

# COMPILATION OF PPP TERMS AND CONDITIONS OF CONTRACT

## PUBLIC SECTOR VERSION

### CLAUSE 2: INTERPRETATION

#### DBFOM CONTRACT

#### CONCESSION CONTRACT

#### DBF CONTRACT

#### DBOM CONTRACT

## INTRODUCTION

It is desirable for all contracts, from a simple consumer contract to a complex PPP contract, to have a section that explains how the words contained in the clauses should be interpreted. Such sections have developed over time in order to reflect case law regarding the interpretation of clauses. Interpretation clauses do not differ widely from contract to contract and are often described as “boiler plate” clauses in order to reflect the fact that they are a standard provision that would not usually be amended.

## CORE CONTRACT DRAFTING

### 2.1 Interpretation

Save to the extent that the context or the express provisions of this Agreement otherwise require:

- (a) headings and sub-headings are for ease of reference only and shall not be taken into consideration in the interpretation or construction of this Agreement;
- (b) all references to Clauses and Schedules are references to Clauses of and Schedules to this Agreement and all references to Parts, Sections, paragraphs, Annexes or Appendices are references to Parts, Sections and paragraphs contained in and Annexes and Appendices to the Schedules;
- (c) the Schedules to this Agreement (including any Annexes or Appendices thereto) are an integral part of this Agreement and reference to this Agreement includes reference thereto and reference to any Schedule includes reference to any Annex or Appendix thereto;
- (d) all references to any agreement (including, without limitation, this Agreement), document or other instrument include (subject to all relevant approvals and any other provision of this Agreement expressly concerning such agreement, document or other instrument) a reference to that agreement, document or instrument as amended, supplemented, substituted, novated or assigned;
- (e) all references to any statute or statutory provision (including any subordinate legislation) shall include references to any statute or statutory provision which amends, extends, consolidates or replaces the same or which has been amended, extended, consolidated or replaced by the same and shall include, without limitation, any statutory instrument,

proclamation, bye-law, directive, decision, regulation, rule, order, notice, codes of practice, code of conduct, rule of court, instrument or delegated or other subordinate legislation made under the relevant statute;

- (f) all references to time of day shall be a reference to whatever time of day shall be in force in the State;
- (g) any reference to “requirements” or “obligations” shall be to such requirements or obligations as may be subsequently altered or supplemented in accordance with the terms of this Agreement;
- (h) the words “herein”, “hereto” and “hereunder” refer to this Agreement as a whole and not to the particular Clause, Schedule, Part, Section, paragraph, Annex or Appendix in which such word may be used;
- (i) words importing the singular include the plural and vice versa;
- (j) words importing a particular gender include all genders;
- (k) “person” includes any individual, partnership, firm, trust, body corporate, government, governmental body, authority, emanation, agency or instrumentality, unincorporated body of persons or association;
- (l) any reference to a public organisation or representative shall be deemed to include a reference to any successor to such public organisation or representative or any organisation or entity or representative which has taken over the functions or responsibilities of such public organisation or representative;
- (m) references to “parties” mean the parties to this Agreement and references to a “party” mean one of the parties to this Agreement;
- (n) references to drawings are references to drawings appearing in the Schedules hereto having the revision numbers set against the relevant drawings numbers in Schedule [•] (Land Issues), Schedule [•] (Construction Requirements) and Schedule [•] (Operation and Maintenance Requirements);
- (o) all monetary amounts are expressed in Euro;
- (p) any references to the Authority shall be deemed to include a reference to the Authority’s Representative, the Authority’s advisers, consultants, servants, contractors and/or agents;
- (q) any references to Relevant Authorities and/or Relevant Persons shall be deemed to include a reference to their respective advisers, consultants, servants, contractors and/or agents;
- (r) at any time any reference in this Agreement to a sum or amount (except for those sums or amounts referred to in Annex 1 to [Clause 35 – Schedule] (Change in Law) or where specified otherwise) shall be construed as referring to such sum or amount adjusted for the effects of inflation at such time; such adjustment shall be made in accordance with the formula set out in paragraph 1 of Part 3 of [Clause 39 – Schedule] (Payment Mechanism). The base index date unless otherwise specified shall be [•];
- (s) wherever this Agreement obliges one party to pay any amount to the other party in respect of any Loss, Claim or other sums incurred by the parties:
  - (i) such obligation shall be construed as applying only to so much of such sums as have

been properly incurred on an arm's length commercial basis (and, for the avoidance of doubt, all documents in Schedule [●] (Required Documents) are deemed to have been agreed on an arm's length commercial basis) or, where not incurred on an arm's length commercial basis (including where the payment is made to the Contractor or an Associated Company of the PPP Co), so much of them as are proper and reasonable; and

- (ii) the parties shall, where requested by the other party, provide supporting evidence of such Loss, Claim or other sums,

(it being acknowledged that in respect of any sum, to the extent Schedule [Clause 54 – Schedule] (Compensation on Termination) otherwise contemplates, the terms of Schedule [Clause 54 - Schedule] (Compensation on Termination) shall prevail);

- (t) the Authority shall not be imputed with knowledge of any fact, matter or thing merely because that fact, matter or thing is within the knowledge of the State's servants or agents;
  - (u) any reference to the statutory duties or functions of the Authority shall be a reference to such duties or functions (including powers and discretions) from time to time and shall include any common law duties and functions (including powers and discretions);
  - (v) if the result of any calculation to be rounded up or down to a multiple of a specified figure (after deducting the next lower multiple of the specified figure) is exactly half that specified figure (for example, where amounts are to be rounded up or down to the nearest [●] ([●]), the calculation gives a [●] ([●]), then such result shall be rounded up to the nearest multiple of the specified figure;
  - (w) any reference to "day" shall, unless otherwise stated, mean the period of time which begins with one midnight and ends with the next;
  - (x) any reference to the obligations or responsibilities of the PPP Co under this Agreement shall, where applicable, be deemed to apply to the Staff;
  - (y) where the context requires, any reference in this Agreement to "approval" shall include "Approval", reference to "certificate" shall include "Certificate", reference to "acknowledge" shall include "Acknowledged", reference to "notice" shall include "Notice", reference to "sub-contractor" shall include "Principal Sub-Contractor";
  - (z) any Approval shall be at the absolute discretion of the Authority's Representative or the Authority, as the case may be, except where expressly stated otherwise in this Agreement; and
- (aa) the term "including" means including but without limitation.

## 2.2 Language

The language of this Agreement is English. All correspondence, drawings, Design Data, test reports, certificates, specifications and information shall be entirely in English. Except where specifically provided for within this Agreement or otherwise required by Law (in which case the relevant language shall be Irish), all operating and maintenance instructions, identification labels and other written and printed matter required for the Project shall be in English. Instructions and notices to the public and Staff and all other signing and information notices shall be available in English and Irish as required by the Authority.

### **2.3 Ambiguities**

In the case of any ambiguity or discrepancy:

- (a) between the provisions in this Agreement (excluding for this purpose, the Schedules) and the provisions of any Schedule (other than [Clause 54 – Schedule] (Compensation on Termination) and [•] (PPP Co Proposals)) the provisions of this Agreement (excluding for this purpose, the Schedules) shall prevail except in the case of the Credit Providers' Direct Agreement in which case the provisions of the Credit Providers' Direct Agreement shall prevail; or
- (b) between the provisions of particular Schedules, the interpretation which provides the safest and most conservative result or the highest standard of work or service, as determined by the Authority's Representative, shall prevail; or
- (c) between the provisions of Schedule [•] (PPP Co Proposals) and the other provisions of this Agreement (including the other Schedules), the other provisions of this Agreement shall prevail save to the extent that the application of the provisions of Schedule [•] (PPP Co Proposals) will, in the opinion of the Authority's Representative, give rise to a higher standard of work or service than that contemplated by this Agreement (including the other Schedules) in which case, the provisions of Schedule [•] (PPP Co Proposals) shall apply; or
- (d) within or between any documentation forming Part [•] of Schedule [•] (PPP Co Proposals), the ambiguity or discrepancy shall be determined and resolved by the Authority's Representative, at his absolute discretion.

### **CROSS REFERENCES**

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

- Clause 13 (Notices)

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