

COMPILATION OF PPP TERMS AND CONDITIONS OF CONTRACT

PUBLIC SECTOR VERSION

CLAUSE 12: REPRESENTATIVES

DBFOM CONTRACT

CONCESSION CONTRACT

DBOM CONTRACT

INTRODUCTION

This is a practical issue, providing for the appointment of a representative of each party for purposes of communication. The drafting is not even-handed: different rules apply to each representative.

CORE CONTRACT DRAFTING

12 REPRESENTATIVES

12.1 The Authority's Representative

- (a) The Authority has appointed or will appoint the Authority's Representative to act as its agent in relation to the Project and as otherwise set out in this Agreement. The Authority's Representative shall exercise the functions set out in [Clause 12 - Schedule] (Representatives), such other functions as are set out in this Agreement, and those other functions in respect of this Agreement which the Authority may notify to the PPP Co from time to time.
- (b) During any period when there is no Authority's Representative, the Authority shall carry out the functions which would otherwise be performed by the Authority's Representative, provided that the Authority shall appoint an alternative Authority's Representative for the purposes of discharging any material obligation of the Authority's Representative under this Agreement.
- (c) Except as notified by the Authority to the PPP Co in writing, the PPP Co shall be entitled to treat any act of the Authority's Representative which is authorised by this Agreement as being expressly authorised by the Authority, and the PPP Co shall not be required to determine whether an express authority has in fact been given.
- (d) Any decision by the Authority's Representative is specific to the circumstances to which it relates, and shall not be construed as binding on, or limiting any other decision to be made by, the Authority's Representative, in the same or similar circumstances or otherwise.
- (e) For the avoidance of doubt the Authority's Representative shall be entitled to consult anyone he considers appropriate in connection with the discharge of his duties in relation to this Agreement.
- (f) The Authority may from time to time appoint any person to act on behalf of the

Authority's Representative either generally in respect of this Agreement or specifically in respect of any particular clauses and any act of any such person within the scope of their authority shall for the purposes of this Agreement constitute an act of the Authority's Representative. Prior notice of any such authorisation shall be given to the PPP Co by the Authority's Representative. Any act of any such person within the scope of such authorisation shall for the purposes of this Agreement constitute an act of the Authority's Representative. Such authorisation shall continue in force until such time as the Authority's Representative shall notify the PPP Co that the same is determined.

12.2 PPP Co's Representative

- (a) The PPP Co shall appoint a competent and qualified person to act as its agent in connection with this Agreement and such person shall be the PPP Co's Representative. Such appointment shall be subject to the Approval of the Authority (such Approval not to be unreasonably withheld).
- (b) The PPP Co's Representative shall have full authority to act on behalf of the PPP Co for all purposes of this Agreement. The Authority and the Authority's Representative shall be entitled to treat any act of the PPP Co's Representative in connection with this Agreement as being expressly authorised by the PPP Co, and the Authority and the Authority's Representative shall not be required to determine whether any express authority has in fact been given.

12.3 Other Representatives

- (a) The PPP Co shall notify the Authority of the person appointed to act as the Contractor's Representative in connection with the Project. Such appointment shall be subject to the Approval of the Authority (not to be unreasonably withheld).
- (b) The Authority and the Authority's Representative shall be entitled to treat any act of the Contractor's Representative in connection with this Agreement as being expressly authorised by the Contractor and to treat the Contractor's Representative as their sole point of contact with the Contractor and as the person authorised to accept on behalf of the Contractor service or delivery of all notices or information and the Authority and the Authority's Representative shall not be required to determine whether any express authority has in fact been given.

12.4 Change of Representatives

- (a) The Authority may, at any time and from time to time by notice to the PPP Co, terminate the appointment of the Authority's Representative or appoint one or more substitute Authority's Representatives. Any such notice shall specify the date on which such termination or substitution shall have effect, which date shall, other than in the case of an Emergency, be such as will not cause serious inconvenience to the PPP Co in the execution of its obligations hereunder.
- (b) Save in the case of death, serious illness, serious misconduct warranting dismissal and/or conduct which constitutes a breach of the terms of appointment of the PPP Co's Representative, the appointment of the PPP Co's Representative shall not be terminated by the PPP Co without the prior Approval of the Authority (not to be unreasonably withheld). As soon as reasonably practicable upon the PPP Co's Representative ceasing to act in the case of death, serious illness, serious misconduct warranting dismissal and/or conduct which constitutes a breach of the terms of appointment of the PPP Co's Representative, and [●] ([●]) Working Days prior to termination of the appointment in all other cases, the PPP Co shall notify the Authority in writing of its intention to appoint a substitute. Such appointment shall be subject to the Approval of the Authority (not to be unreasonably withheld).

(c) Save in the case of death, serious illness, serious misconduct warranting dismissal and/or conduct which constitutes a breach of the terms of appointment of the PPP Co's Representative, in the event that the Contractor proposes to change the Contractor's Representative, the PPP Co shall procure that at least [●] ([●]) Working Days prior notice is given to the Authority and Authority's Representative of the date on which such change will be effective and the name and contact details of the proposed new Contractor's Representative. As soon as reasonably practicable upon the Contractor's Representative ceasing to act in the case of death, serious illness, serious misconduct warranting dismissal and/or conduct which constitutes a breach of the terms of appointment of the PPP Co's Representative, the PPP Co shall procure that a notice containing the information described above is delivered to the Authority and Authority's Representative.

[CLAUSE 12 - SCHEDULE]

Part 1

Authority's Representative

Comment: This list will be project-specific; the NRA Model Contract drafting is included for illustration.

1. The Authority's Representative shall carry out all functions as set out in this Agreement and as notified to the PPP Co from time to time, including without limitation the following functions for the Contract Period.
 - 1.1 Resolve any ambiguity or discrepancy in accordance with Clause [●] (Ambiguities) of the Agreement.
 - 1.2 Determine extensions of time in accordance with Clause [●] (Failure to Grant Access) of the Agreement.
 - 1.3 Receive notification of discovery of any Monuments, Antiquities and Archaeological Objects in accordance with Clause [●] (Monuments, Antiquities and Archaeological Objects) of the Agreement and give instructions and notifications to the PPP Co as to the manner of dealing with the same.
 - 1.4 Monitor the Design and Construction by means of the system of inspection, testing, certification and review set out, inter alia, in Clauses [●] (Design and Construction Certificates), Clause [●] (Permit to Use, Taking Over Certificate and Completion Certificate), Clause [●] (Operation and Maintenance), Clause [●] (Traffic Management), Clause [●] (Signing and Communications), Clause [●] (Audit), Clause [●] (Monitoring of Performance), and Schedule [●] (Certification Procedure) of the Agreement.
 - 1.5 Monitor and review the Programme prepared by the PPP Co, including all amended or varied versions thereof, and require reports or revised Programmes in accordance with Clause [●] (Variations to Programme) of the Agreement.
 - 1.6 Review the PPP Co's proposals for backing up and storage of Design Data and other data in accordance with Clause [●] (Access to Data) of the Agreement.
 - 1.7 Receive, consider and decide applications in respect of Traffic Signs and other signs and take other actions required in accordance with Clause [●] (Signing and Communication) of

the Agreement.

- 1.8 Receive and consider submissions to the Commercial Review in accordance with Clause [●] (Commercial Review) and Part [●] of this Schedule [●] (Commercial Review) of the Agreement.
- 1.9 Review and audit the PPP Co's Quality and Environmental Management System and all other Quality & Environmental Documentation in accordance with Clause [●] (Quality & Environmental Management) of the Agreement and monitor and verify the operation of such systems by, inter alia, carrying out spot checks and making independent inspections and tests of any Plant or material which fails any test or is suspected by the Authority's Representative of not complying with the requirements of this Agreement.
- 1.10 Receive reports in accordance with Clause [●] (Reports) and Schedule [●] (Reports and Records).
- 1.11 Serve notices and allocate Performance Points in accordance with Clause [●] (Monitoring of Performance) and take any actions in respect of such notices.
- 1.12 Monitor the measurement of performance by means of the system of inspections, verifications, testing, surveys, certification, review and correction of Defects set out, inter alia, in Clause [●] (Measurement of Performance) of the Agreement.
- 1.13 Receive details of, review and where appropriate comment on any course of action taken with respect to the Funding Agreements in accordance with Clause [●] (Submission of Documents) of the Agreement.
- 1.14 Carry out the functions set out in Clause [●] (Insurance) of the Agreement including receiving policies or other documents relating to Insurances and evidence of Insurances in accordance with Clause [●] (Policies and Information provided to Insurers) of the Agreement and receiving renewal certificates relating to Insurances in accordance with Clause [●] (Evidence of Renewal) of the Agreement.
- 1.15 Receive notification of insurance claims kept by the PPP Co in accordance with Clause [●] (Notification of Claims) of the Agreement.
- 1.16 Receive, consider and decide applications by the PPP Co and other matters relating to delay under Clause [●] (Delays to Completion and Delay Events) of the Agreement.
- 1.17 Receive and consider applications for any relief requests in accordance with Clause [●] (Relief Events) of the Agreement.
- 1.18 Receive and deal with all relevant matters in respect of a claim of Force Majeure in accordance with Clause [●] (Force Majeure) of the Agreement.
- 1.19 Participate in the Initial, Second and Handback Inspections and exercise the other functions specified in Clause [●] (Handback) of the Agreement.
- 1.20 Perform such functions as may be ascribed to the Authority's Representative under Part [●] of Schedule [●] (Trespassers and Protestors) of the Agreement.
- 1.21 Receive and review any Requirements of Relevant Authorities that contradict the requirements of this Agreement and clarify where appropriate in accordance with Part [●] of Schedule [●] (Third Parties) of the Agreement.
- 1.22 Perform all such functions as may be ascribed to the Authority's Representative under Schedule [●] (Construction Requirements) of the Agreement.

- 1.23 Receive and deal with all relevant matters submitted in accordance with Schedule [●] (Review & Certification Procedure) of the Agreement.
- 1.24 Perform all such functions as may be ascribed to the Authority's Representative under Schedule [●] (O&M Requirements) of the Agreement.
- 1.25 Perform such functions as may be ascribed to the Authority's Representative under the requirements set out in Schedule [●] (Quality & Environmental Management) of the Agreement.
- 1.26 Agree with the PPP Co the form of and receive from the PPP Co the reports referred to in Part [●] of Schedule [●] (Reports and Records) of the Agreement including without limitation monthly progress reports, Annual Reports, Annual Performance Reports, the Five Year Management Plan and any other reports or information provided by the PPP Co and, where appropriate, object to such reports in accordance with Clause [●] (Objections to Reports) of the Agreement.
- 1.27 Inspect and audit the records referred to in Part [●] of Schedule [●] (Reports and Records) of the Agreement and agree procedures for the back-up and off-site storage of such records and any computerised data.
- 1.28 Attend monthly Site and other progress meetings and receive and review minutes and Reports.
- 1.29 Receive, consider and decide upon any applications for Approval of any matters referred to in the Variations requirements as requiring his Approval in accordance with Schedule [●] (Variations) of the Agreement.
- 1.30 Perform such other functions as may be ascribed to the Authority's Representative under the Variations requirements as set out in Schedule [●] (Variations) of the Agreement.
- 1.31 Receive, and consider any valuation submitted by the PPP Co in accordance with paragraph [●] of Schedule [●] (Payment Mechanism) of the Agreement.
- 1.32 Perform any functions as may be ascribed to the Authority's Representative under the Change in Law requirements as set out in Schedule [●] (Change in Law) of the Agreement.
- 1.33 Carry out such functions as required by Schedule [●] (Compensation on Termination) of the Agreement to ascertain the Equity Value on termination of the Agreement.
- 1.34 Receive from the PPP Co all keys codes and passwords etc. in accordance with Schedule [●] (Transfer of Assets) of the Agreement.
- 1.35 Receive, consider and decide upon any applications for approval of any matters referred to in Schedule [●] (Handback Requirements) of the Agreement as requiring his Approval.
- 1.36 Perform such other functions as may be ascribed to the Authority's Representative under Schedule [●] (Handback Requirements) of the Agreement.
- 1.37 Submit any decision, Approval, of recommendation of determination to the Adjudicator as required by Schedule [●] (Disputes Resolution Procedure) of the Agreement.

CROSS REFERENCES

This clause is referred to in the following clause of the Compendium:

- Clause 3 (Effectiveness of this Agreement)

There are no references to this clause in the Risk Matrix.