

## Schedule 38 – Flexibility for Scope Deferral

(clause 36.3)

### 1. Definitions

**Additional Design Work** has the meaning given in clause 2.3(b).

**Deferred Scope** means a portion of the SSTOM Works detailed in a Scope Deferral Notice.

**Deferred Scope Completion Works** has the meaning given in clause 2.3(a)(i).

**Enabling Design Work** has the meaning given in clause 2.3(a).

**Enabling Works** has the meaning given in clause 2.3(a)..

**Material Scope Deferral Election Date** means the date agreed by the parties (acting reasonably) for deferral of identified scope prior to the issuance of a Scope Deferral Notice.

**Modification Process** means the processes for agreement and implementation of Modifications as set out in clause 33 of the Operative Provisions, including the Principal issuing a Modification Impact Request pursuant to clause 33.1(a) of the Operative Provisions or an instruction to implement a Modification pursuant to clause 33.11(a) of the Operative Provisions.

**Relevant Financier** has the meaning given in clause 4.2(a)(ii).

**Scope Deferral Notice** means a notice described in clause 2.2.

**Scope Deferral** has the meaning given in clause 2.1.

**Scope Deferral RFI** has the meaning given in clause 3.1(b).

**Scope Deferral RFI Costs** means the reasonable costs incurred by Opco and any OpCo Contractors to respond to any Scope Deferral RFI in accordance with this Schedule.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

### 2. Acknowledgements

#### 2.1 Scope Deferral

OpCo acknowledges that the Principal wishes to retain flexibility concerning:

- (a) the timing for delivery of portions of the SSTOM Works during the Term, which may include delaying the delivery of certain SSTOM Works, including one or more Stations, until after Completion and the commencement of operations on Sydney Metro – Western Sydney Airport; and
- (b) the deferral of portions of SSTOM Works beyond the Term, which may include delaying the delivery of SSTOM Works, including one or more Stations, indefinitely,

(in the case of each relevant portion of SSTOM Works, a **Scope Deferral**), collectively Deferred Scope.

#### 2.2 Scope Deferral Notice

- (a) The Principal may seek to exercise the flexibility contemplated under clause 2.1 by issuing a notice to OpCo (**Scope Deferral Notice**):

- (i) in respect of a Scope Deferral comprising or including a Station, by no later than the Station Scope Deferral Exercise Date]; or
- (ii) in respect of any Deferred Scope involving the Trains and rail systems, linewise systems or any material aspect of the Stabling and Maintenance Facility, by the Material Scope Deferral Election Date; or
- (iii) in respect of Deferred Scope comprising any other SSTOM Works, at any time during the Delivery Phase,

setting out the following detail:

- (iv) the proposed Scope Deferral, including all relevant works, assets, systems and/or deliverables proposed to be deferred;
- (v) the proposed timing for the Scope Deferral and later delivery of the relevant Deferred Scope;
- (vi) the scope and specifications for Enabling Design Works and Deferred Scope Completion Works (as applicable); and
- (vii) a consultation process in respect of the proposed Scope Deferral, including:
  - (A) the period of consultation, which must not be more than 60 Business Days (unless the parties agree to an extension of that period); and
  - (B) composition of the consultation group established under clause 3.2 and timing for proposed meetings; and
  - (C) such other matters as the Principal's Representative may reasonably determine (or the parties agree) having regard to the nature and circumstances of the proposed Scope Deferral.
- (b) The purpose of a Scope Deferral Notice will be to trigger a consultation process between the Principal and OpCo (and OpCo Contractors, as relevant) regarding the proposed Scope Deferral to agree the matters in clause 2.4 below, prior to progressing the Scope Deferral through the Modification Process.

## 2.3 Flexibility

In combination with a Scope Deferral, the parties acknowledge and agree that:

- (a) a certain minimum level of Design Documentation (**Enabling Design Work**) may need to be developed by OpCo and certain minimum associated physical works (**Enabling Works**) may need to be delivered in respect of the Deferred Scope to support:
  - (i) delivery of the remaining Deferred Scope (**Deferred Scope Completion Works**) at some time in the future;
  - (ii) delivery of the balance of SSTOM Works other than the Deferred Scope and operation of the Sydney Metro – Western Sydney Airport; and
  - (iii) to minimise future cost inefficiency and adverse operational impacts on Sydney Metro – Western Sydney Airport in the Operations Phase or beyond if and when the Deferred Scope is to be delivered and integrated with the Sydney Metro – Western Sydney Airport; and
- (b) there may be benefits for the parties if detailed Design Documentation (**Additional Design Work**) relating to some or all of the Deferred Scope Completion Works is still developed by OpCo prior to Completion notwithstanding the Deferred Scope Completion Works will not be delivered prior to Completion.

## 2.4 Process to agree terms for Scope Deferral

The parties further acknowledge and agree that:

- (a) their mutual intention is that the process to agree the terms and parameters for any Scope Deferral will be via a consultation process triggered by the Principal upon issue of a Scope

Deferral Notice and, if and when agreed, formally instructed through the Modification Process subject to the provisions of this Schedule 38;

- (b) this Schedule 38 (*Flexibility for Scope Deferral*) is supplemental to the provisions of clause 33 of the Operative Provisions and is intended to provide a process for the planning, consideration and implementation of any Scope Deferral in order to achieve the Principal's objectives for any Scope Deferral including to:
  - (i) ensure that any Scope Deferral results in a net cost saving to Sydney Metro and does not result in a net cost increase upon calculation of the Net Financial Impact arising from the Scope Deferral;
  - (ii) minimise overall delivery and operational impacts of the Scope Deferral;
  - (iii) minimise the impacts of the Scope Deferral on OpCo's Debt Financing Facilities and financing of OpCo's Activities;
  - (iv) ensure any required adjustment to the SMWSA Payment Mechanism is consistent with the principles set out in Appendix 2 of Schedule 37; and
  - (v) assure value for money to the Principal;
- (c) the best outcomes for both the Principal and OpCo in respect of any potential Scope Deferral will be achieved if the parties engage openly, collaboratively and efficiently in the processes provided in clause 33 of the Operative Provisions, Schedule 6 (*Net Financial Impact*) and this Schedule 38 (*Flexibility for Scope Deferral*);
- (d) without limitation, the Relationship Principles and all of the provisions of clause 5.1 of the Operative Provisions apply to their interaction and relationship under this Schedule 38 (*Flexibility for Scope Deferral*);
- (e) there are many variables in relation to any Scope Deferral and this Schedule 38 (*Flexibility for Scope Deferral*) is intended to provide flexibility to accommodate any Scope Deferral and timing;
- (f) [not used];
- (g) the Principal:
  - (i) will not be obliged to issue a Scope Deferral Notice or to utilise or conclude the processes contemplated in this Schedule 38 prior to initiating a Modification Process in respect of any Scope Deferral;
  - (ii) may, having initiated the processes contemplated in this Schedule 38, in respect of any or all aspects of the Scope Deferral:
    - (A) issue a Modification Impact Request pursuant to clause 33.1(a) of the Operative Provisions;
    - (B) issue a notice pursuant to clause 33.1(c) of the Operative Provisions to adopt a two-stage process for the development, consideration and approval of a Modification; or
    - (C) instruct OpCo to implement a Modification pursuant to clause 33.11(a) of the Operative Provisions,
 in parallel with or in substitution for the continuation of the processes contemplated in this Schedule 38; and
- (h) it will remain open to the parties through the Senior Project Group (or other appropriate forum) to actively consider, in respect of any specific potential Scope Deferral, whether there is a bespoke process better suited to expeditiously and effectively assist the parties to transact an alternative value for money approach to the implementation of the Scope Deferral.

## 2.5 Management of impacts

- (a) OpCo must, and must ensure that the OpCo Contractors continue to perform OpCo's Activities in all respects during:

- (i) the consideration of any Scope Deferral, notwithstanding that the parties may be considering future changes to OpCo's Activities through the Scope Deferral;
  - (ii) the implementation of any Scope Deferral, subject to any change to OpCo's Activities made through, or as a consequence of, that implementation.
- (b) The parties acknowledge that it is intended that, if implemented, the Scope Deferral will include requirements that OpCo must (and must ensure that the OpCo Contractors), if any pre-existing policy, practice or procedure applied in the conduct of OpCo's Activities is not fully compatible with the implementation of a Scope Deferral, develop a transitional policy, practice or procedure that is fully compatible with the consideration of and (if implemented) implementation of the Scope Deferral.

### 3. Measures to support consideration of Scope Deferral

#### 3.1 Requests for Information

- (a) The parties acknowledge that, at any time during the consultation process triggered by a Scope Deferral Notice, the Principal may, through the process in clause 3.1(b) require initial information in relation to the definition of a proposed Scope Deferral before initiating any Modification Process, including prior to the Principal issuing any notice under clause 3.1(c) of the Operative Provisions.
- (b) At any time (and without limiting the number of times the Principal may do so) the Principal may issue to OpCo a request for information (and OpCo must, subject to agreement on any Scope Deferral RFI Costs provide the information) to assist the Principal in its consideration of a proposed Scope Deferral (**Scope Deferral RFI**). The information requested may include:
  - (i) (**Procurement and Delivery**): information in relation to the procurement and delivery impacts of the proposed Scope Deferral including the D&C Price impacts and Delivery Program impacts;
  - (ii) (**Operations and Maintenance**): information in relation to the operation and maintenance aspects of the Scope Deferral including the ability to meet the Contract Service Level Requirements and any consequential Service Change arising out of the Scope Deferral;
  - (iii) (**Financing**): information in relation to the impacts on the Debt Financing Facilities and financing of OpCo's Activities;
  - (iv) (**Payment Mechanism**): information in relation to the payment mechanism; and
  - (v) (**Other information**): any other information considered relevant by the Principal (including any preliminary or indicative pricing for any aspect of the Scope Deferral).
- (c) Following receipt of a Scope Deferral RFI, OpCo may notify the Principal that OpCo or an OpCo Contractor will incur Scope Deferral RFI Costs (except to the extent that those Scope Deferral RFI Costs are costs of OpCo or the OpCo Contractor that would be incurred in the course of performing OpCo's Activities or otherwise in the ordinary course of OpCo's or the OpCo Contractor's business) in complying with its obligations under clause 3.1(b) in respect of that RFI. OpCo must use its best endeavours to (and procure that OpCo Contractors) minimise any Scope Deferral RFI Costs.
- (d) The Principal will, acting reasonably, advise OpCo within 20 Business Days if it agrees OpCo's proposed Scope Deferral RFI Costs.
- (e) If the Principal does not agree the proposed Scope Deferral RFI Costs, the parties must meet and use their reasonable endeavours to agree the amount of the Scope Deferral RFI Costs.
- (f) The Principal will reimburse OpCo any agreed Scope Deferral RFI Costs on a monthly basis or as otherwise agreed by the parties.

- (g) If the Principal wishes to vary the scope of any Scope Deferral RFI, clauses 3.1(c) to (f) will reapply to the varied scope.

### 3.2 Scope Deferral Consultation Group

- (a) As part of the process to develop terms for any Scope Deferral in clause 2.4 above, the Principal may, at any time, request that OpCo must:
  - (i) establish a consultation group in relation to a proposed Scope Deferral; or
  - (ii) participate in any consultation group arranged by the Principal or its nominee in relation to a proposed Scope Deferral,
 and OpCo must do so promptly after receiving the Principal's request.
- (b) The objectives of the consultation group are to:
  - (i) establish and oversee work streams which will consider, develop and report to the consultation group in respect of options for addressing (to the extent relevant having regard to the proposed Scope Deferral) the:
    - (A) implementation of the proposed Scope Deferral (including both delivery and operation and maintenance elements); and
    - (B) financing impacts.
  - (ii) provide a forum for the discussion of matters relating to the proposed Scope Deferral; and
  - (iii) assist with the resolution of any matters referred to the consultation group by a party.

## 4. Finance

### 4.1 Principles and objectives for management of financing impacts

- (a) In developing an approach to the implementation of any Scope Deferral, the parties must work together to seek to agree and implement a strategy for dealing with debt and equity seeking to achieve, as far as reasonably practicable:
  - (i) the principles and objectives in clause 4.1(b); or
  - (ii) where it is not reasonably practicable to achieve the principles and objectives in clause 4.1(b), the principles and objectives in clause 4.1(c), and
 OpCo must provide the Principal and its nominees with visibility over, and input into, any associated negotiations with Debt Financiers and Equity Investors.
- (b) The priority principles and objectives for dealing with debt and equity are:
  - (i) there will be no change to the levels of debt and equity as a result of the Scope Deferral;
  - (ii) OpCo must use all reasonable endeavours to minimise the need for and extent of any amendments to its existing Debt Financing Facilities and associated requirements for consent from the Debt Financiers;
  - (iii) the implementation of the Scope Deferral should not impact the Base Case Equity Return;
  - (iv) the requirements for drawdown and withdrawal of amounts from the Principal Capital Contribution Account as set out in clause 8.5 of the Financier's Tripartite Deed continue to apply;
  - (v) the overall amount of the Capital Contribution will be reduced to reflect net cost savings arising from the Scope Deferral; and
  - (vi) the Indexing Capital Component and the Non-Indexing Component will not change.

- (c) The alternative principles for dealing with debt and equity are that OpCo must:
- (i) use all reasonable endeavours to:
    - (A) minimise the need for and extent of any amendments to its existing Debt Financing Facilities and associated requirements for consent from the Debt Financiers; and
    - (B) where amendment to the existing Debt Financing Facilities is necessary, as far as reasonably practicable, minimise any financing break costs, prepayment of, cancellation of, Refinancing or other early termination of all or any part of the Debt Financing Facilities;
  - (ii) optimise the levels of debt and equity and the profile and allocation of the Capital Contribution in order to minimise the average cost of capital for the SSTOM PPP, taking into account:
    - (A) the levels of debt and equity prior to the implementation of the Scope Deferral;
    - (B) the implementation of the Scope Deferral should not impact the Base Case Equity Return;
    - (C) the requirements for drawdown and withdrawal of amounts from the Principal Capital Contribution Account as set out in clause 8.5 of the Financier's Tripartite Deed continue to apply; and
    - (D) the Capital Contribution Funding Percentage; or
    - (E) other additional or alternative considerations as agreed by the parties.
- (d) The parties acknowledge that:
- (i) the practicality of achievement of the principles and objectives in this clause 4 is dependant on, and needs to be assessed against, the details and parameters of the actual Scope Deferral proposed; and
  - (ii) unless otherwise agreed by the parties (acting in accordance with this clause 4, or through the provisions of clause 33), the principles and objectives in this clause 4 will not change:
    - (A) the calculation of, or arrangements for, any compensation under Schedule 6; or
    - (B) the calculation of any extension of time;
 for any Modification directed by the Principal to implement any Scope Deferral.

## 4.2 Consent by Debt Financiers

- (a) The parties agree that, if the Principal initiates discussions with OpCo in relation to a proposed Scope Deferral, the following processes will apply:
- (i) OpCo must, at a time agreed by the Principal and OpCo, initiate discussions with the Debt Financiers in relation to details of the proposed Scope Deferral and possible impacts on the Project Agreements if the Scope Deferral were to proceed. OpCo must:
    - (A) keep the Debt Financiers informed as discussions proceed between the Principal and OpCo in relation to the proposed Scope Deferral; and
    - (B) use best endeavours to obtain the consent of each Debt Financier to any amendment, consent or waiver that may be required under a Project Agreement in relation to the proposed Scope Deferral.
  - (ii) If at any time it appears to OpCo that a Debt Financier (**Relevant Financier**) may refuse to consent to any amendment, consent or waiver that may be required under a Project Agreement in relation to a proposed Scope Deferral, OpCo must promptly inform the Principal and, at the Principal's request, must:

- (A) discuss fully with the Principal the options available to the Principal and OpCo which would facilitate progress of the Scope Deferral;
- (B) enter into negotiations with the other Debt Financiers with a view to one or more of them acquiring the Relevant Financier's participation in and commitments under the Debt Financing Documents;
- (C) seek a replacement financier to acquire the Relevant Financier's participation in and commitments under the Debt Financing Documents; and
- (D) keep the Principal fully informed of progress under paragraphs (B) and (C) of this subclause.