

## Schedule 7 – Net Financial Impact

### 1 Application

- (a) Subject to the Contract, the Operator is entitled to be compensated for the negative Net Financial Impact of the following events (**NFI Events**):
- (i) if agreed to by TfNSW, acquisition of a New Depot;
  - (ii) Project Specific Changes in Law; and
  - (iii) Contract Variations directed by TfNSW under clause 13 (Contract Variations) of the Contract,
- but, for clarity, excluding any Service Variations associated with such NFI Events.
- (b) Subject to the Contract, TfNSW is entitled to be paid an amount calculated by reference to the positive Net Financial Impact of the NFI Events referred to in paragraph 1(a)(iii).

### 2 Calculation of Net Financial Impact

- (a) Subject to paragraphs 2(b) and 3.3, the Net Financial Impact of an NFI Event will be calculated having regard to:
- (i) the incremental additional costs which the Operator incurs or will incur as a result of the NFI Event, including:
    - (A) design and construction costs which are the actual incremental direct costs of plant, labour, materials and subcontractors directly engaged in construction required in relation to the NFI Event;
    - (B) manufacturing costs;
    - (C) financing costs;
    - (D) external third-party advisory costs;
    - (E) subcontractor overhead and margin costs; and
    - (F) the Operator's overhead and margin costs;
  - (ii) any cost savings which accrue or will accrue to the Operator as a result of the NFI Event;
  - (iii) any insurance proceeds, damages, compensation or other revenue which the Operator receives or is entitled to receive as a result of the NFI Event; and
  - (iv) any liability to third parties (including subcontractors) incurred by the Operator as a result of the NFI Event.

- (b) Consistent with clause 12.1(d) of the Contract, incremental costs associated with associated Service Variations will not be counted for the purposes of paragraph (a) and are address by the price adjustment for that Service Variation.
- (c) If in any month the incremental additional costs and loss incurred or suffered by the Operator as a result of a NFI Event exceeds the cost savings derived by the Operator as a result of the NFI Event, the Net Financial Impact for that month will be a negative amount.
- (d) If in any month the cost savings derived by the Operator as a result of a NFI Event exceeds the incremental additional costs and loss incurred or suffered by the Operator as a result of the NFI Event, the Net Financial Impact for that month will be a positive amount.

### **3 Principles for calculating Net Financial Impact**

#### **3.1 Overriding considerations**

The overriding considerations for calculating Net Financial Impact will be that:

- (a) TfNSW is receiving value for money; and
- (b) the compensation amount is fair and reasonable and is calculated in a manner that is transparent.

#### **3.2 Open book basis**

The Operator must and must procure that the Operator's Associates:

- (a) provide all information in relation to the Operator's calculations on an open book basis;
- (b) if required by TfNSW, make available the appropriate personnel to explain the basis on which a particular calculation has been made; and
- (c) allow TfNSW to review and undertake audits to enable it to verify compliance with paragraph 3.2(b),

in order to enable TfNSW to make an accurate assessment of the actual costs and savings. "Open book basis" will include the Operator providing a breakdown of the calculation of all relevant preliminaries, labour, equipment, materials, subcontract, finance and other costs and margins of the Operator and the Operator's Associates in a clear and transparent manner and other information reasonably required by TfNSW including reasonable available source documents required to verify such calculation.

#### **3.3 No double counting or double compensation**

- (a) No amounts will be double counted and no costs will be payable more than once, whether as part of the Net Financial Impact or otherwise under this Contract, including a price adjustment for a Service Variation.
- (b) Without limitation to paragraph 3.3(a), no amount will be included in the Net Financial Impact to the extent that the Operator is otherwise compensated for that amount under this Contract, including in any indexation.

### **3.4 Incremental costs only**

Changes in costs are to be determined on an incremental basis where:

- (a) in the case of an increase in costs, only incremental additional costs that would not be incurred but for the NFI Event are taken into account; and
- (b) in the case of a reduction in costs, only incremental additional savings that would not have accrued but for the NFI Event are taken into account.

### **3.5 Fair and reasonable, arm's length arrangements**

All increases or decreases in costs included in the calculation must:

- (a) be fair and reasonable; and
- (b) reflect commercial arm's length arrangements.

### **3.6 Non-compliance with other obligations**

The Net Financial Impact of a NFI Event will:

- (a) exclude any incremental costs which would not be incurred or suffered; and
- (b) include any cost savings which would have been derived,

had the Operator complied with its obligations under this Contract, other than to the extent the Parties agree that an obligation is adversely affected by the relevant NFI Event.

### **3.7 Mitigation**

Without limiting paragraph 3.6, the Net Financial Impact of a NFI Event will:

- (a) exclude any incremental costs which would not have been incurred or suffered; and
- (b) include any costs savings which would have been derived,

had the Operator:

- (c) complied with clause 44.2(a)(iii) (Condition precedent to relief or compensation); and
- (d) taken all action reasonably practicable to mitigate the costs and achieve value for money (including by obtaining multiple quotes for third party costs via market exercises).

### **3.8 Overheads and margin**

- (a) Subject to paragraph 3.8(b), the Operator will not be entitled to any amount on account of profit or overheads in respect of an incremental additional costs incurred as a result of a NFI Event.
- (b) If the Net Financial Impact of a Contract Variation excluding the Operator's overhead and margin costs exceeds:

- (i) \$200,000.00; or
- (ii) where it is due to a breach of this Contract by TfNSW, \$50,000.00,

the Operator will be entitled to charge 5.0% on the incremental Net Financial Impact on account of overheads and profit.

### **3.9 Redundancy**

Any redundancy payments which are necessary as a result of a NFI Event (but excluding annual leave, rostered days off and long service leave entitlements) will be included provided the Operator has used reasonable endeavours to avoid or minimise those redundancies.

### **3.10 Insurance costs**

All insurance cost impacts must be included in the calculations.

## **4 Compensation Arrangements**

### **4.1 If agreed**

- (a) Subject to paragraph 4.2, the Parties can agree that the Operator will be compensated or TfNSW will be paid for the Net Financial Impact of a NFI Event by:
  - (i) single lump sum payment, or a series of lump sum payments;
  - (ii) milestone payments; or
  - (iii) any other means which the Parties may agree.
- (b) If the Parties agree the arrangements by which the Operator will be compensated or TfNSW will be paid, then TfNSW must provide the agreed compensation, or the Operator must make the agreed payment, in accordance with the agreed arrangements.

### **4.2 If not agreed**

If the Parties do not agree upon an arrangement for the payment of compensation under paragraph 4.1 of this Schedule, then:

- (a) if the actual Net Financial Impact of a NFI Event in any month is a negative amount, that amount will become payable by TfNSW to the Operator after the end of the relevant month; and
- (b) if the actual Net Financial Impact of a NFI Event in any month is a positive amount, that amount will become payable by the Operator to TfNSW after the end of the relevant month.

### **4.3 Claims for payment**

The Operator may submit claims for payment due under this paragraph 4 in accordance with clause 37 (Payment).