

Schedule 11 – Estimated Cost Effect

The Estimated Cost Effect in respect of the Project Works, the Public Patient Portion, the Private Patient Portion or the Shared Portion will be determined in accordance with the provisions of this Schedule 11.

1. Provision of information

1.1 Value for money

In determining the Estimated Cost Effect under this Schedule 11, the overriding considerations are:

- (a) that the State receives value for money and that the Estimated Cost Effect is fair and reasonable and is calculated in a manner that is transparent and avoids any double counting; and
- (b) a Change to Services will not, other than in exceptional circumstances, give rise to an Estimated Cost Effect and the Operator will not be compensated by the State for Changes in Services, including those for which (among other things) the cost is included in the Monthly Service Payment or for which the Operator is compensated by other means, provided nothing in this section 1.1(b) limits the rights of the Operator to fully recover amounts which would otherwise be payable under section 3.1.

1.2 Open Book Basis

The Operator must:

- (a) provide (and must procure that the Subcontractors provide) all information referred to in this Schedule 11 on an open book basis; and
- (b) ensure any unit prices or amounts of compensation are calculated based on the most efficient form of delivery which offers the best value for money for the State in order to comply with the Change Order.

1.3 Access to information

If required by the State, the Operator must provide (and must procure that the Key Subcontractors provide) the State with full access to internal cost estimation, programming, contingency and risk information used by the Operator and the Key Subcontractors (as applicable) for their own purposes, in relation to an ECE Event and, to the extent the State reasonably considers the information relevant to its assessment of the impacts of the ECE Event, in relation to the Operator's Activities generally.

1.4 Audits

The Operator must allow (and must procure that the Key Subcontractors allow) the State (or an independent party appointed by the State) to review and undertake audits to enable it to verify compliance with this Schedule 11.

1.5 Further information

If requested by the State, the Operator must (and must procure that the Operator Related Parties):

- (a) meet with the State, or attend any meetings proposed by the State; and
- (b) provide further details and access to appropriately qualified personnel, to enable the State to assess the Estimated Cost Effect.

2. Tender

If directed by the Client Representative:

- (a) under clause 64.10; or
- (b) with respect to an ECE Event for which any Capital Expenditure will be incurred, the Operator must, if directed to do so by the Client Representative:
- (c) carry out a tender process in a manner agreed by the State (acting reasonably); or
- (d) decline any tender offer or not proceed with the work in respect of the ECE Event.

3. Calculation of Estimated Cost Effect

3.1 Operator to calculate costs

Subject to sections 4, 5 and 6, the Operator must calculate the sum of the following items that arise or will arise as a direct result of the occurrence of the relevant ECE Event:

- (a) the following incremental costs (excluding margins) which will be incurred by the Operator and which are the direct result of the ECE Event or its effects (including the reasonable costs incurred in avoiding, mitigating, preventing or eliminating the effects of the ECE Event):
 - (i) incremental design costs;
 - (ii) incremental construction costs;
 - (iii) incremental costs incurred in performing the Services including incremental life
 - (v) any reasonable external third party advisory costs; and
 - (vi) any reasonable incremental administrative and overhead costs of the Operator provided that such costs must not, where incremental Capital Expenditure is incurred, in aggregate exceed of the incremental Capital Expenditure incurred, adjusted:
 - (vii) in the case of a Change undertaken during the Development Phase where incremental Capital Expenditure is incurred or not incurred, in accordance with Part A of Appendix 1 to this Schedule 11;
 - (viii) in the case of a Change undertaken during the Operating Term where incremental Capital Expenditure is incurred or not incurred, in accordance with Part B of Appendix 1 to this Schedule 11;
 - (ix) in the case of a Change which increases or decreases the cost of delivering the Services which is not reflected in the 'State Price' (as defined in the Payment Schedule), the Monthly Service Payment or for which the Operator is not

compensated through other means, in accordance with section 7 of this Schedule 11; and

- (x) for any funding, revenue or compensation received or receivable by the Operator (or a Subcontractor) (other than in accordance with this Schedule 11) from any person for or in respect of that Change,
- (b) plus:
- (i) the reasonable costs to the Operator or the Debt Financiers of engaging consultants to carry out due diligence reasonably required to enable the Debt Financiers to grant any consent required under the Financing Agreements for the Operator carrying out a Change proposed by the State;
 - (ii) any debt or equity financing costs incurred or not incurred in connection with any additional or reduced financial accommodation required to implement the Change (if any) as a direct result of the ECE Event provided that this is calculated in accordance with section 8.3, provided that any such calculation excludes the effect of interest rate variations (other than interest rate variations which are the direct and incremental impact of the ECE Event);
 - (iii) in respect of a period Technical Completion is delayed after the Funded Completion Date due to the occurrence of one or more ECE Events, Prolongation Costs, subject to the limits set out in section 3.4;
 - (iv) Finance Delay Costs payable in accordance with section 8.2;
 - (v) an amount equal to any Tax payable by it on the Estimated Cost Effect (net of any deductions) less any amounts which would not have been payable had it used all reasonable endeavours to minimise any Tax payable;
 - (vi) Delay Costs payable in accordance with section 5 (for the avoidance of doubt other than Finance Delay Costs and Prolongation Costs); and
 - (vii) any compensation for any lost Monthly Service Payments, updated (as appropriate) to reflect current indexation and interest rate assumptions where these risks are assumed by the State.

3.2 Operator to calculate deductions

The Operator must calculate the sum of the following items which arise or will arise as a direct result of the occurrence of the relevant ECE Event:

- (a) any insurance proceeds or damages or other compensation or amounts received by the Operator as a result of the occurrence of the relevant ECE Event;

- (b) any cost avoided (including tax, financing and/or other benefits associated with deferred expenditure) made by or accruing to the Operator as a result of the occurrence of the relevant ECE Event; and
- (c) any other amounts received or receivable by the Operator pursuant to or in accordance with the terms of this document as a result of the occurrence of the event(s) which gave rise to, caused or constituted the ECE Event.

3.3 Determination of Estimated Cost Effect

- (a) Subject to section 3.4, the Estimated Cost Effect will be the sum of the amounts referred to in section 3.1 or section 4 (as applicable) minus the sum of the amounts referred to in section 3.2, provided that there shall be no double counting, and, where an item is included once, it should not be included again in the calculation because it falls into more than one of the categories set out in sections 3.1, 3.2, 4 and 5.
- (b) Notwithstanding section 3.3(a) in respect of the implementation of any Health Initiative by the Operator under clause 52.10(b) which would otherwise constitute a Change or Additional Work, the Operator acknowledges that the Estimated Cost Effect for such implementation may not be greater than the average amount incurred by other public hospitals in NSW having a similar role delineation as the Facility in implementing the same or equivalent Health Initiative which would otherwise constitute Changes or Additional Work.

3.4 Prolongation Costs

To the extent that the Estimated Cost Effect includes an amount on account of Prolongation Costs, the maximum daily rate for those Prolongation Costs are _____ per day.

3.5 Exclusion of Private Patient Portion, State Price elements

The Operator must demonstrate to the satisfaction of the Client Representative (acting reasonably) that any calculation made pursuant to this Schedule 11 by the Operator in respect of an ECE Event during the Operating Term disregards or excludes the impact of that ECE Event:

- (b) to the extent that the impact of the ECE Event is already captured or reflected in the 'State Price' (as defined in the Payment Schedule).

5. Delay Costs (other than Finance Delay Costs)

5.1 References to 'Delay Costs'

In this section 5, references to 'Delay Costs' are taken to exclude a reference to Finance Delay Costs and Prolongation Costs. The Operator's entitlement to payment of Finance Delay Costs is to be determined in accordance with sections 3 and 8.2.

5.2 Calculation of Delay Costs

- (a) Subject to section 5.2(b), if:
- (i) the Operator achieves Operational Readiness after the Original Date for Operational Readiness; and
 - (ii) one or more Compensation Events has occurred prior to the Date of Operational Readiness for which the Operator has been granted an extension of time pursuant to clause 61 (Compensation Events) and the Operator has incurred Delay Costs with respect to those Compensation Events,

the State must pay the Operator an amount determined in accordance with the following formula in accordance with section 5.2(c):

$$P = A \times \frac{B}{C}$$

Where:

- P = the amount to be paid by the State to the Operator;
- A = the aggregate Delay Costs incurred by the Operator arising from all Compensation Events that have occurred prior to Operational Readiness for which the Operator has been granted an extension of time pursuant to clause 61 (Compensation Events);
- B = the lesser of:
- (a) the number of days between the Original Date for Operational Readiness and the Date of Operational Readiness; and
 - (b) the total number of days by which the Original Date for Operational Readiness has been extended pursuant to section 3(a) of Schedule 9 with respect to all Compensation Events occurring prior to the Date of Operational Readiness; and
- C = the total number of days by which the Original Date for Operational Readiness has been extended pursuant to section 3(a) of Schedule 9 with respect to all Compensation Events occurring prior to the Date of Operational Readiness.

If within 5 Business Days of any calculation referred to in this section 5.2(a), the Operator and the State are unable to agree on any part of the calculation of the delay costs under this section 5.2, the disagreement will be referred to the relevant Executive Negotiators in accordance with clause 87.4 (Executive Negotiation) of this document and the disagreement will be deemed to be a Dispute. A written notice under clause 87.3 (Notice of Dispute) will not be required prior to any referral to the Executive Negotiators, although the Executive Negotiators will be deemed to have received a notice of Dispute upon the last party to be notified of the Dispute.

- (b) If:
- (i) a Compensation Event occurs prior to the Date of Operational Readiness for which the Operator is entitled to an extension of time pursuant to clause 61 (Compensation Events);
 - (ii) the Client Representative accepts an Acceleration Notice pursuant to clause 23.7(d) with respect to that Compensation Event; and

- (iii) the execution of the Project Works in accordance with the Project Program and the Construction Management Plan (each as amended pursuant to clause 23.7(e)(i)) partially or wholly ameliorates the delay caused by that Compensation Event, the Operator will be entitled to the costs of the acceleration pursuant to clause 23.7(e)(iii) but, to the extent that the execution of the Project Works ameliorates the delay caused by that Compensation Event, will not be entitled to Delay Costs with respect to that part of the delay pursuant to section 5.2(a).
- (c) The amount calculated in accordance with section 5.2(a) which is payable to the Operator by the State will be paid as follows:
 - (i) the calculation referred to in section 5.2(a) will be performed by the Operator on the last Business Day of every month commencing from the Original Date for Operational Readiness until and including on the Date of Operational Readiness and the Operator will notify the State of the result of the calculation in writing on each of the days the calculation is performed; and
 - (ii) if an amount is payable by the State to the Operator after the calculation referred to in section 5.2(a) is performed, the State will pay to the Operator the amount payable within 20 Business Days of notification of that amount under section 5.2(c)(i).

6. Rates and Disputes

6.1 Dispute as to calculation

Subject to section 5.2(a), if the Operator and the State are unable to agree on any part of the calculation of the Estimated Cost Effect within 20 Business Days after the Estimated Cost Effect, and its component parts and calculations are provided to the State, either party may refer the matter for resolution by expert determination in accordance with clause 87.5 of this document.

6.2 Other Dispute

In the case of a dispute (other than a dispute described in section 6.1) as to reasonable market rates for costs or whether the effects of the relevant ECE Event could have been reduced, mitigated, prevented or eliminated by reasonable and appropriate steps by the Operator, the matter may be referred by either party for resolution in accordance with clause 87 of this document.

7. Changes to Services

Nothing in sections 7.1(a), 7.3(b) and 7.3(c) limits the rights of the Operator to fully recover amounts which would otherwise be payable under section 3.1 (other than under section 3.1(a)(iii) in connection with the actual performance of the relevant Services, but including its incremental life cycle costs resulting from a Change to Services).

7.1 General Principles

- (a) A Change to Services, the way in which Services are delivered, variations to Service volume, the introduction of new Services, the cessation of existing Service Categories or changes to the Quality Standards or Reporting Requirements will not, other than in exceptional circumstances, give rise to an Estimated Cost Effect.
- (b) Notwithstanding paragraph (a), if an Estimated Cost Effect is payable in respect of a Change relating to the Services:
 - (i) it is to be determined having regard to the principles in section 7.2;

- (ii) it must not result in the cost of the Service to the State being more than the State would pay to deliver the Service itself or the National Efficient Price;
 - (iii) it may be payable by way of an adjustment to the Monthly Service Payment or by making another payment; and
 - (iv) there will be no change to the Maximum Payment Amount unless specifically detailed in the Change Order.
- (c) If the Operator is entitled to any funding or payment in accordance with this Schedule 11 for a Change to Services and that funding or payment is actually made available by any person (other than the State, as the contracting party under this document), then such funding or payment will be made available to the Operator on the same basis and subject to any conditions or restrictions to which the funding or payment is subject.

7.2 Change to the method of Service delivery

- (a) **(Normal business)** If a Change Order requires the Operator to change its method of Service delivery in a manner:
- (i) to be consistent with required changes at some or all NSW public hospitals or changes to the NSLHD Service Agreement; and
 - (ii) which (other than in cases where the Change reflects changes in the Role Delineation, in which case this subparagraph (ii) does not apply) either:
 - (A) reflects contemporary practice; or
 - (B) does not have a material detrimental effect on efficiency at the Facility as determined by the State (acting reasonably) and as demonstrated and evidenced by the Operator,

then the Operator will meet any costs, or benefit from any savings, that occurs as a result of implementing the Change and no Estimated Cost Effect is payable.
- (b) **(Change not implemented at other NSW public hospitals)** If the required change to the method of Service delivery as detailed in the Change Order is not a change of the type referred to in paragraph (a), the State will (acting reasonably) specify whether:
- (i) the required change represents 'Normal Business' which (other than in cases where the Change reflects changes in the Role Delineation) must either:
 - (A) reflect contemporary practice; or
 - (B) not have a material detrimental effect on efficiency at the Facility as determined by the State (acting reasonably) and as demonstrated and evidenced by the Operator; or
 - (ii) an Estimated Cost Effect is payable to the Operator.
- (c) If the State determines (acting reasonably) that an Estimated Cost Effect is payable to the Operator, the Change Order will detail the method and conditions associated with payment of the Estimated Cost Effect, in accordance with this Schedule 11.

7.3 Change to the type of services that are delivered

- (a) **(Introduction of new Services)** If a new Service within an existing Service Category is introduced by way of a Change then no Estimated Cost Effect is payable and the new Service will be paid for in accordance with the Payment Schedule.
- (b) **(Introduction of new Service Category)** If a Change Order requires a new Service to be introduced that does not have an existing Service Category and:

- (i) that new Service is able to be prescribed through the NWAU or the Operator is compensated by other means, then no additional compensation will be payable by the State to the Operator; or
- (ii) subparagraph (i) does not apply, then:
 - (A) the State and the Operator must (acting reasonably) attempt to agree a new 'Tendered Price', 'Further Discounted Price 1' and 'Further Discounted Price 2' for the new Service for the purposes of the Payment Schedule; and
 - (B) if, after a reasonable period of time, the parties have been unable to reach agreement as to the matters set out in subparagraph (A), then:
 - (I) the State may (acting reasonably) determine the aggregate price payable for services substantially similar to that new Service at no less than three public hospitals in NSW having a similar role delineation as the Facility (**Comparator Price**); and
 - (II) the 'Tendered Price', 'Further Discounted Price 1' and 'Further Discounted Price 2' for that new Service will be determined by applying the same levels of discount to the Comparator Price as are applied to the State Price in respect of the 'Tendered Price', 'Further Discounted Price 1' and 'Further Discounted Price 2' for the 'General Admitted Activity' Service Category,

provided that, if the Operator disputes the State's methodology for the determination of the Comparator Price pursuant to subsection (b)(ii)(B)(I) above, it may refer the matter for dispute resolution in accordance with clause 87, in which case the aggregate price determined under that dispute resolution mechanism will be the 'Comparator Price' for the purposes of this subsection.

The price agreed or determined in accordance with subparagraph (ii) will be included within the Change Order and represent the price payable for that Service for the purposes of section 2.1 of the Payment Schedule, to be reviewed in future years in accordance with the Payment Schedule.

(c) **(Change in role delineation of existing Service):**

- (i) If a Change Order involves a change in Role Delineation Level for an existing Service and the Operator can reasonably demonstrate to the State's satisfaction that:
 - (A) the reasonable costs of delivering this Service with an increased Role Delineation are not accurately reflected in the applicable NWAU or other cost measure used to determine the State Price; and
 - (B) the Operator's costs will increase as a direct result of the Change Order, the Change will be considered to be a new Service Category and the Estimated Cost Effect will be determined in accordance with section 7.3(b).
- (ii) If the above circumstances apply to Services within the 'General Admitted Activity' Service Category, the use of a separate Service Category for those Services with an increased Role Delineation will cease if the State deems that the NWAUs (or other applicable cost measure used to determine the State Price) being applied for the 'General Admitted Activity' Service Category adequately reflects the reasonable costs of delivering the Service, and the method of remuneration as outlined in section 7.3(a) will apply from that point forward.

8. Payment and Finance

8.1 Payment

- (a) Where the Estimated Cost Effect is a positive amount, the Operator will be entitled to be compensated for the Estimated Cost Effect associated with an ECE Event.
- (b) At the State's discretion, unless otherwise expressly provided in this Schedule 11, the capital component of any Estimated Cost Effect which is payable to the Operator will be paid to the Operator by:
 - (i) lump sum within 40 Business Days after the determination of the Estimated Cost Effect in accordance with this Schedule 11;
 - (ii) to the extent that part of the capital component relates to payments by the Operator to the Construction Contractor, that part of the capital component may be paid by lump sum payments matching the payment obligations of the Operator under the relevant Subcontract. The remainder of the capital component will be paid to the Operator by lump sum within 40 Business Days after the determination of the Estimated Cost Effect in accordance with this Schedule 11; or
 - (iii) by a combination of the methods in sections 8.1(b)(i) and (ii).

8.2 Payment of Finance Delay Costs

If:

- (a) the Operator has not achieved Transfer Completion by the Original Date for Transfer Completion; and
- (b) the Estimated Cost Effect payable to the Operator in respect of that delay includes an amount on account of Finance Delay Costs incurred by the Operator,

then:

- (c) the Operator must issue a notice to the State of the Finance Delay Costs Payment Date not less than 20 Business Days prior to the Finance Delay Costs Payment Date;
- (d) provided that the Operator has complied with its obligations under section 8.2(c), the State must pay those Finance Delay Costs to the Operator on the Finance Delay Costs Payment Date or, if the Operator has not complied with its obligations under section 8.2(c), within 20 Business Days after the end of each month, with effect from the Original Date for Transfer Completion until the expiry of the period which is the total number of days by which the Original Date for Transfer Completion has been extended pursuant to section 3(a) of Schedule 9 with respect to all Compensation Events occurring prior to the Date of Transfer Completion; and
- (e) the notice issued by the Operator under section 8.2(c) will be based on the relevant interest rate under the Financing Agreements as at the date of the notice. If the interest rate changes between the date of the notice and the date of the relevant payment under the Financing Agreements, such that the amount calculated and included in the notice does not accurately reflect the interest rate on the date of the relevant payment under the Financing Agreements, the Operator will make an allowance for, and identify, the difference in a notice issued under section 8.2(c) in the following month.

8.3 Amendment to Payment Schedule and Base Case – State Asset

- (a) Subject to the State's agreement to the calculated adjusted Monthly Service Payments, the Payment Schedule and the Base Case – State Asset will be amended in accordance with clause 76 (Base Cases and Monthly Service Payment adjustments) of this document and

the Operator will be entitled to receive, and the State must make payments based on, the adjusted Monthly Service Payments.

Appendix 1

Part A - Development Phase margins

If a Change is undertaken during the Development Phase and the Operator incurs any incremental Capital Expenditure, the incremental costs set out in section 3.1(a) of this Schedule 11 will be adjusted by the margins set out in Table A as follows:

1. the Design Management Fee will be applied to the amount referred to in section 3.1(a)(i) of this Schedule 11;
2. the On-site management and supervision fee will be applied to the amount referred to in section 3.1(a)(ii) of this Schedule 11;
3. the Construction Margin will be applied to the amount referred to in section 3.1(a)(ii) of this Schedule 11 as adjusted in accordance with section 2 of this Part A; and
4. the Operator Margin will be applied to the amount referred to in sections 3.1(a)(i) and 3.1(a)(ii) of this Schedule 11, as adjusted in accordance with sections 1 to 3 of this Part A.

Table A

Part B - Operating Term - Capital Expenditure margins

If a Change is undertaken during the Operating Term and the Operator incurs any incremental Capital Expenditure, the Operator will not be entitled to charge any margin in respect of the Capital Expenditure.