



MINISTRY OF DEFENCE

**MOD Private Finance Unit
Guidance Note
MOD PFI Project Agreement
Derogations Process**

Version 1.1

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DOCUMENT CHANGE RECORD

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Issue No	Details Of Amendments Made	Amended By	Date
A	First draft for internal review.	G N Oates	Nov 08
B	Second draft for review.	G N Oates	May 09
1	First Issue	G N Oates	May 09
1.1	Change to PFU contact details	G N Oates	Sep 09

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Procedure For Obtaining Derogations To The MOD PFI Project Agreement

Constraints

1. The MOD PFI Project Agreement provides the baseline draft contract document for MOD acquisition teams involved in an acquisition under the Private Finance Initiative (PFI).

Authoritative Guidance Summary

2. This note provides guidance to MOD acquisition teams on the background to the development of the MOD PFI standard form project agreement and the procedure for seeking agreement to make any changes to it.

Authoritative Guidance

3. The MOD PFI Project Agreement version 1 (MOD PAv1) provides a standard template draft contract for all MOD acquisition teams pursuing an acquisition involving private finance. It reflects the HMT's Standardisation of PFI Contracts version 3 (SoPC3) and incorporates HMT approved derogations to SoPC3 reflecting MOD's experience in PFI for defence.
4. Although SoPC4 has since been published, no revision has yet been made to MOD PAv1 to reflect this. Therefore in addressing derogations to MOD PAv1 acquisition teams should work with the MOD Private Finance Unit (PFU) to incorporate any impact SoPC 4 has on the derogations sought.
5. MOD PAv1 contains Core Clauses¹ and Optional Clauses². If, in developing the draft contract, an acquisition team considers it necessary to make amendments³ to either the Core Clauses, or any Optional Clause that are considered relevant for a particular project, these amendments must be discussed with and submitted to the PFU, through the acquisition team's PFU Project Support Officer, for approval.
6. The procedure for obtaining this approval consists of 2 phases the details of which are set out in the flowcharts at Annexes A (for Phase 1) and B (for Phase 2) supplemented by the text below.
7. Once the draft contract based on MOD PFI PAv1, and incorporating any approved derogations, has been issued as part of an ITT/ITN it should be non-negotiable, except where it allows customisation or where the ITT/ITN expressly invites bidders to submit variant bids⁴.

¹ Core Clauses – these compulsory clauses, as described in the MOD PAv1 Guidance Note

² Optional Clauses - these can be deleted if inappropriate to a particular project, as described in the MOD PAv1 Guidance Note

³ except where customisation is specifically allowed

⁴ Any proposal to invite variant bids requires the prior approval of the PFU.

Procedure For Obtaining Derogations To The MOD PFI Project Agreement

Phase 1: Procedure for obtaining derogations from SoPC3

Set out below, and reflected in the flowchart at Annex A, is a step by step procedure for obtaining derogations from MOD PAV1/SoPC3:

- Step 1 Is the acquisition team following a PFI procurement route? If **YES** then move to Step 2. If **NO** then, even where MOD PAV1 is being used as the basis of a draft contract for a non-PFI procurement, no action is required in respect of approval of any derogations from a MOD PAV1 based draft contract.
- Step 2 Does the draft contract vary from SoPC3 required drafting?
- Step 3 If **NO** then acquisition team to confirm this in writing to the PFU, together with a copy of the latest version of their draft contract and confirmatory statements from the acquisition team's external legal advisers. No need to involve Partnerships UK (PUK) but need to consider applicability of Phase 2 process.
- Step 4 If **YES** then the process is as follows:
- a. Acquisition team, PFU and PUK to meet to determine level of PUK input required.
 - b. Acquisition team to request the external legal advisers to prepare the "derogations papers" consisting of:
 - i. a summary paper providing the background and history of the project for which derogations are being sought;
 - ii. a derogations matrix⁵ detailing where the drafting in the draft contract is not compliant with MOD PAV1 and, where relevant, not compliant with SoPC 3, with a clear project specific reason for the derogation; and
 - iii. details of the required timetable.
 - c. Acquisition team to contact PFU to set up interface between the acquisition team, external legal advisers and PUK, provide documents requested in (b) above, together with the latest version of the draft contract, and establish details of the PUK resources required and timetable.
- Step 5 PFU review the derogations papers and provide comments to the acquisition team and arrange for PUK resources to be assigned.

⁵ Matrix format available from PFU

- Step 6 Acquisition team reviews PFU comments, revises derogations matrix if necessary, continues to negotiate compliance with SoPC3 to reduce derogations, and seeks PFU endorsement of revised derogations matrix.
- Step 7 Once PFU has endorsed finalised derogations matrix, then:
- a. PFU sends finalised papers to PUK.
 - b. PUK reviews papers and provides response to the acquisition team copied to PFU.
 - c. Acquisition team consider PUK comments and address through further negotiations and/or provide additional project specific reason.
 - d. Acquisition team resubmits papers to PUK, via PFU.
 - e. PUK confirms that project specific reasons for requested derogations are likely to be acceptable to HMT.
 - f. PUK submits papers to HMT.
 - g. HMT endorses derogations.

Procedure For Obtaining Derogations To The MOD PFI Project Agreement

Phase 2: Procedure for obtaining derogations from MoD PFI Project Agreement v1 (non SOPC 3 based drafting)

Set out below, and reflected in the flowchart at Annex B, is a step by step procedure to obtaining derogations from the non-SoPC 3 based drafting in MOD PAv1:

- Step 1 Does the draft contract comply fully with MOD PAv1?
- Step 2 If **YES** then acquisition team to confirm this in writing to the PFU, together with a copy of the latest version of their draft contract and confirmatory statements from the acquisition team's external legal advisers.
- Step 3 If **NO** then does the draft contract vary from MOD PAv1 SoPC 3 required drafting?
- Step 4 If **YES** then move back to Phase 1 derogation process. If **NO** then does the draft contract comply with SoPC 3 required drafting but vary from MOD PAv1 non-SoPC 3 drafting?
- Step 5 If **YES** then move to Step 6, but no requirement to involve PUK or HMT as all MOD PAv1 drafting has already been approved by PUK and HMT. If **NO** then no action is required as no derogations from MOD PAv1 are required.
- Step 6 The internal MOD process to approve derogations from MOD PAv1 is as follows:
 - a. Acquisition team to request the external legal advisers to prepare the "derogations papers" consisting of:
 - i. a summary paper providing the background and history of the project for which derogations are being sought;
 - ii. a derogations matrix detailing where the drafting in the draft contract is not compliant with MOD PAv1 with a clear project specific reason for the derogation; and
 - iii. details of the required timetable.
 - b. Acquisition team to contact PFU to set up interface between the acquisition team and external legal advisers and provide documents requested in (a) above, together with the latest version of their draft contract.
- Step 7 PFU review the derogations papers and provide comments to the acquisition team.
- Step 8 Acquisition team reviews PFU comments, revises derogations matrix if necessary, continues to negotiate compliance with MOD

PAv1 to reduce derogations and seeks PFU endorsement of revised derogations matrix.

Step 9 Once PFU has endorsed finalised derogations matrix then:

- a. PFU sends finalised derogations matrix to relevant MOD department with responsibility for the policy on that particular area (eg DIPR) of the MOD PAv1.
- b. Relevant MOD department reviews derogation and either approves derogation or arranges meeting with acquisition team and PFU to resolve outstanding issues.
- c. Relevant MOD department endorses finalised position relating to derogation and confirms to acquisition team and PFU.

Additional Information

Further Reading

HMT Standardisation of PFI Contracts (SoPC) Version 3

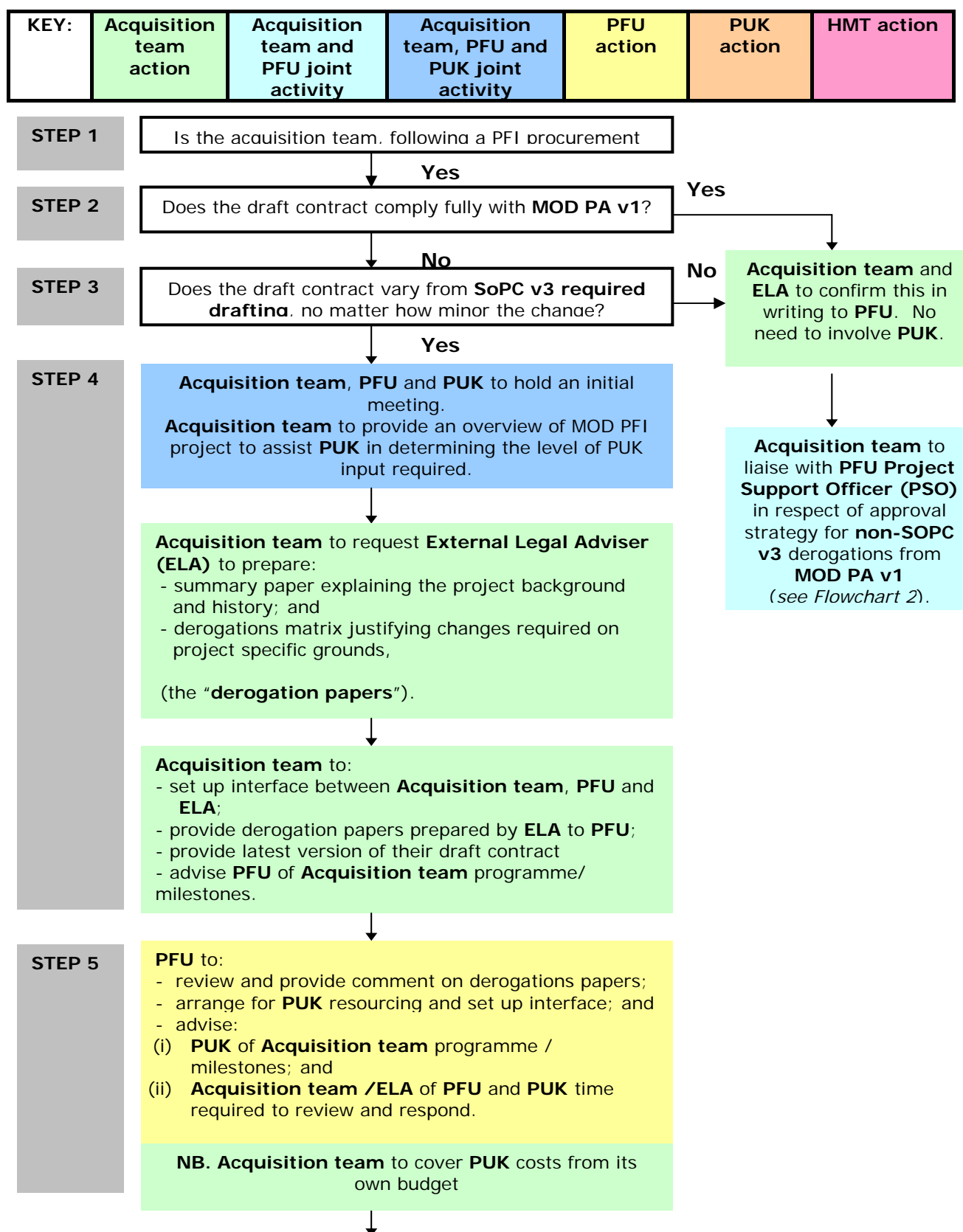
HMT Standardisation of PFI Contracts (SoPC) Version 4

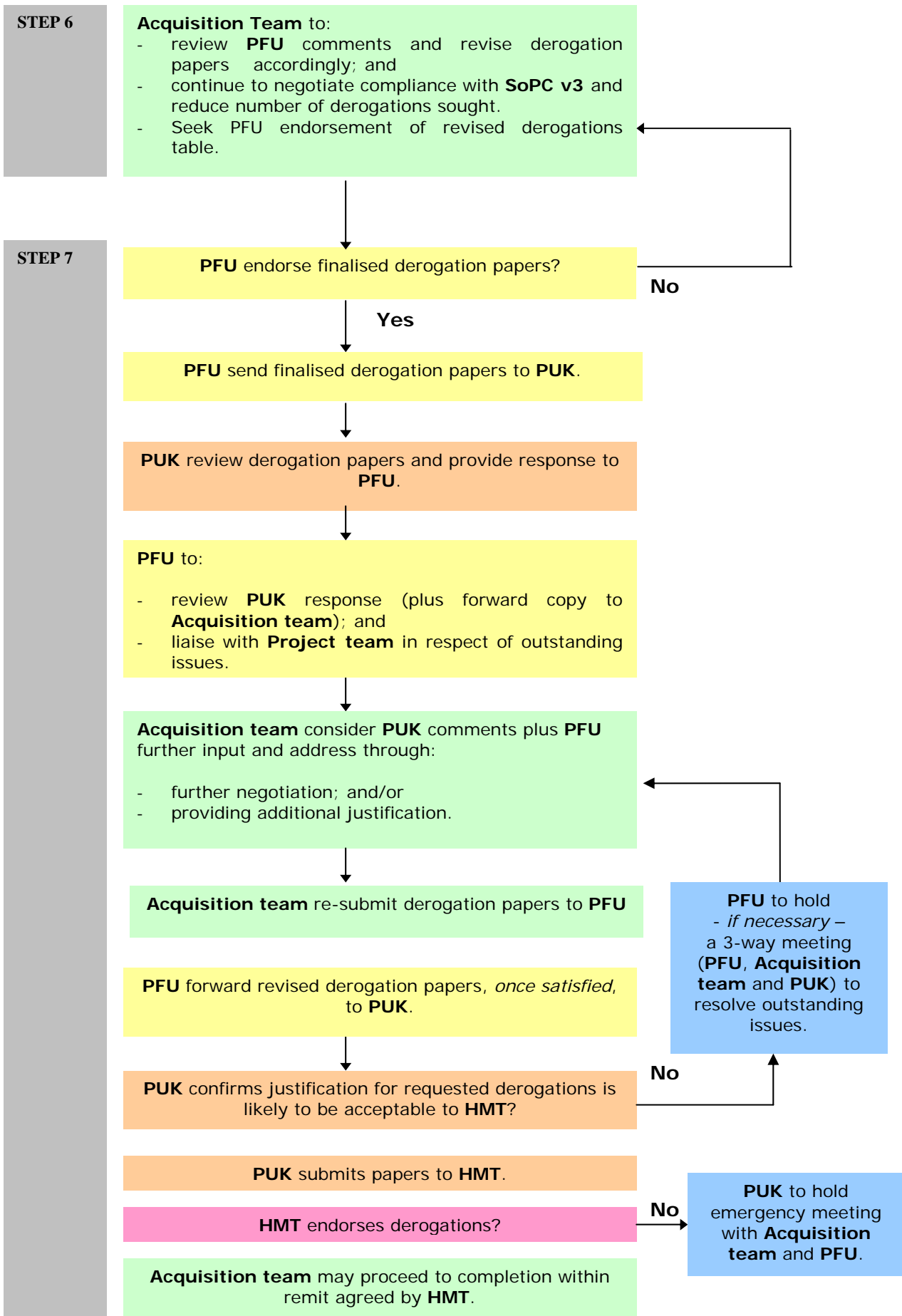
MOD PFI PAv1 Guidance Notes

NOT USED

MOD PFI Procurement

Flowchart 1: PUK derogation process

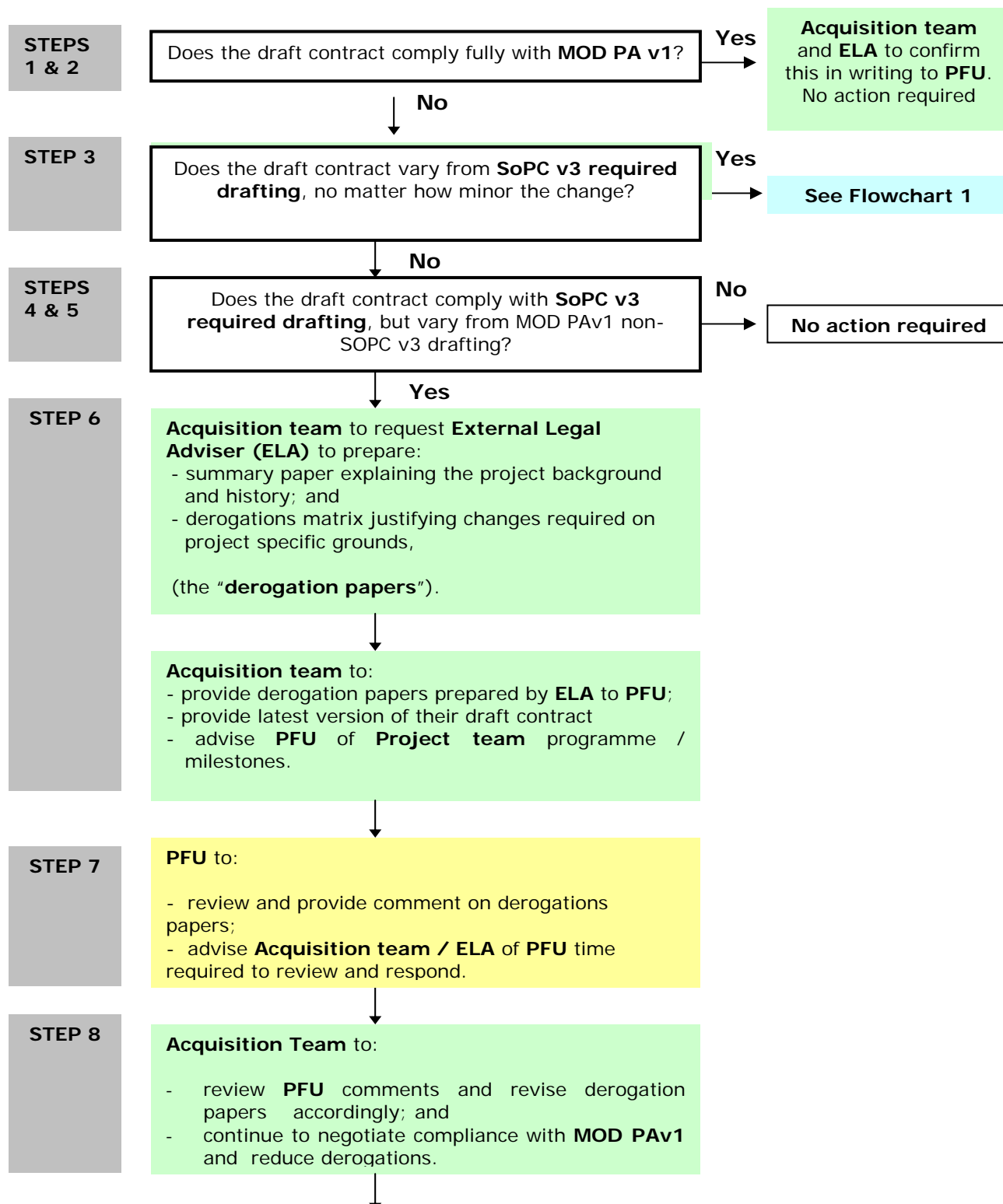




MOD PFI Procurement

Flowchart 2: MOD PFU derogation process

Key :	Acquisition team action	Acquisition team and PFU joint activity	PFU action
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STEP 9

↓
PFU forward revised derogation papers, *once satisfied*, to relevant MOD department (eg DIPR).

↓
Relevant MOD department reviews relevant derogation and provides response to PFU.

↓
Acquisition team re-submits derogation papers to PFU.

↓
Acquisition team consider relevant MOD department comments and address through:

- further negotiation; and/or
- providing additional justification.

↓
Relevant MOD department endorses derogations?

Yes

↓
Acquisition team may proceed to completion within remit agreed by MOD department and PFU.

No

←
PFU to hold
- *if necessary* –
a 3-way meeting
(**PFU, Acquisition team and relevant MOD department**)
to resolve outstanding issues.
↑