it in the Credit Agreement:

**["Security Documents"]**

**Appendix 4 – SoPC Guidance Application Note**

SOPC GUIDANCE	<u>APPLICATION</u>	<u>IMPLEMENTATION LETTER</u>
PFI Core principles and SoPC 3 required drafting specified at paragraph 1.4.4 of SoPC3	Must apply to all PFI Projects	HMT letters of April and July 2004
Clarification of core principles on capital contributions and payments in advance from Part 1 of this document	Must apply to all PFI Projects	HMT letter of December 2005
New Insurance Chapter (24) for SoPC3, revised confidentiality provision (clause 25) and new provisions on change of ownership and shareholder information (clause 17.1.2 and additional limb to any Change of Ownership definition)	Must apply to all PFI Projects where final bids have not yet been submitted as at 1 February 2006	HMT letter of December 2005
New guidance on Direct Agreement priority/subordination arrangements with Senior Lenders and on freedom of information (clause 25 A)	Immediately available for Authorities (but not required drafting)	HMT letter of December 2005
Various other permitted derogations and clarifications specified in parts 2 and 3 of this document	Immediately permissible as Authorities consider appropriate from date of this document	HMT letter of December 2005

All applicable guidance and implementation letters are accessible through the HMT or PUK websites.