

WEST MIDLANDS FIRE AND RESCUE AUTHORITY

EXECUTIVE COMMITTEE

14th DECEMBER 2009

1. TRANSFER OF OWNERSHIP OF NEW DIMENSION ASSETS

Joint report of the Chief Fire Officer and Clerk.

RECOMMENDED

THAT, based on the current response received from the Communities and Local Government (CLG) in relation to the concerns raised by the Authority in April 2009 (Appendix 1), the legal advice received in relation to the low level of risk involved with regard to the revised Transfer and Terms of Access Agreements (Appendices 2 and 3) and the supportive position of the Chief Fire Officers' Association (CFOA) in relation to the future management and maintenance of New Dimension Assets, the Committee approve the proposed transfer of New Dimension Assets (NDAs) to the Authority from CLG to the Fire Authority, which is anticipated to take place early in 2010.

2. PURPOSE OF REPORT

- 2.1 This report is submitted to seek the Committees views as to whether or not it is minded to formally agree to the transfer of the NDAs that are presently hosted by the Authority based on the response subsequently received from CLG relating to the concerns that they had raised in April 2009.
- 2.2 This report also seeks to provide the Committee with information as to the current supportive position and advice of CFOA to the Service with regard to the proposed transfer of NDAs.

3. **BACKGROUND**

- 3.1 Members may recall that in April 2009 the Authority responded to a consultation document issued by CLG relating to the proposed transfer of New Dimension Assets (NDAs) to the FRS. The response, although agreeing in principle to the proposed transfer, identified a number of areas of concern about which the Authority sought clarification to enable them to make an informed decision as to whether or not they would formally agree to the transfer of the NDAs to the Service.
- 3.2 As a point of clarity, NDAs are currently owned by CLG. A number of options relating to the future ownership of the New Dimension assets have been explored by CLG, but in their opinion the one which makes the most sense for the FRSs is that ownership of these new resilience assets be transferred to the FRSs.
- 3.3 CLG has now provided a response in relation to the areas of concern highlighted by this and other Fire and Rescue Authorities. This response is attached as Appendix 1.
- 3.4 As a consequence of the above, CLG is now seeking formal sign up from FRAs, with a view to setting the date for transfer of the New Dimension Assets to the FRAs in early 2010. FRAs are invited to consider the final draft of the transfer agreement, and to indicate to CLG by 31st December 2009 whether they are content to sign. Fire and Rescue Service Circular 59/2009 has set out the position of the CLG with regard to this matter.
- 3.5 Advice has been sought from the Authority's legal advisors in relation to the response provided by CLG to ensure that the matters raised by the Authority have been fully addressed. This opinion is provided at Appendix 2 of the report.
- 3.6 The Authority's Legal Advisors, based upon the information and assurances that have been provided in the response received from CLG, are satisfied that the issues and concerns raised in relation to the Transfer Agreement have been addressed with the exception of the points which are detailed in Appendix 2.

- 3.7 Our legal advisors have reviewed the copy of the Terms of Access Agreement relating to the maintenance of the NDAs via the VTCS/ Firebuy Contract. Their opinion in relation to this agreement is provided at Appendix 3. As can be seen no significant issues have been raised.
- 3.8 In terms of value for money Firebuy is establishing and managing the framework contracts to cover the majority of New Dimension equipment to ensure VTCS, and therefore CLG and the FRAs, receive the best price from suppliers.
- 3.9 During the first year of the contract (September 2008 to October 2009) the total costs that FRAs in England would have had to pay for 'unfair wear and tear' had they not been met by CLG was £118k; of which this Authority would have been recharged £5.977k. Under the transfer arrangements these charges will become the responsibility of FRAs
- 3.10 Clarity has been provided as to the funding issues relating to the replacement of ND Vehicles overtime. CLG has confirmed that the National Assurance Body which is the Fire and Rescue Service National Resilience Board, led by the Chief Fire Officers' Association (CFOA), has already been provided with £1.5m, which will continue to be paid on an annual basis, to deal with routine upgrades and changes to the ND Fleet. With regard to the replacement of the ND Vehicles CLG has restated that whilst this will be a decision for the Government of the day, they would expect major refreshes to be tied to a spending review so as to be able to identify the resources required to complete this task.
- 3.11 CFOA remains supportive of the sector- led approach to managing and maintaining ND assets that support national resilience. They are of the view that this will ensure that ND capability can be fully integrated into FRS core business and, from an FRA perspective, will ensure that both control and ownership lies with those bodies charged with protecting their communities.
- 3.12 In relation to the proposed transfer of ownership of the ND Assets, CFOA supports the stance taken by this and other FRAs to seek their own advice to satisfy themselves that any associated risk can be managed adequately before consenting to the transfer.

- 3.13 Notwithstanding the above, the Association is resolute that the responsibility for future provision of national resilience capability continues to lie with Government and that it's funding should be both adequate and transparent to the public and FRAs. Future funding should not be subsumed into the Revenue Support Grant (RSG) where transparency around the quantum and allocation will be lost.
- 3.14 CLG has confirmed that it remains committed to future funding of the New Dimensions project for the Comprehensive Spending Review (CSR) 07 period and will continue to pay Section 31 grants to FRAs during this time to meet the net additional costs.
- 3.15 Notwithstanding the funding position set out at paragraph 3.14 above, CLG has stated that it will look to channel any future funding through a different mechanism to the current Section 31 Grant System. However, they also confirmed that, whatever method was eventually proposed to replace the Section 31 grant mechanism, the concerns of this and other Authorities would be considered prior to implementing any change.

4. **EQUALITY AND DIVERSITY IMPLICATIONS**

An initial Equality Impact Assessment has been carried out and a full Impact Assessment is not required.

5 **LEGAL IMPLICATIONS**

- 5.1 The opinion of the Authority's Legal Advisor in relation to the response provided by CLG to ensure that the matters raised by the Authority have been fully addressed is provided at Appendix 2.
- 5.2 With regard to the Terms of Access Agreement relating to the maintenance of the NDAs via the Vosper Thorny Croft Critical Services (VTCS)/Firebuy Contract, our legal advisors opinion is provided at Appendix 3.

6. **FINANCIAL IMPLICATIONS**

- 6.1 CLG currently provide New Burdens Funding of approximately £960k to the Authority by way of a Section 31 Grant, which covers New Dimension training, consumables, USAR Team staffing (36 personnel) and the provision of the search and rescue dog.

- 6.2 As indicated at paragraph 3.15, CLG is seeking to channel any future funding through a different mechanism to the current Section 31 Grant System required to support New Dimension Assets transferred to FRAs. As these proposed funding arrangements have yet to be agreed, no clarity can be provided to the Authority as to the level of any additional funding that may be received as an outcome of proposed changes to the RSG formula.
- 6.3 If the Authority was not prepared to sign up to the transfer of New Dimensions Assets, the CLG could transfer the Assets to another FRA which is willing to take ownership and maintenance obligations, in which case the Authority would lose the current £960k annual grant.

BACKGROUND PAPERS

Fire and Rescue Service Circular 16/2009

Fire and Rescue Service Circular 59/2009

Transfer of Ownership of New Dimension Assets Fire Authority Report
20th April 2009

VIJ RANDENIYA
CHIEF FIRE OFFICER

SUE PHELPS
CLERK

CLG Response to Authority's Concerns

Transfer of Ownership of New Dimension Assets

- **Clause 2 of the Transfer Agreement (fitness for purpose)**

The maintenance contract addresses fitness for purpose in terms of condition of the equipment - the maintenance contractor, VTCS, are responsible for maintaining the equipment in its current condition. You highlight the separate issue of suitability for intended use/design issues. The New Dimension fleet is fit for purpose in this sense now, because it is assessed as meeting the requirements to deal with the top risks faced by the country, as determined by the Cabinet Office led Capabilities programme. That the programme, and the Department, continues to monitor how New Dimension meets the top risks as they evolve over time. We envisage that a major refresh of equipment will be needed every 5-6 years, further details on this are provided below. At those times we would expect to consider across the board the fitness of purpose of the fleet.

- **Clause 3.1 ('the Equipment')**

You have asked that clause 3.1 of the draft Transfer of Ownership Agreement refer to "the Equipment" rather than "the Assets" as currently drafted. The Department agrees to amend this in the next version of the Agreement.

- **Clause 5 (request from an indemnity)**

General Departmental policy prevents us providing an indemnity as described. However, we have previously noted that where there is any liability arising out of this transfer agreement, CLG undertakes, acting in good faith, to consider how that liability should be met and to act in a manner consistent with a reasonable public authority. You ask specifically about claims arising from design issues. Given the design of New Dimension equipment and vehicles has been developed by CLG we would need to consider any resulting capability design flaws. Furthermore, any inherent design issues will have to be managed throughout the New Dimension fleet and hence, could not be dealt with by an individual FRS.

- **Clause 6 (request for documentation)**

As previously advised CLG has already provided the vast majority of necessary documentation associated with the New Dimension project to the CFOA-led Assurance Body (the National Resilience Assurance Team) and has, and will continue, to respond to any further requests from them for further documentation or action on outstanding issues. Where FRSs require documentation associated with New Dimension they are able to request this direct from the Assurance Body. Given this, the Department considers the current wording of clause 6 surrounding the request for documentation to be sufficient as it is. Nevertheless, if there is any specific documentation that your FRS is particularly concerned about it may be worth letting me know what this is.

- **Clause 7.4 (definition of interoperability)**

In terms of defining interoperability the starting point is that all New Dimension equipment was bought to the same specification and standard, and is maintained under the national maintenance contract to the same standard. It is a requirement that all FRAs taking ownership of the assets must use this maintenance contract. With training, all FRS personnel using New Dimension equipment have been trained to a common standard, and as an operational matter, it is for the Assurance Body to maintain interoperability in this respect. This is a key part of their role, and obviously, from both operational and health and safety perspectives, is in the national collective interest as well in the interest of all FRSs. In regard to an actual definition of the term 'interoperability' to be outlined within the Transfer Agreement, we are currently discussing this with lawyers and if necessary, will be included within the next version of the Agreement.

- **Schedule 3, clause 1 (CLG approval)**

The purpose of this clause is to ensure the continuing interoperability of the New Dimension assets over the 16 year life of the Transfer Agreement and because the assets need to remain ready to respond to a national incident in a cohesive and unified way. For example, it would not be in the national interest if individual FRSs changed the specification of the equipment, jeopardising interoperability. Alternatively by relocating assets, this may create gaps in coverage across the country and mean that some places could not be reached by any New Dimension assets within set timescales. Therefore CLG approval needs to be sought on these essential issues, to maintain the national resilience capability overall.

- **Schedule 3 clause 1.4 (Decommissioning 'Retained Equipment')**

The retained equipment is reference to the Firelink radios and its accompanying equipment which will be fitted in each New Dimension vehicle. Ownership of the Firelink equipment will not be transferred as part of the New Dimension Transfer Agreement and hence will be 'retained'. The specific reference to decommissioning the retained equipment relates to when the Firelink radios need to be decommissioned (as set out in the Firelink contract). We are currently in discussion with the Firelink project about what this equipment comprises and in regard to the clause on decommissioning. Final details on this will be included within the next version of the Transfer Agreement.

- **Request for maintenance contract documentation**

A number of FRSs, including the West Midlands, have requested the contractual documentation surrounding the maintenance contract for New Dimension assets. As noted above, in signing up to the transfer of ownership agreement, FRAs will also be obliged to sign up to the maintenance contract (the Prime Contract). The contract itself is between VTCS and Firebuy (the contract manager) and the services provided by this contract are accessed through the Terms of Access. CLG, as the current owner of the New Dimension assets have initially signed the Terms of Access to ensure that the vehicles and equipment are being maintained. However, upon transfer of the assets it is a condition that FRSs will use the maintenance contract and hence, each FRA will need to individually enter into the Terms of Access themselves. A copy of the Terms of Access is enclosed.

Please be aware that the Prime Contract itself is commercial in confidence and therefore its circulation requires to be closely safeguarded. Copies will only be available from 1 August 2009 onwards and in obtaining a copy you may be asked to enter into a confidentiality agreement. Please note that copies of the contract will only be sent via secure fire authority email accounts.

- **Funding Issues**

Your final queries concern funding for New Dimension in the long term. The Department set out the new burdens funding for New Dimension for the full CSR period in Circular 36/2008 last summer. On future commitment to funding beyond the CSR period, you will be aware that the Government cannot commit future parliaments.

However, the Department remains fully committed to providing new burdens funding for the net additional costs to fire authorities arising from New Dimension. Currently, the funding is provided through annual s31 grants, as set out in the Circular, and we will continue to pay s31 grants during this CSR period. In line with the Government's and the Local Government Association's general policy, in the future we would wish to provide funding on a more flexible basis.

Several authorities responding to the consultation expressed concern over any move to Revenue Support Grant (RSG, block grant), relating to distribution, the situation of 'floor authorities', and transparency. Similar concerns have been overcome for the many special grants which have transitioned to general grant in the past. Any transfer into RSG would be looked at together with the FRAs themselves, through the normal Formula Review process, and with exemplifications of what a transfer would mean to each individual FRA. An alternative option may be to transfer the grants into Area Based Grant, a single s31 grant paid to the FRAs for a number of different purposes. In due course, when we consider options for the future funding mechanism, we will have regard to authorities' concerns that we are still in a transition phase, that the maintenance contract has been going for only a short while, and their wish to build up a pattern of spend over a period of time.

Finally towards the end of your letter you note that once the New Dimension assets are transferred to the fire authorities, funding for replacement of vehicles and equipment will also be the responsibility of the FRA from its own budget. We recognise that some vehicles and equipment, over time, will reach the end of its life and there are two ways that we intend to deal with this. As you may be aware, the Assurance Body has been provided with an annual sum of money, around £1.5m, to deal with routine upgrades and changes to the New Dimension fleet. Secondly, we envisage that every 5-6 years there will be a need for a major refresh, which will look across the board at the capabilities, and see if they may need to change in the light of new technology, the changing risk environment, or the need to replace worn out vehicles. While a decision on this will always be a decision for the Government of the day, we would expect such major refreshes to be tied to a spending review so as to be able to identify resources to take forward the work.

Where vehicles have been used extensively by the FRS on local incidents and their lifespans are unduly shortened, we would wish to discuss with the FRS concerned, and the Assurance Body, how the replacement costs should be fairly apportioned.

There is recognition that it may not be possible to replace some assets at the end of their lives, in which case the maintenance contractor would be responsible for the collection and disposal of the obsolete/irreparable vehicles.

I trust that the above points answer your concerns. In terms of going forward, we would hope to be in the position whereby FRAs have formally signed up to the Transfer of Ownership Agreement by October, with the actual transfer to take place slightly later. In regard to next steps, we will be writing to you via fire service circular shortly providing a final draft of the Transfer Agreement, and I do hope that your authority will feel able to sign.

Legal Opinion to Response provided by CLG relating to the Transfer Agreement

Our legal advice focuses on Clauses 2 and 5 of the transfer agreement specifically:

- Whilst CLG state that the New Dimension Assets are currently deemed by themselves as 'fit for purpose', they are unwilling to issue a warranty to this effect to be contained within the transfer agreement. Following consultation between our legal advisor and WMFS officers this is deemed to be a low risk.
- CLG are not able to issue any form of indemnity to the Authority in respect of the transfer agreement. The department undertakes to 'act in good faith' should any liability arise, and to act 'in a manner consistent with a reasonable public authority'. Again this is deemed to be a low risk.

Legal Opinion:

Terms of Access Agreement

The Terms of Access Agreement (TAA) provided for a 3 way contract between the Authority, Firebuy Ltd and VT Critical Services Ltd (the 'Prime Contactor'). The agreement has a dispute resolution and liability procedure contained therein, it should be noted that the Authority is bound to accept any agreement between Firebuy and the Prime Contractor in respect of disputed issues.

The Authority is also liable for maintenance costs due to wear and tear arising from the use of ND Assets for FRA purposes; this is termed **'unfair wear and tear'**. The types of wear and tear for which FRAs will be liable has previously been outlined in Fire and Rescue Service Circular 52/2008.

The term unfair wear and tear refers to a vehicle or item of equipment becoming non-serviceable as a result of the action or inaction of the FRS; to the extent that the relevant item has to be changed prematurely or fixed due to breakage, damage or accelerated wear.

As an example, items that this category covers:

- Lenses, mirrors, number plates, body panels including wings, mud flaps, upholstery and seating and other internal parts and fittings; fitted operational equipment – pumps, masts, radios etc.
- Brake components, body panels and transmission systems due to vehicle bottoming on soft ground.
- Engine and transmission repairs due to the failure of the FRA to comply with the FRA responsibilities in relation to routine checks, maintenance and the like.
- All costs associated with the FRA losing keys or other items from the vehicle inventory.
- All costs associated with repairs to fuel systems due to filling vehicle or equipment tanks with the wrong type of fuel.

- Misuse or careless use of equipment during FRS training or operational incidents.
- Driver error accidents.