

Schedule 18: Calculation of Compensation on Termination

Part 1 – Definitions, interpretation and general provisions

1. Definitions

1.1 Definitions

In addition to the definitions set out in clause 1 (Definitions) of the Base Agreement:

Additional Capped Rescue Refinancing Amount means, in respect of each Rescue Refinancing, the amount by which Senior Debt (drawn down or available) immediately after the implementation of the Rescue Refinancing exceeds 110 per cent of the Core Senior Debt immediately prior to the implementation of that Rescue Refinancing;

Adjusted Estimated Value of the Contract means the aggregate of:

- (a) the Estimated Value of the Contract plus the Transport Agency Due Amount, minus:
 - (i) in the case of termination under clause 76 (Termination on Contractor Default), the Compensation Adjustment;
 - (ii) in the case of termination under clause 77 (Termination on Uninsurable Event) or clause 78 (Termination on Uninsurability), 50 per cent of the amount of the item specified in paragraph (b) of Tender Costs, and 100 per cent of the amount of each of the items specified in paragraphs (d), (e), (f) (g) and (j) of Compensation Adjustment;
- (b) the Termination Interest Amount (if any);

Adjusted Estimated Value of the equity means the aggregate of:

- (a) the Estimated Value of the equity, plus the Transport Agency Due Amount, minus the items specified in paragraphs (d), (e), (g) and (h) of Compensation Adjustment; and
- (b) an amount equivalent to interest, at the Senior Debt Rate, from the Actual Termination Date to the date of actual payment, on the amount determined pursuant to paragraph (a) of this definition;

Adjusted Fully Paid Equity means the aggregate of:

- (a) all equity and amounts under the Subordinated Financing Agreements committed as at Financial Close to be contributed to HoldCo LP, minus the items specified in paragraphs (d), (e), (f), (g), (h) and (j) of Compensation Adjustment, provided that such amount shall not in any circumstances be less than zero;
- (b) an amount equivalent to interest, at the Government Bond Rate, from the Actual Termination Date to the Compensation Date, on the amount determined pursuant to paragraph (a) of this definition; and
- (c) where the Compensation Sum is not paid on or prior to the Compensation Date, an amount equivalent to interest, at the Senior Debt Rate, from the Compensation Date until the date of actual payment, on the amount determined pursuant to paragraph (a) of this definition;

Adjusted Highest Compliant Tender Price means the Highest Compliant Tender Price, plus the Transport Agency Due Amount, minus the Compensation Adjustment;

Amortised Aggregate Additional Rescue Refinancing Amounts or **AAARRA** means, on the Actual Termination Date, the aggregate of:

- (a) all Additional Capped Rescue Refinancing Amounts drawn down by the Contractor prior to the Actual Termination Date (if any); less
- (b) all principal payments of Senior Debt made to Senior Lenders following the date of the first Rescue Refinancing,

with any negative number deemed to be zero;

Base Senior Debt Termination Amount means:

- (a) all amounts outstanding at the date on which the Base Senior Debt Termination Amount is actually paid, including interest and Default Interest accrued as at that date, from the Contractor to the Senior Lenders in respect of Permitted Borrowing; and
- (b) all amounts representing Qualifying Breakages payable by the Contractor to the Senior Lenders, subject to the Contractor and the Senior Lenders mitigating all such costs to the extent reasonably possible, but excluding any amounts payable in respect of Swaps or other financing break costs to the extent that the same are not Qualifying Breakages;

less, to the extent it is a positive amount, the aggregate of (without double counting in relation to the calculation of the Base Senior Debt Termination Amount or the amounts below):

- (c) all credit balances on any bank accounts in respect of which the Senior Lenders have the benefit of a security interest (but excluding the Joint Insurance Account and excluding any other account to the extent that the credit balance of the account is not available for the repayment of Senior Debt) held by or on behalf of the Contractor on the date of actual payment of the Base Senior Debt Termination Amount;
- (d) all amounts representing Qualifying Breakages payable by the Senior Lenders to the Contractor as a result of termination of the Base Agreement; and
- (e) all other amounts received by the Senior Lenders on or after the Termination Date and before the date of actual payment of the Base Senior Debt Termination Amount as a result of enforcing any other rights they may have under the Senior Financing Agreements;

Compensation Adjustment means, as at the Compensation Date, an amount equal to the aggregate of:

- (a) the Tender Costs;
- (b) additional costs reasonably and properly incurred by the Transport Agency as a direct result of termination of the Base Agreement or any other Project Documents;
- (c) any Rectification Costs, less (to the extent that such sums are received or receivable in relation to Rectification Costs) any insurance proceeds paid, payable or which will be payable pursuant to policies maintained in accordance with clause 70 (Insurance) of the Base Agreement;
- (d) amounts which the Transport Agency is entitled to set off or deduct against Moneys Owing by the Contractor under the Base Agreement;

- (e) to the extent (if any) not deducted under paragraph (d) of the definition of Base Senior Debt Termination Amount, gains which have accrued or will accrue to the Contractor as a result of the termination of the Base Agreement, any other Project Documents or any Senior Financing Agreement;
- (f) insurance proceeds payable to the Contractor but not paid (or that would have been payable if the Contractor had complied with its obligations under the Base Agreement) in respect of any event to the extent that it gave rise or contributed to the termination of the Base Agreement and which in either case the Contractor is or would be entitled to retain under the Project Documents other than:
 - (i) insurance proceeds representing insurance indemnification of the Contractor against its liabilities to third parties;
 - (ii) insurance proceeds that would be payable to the Joint Insurance Account; and
 - (iii) self-insurance proceeds payable by the Transport Agency to the Contractor under clause 71.2 of the Base Agreement but not yet paid;
- (g) to the extent (if any) not deducted under paragraph (c) of the definition of Base Senior Debt Termination Amount, credit balances in accounts held by or for the benefit of the Contractor (but excluding the Joint Insurance Account and excluding any other account to the extent that the credit balance of the account is not available for the repayment of Senior Debt);
- (h) where the Actual Termination Date occurs prior to the Service Commencement Date, amounts representing the undrawn commitments of HoldCo Limited Partners to contribute equity and/or amounts under the Subordinated Financing Agreements to HoldCo LP which have been released provided that any associated security or collateral has been unconditionally and irrevocably released by HoldCo LP and the Security Trustee;
- (i) where:
 - (i) the Base Agreement has been terminated under clause 75 (Termination on Contractor Default);
 - (i) the Compensation Sum payable to the Contractor is the Adjusted Highest Compliant Tender Price; and
 - (ii) the Highest Compliant Tender Price (after subtracting the aggregate of the amounts referred to in paragraphs (a) to (h) of this definition) (x) is less than the balance of the Senior Debt specified in the Base Case as at the Compensation Date (y);

an amount (a) calculated as follows:

$$a = b \times c$$

where:

b = the aggregate of the amounts paid to the Contractor representing the SDPI_n component of the PTDSA; and

c = the proportion (represented as a decimal) (y-x)/y; and

- (j) where the Base Agreement has been terminated under clause 76 (Termination on Uninsurable Event) as a result of a Substantial Destruction Event, the amount (if positive) determined by an Independent Expert to represent the difference between:
 - (i) the uninsured actual dollar value of the Reinstatement Works required to be undertaken to repair or replace the damage to the TG Project to the standards required under this Agreement; and
 - (ii) the uninsured actual dollar value of the Reinstatement Works that would have been required to repair or replace the damage to the TG Project to the standards required under this Agreement if, on the date of the Substantial Destruction Event, the TG Project had met the standards required under this Agreement;

in each case subject to paragraph 2;

Compensation Date means either:

- (a) if paragraph 9 of Part 3 applies:
 - (i) the date specified by the Transport Agency under the Tender Process on which the New Contract is to take effect (which date must be no later than 15 months (if the Actual Termination Date occurs before the Service Commencement Date) or nine months (if the Actual Termination Date occurs on or after the Service Commencement Date) after the Actual Termination Date);
 - (ii) if the Transport Agency makes an election under paragraph 9.8, a date specified by the Transport Agency which must be no later than 60 Business Days after the date of such determination; or
 - (iii) if it is determined in accordance with clause 89 (Accelerated Dispute Resolution Procedures) of the Base Agreement that there is no Liquid Market, a date specified by the Transport Agency which must be no later than 60 Business Days after the date of such determination; or
- (b) in any other case, subject to clause 79.1(a) and 79.1(b) (Payment of Compensation) of the Base Agreement, a date notified by the Transport Agency to the Contractor which must be no later than 60 Business Days after the Actual Termination Date;

Compensation Sum means:

- (a) where the Base Agreement is terminated under clause 74 (Termination for Convenience) of the Base Agreement, the amount calculated in accordance with Part 2; or
- (b) where the Base Agreement is terminated under clause 75 (Termination on Contractor Default) of the Base Agreement, the amount calculated in accordance with Part 3; or
- (c) where the Base Agreement is terminated under clause 76 (Termination on Uninsurable Event) or clause 77 (Termination on Uninsurability) of the Base Agreement, the amount calculated in accordance with Part 4;

Compliant Tender means any tender submitted by a Compliant Tenderer that meets the Qualification Criteria;

Compliant Tenderer means a tenderer who is a Suitable Substitute Contractor;

Default Interest means any increased margin that is payable to the Senior Lenders or which accrues as a result of any payment due to the Senior Lenders not being made on the date on which it is due;

EOI Invitation means an invitation for expressions of interest, issued by the Transport Agency, for parties to enter into a New Contract;

Estimated Value of the Contract means the Estimated Value of the Contract calculated in accordance with paragraph 10.2;

Estimated Value of the equity means the Estimated Value of the equity calculated in accordance with paragraph 5.4;

Government Bond Rate means, in respect of the period between the Termination Date and the Compensation Date, the published yield to maturity applicable to New Zealand Government Bonds with a remaining maturity closest to that period;

Highest Compliant Tender Price means the price offered by the Compliant Tenderer (if any) with the highest tender price;

Liquid Market means:

- (a) there are at least three parties, each of whom in the Transport Agency's reasonable opinion is capable of meeting the Qualification Criteria and being a Suitable Substitute Contractor who indicate, in response to the EOI Invitation, that they intend to participate in the Tender Process; and
- (b) the Transport Agency receives at least two Compliant Tenders through the Tender Process,

provided always that any vehicle controlled and established by the Senior Lenders specifically for the purposes of this Project and to which the Base Agreement may be novated shall be disregarded in assessing whether the tests set out in paragraphs (a) and (b) above are met, without limiting any such vehicle's ability to participate in the Tender Process;

New Contract means an agreement on the same terms and conditions as this Agreement (including the same Unitary Charge derived from the then-current Base Case) and the other Project Documents existing as at the Actual Termination Date, but with the following amendments:

- (a) if the Base Agreement is terminated prior to the Service Commencement Date, then the Planned Service Commencement Date and the Planned Final Service Commencement Date shall be extended by a period (and the Last Service Commencement Date shall be extended by the same period) to allow a New Contractor to achieve the extended Planned Service Commencement Date and the Planned Final Service Commencement Date;
- (b) the term of such agreement shall be equal to the term from the Compensation Date until the Expiry Date, with Services to commence under the New Contract on the Compensation Date; and
- (c) any other amendments which do not adversely affect the Contractor (including any adverse effect on the compensation payable to the Contractor under this Schedule 18),

provided that any accrued Service Failure Points and/or warning notices shall be deemed to be cancelled for all purposes on entry into the New Contract, and no liability for any breach by the Contractor prior to the date of the New Contract shall be imposed on the new party;

Permitted Borrowing means, without double counting, any:

- (a) advances to the Contractor under the Senior Financing Agreements;
- (b) interest under the Senior Financing Agreements; and
- (c) other amounts accrued or payable under the Senior Financing Agreements (which must, to the extent representing financing breakage costs, comprise Qualifying Breakages);

in each case excluding:

- (d) the aggregate of the AAARRA and Liabilities arising from any Swaps to the extent attributable to such AAARRA (if any) as at the Termination Date; and
- (e) any increased advances, interest or amounts resulting from amendments to or replacements of any Senior Financing Agreements that have not, in either case, obtained the prior written approval (or the deemed approval) of the Transport Agency under the Base Agreement;

Post-Tax Project WACC is the percentage amount specified in cell named [REDACTED] in the "MOS" sheet of the Base Case as at Financial Close;

Post Termination Date Service Amount or **PTDSA** means, for the whole or any part of a Contract Quarter, for the period from the Actual Termination Date to the Compensation Date, the amount calculated as follows:

$$PTDSA_n = SDPI_n + BIA_n - RefiGain_n + ED_n + SPV_n + ADS_n$$

Where:

PTDSA_n means the Post Termination Date Service Amount in respect of Contract Quarter (n);

SDPI_n means the elements of the Unitary Charge specified in the Base Case as attributable to the payment of Senior Debt principal, interest and costs in respect of Contract Quarter (n);

BIA_n has the meaning given to that term in Schedule 14 (Payment Mechanism) in respect of Contract Quarter (n);

RefiGain_n has the meaning given to that term in Schedule 14 (Payment Mechanism) in respect of Contract Quarter (n);

ED_n means the elements of the Unitary Charge specified in the Base Case as attributable to Distributions in respect of Contract Quarter (n);

SPV_n means any overhead costs actually incurred by the Contractor in respect of Contract Quarter (n); and

ADS_n means any amount payable by the Transport Agency under clause 84.4 (Disengagement Services) of the Base Agreement in respect of Contract Quarter (n) (if and for so long as any such amount is payable),

provided that for any partial Contract Quarter the PTDSA_n will be adjusted on a proportionate basis to reflect the number of days in that Contract Quarter;

Qualification Criteria means the criteria each tenderer will be required by the Transport Agency to meet as part of the Tender Process, which shall be:

- (a) each tenderer must provide a commitment to enter into the New Contract with effect from the Compensation Date;
- (b) each tenderer must provide evidence sufficient to satisfy the Transport Agency (acting reasonably) that it has the financial ability to pay the capital sum tendered for the New Contract;
- (c) each tenderer must bid on the basis of a single capital payment to be made by the tenderer to the Transport Agency on the date of the New Contract, representing an amount bid by the tenderer in consideration of it assuming all rights and accepting all obligations set out in the New Contract and including within that sum an amount equivalent to the applicable Rectification Costs (if any);
- (d) each tenderer must have (directly or via its sub-contractors) the experience, technical expertise (including asset management capability) and financial capability to provide the Services;
- (e) the tenderer, and each equity or debt provider in respect of the tender, is not a Governmental Entity in New Zealand and is not owned or controlled by such a Governmental Entity, unless the relevant Governmental Entity is a State Enterprise or subsidiary thereof (as defined in the State-Owned Enterprises Act 1986) or a Crown Entity (as defined in the Crown Entities Act 2004) and, in the case of a Crown Entity:
 - (i) it is acting in accordance with its statutory powers and functions; and
 - (ii) it is not subject to any direction under sections 103 to 107 of the Crown Entities Act 2004 that may affect the independence of the Crown Entity in relation to the tender;
- (f) the technical solution proposed by each tenderer is in sufficient detail and is capable of delivery, each to the Transport Agency's satisfaction (acting reasonably);
- (g) the Transport Agency has not, at any time prior to the tender, made a determination that the tenderer or any of its equity providers is an Unsuitable Third Party or is not, where that equity provider is a person that Controls the tenderer, reputable for the purposes of clause 91 (Change of Ownership) of the Base Agreement; and
- (h) any other criteria and processes that the Transport Agency may determine at its reasonable discretion, provided that any other criteria and processes do not limit or reduce in any way the other Qualification Criteria specified in this definition;

Qualifying Breakages means any Swap or other financing breakage costs payable by the Contractor to Senior Lenders, or by Senior Lenders to the Contractor (as the case may be) as a result of prepayment of amounts outstanding in respect of the relevant Permitted Borrowing as a result of termination of the Base Agreement, in respect of:

- (a) the Swaps placed at Financial Close in relation to the then applicable Senior Debt and terminating on or before the Floating Rate Commencement Date; and
- (b) the [REDACTED] (provided the Transport Agency's obligations in relation to the [REDACTED] will not be increased by any variations of such facility after Financial Close unless agreed in writing by the Transport Agency);

Rectification Costs means an amount equal to the reasonable and proper costs incurred by the Transport Agency (or, in the case of a retender under paragraph 8, to be incurred by the successful tenderer for the New Contract) in respect of any capital expenditure required to

enable the TG Project to achieve Final Works Completion and to obtain a Close-out Certificate for each Close-out Deliverable, and any capital expenditure required to remedy any Snagging Defects occurring prior to the Termination Date or the Actual Termination Date (as applicable);

Request for Tenders means a request for tenders, issued by the Transport Agency, for parties to enter into a New Contract;

Suitable Substitute Contractor means a person approved by the Transport Agency (such approval not to be unreasonably withheld or delayed) as:

- (a) not being an Unsuitable Third Party;
- (b) having the legal capacity, power and agency to become a party to and perform the obligations of the Contractor under this Agreement; and
- (c) employing persons having the appropriate qualifications, experience and technical competence and having the resources available to it (including committed financial resources and sub-contracts) which are sufficient to enable it to perform the obligations of the Contractor under this Agreement;

Tender Costs means

- (a) the reasonable and proper costs of the Transport Agency incurred in carrying out the Tender Process; and/or
- (b) the reasonable and proper third party costs of the Transport Agency incurred in connection with any calculation of the Estimated Value of the Contract;

Tender Process means the process by which the Transport Agency requests expressions of interest and tenders for entering into a New Contract, evaluates the responses from those interested parties and enters into a New Contract with a new contractor, in accordance with paragraph 9 of Part 3;

Tender Process Monitor means a third party appointed by the Contractor under paragraph 9.4 of Part 3;

Termination Interest Amount means:

- (a) where the Project Agreement was terminated under clause 75 (Termination on Contractor Default), an amount equivalent to interest, at the Senior Debt Rate, from the Actual Termination Date to the Compensation Date, on that part of the amount determined pursuant to paragraph (a) of the definition of Adjusted Estimated Value of the Contract attributable to Senior Debt; or
- (b) where the Project Agreement was terminated under clause 76 (Termination on Uninsurable Event) or clause 77 (Termination on Uninsurability), an amount equivalent to interest, at the Government Bond Rate, from the Actual Termination Date to the Compensation Date, on the amount determined pursuant to paragraph (a) of the definition of Adjusted Estimated Value of the Contract to the extent it exceeds the Base Senior Debt Termination Amount;

Transport Agency Due Amount means any amount due and payable by the Transport Agency to the Contractor in accordance with the terms of the Project Documents as at the Termination Date and which is not discharged prior to the Compensation Date; and

Valuation Principles means the valuation principles set out in the Appendix to this Schedule 18.

1.2 Interpretation

Any reference in this Schedule to a **Part** or a **paragraph** is, unless the context otherwise requires, to a Part or a paragraph of this Schedule.

2. General principles

2.1 No double counting

Notwithstanding any other provisions in the Base Agreement or this Schedule 18, neither party shall be entitled to recover compensation or make a claim under the Base Agreement or this Schedule 18 in respect of any Losses that it has incurred or costs that it will incur to the extent that it has already been compensated in respect of those Losses or those costs pursuant to the Base Agreement, this Schedule 18 or otherwise.

2.2 Compensation Adjustment

To the extent that any amount, cost, gain, proceed or balance that falls within any of the limbs of the definition of Compensation Adjustment (**Relevant Amount**) has been taken into account when determining the Highest Compliant Tender Price or the Estimated Value of the Contract (as the case may be), those amounts will not be added or deducted when determining the Adjusted Estimated Value of the Contract or the Adjusted Highest Compliant Tender Price (as the case may be). The Transport Agency will ensure that the retendering procedure in paragraph 9 of Part 3 or the valuation procedure in paragraph 10 of Part 3 is conducted in such a way that it can be determined whether any Relevant Amount is included in the Highest Compliant Tender Price or the Estimated Value of the Contract (as the case may be).

2.3 Compensation Adjustment methodology

- (a) In determining the Compensation Adjustment, the Transport Agency will determine the amounts comprised in that definition on a consistent basis and ensuring that no amounts are double counted.
- (b) To the extent that Rectification Costs will be paid or due for payment after the Compensation Date, then those costs are to be discounted at the discount rate specified in paragraph 10.2(b) having regard to when those costs are projected to be paid (provided that costs which are paid on or before the Compensation Date are not to be discounted).

3. Post Termination Date Service Amount

- (a) If the Transport Agency:
 - (i) terminates the Base Agreement pursuant to clause 75 (Termination on Contractor Default) of the Base Agreement; and
 - (ii) elects to retender the provision of the Project in accordance with paragraph 8 of Part 3,

then for all or any part of a month falling within the period from the Actual Termination Date to (but excluding) the Compensation Date, the Transport Agency shall pay to the Contractor the PTDSA for that month (or relevant part of that month), on or before the date falling 20 Business Days after the end of that month.

- (b) The Transport Agency may, prior to making the payment, require the Contractor and/or the Senior Lenders to establish a mechanism acceptable to the Transport Agency under

which the Transport Agency pays the Senior Lenders, on behalf of the Contractor, that element of the PTDSA (if any) attributable to principal, interest or fees payable to the Senior Lenders under the Senior Financing Agreements during the relevant period.

- (c) No PTDSA will be payable in any circumstance other than that specified in paragraph 3(a).

4. **Payment of Compensation Sum**

- (a) The Transport Agency shall pay to the Contractor the element of the Compensation Sum that is not disputed on the Compensation Date and the remainder on or before the date falling 20 Business Days after it has been determined under the Accelerated Dispute Resolution Procedures.
- (b) The Transport Agency shall pay interest to the Contractor at the Senior Debt Rate on any amount of the Compensation Sum that the Transport Agency:
- (i) has failed to pay on or prior to the Compensation Date (where there is no Dispute as to any element of the Compensation Sum); or
 - (ii) has been held liable to pay under the Accelerated Dispute Resolution Procedures and which has been withheld from the Compensation Date until the date specified in paragraph 4(a).
- (c) Without limiting the Transport Agency's obligation to pay any PTDSA pursuant to paragraph 3, the discharge by the Transport Agency of its payment obligation in paragraphs 4(a) and 4(b) shall be in full and final settlement of all of the Contractor's claims and rights against the Transport Agency for breaches and/or termination of the Base Agreement and the Project Documents whether under contract, tort, restitution or otherwise, except (but only) to the extent provided in clause 78 (Consequences of Termination) of the Base Agreement.

Part 2 - Compensation on termination for convenience

5. **Compensation payable**

5.1 **Obligation to pay**

If the Transport Agency terminates the Base Agreement pursuant to clause 74 (Termination for Convenience) of the Base Agreement, the Transport Agency shall calculate the relevant Compensation Sum in accordance with paragraph 5.2 of this Part 2.

5.2 **Compensation Sum**

The Compensation Sum for termination for convenience under clause 74 (Termination for Convenience) of the Base Agreement is an amount equal to the net aggregate of the following:

- (a) the Base Senior Debt Termination Amount;
- (b) an amount which reflects the Adjusted Estimated Value of the equity, provided that such amount shall not in any circumstances be less than zero;
- (c) redundancy payments for employees of the Contractor that have been or will be reasonably incurred by the Contractor as a direct result of termination of the Base Agreement, that the Contractor is legally liable to pay under the terms of the relevant

employment contracts or at law and that would not have been otherwise incurred if the Base Agreement was not terminated for convenience; and

- (d) amounts reasonably and properly incurred by the Contractor and payable as Sub-contractor Breakage Costs, as a direct result of termination of the Base Agreement, such amounts only to be paid to the extent that:
 - (i) the Contractor is liable to pay such amounts to the Sub-contractor under the express terms of the relevant sub-contract; and
 - (ii) as at the Termination Date there is no event of default (however described) subsisting under the relevant sub-contract that would entitle the Contractor to terminate such sub-contract.

5.3 Required Procedure

If the Transport Agency terminates the Base Agreement pursuant to clause 74 (Termination for Convenience) of the Base Agreement, then the following procedure shall apply:

- (a) the parties will appoint an Independent Expert in accordance with clause 89 (Accelerated Dispute Resolution Procedures) of the Base Agreement to determine the Estimated Value of the equity; and
- (b) the terms of this paragraph 5 and the terms of clause 89 (Accelerated Dispute Resolution Procedures) of the Base Agreement will apply as if the Independent Expert was determining a Dispute.

5.4 Valuation methodology

Where an Independent Expert is required to determine the Estimated Value of the equity in the Contractor under this Part 2, the Independent Expert:

- (a) will be required to determine the Estimated Value of the equity in the Contractor based on a discounted cash flow valuation methodology, in respect of the post-tax nominal equity cash flows, for the period from the Actual Termination Date to the Expiry Date;
- (b) will be required to determine an appropriate post-Tax discount rate having regard to prevailing market rates of return on equity for projects with a similar risk profile to the Project, on a nominal basis;
- (c) will be required to determine:
 - (i) the projected revenue of the Contractor for the Project; and
 - (ii) the projected operating and financing costs and lifecycle capital expenditure of the Contractor for the Project,in accordance with the Valuation Principles;
- (d) will be entitled to consider any relevant comparable data available from or submissions made by the Transport Agency or the Contractor; and
- (e) will be entitled to consider any other evidence, matters or market information that the Independent Expert considers to be relevant (acting reasonably) on a basis consistent with the requirements of this paragraph 5.4 and the Valuation Principles.

Part 3 - Compensation for Contractor Default

6. Obligation to pay

If the Transport Agency terminates the Base Agreement pursuant to clause 75 (Termination for Contractor Default) of the Base Agreement, the Transport Agency shall calculate the relevant Compensation Sum in accordance with paragraph 7 of this Part 3.

7. Compensation Sum

Where the Base Agreement is terminated under clause 75 (Termination for Contractor Default) of the Base Agreement, the Compensation Sum will be equal to either:

- (a) the Adjusted Estimated Value of the Contract; or
- (b) the Adjusted Highest Compliant Tender Price.

8. Retendering

8.1 Election

In determining the Compensation Sum for termination for contractor default under clause 75 (Termination for Contractor Default) of the Base Agreement, the Transport Agency, subject to paragraph 8.2 of this Part 3, is entitled to either:

- (a) retender the provision of the Project in accordance with paragraph 9; or
- (b) require an expert determination in accordance with paragraph 10.

8.2 Limitations on election

Subject to paragraph 9.9, the Transport Agency shall only be entitled to elect to retender the provision of the Project in accordance with paragraph 9 of this Part 3 if:

- (a) the Transport Agency notifies the Contractor on or before the date falling 20 Business Days after the Actual Termination Date that it intends to retender; and
- (b) the Transport Agency (acting reasonably) determines that there is likely to be a Liquid Market, provided that the Transport Agency shall not be entitled to retender if:
 - (i) the Contractor or the Senior Lenders have demonstrated to the reasonable satisfaction of the Transport Agency that they have used reasonable endeavours, (by way of a bona fide tender request issued to market participants and incorporating a bidder pre-qualification stage and a bidder short-listing stage), to procure the transfer of the rights and obligations of the Contractor under the Base Agreement or under clause 12 (Tender Process) of the Financier Direct Deed, and the equity interests in the Contractor, but have failed to do so (provided that failure to transfer was not a result of the Contractor or the Senior Lenders deciding not to transfer to a Suitable Substitute Contractor solely on the grounds of price);
 - (ii) the Contractor or the Senior Lenders have notified the Transport Agency of a Dispute under paragraph 8.3, and that Dispute has not yet been resolved in

accordance with clause 89 (Accelerated Dispute Resolution Procedures) of the Base Agreement; or

- (iii) it is determined in accordance with clause 89 (Accelerated Dispute Resolution Procedures) of the Base Agreement that there is not likely to be a Liquid Market.

8.3 Disputes

The Contractor may, no later than 10 Business Days after the Transport Agency notifies the Contractor in writing that it intends to retender, notify the Transport Agency in writing that it will dispute this decision on the grounds that the Transport Agency has not acted in accordance with paragraph 8.2, and clause 89 (Accelerated Dispute Resolution Procedures) of the Base Agreement will apply.

9. Retendering procedure

If the Transport Agency elects to retender the provision of the Project under paragraph 8.1 of this Part 3, then the following provisions shall apply.

9.1 Objective

- (a) The objectives of the Tender Process are:
 - (i) to enable the Transport Agency to enter into a New Contract with a Compliant Tenderer; and
 - (ii) to establish the Highest Compliant Tender Price.
- (b) The Transport Agency shall (subject to any legal requirements preventing it from doing so) use reasonable endeavours to complete the Tender Process as soon as practicable.
- (c) The Transport Agency shall, in undertaking the Tender Process and establishing the Highest Compliant Tender Price, owe a duty of reasonable care to the Contractor to obtain the best price reasonably obtainable at the time the Tender Process is undertaken.

9.2 Qualification Criteria

The Transport Agency shall notify the Contractor of the Qualification Criteria and the other requirements and terms of the Tender Process, including the timing of the Tender Process, and shall act reasonably in setting such requirements and terms.

9.3 Information to be available

The Contractor authorises the release of any information by the Transport Agency under the Tender Process, which would otherwise be prevented under clause 55 (Confidential Information) of the Base Agreement, that is reasonably required as part of the Tender Process.

9.4 Tender Process Monitor

The Contractor may, at its own cost, appoint a person (the **Tender Process Monitor**) to monitor the Tender Process for the purpose of reporting to the Contractor and the Senior Lenders on the Transport Agency's compliance with the Tender Process and the Qualification Criteria, and making representations to the Transport Agency. The Tender Process Monitor will not disclose any Confidential Information to the Contractor or any other person (and shall provide an undertaking to the Transport Agency to such effect as a condition of its

appointment) but shall be entitled to advise the Contractor and the Senior Lenders as to whether it considers that the Transport Agency has acted in accordance with the Tender Process and the Qualification Criteria, and correctly determined the Highest Compliant Tender Price.

9.5 **Role of Tender Process Monitor**

The Tender Process Monitor shall enter into a confidentiality agreement with the Transport Agency in a form acceptable to the Transport Agency and shall (subject to execution of such confidentiality agreement) be entitled to attend all meetings relating to the Tender Process, inspect copies of the tender documentation and bids and shall be required to make written representations to the Transport Agency, the Contractor and the Senior Lenders regarding compliance with the Tender Process and the Qualification Criteria. All representations shall be made by the Tender Process Monitor in a timely manner as the Tender Process proceeds. The Transport Agency shall not be bound to consider or act upon such representations but acknowledges that such representations may be referred to by the Contractor in the event that the Contractor refers a Dispute relating to the Adjusted Highest Compliant Tender Price to dispute resolution in accordance with the Accelerated Dispute Resolution Procedures.

9.6 **Adjusted Highest Compliant Tender Price**

- (a) As soon as practicable after tenders have been received, the Transport Agency shall determine the Compliant Tenders, determine the Highest Compliant Tender Price and calculate and pay the Contractor the Adjusted Highest Compliant Tender Price.
- (b) If, following the conclusion of the tender response period, the Transport Agency has received at least two Compliant Tenders, but decides not to enter into a New Contract with a Compliant Tenderer, it shall notify the Contractor of this decision and pay to the Contractor an amount equal to the Adjusted Highest Compliant Tender Price.

9.7 **Completion of Retendering procedure**

If the Transport Agency elects to retender the provision of the Project under paragraph 8.1 of this Part 3, and the Highest Compliant Tender Price has not been established within 18 months after the Actual Termination Date, then the Compensation Sum will be ascertained in accordance with paragraph 10 of this Part 3.

9.8 **Transport Agency may elect to discontinue**

The Transport Agency may elect at any time prior to the receipt of a Compliant Tender to follow the no retendering procedure under paragraph 10 of this Part 3 by notifying the Contractor that this election has been made.

9.9 **No Liquid Market**

- (a) If the Transport Agency does not receive:
 - (i) by the closing date specified in the EOI Invitation issued as part of the Tender Process, responses that meet the test set out in paragraph (a) of the definition of Liquid Market; or
 - (ii) by the closing date specified in the Request for Tenders issued as part of the Tender Process, responses that meet the test set out in paragraph (b) of the definition of Liquid Market,

the no retendering procedure under paragraph 10 of this Part 3 will automatically apply.

- (b) If it is determined in accordance with clause 89 (Accelerated Dispute Resolution Procedures) of the Base Agreement that the Transport Agency has not acted in accordance with paragraph 8.2, the no retendering procedure under paragraph 10 of this Part 3 will automatically apply.

10. No retendering

10.1 Required procedure

If:

- (a) the Transport Agency is not entitled to retender the provision of the Project under paragraph 8.2 of this Part 3;
- (b) Part 4 applies;
- (c) paragraph 9.8 or 9.9 applies; and/or
- (d) the Transport Agency elects pursuant to paragraph 8.1 to require determination of the Estimated Value of the Contract,

then the following procedure shall apply:

- (e) the parties will appoint an Independent Expert in accordance with clause 89 (Accelerated Dispute Resolution Procedures) of the Base Agreement to determine the Estimated Value of the Contract; and
- (f) the terms of this paragraph 10 and the terms of clause 89 (Accelerated Dispute Resolution Procedures) of the Base Agreement will apply as if the Independent Expert was determining a Dispute.

10.2 Valuation Methodology

Where an Independent Expert is required to determine the Estimated Value of the Contract under this Part 3, the Independent Expert:

- (a) will be required to determine the Estimated Value of the Contract based on a discounted cash flow valuation methodology, in respect of the post-tax nominal cash flows for the Project, for the period from the Actual Termination Date to the Expiry Date;
- (b) will be required to apply the Post-Tax Project WACC as the applicable discount rate, on a nominal basis;
- (c) will be required to determine:
 - (i) the projected revenue of the Contractor for the Project; and
 - (ii) the projected operating costs and lifecycle capital expenditure of the Contractor for the Project,

in accordance with the Valuation Principles;

- (d) will be required, when establishing the Estimated Value of the Contract where this Agreement has been terminated under clause 76 (Termination on Uninsurable Event) or clause 77 (Termination on Uninsurability), to exclude the effect of the relevant

Uninsurable Event or the impact of the relevant risks that have become Uninsurable, as the case may be;

- (e) will be entitled to consider any relevant comparable data available from or submissions made by the Transport Agency or the Contractor; and
- (f) will be entitled to consider any other evidence, matters or market information that the Independent Expert considers to be relevant (acting reasonably) on a basis consistent with the requirements of this paragraph 10.2 and the Valuation Principles.

Part 4 - Compensation on Uninsurable Event or Uninsurability

11. Obligation to pay

If the Transport Agency terminates the Base Agreement pursuant to clause 76 (Termination on Uninsurable Event) or clause 77 (Termination on Uninsurability) of the Base Agreement, the Transport Agency shall calculate the relevant Compensation Sum in accordance with paragraph 12 of this Part 4.

12. Compensation Sum

The Compensation Sum for termination on Uninsurable Event or Uninsurability under clause 76 (Termination on Uninsurable Event) or clause 77 (Termination on Uninsurability) shall be:

- (a) where termination occurs before the Service Commencement Date, an amount equal to the aggregate of:
 - (i) Adjusted Fully Paid Equity; and
 - (ii) the Base Senior Debt Termination Amount.
- (b) where termination occurs on or after the Service Commencement Date, an amount equal to the greater of:
 - (i) the Adjusted Estimated Value of the Contract; or
 - (ii) the Base Senior Debt Termination Amount.

Appendix – Valuation Principles

1. The Independent Expert must assume that the Project Documents and Major Sub-contracts in force immediately prior to the Termination Date continue for the Contract Term.
2. The Independent Expert must assume that the Services are delivered in accordance with this Agreement and Deductions, Charges and Claims will be zero for every period during the unexpired Contract Term.
3. The Independent Expert must assume that, as at the Termination Date, no breach of this Agreement, Remediable Contractor Default or Immediate Termination Event subsists and there are no Deductions, Charges or Claims outstanding.
4. All assumptions made in determining costs and revenues must be adopted and applied consistently, and must not result in double counting of Charges, Deductions, Claims and other costs.
5. In determining any component of revenue or cost, the Independent Expert must, among other things:
 - (a) consider the historical performance of the Contractor, on the assumption that the payment mechanism, performance regime and scope and nature of services remain in the form existing as at the Termination Date (excluding amounts incurred by the Contractor prior to termination in order to prevent, cure or mitigate the effects of any Deductions, Charges Claims or default under this Agreement other than where such costs have resulted in a permanent increase in the historical cost base);
 - (b) utilise the financing and economic assumptions set out in the then-current Base Case;
 - (c) include additional costs if and to the extent the Independent Expert forms the view the Services could not, without including such additional costs, be performed to the level required to achieve zero Charges, Deductions and Claims; and
 - (d) determine that component of revenue or cost on a basis consistent with that incorporated into a price for the Project if the Project were to be sold in a market of knowledgeable, willing but not anxious buyers and sellers acting at arm's length.
6. The Independent Expert will have a duty to obtain specialist advice, including independent technical advice in relation to the provision of the Services (including costs and performance standards), specialist commercial and legal advice to the extent reasonably required.
7. Where the Actual Termination Date occurs prior to the Debt Service Commencement Date, the projected cash flows for the purpose of this valuation will be those occurring from the Debt Service Commencement Date as per the then-current Base Case and the Independent Expert must assume that the Service Commencement Date will occur on the Planned Service Commencement Date.