

**39. SCHEDULE 39:**

**UNITARY CHARGE**  
**ADJUSTMENT PROTOCOL**

## **Schedule 39 (Unitary Charge Adjustment Protocol)**

### **1. OBJECTIVE**

- 1.1 The objective of this Schedule 39 (Unitary Charge Adjustment Protocol) is to:
- 1.1.1 establish the arrangements for custody and amendment of the Base Case;
  - 1.1.2 determine the financial consequences of a Relevant Event and (if applicable) to determine any adjustment to the Annual Unitary Charge;
  - 1.1.3 to confirm the application of the 'no better no worse' principle in relation to any Relevant Event and the consequences thereof;
  - 1.1.4 establish the basis upon which the Contractor will (in the circumstances provided for in this Contract) be compensated for lost Third Party Income.

### **2. CUSTODY OF THE BASE CASE**

- 2.1 On the date of this Contract, the Contractor shall deliver an electronic copy of the Base Case to the Authority.
- 2.2 Not Used.
- 2.3 Either Party shall have the right to inspect and audit the Base Case at all reasonable times.
- 2.4 Amendments to the Base Case (including for these purposes the Mass Balance Model) shall reflect and be consistent with and shall only be made in accordance with the provisions of the Contract and in particular this Schedule 39 (Unitary Charge Adjustment Protocol).
- 2.5 Following the approval of any amendment of the Base Case by the Authority, the Contractor shall promptly deliver two (2) copies of the revised Base Case to the Authority, in the same form as the original form (or such other form as may be agreed by the Parties from time to time).

### **3. DETERMINING THE EFFECT OF A RELEVANT EVENT**

- 3.1 Subject to Paragraph 3.2 below, where the impact of a Relevant Event is likely to involve additional Capital Expenditure the Authority may (at its discretion)
- (a) provide the additional Capital Expenditure itself or
  - (b) require the Contractor to use its reasonable endeavours to finance the increase Capital Expenditure on terms reasonably satisfactory to the Contractor and the Senior Lenders

and the provisions of Clauses 105.4 to 105.7 (Qualifying Change in Law) or 107.2.2 and 107.9 to 107.13 (Authority Change) shall apply as applicable.

- 3.2 Where the Relevant Event is a Compensation Event, the Authority shall provide the additional Capital Expenditure itself in accordance with Clause 36.4 unless the Contractor (at its discretion) agrees to finance the Capital Expenditure.
- 3.3 Where the Relevant Event is likely to result in an Estimated Change of Project Costs the Parties shall attempt to agree the effect on the Annual Unitary Charge by negotiation both acting reasonably and in good faith. Recourse shall be had to the provisions of the remainder of this Schedule and its Appendix where (and at any time) either Party considers that a negotiated solution is unlikely to be achieved.

#### **4 ADJUSTMENT TO BASE CASE PRIOR TO ASSESSING THE IMPACT OF RELEVANT EVENT**

The Base Case shall prior to assessing the impact of the Relevant Event in question firstly be adjusted to reflect the impact of any prior Relevant Event and all Indexation required under this Contract (not already reflected).

#### **5 ESTABLISHING THE ESTIMATED CHANGE IN PROJECT COSTS**

- 5.1 Where for the purposes of this Schedule 39 the Base Case is to be adjusted by reference to a Relevant Event, this shall be carried out by the Contractor, in consultation with the Authority, to reflect the impact of that Relevant Event on the version of the Base Case applicable immediately prior to the relevant adjustment including (without limitation) the effect of Estimated Change in Project Costs.
- 5.2 In determining the Estimated Change in Project Costs the Contractor shall take into account the provisions of Clauses 36 (Supervening Events), 46 (Service Delay), 53 (Composition Changes), 54 (MBT Input Composition), 55 (Composition Risk), 105 (Changes in Law) and 107 (Authority Changes) and inter alia:
  - 5.2.1 the financial impact of the Relevant Event to the extent directly caused or contributed to by the Relevant Event
  - 5.2.2 any net increase or decrease in Capital Expenditure to be incurred by the Contractor as a direct consequence of the Relevant Event (taking into account the extent to which any additional Capital Expenditure which will be provided by the Authority itself);
  - 5.2.3 any net increase or decrease in the cost of providing the Services during the remainder of the Contract Period as a direct consequence of the Relevant Event;
  - 5.2.4 any net increase or decrease in financing costs of the Project as a direct consequence of the Relevant Event;

- 5.2.5 reasonable economic assumptions prevailing at the time of the Relevant Event
- 5.2.6 the technical performance of the Facilities as a result of the Relevant Event
- 5.2.7 subject to paragraph 10 (Tonnage Based Element) below the amount of any Tonnage Based Element or 'T' of the Annual Unitary Charge (as provided for in paragraph 3 (Tonnage Based Element) of the Payment Mechanism which has not been paid to the Contractor as a result of the Relevant Event and its consequences or which would have been paid (in the past or in future) to the Contractor but for the occurrence of the Relevant Event and its consequences.
- 5.2.8 any net increase or decrease in Third Party Income (and any impact on TPI bands including Band 1) to the extent provided for in the Appendix (Compensation for lost Third Party Income) to this Schedule 39 (Unitary Charge Adjustment Protocol) and to no other extent.

provided that, unless varied as a direct consequence of the Relevant Event the key assumptions which underpin the Base Case shall be used in determining the Estimated Change in Project Costs so that the comparison between the Base Case and the proposed Base Case updated by reference to the Relevant Event for the changes in costs referred to in paragraph 5.2.1 to 5.2.8 above demonstrates that the Contractor is in no better and no worse position.

For the avoidance of doubt, paragraph 10 (Tonnage Based Element) shall apply in respect of the Tonnage Based Element and the Appendix to this Schedule 39 (Unitary Charge Adjustment Protocol) shall apply in respect of Third Party Income notwithstanding any other provision of this Schedule 39 (Unitary Charge Adjustment Protocol).

For the further avoidance of doubt no current, previous or projected,

- (a) Third Party Income (other than Recyclates TPI) nor
- (b) the Contractor's share of any LATs (LAT1 calculated in accordance with section 7 of Schedule 26 (Payment Mechanism))

shall be taken in account in calculating and determining a no better/no worse position nor in calculating the Estimated Change in Project Costs since neither formed part of the Contractor's Base Case.

- 5.3 For the purposes of paragraph 5.2 (and for the purposes of assessing the impact of any Relevant Event) the Contractor being in a no better and no worse position shall be construed by reference to:
  - 5.3.1 the Parties' rights, duties, risk and liabilities under or arising pursuant to performance of this Contract, the Financing Agreements and the Sub-Contracts and any other Project Documents and Ancillary Documents.
  - 5.3.2 where necessary, incorporating the consequence of any funding obtained or used by the Contractor (other than the Contractor's

share in respect to any General Changes in Law) to implement the Relevant Event and which has been previously agreed by the Authority or determined in accordance with this Contract; and

- 5.3.3 its ability to perform its obligations and exercise its rights and to generate Third Party Income under this Contract, the Financing Agreements and the Sub-Contracts and any other Project Documents or Ancillary Documents;

so as to ensure that:

- 5.3.4 the Contractor is left in a position which is no better and no worse in relation to the Key Financial Indicators as set out in paragraph 11 by reference to the version of the Base Case applicable immediately prior to the Relevant Event had the Relevant Event not occurred; and

- 5.3.5 the ability of the Contractor to comply with this Contract (including without limitation the Contract Targets) and the Financing Agreements and/or to generate Third Party Income is not adversely affected or improved as a consequence of the Relevant Event (and for the avoidance of doubt (without limiting the generality of the foregoing) this paragraph 5.3.5 includes ensuring that any tolerance or buffer that the Contractor may have in relation to the Contract Targets) or any ability to over achieve in relation to the Contract Targets is not adversely affected or improved)

always taking into account the provisions of Paragraph 10 (Tonnage Based Element) as regards the Tonnage Based Element and the Appendix to this Schedule 39 as regards Third Party Income.

## **6 CHANGING THE BASE CASE**

- 6.1 Adjustments shall be made to the Base Case in accordance with this paragraph 6 to achieve the objectives set out in paragraph 5.3 and produce outputs reflecting the results required by paragraph 5.3.

- 6.2 The Base Case shall be amended by entering the costs described in paragraphs 5.2 and, where necessary, this will incorporate the consequences of any funding obtained or used by the Contractor to implement the Relevant Event and which has been previously agreed by the Authority or determined in accordance with this Contract.

- 6.3 The following provisions shall apply when making such adjustments:

- 6.3.1 wherever possible the adjustment shall be carried out without altering the logic and formulae incorporated in the Base Case in any way whatsoever and only data, such as costs incurred by the Contractor and the timing and amounts of draw downs of funding, shall be changed;

- 6.3.2 where it is necessary to amend the logic or formulae incorporated in the Base Case to permit adjustments to be made, this shall be done to the minimum extent necessary; and

6.3.3 where any amendment is made to the logic or formulae incorporated in the Base Case, the Base Case (as amended) shall first be run with the data included in the Base Case immediately prior to amendment to ensure that the outputs immediately prior to amendment.

6.4 Any amendment to the logic or formulae incorporated in the Base Case shall be fully recorded so that the manner in which the revised applicable elements of the Annual Unitary Charge are calculated can be readily verified.

## **7 OBLIGATION TO PAY**

7.1 Without prejudice to any other obligation (if any) of the Authority to make payments in respect of the Relevant Event, if the Authority, acting reasonably, is satisfied that:

7.1.1 the proposed new Base Case has been correctly derived from the version of the Base Case applicable immediately prior to the relevant adjustment (as provided for under paragraph 4), including the reasonableness of all amendments pursuant to this Schedule 39; and

7.1.2 the Contractor has demonstrated the matters referred to in paragraphs 5.2 and 5.3 above,

the proposed Base Case shall become the new Base Case and the applicable elements of the Annual Unitary Charge shall be adjusted in accordance with the new Base Case.

## **8 FINANCING COSTS WHERE LUMP SUM PAYMENT**

8.1 If payment of the Capital Expenditure and associated costs of implementation required for any Relevant Event is to be made by the Authority in a lump sum which fully finances the relevant Capital Expenditure or in the case of Cumulative Capital Expenditure the Authority's Share of the Cumulative Capital Expenditure, no account shall be taken of the need to finance the Authority's share of any Capital Expenditure in connection with the Relevant Event.

## **9 INDEPENDENT AUDIT**

9.1 Any adjustments proposed to the logic or formulae of the Base Case by the Contractor in respect of a Relevant Event, may, on reasonably prior notice to the Contractor, be subject to independent audit on behalf of the Authority. The costs of any such model audit shall be borne by the Authority except that if such an audit identifies a deliberate or fraudulent material error in the Base Case or the proposed Base Case in which case the Contractor shall reimburse the reasonable model audit costs properly incurred by the Authority, provided the Authority has given reasonable prior notice of such audit and the estimated cost thereof.

## **10 TONNAGE ELEMENT**

10.1 In calculating amounts of Tonnage Based Element of the Annual Unitary Charge as part of the Estimated Change in Project Costs there shall be reflected the actual amount of T lost based on available

evidence as to relevant waste flows or where such calculation relates to future amounts of T reasonable projections based upon available evidence as to the relevant waste flows (both historic and projected) provided that both Parties undertake to act in good faith having regard to the calculation of any such amounts of the Tonnage Based Element. For the avoidance of doubt

10.1.1 whilst the Base Case includes a Low Growth Scenario as to Contract Waste growth this shall not apply in calculating lost Tonnage Based Element.

10.1.2 Projected Waste flows for the purposes of the calculation described in this paragraph 10.1 shall mean Waste flows projected taking into account factors relevant at the time of the calculation (including Waste flows current at the time). Waste flows projected or forecast by either Party at the date of this Contract shall not be relevant.

## 11 KEY FINANCIAL INDICATORS

[REDACTED]

## 12 DISPUTE RESOLUTION

The Dispute Resolution Procedure shall apply to this Schedule 39 (Unitary Charge Adjustment Protocol).



## Appendix

### Compensation for lost Third Party Income

In the event that, in the circumstances set out in this Appendix (Compensation for lost Third Party Income), the Authority is required to compensate the Contractor for lost Third Party Income, the level of compensation payable shall be assessed on the basis set out in paragraphs 1 to 7 below. In the event of any inconsistency this Appendix shall override the provisions of main body of Schedule 39 (Unitary Charge Adjustment Protocol).

Notwithstanding any other provision of this Contract to the contrary (but without affecting the interpretation of Section 11 (Third Party Income) of the Payment Mechanism):

- (a) Base Case Level for the purposes of this Appendix (Compensation for lost Third Party Income) shall mean the assumed level of Recyclates Third Party Income set out at Cell H88 in the Contract Waste Sheet of the Base Case Provided that for the avoidance of doubt, the Base Case level shall include (without limitation) all Band 1 Recyclates TPI as provided for in Table 9 to Section 11 (Third Party Income) of the Payment Mechanism;
- (b) "Recent Performance Level" means the average performance for the affected Third Party Income in the 24 Months prior to the occurrence of the event referred to below in this Appendix (Compensation for lost Third Party Income). Provided that the period of 24 Months referred to in this paragraph (b) shall only apply from the date which is 24 Months after the HWRC Date and if prior to that date the Recent Performance Level shall be deemed to comprise the Base Case Level;
- (c) Compensation in respect of lost Third Party Income pursuant to this Appendix (Compensation for lost Third Party Income) shall not take into account the Authority's Share of any Band 2, 3 or 4 Recyclates TPI but shall take into account (where applicable) all "Modelled" Band 1 Recyclates TPI in each case as referred to in paragraph 11.8 and Table 9 of Section II (Third Party Income) of the Payment Mechanism.

In calculating the Recent Performance Level the Parties shall take into account the same factors and assumptions regarding cost of generating the income as provided in paragraphs 11.6 and 11.9 of Section 11 of Schedule 26 (Payment Mechanism) and similarly the Base Case shall be assumed to have been calculated accordingly. No current, previous or projected Third Party Income (other than Recyclate Third Party Income) shall be taken in account in calculating and determining a no better/no worse position nor in calculating the Estimated Change in Project Costs since neither formed part of the Contractor's Base Case.



Where the event referred to below in this Appendix (Compensation for lost Third Party Income) is a Relevant Event, this Appendix shall be read in conjunction with the main body of this Schedule 39 (Unitary Charge Adjustment Protocol).

1. **POST-TERMINATION SERVICE AMOUNT**

- 1.1. The positive amount of any Third Party Income actually received by the Authority or any Authority Related Party in any relevant Month must be added to the Post Termination Service Amount payable in respect of that Month pursuant to Clause 92 (Compensation on Termination for Contractor Default).

2. **COMPENSATION EVENTS**

- 2.1. The test of 'no better no worse' applies as set out in paragraph 5 of Schedule 39 (Unitary Charge Adjustment Protocol) applies PROVIDED THAT the compensation for lost Recyclates Third Party Income shall be assessed at the lower of Recent Performance Level and the Base Case Level.

3. **QUALIFYING CHANGE OF LAW**

- 3.1. The test of 'no better no worse' applies as set out in paragraph 4 of Schedule 39 (Unitary Charge Adjustment Protocol) applies PROVIDED THAT the compensation for lost Recyclates Third Party Income shall be assessed at the lower of Recent Performance Level and the Base Case Level.

4. **AUTHORITY CHANGE**

- 4.1. The test of 'no better no worse' applies as set out in paragraph 4 of Schedule 39 (Unitary Charge Adjustment Protocol) applies PROVIDED THAT the compensation for lost Recyclates Third Party Income shall be assessed at the lower of Recent Performance Level and the Base Case Level.
- 4.2. For the avoidance of doubt, this paragraph 4 (Authority Change) applies in respect of Authority Changes or any other circumstances under the Contract where Authority Change provisions are expressed or deemed to apply.

5. **FORCE MAJEURE EVENT**

- 5.1. If the Authority exercises its option under Clause 89.7 to continue the Contract following written notice from the Contractor pursuant to Clause 89.5 then the ongoing payments of Unitary Charge will be increased only by the amount of lost Recyclates Third Party Income at the lower of Recent Performance Levels and the Base Case Level.

**6. AUTHORITY STEP-IN**

- 6.1. Where the Required Action is taken under Clause 108.4, the Contractor's compensation for lost Third Party Income should be assessed at the higher of:
- (i) the amount of Third Party Income received by the Authority or an Authority Related Party; and
  - (ii) the lower of Recent Performance Levels and the Base Case Level in respect of Recyclates Third Party Income.
- 6.2. Where the Required Action is taken under Clause 108.5, the Authority should set off any Third Party Income actually received by the Authority or any Authority Related Party under the Contractor's third party contracts against the Authority's own costs of operation in taking the Required Action. The Authority should where the amount is positive pay the balance between the two sums.

**7. ESTIMATED FAIR VALUE OF THE CONTRACT**

- 7.1. Where the Estimated Fair Value of the Contract is agreed or determined in accordance with clause 92.4.3, the value of Recyclates Third Party Income shall be assessed at the lower of Recent Performance Level and the Base Case Level