

COMPILATION OF PPP TERMS AND CONDITIONS OF CONTRACT

PUBLIC SECTOR VERSION

CLAUSE 18: SUB-CONTRACTING

DBFOM CONTRACT

CONCESSION CONTRACT

DBOM CONTRACT

INTRODUCTION

The Special Purpose Company (SPC) that enters into the Contract with the Authority will usually not actually carry out any of the works or services; these will all be carried out by Sub-contractors. It will be the Building Contractor that designs and builds the project and the FM Contractor that operates it, etc. Accordingly, the Authority will require some degree of control in relation to the identity and obligations of the SPC's sub-contractors. These provisions provide a framework for that control.

SOPC 3 GUIDANCE

9.5 REPLACEMENT OF SUB-CONTRACTORS

9.5.1 *Some Contracts allow flexibility in the performance regime where a replacement Contractor or Sub-Contractor is being installed.*

9.5.2 *The Contractor should bear the risk of poor performance of its Sub-Contractors. The Authority should not be disadvantaged by any change in Sub-Contractors so the performance regime should not be interrupted. The Authority should however recognise that it should allow the Contractor the right to replace its Sub-Contractors in order to improve performance and avoid termination. To enable it to do so, the Contractor will normally set a stricter termination threshold (or trigger termination earlier in point of time) in its sub-contracts than that which applies in the Contract.*

9.5.3 *However, where there are one or two Sub-Contractors, the Contractor may find it impossible to find a replacement Sub-Contractor where the performance points accrued at Contract level are such that a further very minor default under the Sub-Contract could trigger termination of the Contract. In these circumstances the Authority should consider whether it should:*

- *give relief from termination of the Contract on replacement of that Sub-Contractor for a limited period of time (e.g. two months) during which failures attributable to poor performance of the relevant Services provided by the replacement Sub-Contractor will not result in termination of the Contract. Financial deductions under the Contract should continue to be made for such failures to incentivise proper performance of that contract and to the extent that the performance regime includes any "ratchet" mechanisms for continued poor performance, these should not be relaxed; and/or*
- *cancel any performance points accrued by the Contractor under the Contract in relation to the relevant Services provided by the replaced Sub-Contractor on the appointment of the replacement Sub-Contractor.*

9.5.4 *The Contractor's ability to benefit from the performance relief regime should be limited to twice in the life of the Contract.*

9.5.5 *As mentioned above, the Authority should not be disadvantaged by the replacement of any Sub-Contractor. Accordingly, the Authority should consider allowing itself the opportunity to approve the identity of any replacement Sub-Contractor if a request is made by the Contractor for temporary relief under the performance regime following the replacement of a Sub-Contractor. This approval right is consistent with the approach taken in the Direct Agreement (see Section 30 [of the SoPC3 Guidance] (Direct Agreement) and similarly, any such approval rights should be limited to matters of technical competence and financial standing.*

9.5.6 *For Projects where there are a number of Sub-Contractors the Authority should not give this relief as failures attributable to a single Sub-Contractor in these circumstances will not cause accrued penalty points under the Contract to approach termination thresholds.*

9.9 MONITORING OF SUB-CONTRACTORS

9.9.1 *An Authority may feel it needs to use the Contract to allow it to intervene at Subcontractor level to protect its interest if a Sub-contractor is underperforming (e.g. the Authority may want the right to direct or require the replacement of the Sub-contractor). This approach is not recommended as it should be for the Contractor to manage its Subcontractors and intervention by the Authority will affect the degree of risk transfer achieved (see Section 15 [of the SoPC3 Guidance] (Sub-contractors and Employees)). The Authority should instead rely on the payment mechanism and its termination rights to address sub-standard performance.*

9.9.2 *Deductions under the payment mechanism and, ultimately, the risk of the Authority terminating the Contract for under performance, should be a sufficient incentive on the Contractor to manage its Sub-contractors' performance. The Contractor will typically ensure it has the right under the Project Documents to replace its Sub-contractors before the Authority's right to terminate arises under the Contract. Concerns regarding Sub-Contractors' performance may be further addressed in the Contract by requiring a temporary increase of monitoring at the Contractor's expense in specified circumstances as well as requiring the Contractor to provide an acceptable plan outlining how any defects in the Service will be put right. Both of these measures impose costs on the Contractor and are only acceptable if there has been a persistent and verifiable period of under-performance. If the Contractor elects to replace any of its Sub-Contractors to improve performance, the Contractor should not be entitled to a relaxation of the performance regime, but it is recognised that this will be a factor to be taken into account in the initial development of the performance regime.*

Comment: *The Core Contract drafting falls at the restrictive end of the spectrum of SOPC – recommended approaches, or possibly of the scale. All changes to sub-contractors (and even some lower tier subcontractors) need Authority approval, and there is no performance relief associated with their replacement.*

CORE CONTRACT DRAFTING

18 SUB-CONTRACTING

18.1 Sub-Contracting Performance

The PPP Co shall not be entitled to sub-contract performance of the Project in whole or part, except to the parties listed in Clause 18.2(c) (Principal Sub-Contractors), without the Authority's prior Approval. The Designer shall not be entitled to sub-contract performance of its services relating to the Project, without the Authority's prior Approval. The PPP Co shall

procure that the Operator shall obtain prior Approval to sub-contracting performance of its [services and obligations] relating to the Project and shall notify the Authority in the event that it subcontracts performance of any other of the Operator's services relating to the Project. Where any Contracting Associate (other than the Designer, Contractor or Operator) sub-contracts any of its performance of the Project without the prior knowledge of the PPP Co and without the prior Approval of the Authority, the PPP Co shall not be in breach of this Clause 18.1 where it has acted in good faith and either:

(a) obtains the Approval of the Authority; or

(b) procures that the Contracting Associate terminates, rescinds, revokes and/or procures the rescission of such sub-contract, within [•] ([•]) Working Days of the date of any such sub-contract.

18.2 Principal Sub-Contractors

Subject to Clause 21.1 (Project Documents), the Authority's prior Approval (not to be unreasonably withheld) shall be obtained before:

- (a) the engagement or employment of the persons identified in Clause 18.2(c) are terminated; or
- (b) the terms of engagement or employment of any proposed substitute are agreed or varied in relation to the Contractor, the Designer and/or the Operator; or
- (c) the appointment of any proposed substitute is made in relation to:
 - (i) the Contractor;
 - (ii) the Designer;
 - (iii) the Checker;
 - (iv) the Operator;
 - (v) the PPP Co Quality Director;
 - (vi) the Archaeologist;
 - (vii) the Archaeological Licence Holder;
 - (viii) [any other sub-contractor with design responsibility]¹,

provided however if there is an event of default under the PPP Co's contract with any of the above persons such that their appointment is to be terminated, the Authority shall not object to the appointment of any replacement who has the necessary legal capacity, power and authority to perform such function and who has the necessary technical and financial resources to perform such function.

18.3 Replacement Principal Sub-Contractors

If any of the persons referred to in Clause 18.2(c) (Principal Sub-Contractors) shall cease to

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To be advised by PPP Co.

act as such at any time, the PPP Co shall as soon as practicable appoint [(or, in the case of the [Designer], procure that the Contractor appoints as soon as practicable)]² a replacement, subject to it obtaining Approval in accordance with Clause 18.2 (Principal Sub-Contractors).

18.4 Waiver of Liability – Disclosed Data, Review and Certification Procedure and Commercial Review

No such replacement for a Principal Sub-Contractor shall perform any of the Project until the PPP Co has provided to the Authority and, if requested, its respective advisers, consultants, servants, contractors and/or agents a waiver of liability in respect of the Losses or Claims referred to in Clause 5.2 (Review and Certification Procedure) and Clause 29.1 (Commercial Review) in a form satisfactory to it (acting reasonably).

18.5 Principal Sub-Contractor's Direct Agreements

- (a) The PPP Co shall enter into, and procure that each of the Contractor, the Designer and the Operator shall, upon its appointment, enter into a Principal Sub-Contractor's Direct Agreement in favour of the Authority in the Agreed Form set out in Part [•] of Schedule [•] (Form of Direct Agreement).
- (b) The PPP Co shall enter into, and procure that any substitute for the Contractor, the Designer or the Operator to be appointed in accordance with Clause 18.3 (Replacement Principal Sub-Contractors) shall, upon its appointment, enter into a Principal Sub-Contractor's Direct Agreement in favour of the Authority in the Agreed Form set out in Part [•] of Schedule [•] (Form of Direct Agreement).

CROSS REFERENCES

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

- Clause 17 (Assignment)

This clause is relevant to the following entries in the Risk Matrix:

- C9 (Works)
- D20 (Sub-contractor Performance)

²

Details to be provided by the PPP Co.