Benchmarking Period Checklist

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In infrastructure projects involving existing assets or utilities, the data provided prior to commencement of the contract is often inaccurate, resulting in inaccuracies in the assumptions for financial modelling and performance standards. This page suggests a solution and provides sample wording for an initial benchmarking period at the beginning of a contract.

You can also download a word version of the Benchmarking Period Checklist.

General

A benchmarking period enables the operator to establish, with the participation of the awarding authority, the base case for performance and asset condition during a preliminary phase of the project. The disadvantages are that: -

- there is little certainty at the beginning of the contract for the awarding authority as to the cost of the contract and the level of performance to be achieved and since the operator controls the assets it is hard for the authority to verify the data.
- it is hard to achieve transparency in procurement procedures as parameters and performance standards may need to be amended post-contract – this risk can be mitigated by ensuring that the data and performance standards are amended in line with the base data and performance standards set out in the schedules to the contract and only to the extent that the data is materially different from that assumed in the base data and performance standards.
- the awarding authority will also have less leverage in terms of competitive pressure over the operator on the actual service levels.

The alternative solution is for the base data to be established prior to contract commencement by consultants or other third party; however, it is often difficult to establish the performance parameters where day to day management is not being overseen as it is difficult to verify data such as billing through isolated verification.

Key issues to consider in relation to the benchmarking period

- length of time needed to establish and agree base data. This may be anything from 3 months to a year. It will depend on whether benchmarking involves preparation of an asset register, or merely verification of key performance indicators such as levels of collection of bills, water quality at relevant outlets, cost of inputs such as electricity, regularity of supply, etc. Is there to be a possibility of extension of the benchmarking period if this is found to be necessary?
- is operator going to be operating system during the benchmarking period – if so, what are its responsibilities and liabilities during this period? How can the authority verify data? Is there joint monitoring, testing and analysis?
- once base data has been prepared by operator, and presented to awarding authority, what will time frame be for approval by authority of the base data? What will be the process for amending the base case data, the base case performance standards and compensation and liability regimes? How will any disagreements be resolved?

Sample Wording

Obligations of Operator during the Benchmarking Period

- During the Benchmarking Period, the Operator shall use reasonable endeavors to perform the [Outsourced Activities] from the Effective Date to standards not less than those achieved by the Owner as at the date of the Contract. The Operator will only be liable during this period for loss or damage directly caused by negligence, wilful default or fraud of the Operator. The Operator will not be liable for any Liquidated Damages during the Benchmarking Period.
- [During the Benchmarking Period the Operator will also, with the assistance and co-operation of the Owner, perform the following activities:
    - establishment of initial financial systems and protocols; and
    - establishment of the process of initial key Operator staff familiarization with the [System].]

Benchmarking Activities

- At the beginning of the Benchmarking Period the Operator shall install and/or recalibrate the [input and output meters][electricity meters] and all other meters [Meters] that the parties agree are necessary to calibrate the system as provided within the [Agreed Capital Investment Program] and the Parties will calibrate all the Meters jointly. The Parties will then jointly take meter readings from all relevant Meters over a minimum period of [six months].
- During the Benchmarking Period all of the parameters of operation such as water quantities pumped, water quantities received, expenditure incurred, electricity consumed, chemicals consumed, maintenance costs, etc. will be benchmarked against the Base Charge Data. At the end of the Benchmarking Period, if and to the extent necessary, the variable rates will be adjusted in line with actual expenditure and volumes of water pumped to take into account the Base Charge Data, as has been verified during the Benchmarking Period.
- During the Benchmarking Period the Operator in consultation with the Owner will also take monthly samples and monitor performance in order to collate the Base Performance Data against the criteria set out in Schedule [ ] (Performance Indicators).

Conclusions of benchmarking

- At the end of the Benchmarking Period the Operator will propose:
    - a set of Performance Standards to the Owner using the Base Performance Data (as verified during the Benchmarking Period) to be met by the Operator; and
    - the level of Liquidated Damages to be imposed for failure by the Operator to meet the various Performance Standards
    - for approval by the Owner, such approval not to be unreasonably withheld. The Owner shall respond to such proposals within [30] days of receipt thereof. In the event that the Owner does not deliver a written response to the Operator within this period, then the Owner shall be deemed to have agreed to the Performance Standards, Liquidated Damages and the Incentive Payments proposed by the Operator.
- The Performance Standards will be based on the Performance Indicators. The Performance Standards and the Liquidated Damages will be set at levels which are reasonable in the context of the Base Performance Data, the level of investment contemplated by the Contract and the other terms of the Contract.
- If the parties cannot agree these Performance Standards or Liquidated Damages within [30] days of the response then they shall refer the matter to Arbitration.

Adjustment to Specifications

The Specifications will be adjusted, to the extent appropriate, in accordance with the Base Performance Data.

Definitions:

- "**Base Charge Data**" means the data used to calculate the charges and includes data provided to the Operator by the Owner before signature of the Contract and projections for the first 5 years of the Contract as set out in Schedule [ ], which is to be verified during the Benchmarking Period in accordance with clause 6;
- "**Base Performance Data**" means the data which is to be collated during the Benchmarking Period by the Operator in accordance with Clause [ ];
- "**Liquidated Damages**" means the liquidated damages for failure by the Operator to meet the Performance Standards, [as these are to be agreed by the Parties during the Benchmarking Period in accordance with Clause [ ] [as set out in Schedule [ ]
- "**Performance Indicators**" means the indicators of performance set out in Schedule [ ] (Performance Indicators);
- "**Performance Standards**" means the standards of performance required of the Operator in carrying out the Outsourced Activities, as determined in accordance with clause [ ];

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1. It may be possible to set the levels of liquidated damages – or at least estimate them – prior to contract signature and only amend them if there are material levels in the actual performance levels.

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