

COMPILATION OF PPP TERMS AND CONDITIONS OF CONTRACT

PUBLIC SECTOR VERSION

CLAUSE 20: GENERAL PROJECT UNDERTAKINGS

DBFOM CONTRACT

CONCESSION CONTRACT

INTRODUCTION

This clause sets out in general terms certain obligations of the PPP Co. It is a sort of introduction to what the PPP Co is to do.

In relation to Clause 20.5 (General Obligations), State Authorities should consider the insertion of a clause to include an obligation that the PPP Co / SPC and its constituent members and sub-contractors do not participate in active tax planning.

State bodies, while availing of all legitimate taxation arrangements, should not engage in “offensive” tax avoidance transactions. In broad terms tax avoidance is offensive if it involves the use of the tax code for a purpose other than that intended by the Oireachtas (including an unintended use of a tax incentive) with a view to reducing the amount of tax to be paid by the State body or some other party to a transaction in which the State body participates. Where a doubt arises in a particular instance, the State body concerned should consult the Revenue Commissioners.

State Authorities should be aware of the guidance published by the Central PPP Unit in the Department of Finance (available at www.ppp.gov.ie) in relation to the treatment of VAT and Corporation tax in PPP projects.

CORE CONTRACT DRAFTING

20. PROJECT UNDERTAKINGS – GENERAL

20.1 PPP Co Obligations

Subject to and in accordance with the provisions of this Agreement, the PPP Co shall:

- (a) design, construct, complete, commission and test the Works, the Additional Works, the Renewal Works and the works forming part of the Operations;
- (b) operate and maintain the [Project Facility] during the Contract Period;
- (c) fully comply with and meet the User Requirements and the PPP Co Proposals;

- (d) to the extent not contemplated by Clause 20.1(a) and (b) above, conduct the Operations during the Contract Period (including without limitation, in accordance with the User Requirements);
- (e) finance the activities referred to in this Agreement;
- (f) procure that, subject to the terms of the Review and Certification Procedure, the Design will be carried out by or under the supervision of the Designer and the persons carrying out any design and/or supervision are suitably qualified and experienced so to do and, in particular, have adequate previous experience of the part of the Design they are carrying out or supervising; and
- (g) procure that any items referred to in Clause 26.1 (Design and Other Data) will be original and will not infringe any third party's copyright, moral rights, design rights, trade mark or any other intellectual property rights,

at its own cost and risk and without recourse (other than as expressly provided in this Agreement) to funds from or support of the State or the Authority (including the provision of guarantees by the State or the Authority).

Comment: An additional obligation included in the NRA Model Contract is:

- (i) *operate the Project and/or the Project Road in accordance with the Tolling Requirements, the Toll Scheme and the Bye-Laws during the Contract Period.*

20.2 Improvements

The PPP Co may, if it thinks fit, improve the [Project Facility], subject to and in accordance with the provisions of this Agreement.

20.3 Public Use

- (a) The PPP Co shall from the date of issue of a Services Commencement Certificate, open or keep open the relevant part(s) of the [Project Facility] for use by the Users in connection with the Project.
- (b) Without prejudice to Clause 8.1 (Primary Duty of Co-ordination), the Project shall be carried on so as not to interfere unnecessarily with the convenience of the public or the access to, use and occupation of public or private roads or footpaths, cycleways, footways or bridleways or public or private buildings and premises whether under the control or in the possession of the Authority or any other person.

Comment: These provisions are related in a road contract, but do not naturally fit together in accommodation or other contracts. Also, it is better to use the active voice, so there is no doubt as to who has the obligation.

20.4 Standard of Performance

The PPP Co shall perform and shall procure that the Project is at all times performed:

- (a) in an efficient, effective and safe manner and in accordance with Good Industry Practice and the Quality & Environmental Documentation;
- (b) in compliance with all applicable Laws and Legal Requirements; and
- (c) in a manner that is not likely to cause any damage to property, unreasonable nuisance, annoyance, inconvenience or disturbance to or unreasonable interference with members of the public, the owners, the occupiers and the users of adjoining buildings or land or any other

persons.

20.5 General Obligations

- (a) The PPP Co shall take such actions as are reasonable and appropriate to inform all Interested Parties of its role on behalf of the Authority pursuant to Clause 29.4 (Applications, Appeals, Directions and Objections).
- (b) Subject to Schedule [●] [(Third Parties)], Part [●], Paragraphs [●] and [●] and Schedule [●] [(Third Parties)], Part [●], Paragraphs [●] and [●], the PPP Co, at all times, shall comply with the requirements of the Authority's Representative issued in accordance with the terms of this Agreement, the Requirements of Relevant Persons and any Legal Requirement.
- (c) To the extent not procured prior to the Commencement Date, the PPP Co shall procure that all Necessary Consents required in connection with the entry into, performance, validity and enforceability of this Agreement and the Required Documents (or any obligations contemplated herein or therein) will be obtained in a timely manner.
- (d) The PPP Co shall procure that all necessary returns required by law will be delivered by or on behalf of the PPP Co to the relevant taxation authorities, that the PPP Co is not in default in the payment of any taxes save in respect of any liability to Tax which is disputed in good faith by the PPP Co, and that no Claim will be asserted with respect to taxes which has not been disclosed to the Authority.
- (e) The PPP Co shall procure that to the extent within its control all Necessary Consents remain in full force and effect and it shall comply, and shall procure compliance, with the terms and requirements of each of the Necessary Consents.
- (f) The PPP Co shall procure, comply with and procure compliance with the Environmental Impact Statements.

Comment: Paragraph (f) should refer to the relevant statutory orders and consents that apply to the project.

20.6 Independent Obligations

To avoid doubt, the obligations in this Clause 20 are independent obligations. In particular:

- (a) the fact that PPP Co has complied with the PPP Co Proposals shall not be a defence to an allegation that PPP Co has not satisfied the User Requirements;
- (b) the fact that PPP Co has satisfied the User Requirements shall not be a defence to an allegation that PPP Co has failed to comply with the PPP Co Proposals;
- (c) if it shall be found that the PPP Co Proposals do not fulfil the User Requirements, PPP Co shall at its own expense amend the PPP Co Proposals and rectify the Works or any part of the [Project Facility] affected. Such amendment and rectification shall have the effect that:
 - (i) the PPP Co Proposals shall satisfy the User Requirements; and
 - (ii) the structural, mechanical, electrical and operational performance of the [Project Facility] will be of an equivalent standard of performance to that set out in the PPP Co Proposals prior to their amendment or rectification (for the purpose of this comparison disregarding the fault that required the amendment or rectification to be made).

CROSS REFERENCES

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

- Clause 3 (Effectiveness of this Agreement)

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

- B8 (Redesign)
- B9 (Flexibility)
- B10 (Performance)
- B13 (Latent Defects)
- C9 (Works)
- C12 (Working Practices)
- C20 (Cost Control)
- C24 (Commissioning)
- C30 (Latent Defects)
- D3 (Service Performance)