

#		Question	Answer
1	EN	<p>As an Economic Operator participating in the Tender for Sofia Airport Concession Project, requests an amendment to the Concession Agreement. We are issuing this request for an amendment to the Concession Agreement, pursuant to the procedure in Clause 5.2 of the Tender Documents.</p> <p>Amendments</p> <p>We request for approval by the Grantor the introduction of a liability cap for the Concessionaire (and by extension, to the extent relevant, the Initial Shareholders, the Shareholders, the Airport Operator, the Airport Operator Third Party and/or the Third Party Providing Financial Capabilities (being the third parties providing the equity investment pursuant to Clause 12 of the Concession Agreement)).</p> <p>We propose that the amendments to the Concession Agreement shall encompass the following key elements:</p> <ul style="list-style-type: none"> ■ The liquidated damages set in the Concession Agreement pursuant to Clauses 18.2 and 26.10.2 and the Performance Penalties pursuant to Appendix 6 shall be the sole and final legal remedy in the form of exclusive liquidated damages in relation to the failure to fulfil the investments in the investment proposal, the delay to the relevant Works and the failure to perform the Concession Operations to the Performance Standards (respectively). <p>The Concession Agreement should contain an explicit statement to this effect and a statement that the parties agree that the liquidated damages and the Performance Penalties represent a genuine pre estimate of loss of the Grantor. Technically, in accordance with Bulgarian Law, the Concession Agreement would also need an explicit</p>	<p>The [Ministry/Grantor] will request official guidance from the specialized administration of the Council of Ministers on the possibility to amend the draft Concession Agreement in view of the proposed changes and the interpretation of the relevant provisions of the Concessions Act. Where considered possible and appropriate, the Grantor reserves the right to amend the draft Concession Agreement, in which case the procedure set out in Clause 5.3 of the Tender Documents will apply.</p>

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	<p>statement that the Grantor shall not seek compensation of actual losses suffered instead of the defined liquidated damages or in addition to them.</p> <ul style="list-style-type: none"> ■ A liability cap to be introduced so that the total liability of Concessionaire (including the Supporters) shall not exceed an amount equal to BGN 100,000,000 (in words: one hundred million Bulgarian Lev) which represents 50% of the minimum equity capitalisation of the Concessionaire. It is acknowledged that as a matter of Bulgarian Law this cap cannot apply to Third Party Claims, personal injury and labor law issues. ■ Where and to the extent the total liability of Concessionaire to the Grantor exceeds an amount equal to BGN100 million (“Total Liability Amount”), then either party shall have the right to unilaterally terminate the Concession Agreement. We would propose that the event of default be a Concessionaire Event of Default and shall be a Curable Event of Default and the Concessionaire shall be entitled to extend the Total Liability Amount to avoid a termination of the Concession Agreement. Where a termination occurs then the compensation to be paid shall equal to the compensation payable in the case of termination by the Grantor for Concessionaire’s default. ■ Where the Grantor has a right of remedy pursuant to the Concession Agreement and/or at Law which includes a claim under the indemnity pursuant to Clause 37.1, a call under the Works Guarantee, a call under the Operations Guarantee, a claim for breach of contract before the courts of Bulgaria/arbitration proceedings, a tortious claim or any other remedy as a matter of law, then the relevant claim shall be for a Loss and the Grantor shall be obliged to mitigate its Losses. The obligation in 	

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	<p>relation to establishing a Loss and mitigating the Loss shall not apply to the application of liquidated damages or the Performance Penalties.</p> <p>Context for the Amendment</p> <p>It is understood that in accordance with the Concessions Act, the Initial Shareholders and those providing support (financially and technically)(“Supporters”) to a bidder for a Project needs to be joint and severally liable for the performance or non performance of the Concession by the Concessionaire. The principle of joint and several liability is accepted.</p> <p>We acknowledge that there is a different interpretation within the Grantor, however, having taken our own advice, we are strongly of the view that there is nothing in the law which prohibits the liability of the Concessionaire (and by extension the Supporters) to be capped. Indeed this is a common practice in commercial contracts in Bulgaria.</p> <p>We further believe that capping the liability of the Concessionaire (and by extension the Supporters) does not affect the balance of risk between the parties in a way that is not permitted by the Bulgarian Concessions Act nor does it affect the rights of the Grantor in an inappropriate manner. Rather, it provides a structure which places emphasis on ensuring the Grantor receives first class airport services and first class development and maintenance of the Airport Assets which is the main goal of the Concession. We do not believe it is helpful for the Project to be engaged in endless claims and indeed would be more productive for the Airport, the Grantor and the passengers for the issues to be resolved rather than resorting to simply collecting damages. That being said, it is obvious from the size of cap being offered that the</p>	

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	<p>Concessionaire is taking seriously its liabilities and the failure to perform its obligations.</p> <p>Rationale for the Amendment</p> <p>In the first instance, binding the Supporters into the Project is not common international practice however it is accepted that this is the law in Bulgaria and that therefore the Supporters need to be jointly and severally liable to the Grantor for the performance or non performance of the Concessionaire. However in the context of a limited recourse financed project such as this Project, it is not common in other International PPP Projects to have an unlimited liability of the Concessionaire (and in this instance by extension the Supporters). The financiers are providing a significant amount of money to this Project and require certainty as to the extent of the risk being taken by the Concessionaire. The liability cap provides that certainty and is one of the consequences of introducing a Concession/PPP Project rather than continuing with the status quo.</p> <p>Consequences of the Amendments</p> <p>By introducing the cap and the right to terminate, the Grantor will be applying principles which represent international best practice within the EU and globally for Concession/PPP Projects. This will ensure the Concession will be able to attract more than a limited number of bidders to the competition which in turn will give a better value for the State and the people of Bulgaria. In addition, the introduction of such a cap and right of termination in a position where there is joint and several liability of the Supporters, is something that requires approval of the management board of any bidder who is looking to exercise best international project finance principles. If</p>	

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		<p>this matter is not addressed, it may be very difficult to achieve corporate approvals and support by shareholders and financiers for such a great project as the Sofia Airport Concession which we value as a great opportunity for both the Grantor and ourselves. We would urge the Grantor to reconsider this issue and introduce a cap on the liability of the Concessionaire (and by extension the Supporters).</p>	
2	EN	<p>Based upon clause 6.2 and 9.4 of the Tender Documentation, it is interpreted that the 3rd party operator shall be jointly and severally liable with the Sponsor/Bidder vis-à-vis the Grantor (MTITC). Please confirm this interpretation is accurate and in accordance to other provisions part of the Concessions Act. At this end we believe that the 3rd party operator shall be liable for operational matters and in line with, therefore limited to, the contract agreement he executes with the Sponsor/Bidder. Having said this, we would like to know if the Grantor would accept a variation (e.g. limitation) in regard to how and which liabilities are passed on to the 3rd party operator.</p>	<p>The Third Party Airport Operator shall be jointly and severally liable with the Concessionaire for the fulfillment of the respective contractual obligations under the Concession Agreement in respect of Third Party Supported Functions. Such liability is capped up to the amount of the corporate guarantee to be provided to the Grantor by signing the Third Party Undertaking in the form of Appendix 11b. The Grantor reserves the right to make changes to Appendix 11b to the draft Concession Agreement for clarifying the above principles, where the procedure set out in Clause 5.3 of the Tender Documents will apply.</p>
3	EN	<p>Will there be an opportunity to make suggestions on how the RFP document may be amended?</p>	<p>As provided for in clause 5.3 of the Tender Documents and in accordance with Art. 79, para. 4 of the Concessions Act, the Commission may propose and the Grantor may make amendments to the Tender Documents, as result of the process of requesting and providing clarifications or additional information, where the Economic Operators are free to propose amendments in their requests for clarifications.</p>
4	EN	<p>Please confirm that the definition of Termination Date Debt in the Concession Agreement includes the debt used to fund the Upfront Fee. In addition please clarify the rationale for the phrase ".. utilized for performance of investments in the Concession Site" in relation to Termination Date Debt in clauses 40.6.1(a) and 40.6.2(a).</p>	<p>As per our previous responses (please see the answer to question No.2 within the answers published on 27.07.2018), the Termination Date Debt intends to cover all debt under approved Financing Agreements, which has been used for the implementation of the Project through investments in the Concession Site, including such related to the Upfront Concession</p>

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			Fee Payment. Again, as mentioned in our response to question No.2, the expression "utilised for performance of investments in the Concession Site" follows from the provision of Article 150 paragraph 2 item 1 of the Concessions Act.
5	EN	<p>The hanging paragraph in Clause 40.6.2 of the Concession Agreement provides as follows: ""The Parties agree that neither any amount paid as Concessionaire Default Compensation Sum shall exceed the market value of the Concession as of the Termination Date in accordance with the Concessions Act.""</p> <p>Please clarify:</p> <ul style="list-style-type: none"> • To which compensation sum this provision relates to being either: (i) Concessionaire Compensation Sum as referred to in the provision; or (ii) Grantor Default Compensation Sum which is contained in the previous paragraph? • the meaning of the phrase ""the market value of the Concession as of the Termination Date in accordance with the Concessions Act". 	The clause refers to the Concessionaire Default Compensation Sum, thus to the Concessionaire Event of Default. The clause is set in accordance with Article 150 paragraph 3 no 1 of the Concessions Act.
6	EN	Please clarify the rationale for limiting the amount payable for Distributions projected in the Financial Model to five years after the Termination Date (Clause 40.6.2(c) of the Concession Agreement). It is common market practice to allow the Concessionaire to recover Distributions projected to the end of the Concession Period in the event of Grantor Default (and if otherwise there seems the potential to create perverse incentives for the Grantor to default, thus keeping the Upfront Fee and only compensating 5 years of dividends).	The distributions need to be predictable. A five year term seems in this respect adequate, taking into consideration the allocation of the risks in the Concession Agreement and that, upon early termination of the Agreement, the Grantor shall refund the Upfront Concession Fee in respective amount in accordance with the clauses of the Agreement.
7	EN	Please clarify what is intended to be captured by following wording in Clause 41.3.1 of the Concession Agreement: "the sum unamortised Upfront Concession Fee and any unamortised actual Capital Expenditures relating to the Concession Site and	The Concessions Act does not provide for any compensation in case of an Extensive Force Majeure. In view of this and applicable Bulgarian law, this clause provides a compromise to avoid any unjust enrichment. These provisions of the draft Concession

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		<p>the Concession Assets". In accordance with international practice we would expect that the refund following a Extensive Force Majeure to include all outstanding debt (including that used to fund any Upfront Fee and the Award Fee), all equity injected to the Project and all third party breakage costs to be included to refund the Concessionaire for the unjust enrichment of the investment in the assets that the Grantor will receive once the Concession Assets are returned to the Grantor.</p>	<p>Agreement have practically the same effect as if the Concessions Act was providing for compensation in case of termination for force majeure.</p>
8	EN	<p>Why is a Force Majeure refund sum payable for Compensation Events in Clauses 34.1.5, 34.1.6 and 34.1.7 whereas Grantor Default Compensation Sum is payable for the remainder of the Compensation Events. They should all be Grantor Default Compensation.</p>	<p>Please refer to the answer to the previous question. In addition, from the circumstances giving rise to such claim, the circumstances giving rise to such termination are more connected to termination for Extensive Force Majeure, accordingly the compensation shall be similar.</p>
9	EN	<p>Can you please confirm that it is the intention that, for each set of Works, the Works Guarantee is a 1 time guarantee for a set amount over the duration of the Works (and is not required to be replenished following a call on the guarantee). The Concession Agreement is not clear in this regard.</p> <ul style="list-style-type: none"> • Can you please confirm that the Operations Guarantee is for a set amount for each year and that the guarantee is only required to be replenished annually as opposed to after any call on the guarantee? The Concession Agreement is not clear in this regard. <p>In addition please clarify:</p> <ul style="list-style-type: none"> • What is the intended level of Operations Guarantee during the 2 year Concession Guarantee Period • Is it intended that the Lenders are entitled to include these guarantees in their security package. If not would the Grantor consider an obligation on it to use the proceeds of the call on the guarantee to remedy the breach which led to the call. 	<p>In our opinion, the renewal is clearly defined in Clause 16.2.3 of the Agreement as concerns the Works Performance Guarantee. A similar mechanism applies for the Operation Guarantee as per Clause 16.3.2. It shall be kept at the level of 200% of the amount of the Annual Concession Fee proposed by the Concessionaire with its Offer, this including during the Concessions Guarantee Period.</p> <p>As the guarantees are intended to cover (at least partially) defects in Works and Operation, they shall not serve as security package for Lenders.</p>

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10	EN	<p>Please clarify the circumstances in which a Change in Ownership "would be against the Grantor's national interest" and "reasons of public order" which would permit the Grantor to object to a proposed Change in Ownership under Clause 13.1.2 of the Concession Agreement?</p>	<p>In this respect, we do refer to general principles of Bulgarian law and EU law and the respective interpretation thereof which provides guidance on what can be considered against the national interest or against public order. In practice, this will depend on the specific circumstances and proposed change in the ownership and will in any case be solely at the Grantor's discretion. As a rule, upon occurrence of any danger to the national security and defence of the country, the protection of citizen's life and health, the environment, the protected territories, areas and sites, or the public order, the Grantor is entitled propose amendments to or terminate the Concession Agreement (see Articles 135 and 146 in link to Art. 24 of the Concessions Act).</p>
11	EN	<p>Please clarify the following wording in Clause 34.13 of the Concession Agreement: ""the actual equity IRR exceeds by 30% the equity IRR value in the Initial Financial Model of the Concessionaire"".</p> <p>If a tenderer's equity IRR value in its Initial Financial Model was 20%, please clarify if this provision is triggered where (i) the actual equity IRR exceeds 50% or (ii) the actual equity IRR exceeds an amount equal to 30% of 20% i.e. 26%?</p> <p>It is generally accepted that the Concessionaire is required to share any "super profits" as they arise however we would like to understand how the rebalancing mechanism set out in Clause 34.13 of the Concession Agreement is intended to work.</p> <p>For how long would the increased Concession Fee be payable? We note that if it were for the remainder of the Concession, significant losses could arise to the Concessionaire as a result of triggering of this clause (leading to a potentially highly unbalanced payoff profile between Grantor and Concessionaire).</p> <p>Is it reviewed in every rolling 24 month period and could the</p>	<p>Clause 34.13 provides for a re-balance in favour of the Grantor and the calculation basis is the equity IRR value in the Initial Financial Model.</p> <p>Accordingly, as per your example, if the IRR value in the Initial Financial Model was 20%, the trigger would be an actual IRR in the amount of 26%.</p> <p>The increased Concession Fee would only be payable as long as the actual equity IRR is 30% or above the equity IRR in the Initial Financial Model (in your example, as long as the actual IRR is above 26%).</p>

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		effect on the Annual Concession Fee could be positive as well as negative?	
12	EN	The definition of "Required Level of Service" refers to the level of "Service Optimum" as defined by IATA in the Airport Development Reference Manual (or any replacement thereof). Please confirm that any replacements of or material amendments to the ADRM will be captured in the definition of "Change in Law" and will be a Qualifying Change in Law.	Any replacements of or material amendments to the ADRM will be captured only if they qualify as Change in Law. Please see in this respect the very detailed definition of Change of Law in the draft Concession Agreement.
13	EN	Please clarify that the obligation to implement the investments proposed in the Offer will be considered by reference to the Required Level of Service. For example will the Concessionaire still be required to implement the investments proposed in the Offer as required by Clause 18.2 of the Concession Agreement if the Required Level of Service is being met and/or technological advancements mean that the investments proposed are not required at all or in accordance with the timings set out in the Offer.	Whereas we emphasise that the investment volume proposed in the Offer will be binding, we confirm that the mechanisms and provisions of the draft Concession Agreement provide for some flexibility as concerns the investment items and the timing of investments. Let us draw your attention in this regard to Clauses 18.3 and 18.4 of the draft Concession Agreement regarding the five year investment plans and the annual investments. Within this ambit, there is a certain flexibility for the investor. Moreover, under the circumstances set forth in the draft Concession Agreement there might be certain deviations / variations as concerns the timing and items.
14	EN	In relation to Clause 46.2, please clarify that it is intended that the provisions of Bulgarian Law are reflected in relation to the rights of the Grantor to assign the benefit of this Contract. Particularly confirm that any such transfer would be to another Ministry who has sufficient financial standing or financial resources to perform the obligations under the Concession Agreement and has the legal capacity, power and authority to become a party to and to perform the obligations of the Grantor under the Concession Agreement. If this is the case would the Grantor be willing to include an explicit statement to this effect in the Concession Agreement.	Bulgarian law will be taken into account with respect to any transfer.

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15	EN	<p>In relation to Clause 36.1.3 of the Concession Agreement, please confirm that with these words in the definition of Force Majeure this will not in practice prevent most events from being classified as a Force Majeure Event even though they satisfy the other hurdles. This is of particular concern if it prevents either Party from being able to terminate the Agreement for the occurrence of events which would typically be classed as Force Majeure Events. The events should speak for themselves and there should not be an additional hurdle in the definition to deal with the consequences of the event. In addition, there is a degree of inconsistency with the remainder of the Clause particularly in relation to 36.4.2 (a) where the parties are obliged to perform its obligations to extent it can notwithstanding the occurrence of a Force Majeure Event.</p>	<p>In our view, the definition of Force Majeure is completely standard. There might be, even in an Force Majeure Scenario, possibilities for a certain performance and at this level performance shall occur.</p>
16	EN	<p>In relation to Clause 35.1, please confirm that the following Relief Events would also be captured. The first being, in the event that there has been an event which has caused damage or destruction to the Airport Site and the Concessionaire is reinstating those parts, that the Concessionaire would be relieved from being in breach of its obligations under the Concession Agreement during the reinstatement. Secondly in the event that there is a strike, not caused by the Concessionaire, then to the extent that this affects the performance of its obligations under the Concession Agreement, then the Concessionaire should be relieved from being in breach of its obligations.</p>	<p>The Relief Events have been defined exhaustively under the Concession Agreement. No further relief Events are covered at this stage.</p>
17	EN	<p>In relation to Clause 12.1.2, can you clarify how minimum equity will be calculated? Will this be measured in relation to investor equity (i.e. share capital, share premium and shareholder loans) or will this be measured in relation to the total IFRS shareholders' equity in the audited SPV accounts (and thus 'accounting equity') or will this require a cash</p>	<p>In Clause 12.1.2, minimum equity will be calculated in relation to investor equity (i.e. share capital, share premium and shareholder loans).</p>

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		injection on Day 1 of €100m, in addition to the €281m Upfront Fee payment?	
18	EN	<p>In relation to Clause 12.1.2, please clarify how total assets will be measured. Will this be a gross or net asset position?</p> <p>In particular will total assets include the capitalised Upfront and Annual Concession Fee?</p> <p>If yes, this will impact distributable reserves and ability for SPV to pay dividends.</p>	For the purpose of Clause 12.1.2, total assets will be calculated excluding the capitalised Upfront Concession Fee, net of depreciation, but gross of liabilities.
19	EN	In relation to Clause 12.1.2, please clarify if the intention is that Shareholder Debt is included in minimum equity.	Yes. Shareholder Debt is included in minimum equity.
20	EN	In relation to Clause 12.1.2, please clarify the intended consequences if 'equity' were to fall below one of the tests.	The consequences are clearly regulated in Clause 40.1.10 of the draft Concession Agreement.