COMPILATION OF PPP TERMS AND CONDITIONS OF CONTRACT

PUBLIC SECTOR VERSION

CLAUSE 16: CHANGE IN CONTROL

DBFOM CONTRACT

CONCESSION CONTRACT

INTRODUCTION

Because the PPP Co will often be a single purpose company, the Authority will want to ensure that the sponsors behind it remain those whose tender it accepted, and that it has a say in any changes. There is slightly more scope for changes in control after construction is complete.

SOPC3 GUIDANCE

SOPC3 *provides the following commentary regarding change in control:*

17 CHANGE OF OWNERSHIP

17.1 INTRODUCTION

17.1.1 *An Authority may be concerned about changes in the Contractor's shareholders, particularly where such changes lead to a change in ownership which gives cause for concern for particular, agreed reasons. If this is the case then it may seek to impose restrictions on the ability of shareholders to transfer their shareholdings in the Contractor. Shareholders will usually object to such restrictions other than restrictions on transfers of equity prior to the Service Commencement Date. As a general rule, it should not be necessary for the Contract to contain other restrictions on the transferability of equity other than a need to inform the Authority.*

17.2 AUTHORITY'S CONCERNS

17.2.1 *Imposing a restriction on the shareholder's ability to transfer their interests in the Contractor is partly to prevent any party the Authority views as unsuitable from being involved in the Project (or in control of the Contractor) and partly because the Authority takes comfort from the original shareholders' continuing to retain their economic stake in the Project.*

17.2.2 *The Authority should generally look to other provisions under the Contract to address its concerns about the effect a change in shareholders may have on the Contractor. For example, any concerns relating to the ability of the Contractor to perform the Contract without the support of the original shareholders, should be addressed by the payment mechanism and termination rights.*

17.2.3 *The Authority may seek to restrict equity transfers if it is concerned that the original shareholders may leave the Project before all their equity commitments have been fulfilled. There should be no reason to prevent transfers of equity (at least following Service*

Commencement) provided that any such deferred equity commitments are fully supported (e.g. by suitable letters of credit) and a substantially similar overall package is available from the proposed shareholders (e.g. if technical support was provided in its capacity as a shareholder then equivalent support should be looked for before a transfer can occur). It is not unreasonable for the Authority to restrict equity transfers by the Construction Sub-contractor (or any of its Affiliates) until Service Commencement or by the Operating Sub-contractor (or any of its Affiliates) until Service delivery is established.

17.3 SHAREHOLDER'S CONCERNS

17.3.1 *Holders of shares in Contractors will not want their liability to transfer their investment to be restricted. This is because allowing them to transfer their investments in Contractors extends the availability of capital for projects, makes the market more liquid and, as a consequence, can help improve value for money.*

17.3.2 *The risk exposure of the Contractor also changes over time as most risks are concentrated in the period prior to Service Commencement. The optimal financing structure can therefore be expected to change over time to reflect this. Restrictions on transfers of equity would inhibit changes to the financing structure. For example, the Contractor may be able to offer the Authority a more competitive price, principally by relying on the fact that changes in the financing structure (e.g. through a refinancing) will allow it to reduce its costs and achieve its desired return.*

17.4 EXCEPTIONS TO THE GENERAL RULE

17.4.1 *In some exceptional cases it may be reasonable for an Authority to impose some wider restriction on the transfer of ownership or investment in a Contractor (the precise restrictions will depend on the financing structure of the Project). Restrictions should address specific concerns and not be blanket restrictions. Certain limits are appropriate. For example, in certain defence projects, the Authority may be concerned that national security may be threatened by unsuitable shareholders and for that reason restrictions will exist. Similar public interest concerns will exit in prison projects. Political considerations may also apply – for example, an Authority may not wish to have tobacco companies holdings shares in schools. The Authority should ensure bidders are made aware of such concerns and restrictions as early as possible and certainly no later than the ITN.*

17.4.2 *In such exceptional cases the Contract should either seek to set out in an objective manner the grounds on which a transfer Is not permitted or, if necessary and practical, set out a list of unacceptable holders of equity. A less attractive option for all concerned is to include a provision requiring the investor to seek the prior written consent of the Authority before transferring its shareholding (or other investment). If this latter course of action is taken, it should be made clear in the Contract that any such consent should not be unreasonably withheld (nor a response delayed). The Authority should be obliged, unless there are public policy reasons to withhold reasons, to specify the reason for any refusal.*

17.4.3 *To the extent such matters are of a sensitive nature, they may be better dealt with outside the Contract (for example, in a confidential letter that does not form part of the Contract). If sensitive matters are to be in the Contract, the issues discussed in Section 25 (Information and Confidentiality) [of SoPC3 Guidance] are relevant. In addition, any restrictions which are imposed need not last throughout the Contract.*

17.4.4 *To the extent restrictions are needed, then there should be a focus on transfers of individual shares rather than necessarily changes of control.*

17.5 RELATED ISSUES

17.5.1 *It is not always possible to ascertain who holds an interest or beneficial interest in shares and it may not be possible in any event to police more remote changes in ownership. The use of* *nominees means the Authority may not even be aware of changes. The protection offered by change of ownership provisions should therefore be seen by the Authority as an imperfect tool for controlling the substantive ownership of the Contractor.*

Comment : The Core Contract drafting below, requiring Authority consent to all changes of control, (albeit not to be unreasonably withheld after construction) goes beyond the approach recommended by SOPC3.

CORE CONTRACT DRAFTING

16. CHANGE IN CONTROL

16.1 PPP Co Warranty

The PPP Co warrants and represents to the Authority that the legal and beneficial ownership of the PPP Co and the Holding Companies at the date of this Agreement and at the Effective Date is as set out in Schedule [●] (Details of Companies).

16.2 Change of Ownership

(a) The PPP Co shall be obliged to seek the consent of the Authority:

(i) which consent shall not be unreasonably withheld, prior to a Change in Control during the Design and Construct Period; and

(ii) which consent may be withheld at the Authority's absolute discretion, prior to a Restricted Share Transfer provided that in relation to a Restricted Share Transfer arising pursuant to limb (f) of that definition, the Authority may not unreasonably withhold its consent.

(b) The PPP Co shall be obliged to seek the consent of the Authority (which consent shall not be unreasonably withheld) prior to a Change in Control during the Operational Period.

(c) Where this Clause 16.2 requires the Authority's consent to a Change in Control not to be unreasonably withheld, such consent may be withheld only on the grounds of:

(A) public interest; or

(B) the Authority demonstrating that such relevant Change in Control would be likely to have a material adverse effect on the performance of the Project by the PPP Co.

16.3 For the purposes of Clause 16.2 (Change of Ownership):

(i) any change in beneficial or legal ownership of any shares that are listed on a recognised stock exchange (being for this purpose, the Irish Stock Exchange Limited, London Stock Exchange plc, or such other stock exchange as may be agreed from time to time by the parties);

(ii) any transfer of shares or of any interest in shares by a person to its Associated Company;

(iii) any transfer of shares or of any interest in shares by way of security pursuant to the Funding Agreements or by way of enforcement of such security;

(iv) a reorganisation for bona fide fiscal purposes where the ultimate control of the PPP Co does not change;

shall be disregarded.

16.4 For the purposes of a Change in Control under this Clause 16, shareholdings of persons under common control or who, in the reasonable opinion of the Authority, are acting in concert shall be aggregated.

16.5 Without prejudice to Clause 16.2, the PPP Co shall inform the Authority as soon as reasonably practicable and, in any event, within [●]([●]) days of any change in ownership of the PPP Co.

NRA MODEL CONTRACT DRAFTING

Comment: The NRA Model Contract drafting is more detailed about control, but does not list types of undesirable controlling companies.

[●]. **CHANGE IN CONTROL**

[●].1 Change in Control

(a) Subject to Clause [●].4 (Open Market Transactions) [*below*], a change in control of the PPP Co shall occur whenever:

(i) any person has control of the PPP Co who did not have control of the PPP Co when this Agreement was executed; or

(ii) any person ceases to have control of the PPP Co.

(b) The PPP Co shall be obliged to seek the consent of the Authority prior to any change in control of the PPP Co as defined in Clause [●].1(a) [*above*].

[●].2 Authority's Consent

(a) The Authority shall not unreasonably withhold or delay its consent to a change in control in the following circumstances:

(i) in the case of a re-organisation for bona fide fiscal purposes where the ultimate control of the PPP Co does not change; or

(ii) where the proposed change in control is pursuant to the bona fide enforcement of the [Shares Charge/Mortgage] following an Event of Default to an entity of financial standing (as reasonably determined by the Authority) at least equivalent to the financial standing at the Commencement Date of the ultimate Holding Company of the Sponsor whose shares are proposed to be sold and which is not an entity to which the Authority had previously refused to give its consent pursuant to this Clause [●] provided that the Authority's consent to a change in control shall not be required where the change in control is pursuant to:

(A) any Encumbrance over, or a transfer of, shares or other securities of the PPP Co to [chargee/mortgagee] in accordance with the

[Share Charge/Mortgage]; or

(B) [share transfer rights under the Credit Providers' Direct Agreement]; or

(C) [any transfer of shares by a third party equity provider][1] .

(b) During the period commencing on the Commencement Date and expiring on the date falling 1 (one) year after the Completion Date (hereinafter called the "Initial Period"), the Authority may, subject to Clause [●].2(a) [*above*] withhold or delay its consent in its absolute discretion in relation to any transfer of shares giving rise to a change in control in the PPP Co. Following the expiry of the Initial Period:

(A) the Authority's consent shall not be required for any transfer of shares in the PPP Co between the Shareholders provided before and after any such transfer each of the Shareholders retains a minimum of [●]%[2] ([●] percent) of the issued share capital of the PPP Co (the "Minimum Shareholding"); and

(B) the Authority shall not unreasonably withhold its consent to any other transfer of shares in the PPP Co giving rise to a change in control.

Where this Clause [●].2 requires the Authority's consent to a change in control to be not unreasonably withheld or delayed, such consent may only be withheld on the grounds of (1) public interest, or (2) the Authority demonstrating that such relevant change in control would be likely to have a material adverse effect on the performance of the Project by the PPP Co.

[●].3 Section 432 of the Taxes [Consolidation] Act [1997]

Sub-sections (2) to (6) of Section 432 of the Taxes Act shall apply for the purpose of determining whether, for the purposes of this Clause 55, a person has or had control of the PPP Co, with the following modifications:

(a) for the words "the greater part" wherever they occur in the said subsection (2) there shall be substituted the words "one third or more";

(b) in the said Subsection (6), for the word "may" there shall be substituted the word "shall", the words from "and such attributions" onwards shall be omitted and in the other provisions of that subsection any reference to an associate of a person shall be construed as including only a relative of it (as defined by Section 433(3)(a) of the Taxes Act), a partner of it and a trustee of a settlement (as contemplated by Section 433(3)(b)(ii) of the Taxes Act); and

(c) Section 432(3) of the Taxes Act shall only apply insofar as the persons whose shareholdings or rights in respect of such shareholdings as described in section 432(2)(a), (b) and (c) of the Taxes Act, are to be aggregated are themselves under common control or, in the opinion of the Authority, are acting in concert.

[●].4 Open Market Transactions

A change in control of any Sponsor or any of its Holding Companies which arises from any bona fide open market transactions in any shares or other securities of such Sponsor or such Holding Company effected on a recognised stock exchange (being for this purpose, The Irish Stock Exchange Limited, London Stock Exchange plc or such other stock exchange as may be agreed from time to time by the parties) shall not constitute a change

1 ***For insertion if the PPP Co's consortium structure contemplates third party equity providers.***

2 ***Scheme specific: dependant on Sponsor's shareholding in the PPP Co***

in control.

[●].5 Restrictions on Appointing Contracting Associate

The PPP Co confirms that it has not and undertakes that it will not directly or indirectly by way of formal or informal arrangement appoint any Contracting Associate as its agent or sub-contractor to act on behalf of the PPP Co in the Disputes Resolution Procedure or act on behalf of the PPP Co in its dealings with the Principal Sub-Contractors and any such purported agency, sub-contracting arrangement, proposed document or proposed course of action shall be sufficient grounds (but not the sole grounds) upon which the Authority's Representative may make comments, including objecting to any document relating to the Project which is submitted to the Authority's Representative for Commercial Review.

Comment: The last provision is not about change of control.

CROSS REFERENCES

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

- Clause 3 (Effectiveness of this Agreement)

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