

Waste Infrastructure Delivery Programme Contract Management Training



Norfolk County Council

Contract Administration (Part 1)

- Change in Law
- Insurance

8 May 2013 – NAME REDACTED

Housekeeping



- Fire alarms and exits
- Mobile phones/laptops/blackberries off
- Chatham House rules

Agenda



- 08:45 – 09:00 Arrival and tea
- 09:00 – 10:30 Contract Administration (Part 1) – Huw
- 10:30 – 10:45 Tea
- 10:45 – 12:15 Contract Administration (Part 2) – Daryl
- 12:15 – 12:45 Lunch
- 12:45 – 14:15 Authority Change and the Change Protocol – Huw
- 14.15 – 14:30 Tea
- 14:30 – 16:00 Managing Service Performance – Daryl
- 16.00 – 16:15 Conclusions and close

Objectives for the Course



1. To broaden understanding of contractual provisions covered by modules chosen
2. To enhance Authority's ability to act as an intelligent and assertive client which understands best practice in relation to contract management.
3. To identify specific areas when new or amended procedures are required to optimise contract management.

NB The objective is NOT to provide detailed advice about specific contractual provisions or disputes with the Contractor.

Agenda



- Change in Law – 20 mins
 - Exercise – Change in Law – 20 mins
- Insurance – 20 mins
 - Exercise – Insurance – 20 mins



Change in Law – Objectives



For the contract management team :

- To be aware of the process required to deal with a Change in Law
- To be aware of the contractual definitions of different types of Changes in Law
- To understand the different financial implications of different types of Changes in Law



Change in law - background

- Either party may notify the other
- Initiated by Authority raising an Authority Change Notice
- Authority needs to maintain control of process



When can they occur

- Planning – unlikely
- Construction – possible
- Commissioning – possible/probable
- Service delivery – almost inevitable

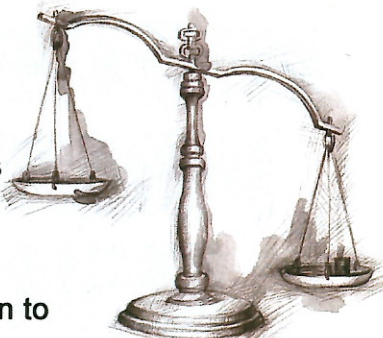
Change in Law

- Contractors concerned about changes to cost base over 25 years
- Changes in Law are a potential cause of changes in the cost base (positive and negative)
- Contractors seek to pass on such cost pressures to customers



Change in Law

- PFI Contracts allow Contractors to pass on cost increases caused by most types of Change in Law – **Qualifying Changes in Law**
- But not if the Change in Law was foreseeable at contract close
- And not if costs can be passed on to other customers



What is a Change in Law ?

- **New Legislation not already published as :**
 - draft Bill or a Bill or draft Statutory Instrument
- **New Guidance**
 - Issued by a Relevant Authority
 - Contractor bound to comply
- **Court judgement**
 - By relevant Court of Law
 - Changes binding precedent



Change in Law – Process (Clause 44)

1. Notify

2. Discuss and agree

3. Obtain funding

4. Adjust Unitary Charge

Step 1 - Notify



One party notifies the other in writing giving its opinion on any:

- changes to Works or Services
- changes to the Contract
- relief from Contractual obligations
- changes in project costs
- capital expenditure

required as a result of the change.



Step 2 - Discuss and Agree (a)



Discussions include reasonable cost mitigation measures by Contractor including:

- minimising cost increases from sub-contracts
- passing on higher costs to other customers
- minimising loss of third party income
- taking avoided costs into account



Step 2 - Discuss and Agree (b)



Contractor also has to show how the Change in Law :

“has affected prices charged by similar businesses to the Project, including similar businesses in which the shareholder or their affiliates carry on business”



Step 3 – Obtain Funding (a)



If change in law requires capital expenditure then:

- the Contractor must demonstrate how any capex is being measured in a cost effective manner, and
- if successful recover the capital cost through an increase in the unitary charge



Step 3 – Obtain Funding (b)



If the Contractor uses reasonable endeavours to secure funding but is unsuccessful then :

- The Council has to pay the capital expenditure upfront; but
- There is no adjustment to the unitary charge

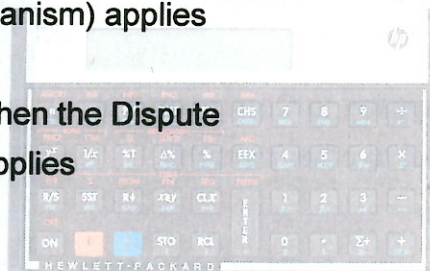


Step 4 – Adjust Unitary Charge



If the unitary charge has to be changed then Schedule 4 (Payment Mechanism) applies

If the parties cannot agree then the Dispute Resolution (Schedule 22) applies

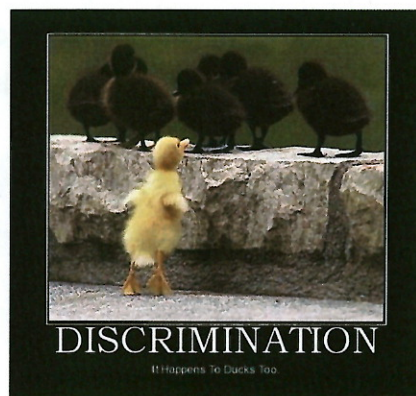


Qualifying Changes in Law

- 3 types:
 - 1) Discriminatory
 - 2) Specific
 - 3) General

Types of Change in Law - Discriminatory

- Applies to project but not to similar PFI projects
or
- Applies to Contractor but not to other persons
or
- Applies to PFI Contractors but not to other persons



Types of Change in Law - Specific



Specifically refers to:

- provision of works/services similar to the project; or
- shareholdings in companies whose main business is providing Works/Service similar to the project



Types of Change in Law - General



Any Change in Law which is not a:

- Discriminatory Change in Law, or
- Specific Change in Law

Types of Change in Law – Waste Law List



Any Legislation or Guidance giving effect to any items listed on the Waste Law List contained in Schedule 14

Exercise 1 (20 mins)



In table groups determine in 15 mins

- (i) Which Changes in Law are solely for the account of the Contractor?
- (ii) For other Changes in Law how are costs apportioned between the parties ?

Feedback (5 mins)

What Changes in Law are solely for the account of the Contractor



- All legislative changes foreseeable at the time of contract
- General Changes in Law involving capital expenditure up to the Services Commencement Date
- Changes to an Environmental Permit by actions or omissions of the Contractor or failure to comply with good practice in relation to EA guidance
- Items on the Waste Law List are exceptions

Cost apportionment between the parties Cumulative capital expenditure



Expenditure	Contractor's Share
£ 0 - £967,742 (inclusive)	100%
£967,743 to £1,935,485 (inclusive)	80%
£1,935,486 to £2,903,228 (inclusive)	60%
£2,903,229 to £3,870,971 (inclusive)	40%
£3,870,972 to £4,838,714 (inclusive)	20%
£4,838,715 to £5,806,475 (inclusive)	10%
£5,806,458 and above	0%

Role of Contract Management Team (a)



- Assess whether the change was foreseeable
- Ensure Contractor mitigates the impact
- Check whether any costs arising from General Change in Law are capital
- Ensure Contractor absorbs Contractors share if relevant



Role of Contract Management Team (b)



- Assess whether Contractor has already had relief though Indexation, Market Testing and Benchmarking provisions
- Arrange for payment (in relation to capital cost) if Contractor unable to secure finance for capital expenditure
- Check calculation of change to Unitary Charge



Further Reading



- Clause 44 – Change in Law
- Clause 23 – Acceptance of Contract Waste
- Clause 34 – Market Testing
- Clause 50 – Third Party Income
- Clause 51 – Off Take Contracts and Third Party Waste Contracts

Further Reading



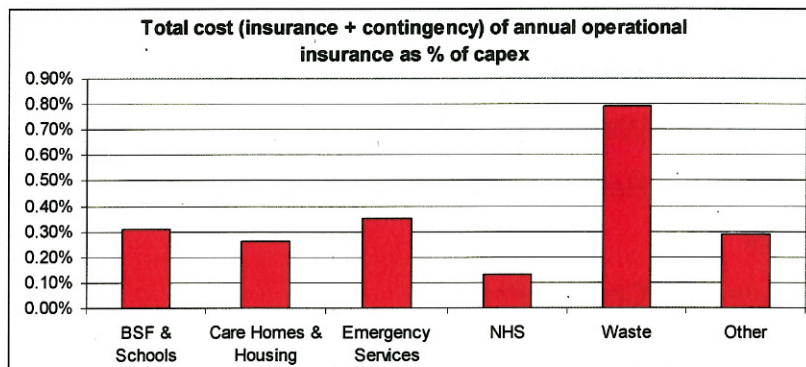
- Clause 60 – Disputes Resolution
- Schedule 1 – Definitions
- Schedule 14 – Waste Law List
- Schedule 19 – Revision of the Base Case and Custody
- Schedule 21 – Change Protocol

Insurance

- Cost of Insurance – 5 mins
- Fixing Insurance – 5 mins
 - Exercise – Contractual provisions on Insurance – 20 mins
- Insurance and Risk Sharing – 10 mins



Cost of Insurance



Fixing Insurance



- Two phases: construction period and operational period
- Construction period insurance arranged at outset (fixed price at PB) and no cost share
- Operational insurances renewed annually (assumed price at PB and put in model)

Exercise (15 mins)

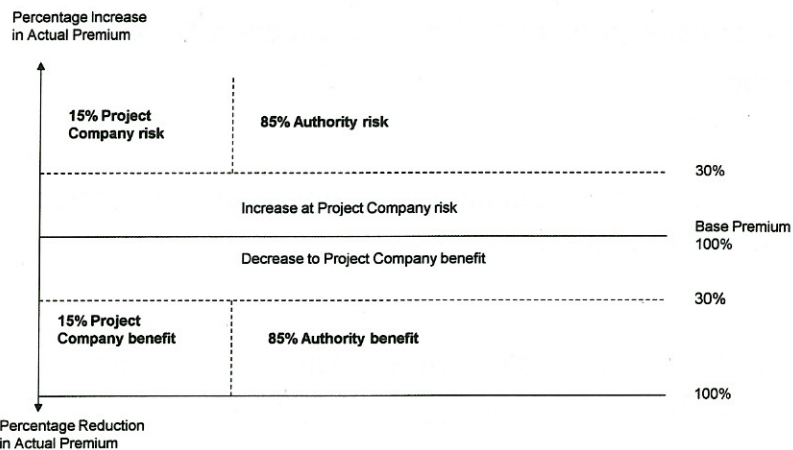


In table groups consider the following:

- When is insurance reviewed under your contract?
- How is the insurance risk shared under your contract?
- Outline the process involved in reinsuring this contract?

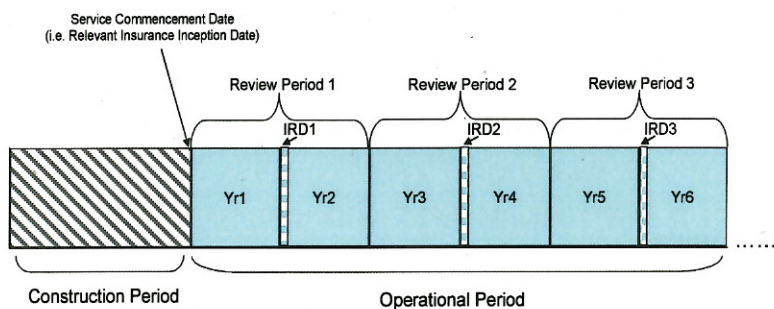
Feedback 5 mins

Insurance sharing mechanism



Premium Risk Sharing for SoPC4 projects

Review every two years starting one year after service commencement



IRD = Insurance Review Date
IRD1 = First Insurance Review Date

Insurance Requires Active Management



- Every two years : Insurance report (jointly addressed)
- For recent years may expect payment of rebate
- Contract management team may want to use their own insurance adviser to assist

Further Reading



- Clause 51 – Off-Take and Third Party Waste Contracts
- Clause 55 – Required Insurances
- Clause 56 – Reinstatement
- Clause 58 – Unavailable Terms and Conditions

Further Reading



- Clause 59 – Insurance Review Procedure
- Clause 77 – Calculation and Payment of Early Termination Payments
- Schedule 10 – Required Insurances
- Schedule 24 – Direct Agreement