

COMPILATION OF PPP TERMS AND CONDITIONS OF CONTRACT

PUBLIC SECTOR VERSION

CLAUSE 17: ASSIGNMENT

DBFOM CONTRACT

CONCESSION CONTRACT

INTRODUCTION

SOPC3 states the principles. The issue is related to the issue of change of control (Clause 16). The Core Contract text goes beyond SOPC3 by regulating the assignment of subcontracts and the encumbering of assets.

For information on guarantees, letters of comfort and contingent liabilities see Clause 15 (Warranties) and/or the Public Financial Procedures as issued by the Department of Finance.

SOPC3 GUIDANCE

16. ASSIGNMENT

16.1 INTRODUCTION

16.1.1 *Over the course of a long term contract, the identity of the Authority, the Contractor or its financiers may change to some extent. This should be recognised at the time of negotiating the Contract and an appropriate balance struck which allows some flexibility for change where appropriate but gives the parties sufficient comfort about the identity and/or creditworthiness of their counterparties.*

16.2 RESTRICTIONS ON THE CONTRACTOR

16.2.1 *The Contract should not allow the Contractor to assign, novate or transfer its rights under the Contract, except as part of its Senior Lenders' security package. If a replacement Contractor is appointed by the Senior Lenders in accordance with their rights under the direct agreement (see Section 30 [of the SoPC3 Guidance] (Direct Agreement)), the Contract should allow for the original Contractor's rights and obligations to be transferred.*

16.3 RESTRICTIONS ON THE AUTHORITY

16.3.1 *The Contract should generally not allow the Authority to assign or transfer its rights or obligations under the Contract without the consent of the Contractor.*

16.3.2 *The main exceptions to the above are where transfer either takes place under statute or is required to facilitate a public sector reorganisation. Specific exceptions may also have to be provided for in a particular project if a transfer is anticipated (e.g. the London Underground project which was, under statute, transferred to Transport for London) or particular sectors (e.g. the local authority sector where transfers may be required due to boundary changes). Authorities should recognise that financiers will be concerned to ensure that any transferee's covenant is as strong as that of the original Authority and that the transfer could not prejudice*

their security. If this is not the case, appropriate credit enhancement (e.g. in the form of a guarantee) may be required so that the Contractor's position is not prejudiced. Where such a right is required by the Authority, appropriate drafting for both central and non-central government projects is set out below.

16.4 RESTRICTIONS ON THE SENIOR LENDERS

16.4.1 *The Authority may be tempted to seek to limit the ability of Senior Lenders to transfer their rights. This is due in part to a perceived need to have the original Senior Lenders involved who understand the deal negotiated, but is primarily a confidentiality and national security/public policy issue. The Authority may be concerned, for example, about whose hands project information may be in and to whom the Authority may end up owing money. The Authority does not want to become embroiled in national security issues.*

16.4.2 *The Authority should not attempt to put restrictions on the identity of the Senior Lenders unless exceptional circumstances apply. The appropriate way to deal with confidentiality issues, for example, is to impose confidentiality obligations in either the Contract (as against the Contractor) and the direct agreement (as against the Senior Lenders) (see Section 25 [of the SoPC3 Guidance] (Information and Confidentiality) and 30 [of the SoPC3 Guidance] (Direct Agreement)).*

16.4.3 *To the extent that transfer restrictions against financiers can be justified, however, they should focus on objective categories (e.g. credit ratings or EU/OECD banks) or should prescribe a list of acceptable transferees rather than adopting the clumsy, all encompassing approach of a general right of veto (which, in any event, is unlikely to work). Such list should be updated as and when appropriate. Restrictions of this type can be dealt with in the direct agreement, or in a separate confidential letter if there are particular sensitivities (see Section 30 [of the SoPC3 Guidance] (Direct Agreement)).*

16.4.4 *Restrictions are often more cosmetic than real, as they can usually be circumvented through assignment or sub-participation and so reliance should not be placed on such arrangements being effective or meeting the Authority's concerns.*

16.4.5 *Where projects are financed by bond issues, it is likely to be particularly difficult to identify the bondholders at any one time. The Authority should not seek to impose or rely on any restrictions on such Senior Lenders either (this is particularly impractical where bondholders are not registered e.g. holders of bearer bonds). Where bonds are privately placed and the Authority can justify imposing restrictions on financiers, a similar approach as under Section 16.4.3 may be adopted. The Authority should note that Stock Exchange rules on bond issues may require details of the Contract and underlying documents to be publicly displayed (there are some exceptions to such rules (e.g. if display would prejudice national security)).*

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.*

17.1.2 *Suitable drafting is set out below:*

(a) The Contractor shall inform the Authority as soon as reasonably practicable and, in any event, within [30] days of any change in the ownership of the Contractor.

17.2 AUTHORITY'S CONCERNS

17.2.1 *Imposing a restriction on the shareholders' 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 shareholder (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 Subcontractor (or any of its Affiliates) until Service Commencement or by the Operating Subcontractor (or any of its Affiliates) until Service delivery is established.*

17.3 SHAREHOLDERS' CONCERNS

17.3.1 *Holders of shares in Contractors will not want their ability 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 exist in prison projects. Political considerations may also apply – for example, an Authority may not wish to have tobacco companies holding 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 [of the SoPC3 Guidance] (Information and Confidentiality) 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, one way to do this is as follows:*

(a) The Contractor shall obtain the Authority's prior written consent (which may be given subject to conditions) to any Restricted Share Transfer of the Contractor (other than where the Senior Lenders exercise their rights in respect of shares of the Contractor granted in any document conferring security over any of the shares of the Contractor).

(b) For the purpose of paragraphs (a)4 and (b) above:

(i) any change in beneficial or legal ownership of any shares that are listed on a stock exchange shall be disregarded.

(ii) any transfer of shares or of any interest in shares by a person to its Affiliate shall be disregarded.

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 its counterpart.*

CORE CONTRACT DRAFTING

17 ASSIGNMENT

17.1 Binding on Successors and Assigns

This Agreement shall be binding on and shall enure to the benefit of the PPP Co and the Authority and their respective successors and permitted assigns.

17.2 Assignment

(a) Subject to Clause 17.2(b) and Clause 17.4 (Encumbrances) the PPP Co:

(i) shall not, and shall procure that no Contracting Associate shall, in any such case without the prior consent of the Authority, assign, novate, transfer or create or allow to subsist any Encumbrance, trust or interest in this Agreement or, subject to Clause 17.2(a)(ii) below, any other contract entered into by the PPP Co in performing its obligations under this Agreement or any part thereof or any benefit or interest therein or thereunder;

(ii) shall not, and shall procure that no Contracting Associate shall, in any such case without the prior consent of the Authority, assign, novate, transfer or

create or allow to subsist any Encumbrance, trust or interest in the Principal Sub-Contracts or any other contract entered into by the PPP Co in performing its obligations under this Agreement or any part thereof or any benefit or interest therein or thereunder, which Encumbrance, trust or interest would, upon enforcement by the relevant security holder, result in a breach of Clause 18.3 (Replacement of Principal Sub-Contractors) or termination of the relevant agreement;

- (iii) shall procure that the Principal Sub-Contractors shall not be permitted to assign their respective Principal Sub-Contracts or any part thereof or any benefit or interest therein or thereunder, without the PPP Co having obtained the prior consent of the Authority;

provided however that where any Contracting Associate and/or Principal Sub-Contractor (other than the Designer, the Contractor or the Operator) enters into any assignment without the prior knowledge of the PPP Co and without the prior consent of the Authority, the PPP Co shall not be in breach of this Clause 17.2(a) where it has acted in good faith and either:

- (A) obtains the Approval of the Authority; or
- (B) procures that the Contracting Associate and/or Principal Sub-Contractor rescinds and/or procures the rescission of any such assignment within [●] ([●]) Working Days of the date of any such assignment.

(b) The provisions of Clause 17.2 do not apply:

- (i) in relation to the creation of any Encumbrance over the benefit of, or any permitted assignment, novation or transfer of, any of the agreements referred to in Clause 17.2(a) by way of security in accordance with the Funding Agreements, provided that, in the case of an assignment of the benefit of this Agreement or any part thereof or any benefit or interest therein or thereunder, any assignee shall have entered into the Credit Providers' Direct Agreement or such other similar agreement in relation to the exercise of its rights as the Authority shall require; or
- (ii) to the novation of this Agreement in accordance with the provisions of the Credit Providers' Direct Agreement.

(c) The Authority may not assign, novate, transfer or create or allow to subsist any Encumbrance, trust or interest in this Agreement, the Principal Sub-Contractor's Direct Agreement, the Credit Providers' Direct Agreement and the Performance Bond¹ or any other contract entered into by the Authority in relation to the performance of its obligations under this Agreement or any part thereof or any benefit or interest therein or thereunder or otherwise in relation to the Project without the prior consent of the PPP Co except to any;

- (i) Minister of the Government; or
- (ii) non-departmental statutory body which:
 - A. has the necessary legal capacity and similar or equivalent duties as the Authority in each case in relation to the Project; and

¹ *Details of any other agreements that are to be transferred by the Authority to be inserted.*

- B. is funded in relation to the Project (which funding and other resources in relation to, and allocated to, the Project shall not be substantially less than those in relation to the Authority) but, subject thereto, the funding shall be available in substantially the same or equivalent manner as to the Authority and to the equivalent level as the Authority having regard to their respective liabilities (including in the case of the statutory body, the liabilities it will assume from the Authority); or
- (iii) person who has the necessary legal capacity and whose obligations under this Agreement, the Principal Sub-Contractor's Direct Agreement, the Credit Providers' Direct Agreement and the Performance Bond are irrevocably and unconditionally guaranteed by any person referred to in Clause 17.2(c) and (ii) above having the necessary legal capacity to do so;

provided also, in respect of the body or person at Clause 17.2(c)(ii) or Clause 17.2(c)(iii) above that there is in respect of it substantially the same or equivalent Government control and ownership as the Authority.

17.3 Authority Successors

Where:

- (a) a Bill is initiated in the Oireachtas or a draft Statutory Instrument is circulated among Government departments for consultation, in either case, providing for the transfer of the rights, powers, duties and obligations of the Authority (a "**Transfer**"); or
- (b) a Minister having responsibility for the Authority, the Minister for Finance or An Taoiseach has made a formal statement to the Dáil or the Seanad stating his intention that a Transfer be effected,

in either case, to a new entity (the "**Successor**") then, subject to Clause 17.3(c) below:

- (i) the Authority shall notify the PPP Co of such event and provide such details as are available to it within [●] ([●]) Working Days of it becoming aware of such event provided that if the Bill or statement is withdrawn within such [●] ([●]) Working Days then the Authority shall not be required to make any notice hereunder;
- (ii) upon receipt of the notice from the Authority pursuant to Clause 17.3(i) above, the PPP Co shall, acting reasonably, determine whether the Successor fulfils the requirements of Clause 17.2 (Assignment), if it determines that it does not, then it shall forthwith notify the Authority of this, setting out its reasons, together with supporting documentation for such determination;
- (iii) the Authority shall consider such determination and shall within [●]([●]) Working Days:-
- (A) refer the matter to Disputes Resolution Procedure; or
- (B) agree that the Successor does not comply with the requirements of Clause 17.2 (Assignment) and that an Authority Default has occurred and is continuing; or
- (C) confirm that the proposed Transfer is not proceeding,

(c) a Transfer is to be effected in a time period less than [●]([●]) Working Days from the event specified in Clause 17.3(a) or 17.3(b) above, as the case may be, then if:

- (i) the PPP Co advises the Authority that in its reasonable opinion such Transfer would be to a person other than those persons permitted pursuant to Clause 17.3(c)(i) to (iii) above; and
- (ii) the Authority fails to demonstrate to the reasonable satisfaction of the PPP Co that such Transfer is not proceeding,

an Authority Default shall be deemed to have occurred.

17.4 Encumbrances

(a) Subject to the remainder of this Clause 17.4 and Clause 17.2(b) (Assignment), the PPP Co shall not without the prior written consent of the Authority, which consent shall not be unreasonably withheld or delayed, create, nor permit to exist, any Encumbrance over its Assets.

(b) Without prejudice to the generality of Clause 17.4(a), the PPP Co shall not be entitled to grant any Encumbrance over or in respect of the Retention Account or any sums standing to the credit thereof from time to time other than in favour of the Authority provided that the PPP Co shall be entitled to grant a security interest to the Senior Credit Providers as defined in the Credit Providers' Direct Agreement in and to the Retention Account (on such terms as are subject to the Authority's prior Approval, such Approval not to be unreasonably withheld) provided that any such security interest shall provide that it:

- (i) is subject to and ranks at all times behind:
 - (A) any Encumbrance in favour of the Authority whether created before or after any such security interest in favour of the Senior Credit Providers over or in respect the Retention Account or any sums from time to time standing to the credit of the Retention Account (including without limitation any accrued interest); and
 - (B) any and all other rights of the Authority in and to the Retention Account, all sums from time to time standing to the credit of the Retention Account and all accrued interest;
- (ii) is subject to the provisions of this Agreement; and
- (iii) shall not in any way interfere with, prejudice or otherwise affect any of the rights and obligations of the parties under this Agreement (in particular, but without limitation, this Clause 17.4) or in respect of the Retention Account,

and otherwise upon such terms as are subject to Authority's prior Approval. The PPP Co shall (if so required by the Authority) execute such documents and do such things as the Authority may reasonably require to give effect to the ranking of any security interest contemplated by this Clause 17.4(b).

(c) Notwithstanding any other term of this Agreement, the PPP Co shall be entitled to create Encumbrances over all or any part of its assets pursuant to any of the Funding Agreements.

CROSS REFERENCES

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

- Clause 3 (Effectiveness of this Agreement)
- Clause 26 (Intellectual Property)
- Clause 54 (Compensation on Termination)

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