

Protective Provisions Task Order 2 Scope

Proposed Scope:

The scope for Task Order 2 (TO2) is set out below using the agreed scope for Task Order 1 as a baseline against which we have incorporated the agreed changes/new items. The scope details not only the specific scope for TO2 but the scope of the overall programme through to May 2022.

Task Order requires formal approval for additional funding however whilst this is being sought the commission will be kept live through an interim extension for 5 months for which there is more than sufficient funding currently approved.

Strategic context

The context to this scope is that currently there is no formalised coordination of standardised Statutory Utilities (SUs) Protective Provisions (PP) templates supporting DCO applications or Asset Protection Agreements (APA) supporting single option schemes. All MP Programme and Schemes engage General Counsel on an individual basis.

As a consequence of Task Order 1 findings, published Statement of Nation Report (SON) and endorsement of General Council, it is recommended using the opportunity to revise the approach being taken with the commission to provide greater value to Highways England (HE).

The proposal is:

1. To adopt the Landscape approach detailed in the SON and develop a suite of standard agreements for DCO projects with a Protective Provisions and Asset Protection Agreement as the main agreement supported by pre-agreed templates for Protective Provisions; SU Works; and HE directly delivered works
2. To focus initially on a single Statutory Undertaker (Cadent) to agree a standard suite of agreements working directly with a number of Project teams.

Benefits:

- Consistency across the current and future RIS portfolio, across and outside RIP, which drives:
 - Familiarity with our DCOs for common stakeholders (PINS, DfT, SUs)
 - Robustness through reducing inconsistencies across individual DCOs
 - Continuous improvement by having single templates held centrally with General Counsel that is the reference for embedding lessons and best practice.
 - Gives standard arrangements of the delivery of all projects inter-related to the PP requirements

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- Addresses the commercial and project management arrangements to be undertaken at the delivery stage
 - Avoids the issue of SU forcing arrangements on HE due to time imperative of delivery
 - Reducing cost and delays of producing multiple individual Protective Provisions for DCOs
 - Providing efficiencies to the project teams by having streamlined documents which enable working in a more efficient manner with the SU's legal teams because they are working to a pre-agreed set of provisions.
 - Advancing work and mutual engagement with top 5 Utilities (i.e., Power, Gas, Water, Drainage & Comms on PP & or APA's prior to scheme-level need, reducing delays in submitting both draft and DCO applications.
 - Opportunity to engage in all other key Utility suppliers to pilot future work on a one stop Protective Provision template with key locked down clauses.
 - Protective Provision Templates will be developed, used and improved – so accepted - by all HE DCO internal/external legal firms
 - Template can be shared with PINS (as managers of the DCO process), and DfT decision-making team on contentious Liability and Indemnity risk issues, to give them advance notice of our strategy and seek feedback ahead of the “heat” of individual schemes entering the process.
 - Opportunity to test content with both internal Programmes and external Utility stakeholders, not happened on past DCOs; lawyers reference external precedence not HE requirements. Opportunity to produce a non-technical Memorandum of Understanding and practical guide for implementing the Protective Provisions template drafting for the DCO, outlining roles & responsibilities, mandatory actions & timeframes, consultation obligations. It will be used by HE staff & suppliers, who could be new at construction. It also could be published externally so the local community understand how Highways England approaches its Protective Provisions Agreements. This supports our Customer Imperative.

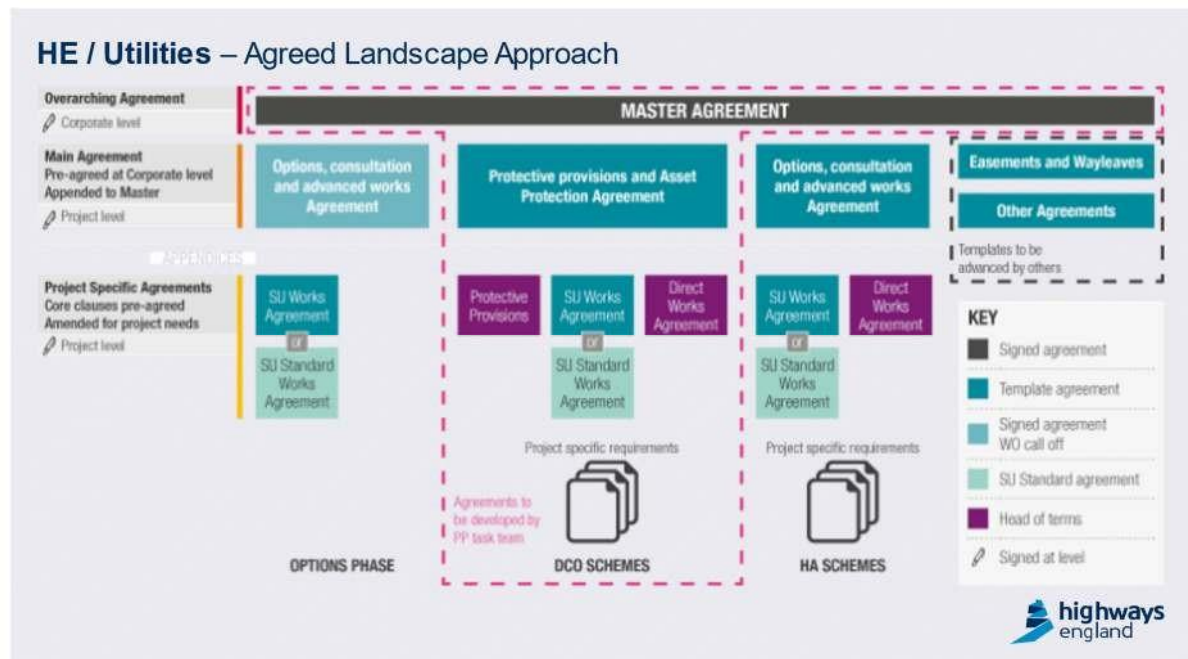
Delivery:

The work will be delivered by the current Statutory Undertakers Consultant MACE supporting our South East Region Statutory Utility engagement. The Protective Provisions templates (and work towards it) would be hosted and developed before rolling out into the SU PCF product.

Scope approach:

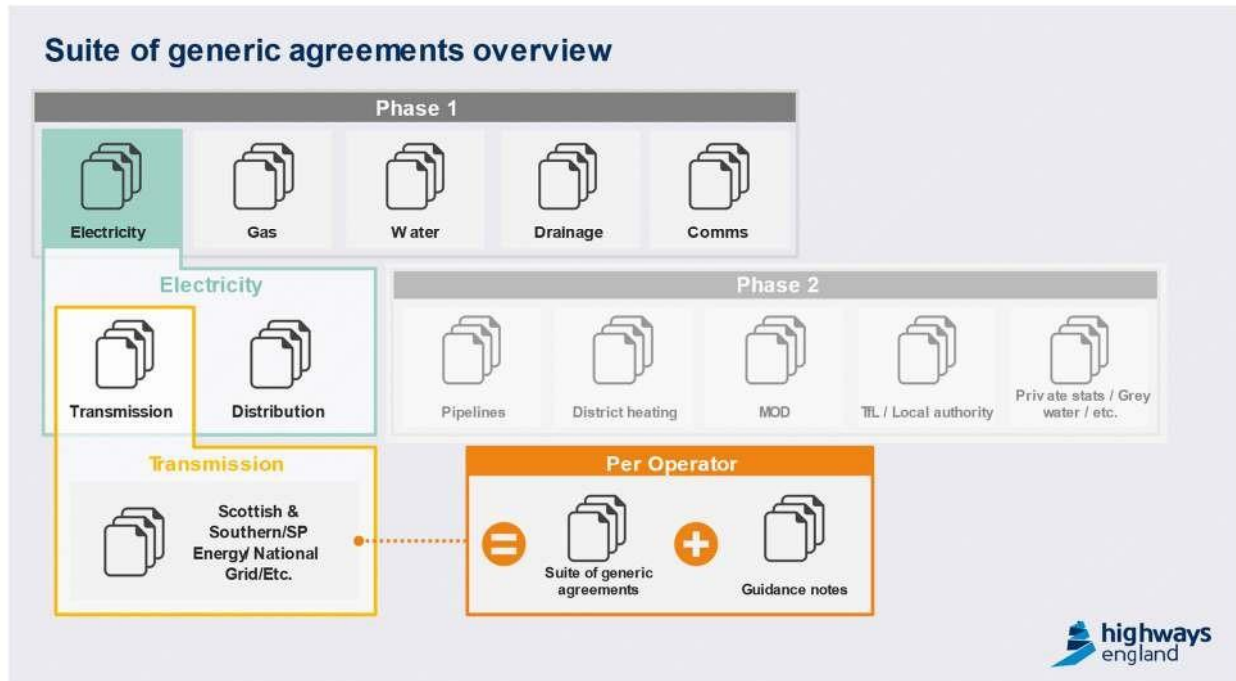
The proposal is:

- To adopt the Landscape approach detailed in the SON (see graphic below) and develop a suite of standard agreements for DCO projects with a Protective Provisions and Asset Protection Agreement as the main agreement supported by pre-agreed templates for Protective Provisions; SU Works; and HE directly delivered works
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- To develop a suite of standard agreements for DCO projects with a Protective Provisions and Asset Protection Agreement as the main agreement supported by pre-agreed templates for Protective Provisions; SU Works; and HE directly delivered works
- To focus on a single Statutory Undertaker (Cadent) to agree a standard suite of agreements (see the graphics below)
- As these are developed the proposal would be to progress to tackle the remaining “usual suspects” i.e., Power, gas, water, drainage, comms as these providers are the ones that most frequently affect most projects
- The providers approached would be prioritised initially by frequency of impact then by cost of impact. This may be facilitated by scoring each provider with an “impact factor” (to be developed)
- The idea would however be to re-prioritise on an ongoing basis as dictated by agreement of the perceived easy wins vs slow burners vs value gain with the philosophy being to start slow burners off asap then fill the gaps with easy wins
- As the response times stretch out, we would start looking at the less frequently affected providers applying the same prioritisation philosophy as with “usual suspects”
- The intention would be to develop the Guidance notes as soon as sensible. This would start with a specific set of notes for the 1st ones and develop these as a template for subsequent providers.
 - The philosophy would be to review on an ongoing basis with quarterly go/no go governance reviews to assess if the progress being made is acceptable and if the project is achieving acceptable value for money

The graphic below is the final vision, agreements in place with all SUs where Highways England have interventions requirements.



Timing:

- April 2021 - Approval of additional IDC funding
- April 2021 - Appointment of Statutory Undertakers Consultant Mace for TO2
- June 2021 - Governance review – Go/No Go Gateway
- Sept 2021 - Governance review – Go/No Go Gateway
- Dec 2021 - Governance review – Go/No Go Gateway
- Q3/Q4 2021 - Partially agreed versions of the Cadent agreements are anticipated to be rolled out as early as the 3rd & 4th quarters of this year as they are developed in line with the planned statement of common ground dates for the upcoming DCO's.
- April 2022 - Revised draft Protective Provision templates agreed to be rolled out progressively as developed

Breakdown of Remaining Scope deliverables & forecast cost:

The current forecast budget is **£601,532 + £150,003** in legal fees **for 2021 / 2022 giving a total cumulative estimated value of £751,535**. A proposed 9-month task order (TO2) is proposed to be issued for the second phase to the value of **£339,539**. In addition, a potential further draw down of the legal fees of £69, 438.60 is forecast. The value of the interim instruction for TO2 whilst full funding approval is being sought is **£221,689** plus a draw down allowance for legal fees of **£36,105.27**.

Governance and Sponsorship go/no go gateway reviews will be held every 3 months to assess if on target to achieve the agreed targeted outcomes.

The budget is a ceiling that is likely to be reached. However, in view of the impending preparation of individual scheme Protective Provision DCOs and proposal for a collaborative approach for the current “working drafts”, the costs then will revert to individual project budgets in the improvement and maintenance of the working draft.

The breakdown of outputs and proposed scope of the MACE supplier & HE-led activities are covered in the notes and graphics below.

Workstream 1

- Information gathering, analysis and formulation of strategy with the following specific deliverables to be assessed at the 1st “Governance Review”:
 - Strategic Programme 4 to 6 weeks into task
 - State of the Nation report including:
 - fully defining scope of the commission
 - progress to date
 - proposed action going forward
 - the strategy/process for how it will be achieved
 - the stakeholders involved together with a stakeholder management plan.
 - There will also be an update against proposed spend and definition of next gateway review deliverables.

Workstream 2

- Develop generic documents as per Landscape including:
 - Cadent specific agreements
 - Generic agreements modified for statutory undertaker’s consultation frequently affected by HA DCO projects (Power, water, drainage, comms)
 - Tailor-made draft standard suite of agreements for SU’s as above.

Workstream 3

- Generic suite of agreements for other statutory undertakers affected by DCO & HA projects
- Tailor-made draft standard suite of agreements for other statutory undertakers affected by DCO & HA projects

Workstream 4

- Formulation of guidance notes for each affected Statutory Utility Provider
- Task Order 2 Key Deliverables: Snapshots of the Cadent suite of agreements as agreed up to that point as the statement for common ground is reached for each project
- Guidance notes snapshots to accompany the partially developed agreements as above □
Generic suite of agreements for power, water, comms, foul drainage □ Summary progress reports in preparation for Governance reviews.

Risks of current situation

- Delays to RIS timescale caused through lack of guidance available to PMs and lack of General Counsel capacity in managing bespoke Utility Protective Provisions □
Delays due to project teams not understanding Protective Provisions.
- Inconsistency between PP's produced across Major Projects programme. □
Internal support not available for SU teams.
- Duplication (added time and cost) of going to expertise sub-contracted through external lawyers and supplier.
- Significant risk to programme delivery without appropriate support/guidance in place for project teams.
- Establish and stay internally joined up with others negotiating on HE behalf with regards to PPs and other agreements.

Item	Notes on proposed approach	Estimated costs
Protective Provisions schedule & side agreements	Refer to option 4 as published within the State of the Nation Report.	Included within Mace scope
Non-technical guide	<ul style="list-style-type: none"> • Production of a non-technical “user” (+ potentially public facing) implementation guide to the Protective Provision within a DCO. The aim of the output would be that project teams (including DIP’s and potentially new project teams) and public can understand the need for Protective Provisions, and that HE can implement the DCO with minimal risk if not familiar with drafting • For each article / requirement including in guide, it should confirm <i>briefly</i>: <ul style="list-style-type: none"> o Purpose (couple of sentences) o Scope (couple of sentences) o Legal obligations (e.g., actions, timescales, dependencies) • This must evolve at same time as drafting items below, so consultees (DCO team, SU team, SU’s, etc.) can understand drafting. • User-friendly format needs to be considered, e.g., tables & (for requirements / PPs) flowcharts rather than pure text (e.g., Requirements Flowchart) 	Included within Mace scope

Profile Spend

Redacted per Freedom of Information Act 2000, S43(2)

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Author: Redacted per Freedom of Information Act 2000, S40(2) 19/03/2020