

Schedule 9 – Compensation Event Procedure (clause 61)

1. Claim for Compensation

To obtain relief and/or claim compensation in respect of a Compensation Event (or its effects), the Operator must:

- (a) as soon as practicable, and in any event within 20 Business Days after it becomes aware that it is entitled to apply for relief from its obligations and/or claim compensation under clause 61 of this document, give to the Client Representative a notice (**Compensation Notice**) of its intention to claim for an extension of time, relief from its obligations under this document and/or compensation in accordance with this Schedule 9 including full written details of:
 - (i) the nature of the Compensation Event;
 - (ii) the date of the Compensation Event's occurrence;
 - (iii) the estimated duration of the Compensation Event;
 - (iv) the extent to which the Compensation Event is covered by insurance;
 - (v) the Compensation Event's actual impact on the delivery of the Services or the critical path shown in the Project Program at that time; and
 - (vi) whether the Compensation Event will directly and materially impact on the Operator's ability to perform the full volume of contracted Services as set out in the Annual Notice for the relevant Operating Year or to reach the Maximum Payment Amount within that Operating Year;
- (b) within 10 Business Days after receipt by the Client Representative of the Compensation Notice, give full written details of:
 - (i) the requested relief from its obligations under this document and any extension of time claimed, provided that no relief may be claimed in respect of the Operator's obligations under clause 74 (Reinstatement) unless it is actually or practically impossible to perform those obligations given the nature of the Compensation Event;
 - (ii) any Estimated Cost Effect or compensation under section 3(b) claimed;
 - (iii) an estimate of the extent to which the Compensation Event will directly and materially impact on the Operator's ability to perform the full volume of contracted Services as set out in the Annual Notice for the relevant Operating Year or to reach the Maximum Payment Amount within an Operating Year;
 - (iv) the steps which the Operator has taken to and will take to mitigate, prevent or eliminate the effects of the relevant Compensation Event, including its effects on the Operator's ability to perform the Services and its other obligations under this document;
 - (v) an estimate of the time during which the Operator will be unable to carry out the affected obligations due to the Compensation Event;

- (vi) all insurance moneys to which the Operator believes it will be entitled in making good any damage caused by the Compensation Event; and
 - (vii) an estimate of the costs to the Operator of obtaining any necessary consents under the Financing Agreements; and
- (c) if the Compensation Event (or its effects) is continuing:
- (i) continue to give the information required by section 1(b) every fortnight or 10 Business Days after the Compensation Notice (or such longer intervals agreed to by the State) was provided by the Operator until the cessation of the Compensation Event or its effects (other than for a Compensation Event arising from a Project-Specific Change in Law or a Qualifying Change in Law); and
 - (ii) provide a final notice within 10 Business Days after the Compensation Event (or its effects) has ceased confirming that the Compensation Event (or its effects) has ceased.

2. Request for information

Upon receipt of a Compensation Notice from the Operator, the Client Representative may request from the Operator any further information which the Client Representative requires to assess any claim for relief or compensation under this Schedule 9.

3. Client Representative's response

Subject to sections 4, 5, 6 and 7, and provided that the Operator has complied with its obligations under section 1, if the Client Representative is satisfied that:

- (a) a Compensation Event has occurred prior to the Date of Final Completion and, as a consequence, is satisfied of the matters claimed in the Compensation Notice, then:
 - (i) the Client Representative must, if satisfied (acting reasonably) that the Operator has actually been delayed in achieving:
 - (A) a Date for Completion; or
 - (B) if Technical Completion has not occurred on or prior to the Funded Completion Date, Technical Completion,

and is entitled to an extension of time, amend the relevant Date for Completion and (in the case of an amendment to the Date for Operational Readiness) the Sunset Date, by such time as is reasonable for such a Compensation Event, taking into account the Compensation Notice; and
 - (ii) if the Compensation Event occurred during the Development Phase, the State must, in the case of additional or increased costs or decreased revenue being incurred by the Operator, pay the Estimated Cost Effect determined in accordance with the ECE Schedule.
- (b) a Compensation Event has occurred during the Operating Term and, as a consequence, is satisfied:
 - (i) as to the matters claimed in the Compensation Notice;
 - (ii) that if the Operator wishes to seek compensation under section 3(b)(vi):
 - (A) the Operator's ability to perform the full volume of contracted Services as set out in the Annual Notice for the relevant Operating Year; or
 - (B) to reach the Maximum Payment Amount within that Operating Year,

is directly and materially impacted;
 - (iii) that the Operator is wholly or substantially prevented from performing the Service in relation to which they are seeking relief or compensation or its other obligations under this document during the Compensation Event; and
 - (iv) that the Operator has taken, and will take, all reasonable steps to mitigate that loss and the effects of the Compensation Event throughout that Operating Year (including by way of the re-scheduling of the Services within the Activity Profile and the MPA to the extent possible),

the State must:

- (v) subject to sections 4 and 5 below and the Operator's compliance with its obligations under clauses 61(b) and 61(c), give the Operator such relief from the performance of its obligations under this document as is reasonable for such a Compensation Event, taking into account the Compensation Notice; and
- (vi) subject to section 7.2 and without limiting the Operator's compliance with its obligations under clauses 61(b) and 61(c), continue to pay the Monthly Service Payment in connection with the Services affected by the Compensation Event for the period of any relief under clause 61 as if those Services had been provided on the basis of the type and volume of Services set out in the latest issued Annual Notice (and if no Annual Notice has been issued, that contained in the Activity Profile in Schedule 16, and in each case with all relevant Services assumed to have been provided equally over the course of the relevant year, and then prorated in respect of the relevant period of relief) after deducting:

- (A) the amount of recurrent costs which are not in fact incurred by the Operator during the period (and the Operator must give to the State on demand all reasonable information and documentation that the State requires in order to ascertain this amount); and
 - (B) to the extent that the Compensation Event or the risk giving rise to the Compensation Event is required to be insured against in accordance with this document, the proceeds of such insurances that are paid or would have been payable had the Operator complied fully with its obligations in accordance with this document or the terms of the relevant insurance policy; and
- (vii) pay:
- (A) any additional costs actually and reasonably incurred by the Operator as a direct result of the Compensation Event or by reason of continuing to provide the Services in accordance with section 5 and clauses 61(b) and 61(c), which:
 - (I) would not have been incurred by the Operator but for the Compensation Event or but for the Operator's obligations under section 5, or clauses 61(b) and 61(c); and
 - (II) are not otherwise taken into account by payment of the Monthly Service Payment for the relevant period or any other payment made by the State to the Operator under a Project Document;
 - (B) any additional Liabilities reasonably and lawfully incurred by the Operator pursuant to a Subcontract; and
 - (C) all costs reasonably incurred by the Operator in rectifying damage (of the types and for which sufficient details are given under section 1),
 arising as a direct result of the Compensation Event.
- (c) The Client Representative must notify the Operator in writing of its response under this section 3 within 30 Business Days after receipt of the notice specified in section 1(b) of this Schedule 9.

4. Consideration of further information

4.1 Interim Relief and Compensation

If while the State and the Client Representative are determining the relief and compensation to be granted under section 3 in respect of a Compensation Event, further information is provided under section 6 in respect of that same Compensation Event, the State and the Client Representative must (subject to section 5 below and the Operator's compliance with its obligations under clauses 61(b) and 61(c)) grant reasonable and timely interim relief and compensation under this section 4 (**Interim Relief and Compensation**):

- (a) using the information previously provided for that Compensation Event; and
- (b) taking into account the likely effect that the further information provided under section 6 will have on the relief and compensation granted or to be granted under section 3, but only to the extent it will not and does not materially delay the granting of reasonable and timely relief and compensation using the information previously provided.

4.2 Adjustment of Interim Relief and Compensation

Following the granting of Interim Relief and Compensation for a Compensation Event, the State and the Client Representative will, in accordance with sections 3 and 6, adjust the Interim Relief and Compensation taking into account all information provided in respect of the Compensation Event (including the further information provided under section 6).

5. Notice periods and mitigation

Notwithstanding section 1, in the event that:

- (a) the information required under section 1 above is provided more than 5 Business Days after the dates referred to in section 1, then the Operator will not be entitled to any extension of time, relief from its other obligations or compensation under this Schedule 9 in respect of the period for which the information is delayed; or
- (b) in the reasonable opinion of the Client Representative, the Operator has not:
 - (i) taken all reasonable steps to reduce, avoid, mitigate, prevent or eliminate the occurrence of the Compensation Event or its effects on the Operator's ability to perform its obligations under this document; and
 - (ii) complied with its obligations under clauses 61(b) and 61(c) (in respect of a Compensation Event which occurs during the Operating Term),

then the Operator will only be entitled to an extension of time, relief from its other obligations or compensation under this document to the extent only that such extension, relief or compensation would have been granted had such reasonable steps been taken and (if applicable) the obligations in subparagraph (ii) been complied with.

6. Revised information

- (a) The Operator must notify the Client Representative (together with the information required under section 1 above) if at any time it receives or becomes aware of any further information relating to the Compensation Event, giving details of that information to the extent that such information is new or renders information previously submitted materially inaccurate or misleading, and the compensation and relief given in accordance with section 3 will be amended accordingly, provided the Operator has complied with its obligations under section 1.
- (b) Upon provision of the further information under section 6(a), the State and the Operator will meet to agree on the amendments which need to be made to the relief (**Prior Relief**) and compensation given for that Compensation Event in accordance with section 3, as a result of the new information. Any amendment made to the Prior Relief and compensation under this section 6(b), will be made in accordance with the terms of this Schedule 9 as if the notice given under section 6(a) were a notice given under section 1(b).

7. Reconciliation of compensation payable

7.1 Development Phase Reconciliation

- (a) Where the State has paid, or commenced payment of, the Estimated Cost Effect in respect of a Compensation Event which occurs during the Development Phase (**Original Compensation**) and further information is provided under section 6 in respect of the same Compensation Event:

- (i) the State and the Operator must, subject to section 4, recalculate the Estimated Cost Effect in accordance with the ECE Schedule to take into account the further information provided under section 6 (**Revised Compensation**); and
 - (ii) subject to section 7(b), the Revised Compensation is the amount payable by the State to the Operator in respect of that Compensation Event.
- (b) If on the date the Revised Compensation is agreed or determined (the **Revision Date**), amounts which have already been paid by the State in respect of the Original Compensation:
- (i) exceed the Revised Compensation, then within 20 Business Days after the Revision Date the Operator must pay to the State an amount necessary to ensure the Operator receives no more than the Revised Compensation; or
 - (ii) are less than the Revised Compensation, then within 20 Business Days after the Revision Date the State must pay to the Operator an amount necessary to ensure the Operator receives no less than the Revised Compensation.

7.2 Operating Term Reconciliation

If a Compensation Event occurs during the Operating Term, the Operator may claim:

- (a) 50% of amounts due to the Operator under section 3(b)(vi) with the next Operations Payment Claim submitted by the Operator in accordance with clause 55.3, with an adjustment to take place at the end of the relevant Operating Year (taking into account the Operator's obligations to mitigate under section 5 and clauses 61(b) and 61(c)), which adjustment:
 - (i) must be reflected in the first Operations Payment Claim submitted by the Operator in accordance with clause 55.3 in the next Operating Year; and
 - (ii) will, for the avoidance of doubt, entitle the State to set-off any overpayment for that Operating Year in accordance with clause 55.7 of this document; and
- (b) payment of amounts due to the Operator under section 3(b)(vii) with the next Operations Payment Claim submitted by the Operator in accordance with clause 55.3,

and (subject to clause 55.3) the relevant amounts will be paid at the same time as the relevant Operations Payment Claim.

8. Resolution of disputes

- (a) Subject to section 8(b), if the parties cannot agree on the extent of any delay incurred or the extent to which the Operator has been prevented from performing its other obligations under this document or the impact on costs or the extent of relief and compensation sought, or the Client Representative disagrees that a Compensation Event has occurred, or that the Operator is entitled to any relief or any amendment to relief under this Schedule 9, the matter may be referred for resolution by either party in accordance with clause 87 of this document, provided that:
 - (i) where the State refers the matter to resolution, the State must provide the Operator with written notice of the disputed amount and any undisputed amount within 2 Business Days of that referral; and
 - (ii) where the Operator refers the matter to resolution, the State must provide the Operator with written notice of the disputed amount and any undisputed amount within 5 Business Days of receipt of notice of the referral.

- (b) In the event of a referral to dispute resolution under section 8(a), the State must not withhold payment of any undisputed amounts payable under this Schedule 9 and shall pay such amounts to the Operator in accordance with this Schedule 9.

9. No change to relief claim during Development Phase

Without limiting the Operator's obligations under section 6, where prior to the Date of Final Completion the Operator has been granted an extension of time to a Date for Completion or the Sunset Date, no revision of that claim may be made where the quantum of relief originally granted is no longer required.