

# COMPILATION OF PPP TERMS AND CONDITIONS OF CONTRACT

## PUBLIC SECTOR VERSION

### CLAUSE 21: SPECIFIC PROJECT UNDERTAKINGS

#### DBFOM CONTRACT

#### CONCESSION CONTRACT

#### DBFM CONTRACT

#### DBF CONTRACT

## INTRODUCTION

This clause of the Core Contract groups together a disparate set of obligations in relation to project documents, funding, dealing with complaints and planning. An alternative approach is to deal with these issues in specific clauses, each relating to its own subject matter.

## CORE CONTRACT DRAFTING

### 21. PROJECT UNDERTAKINGS – SPECIFIC

#### 21.1 Project Documents

- (a) The PPP Co shall, and shall use all reasonable endeavours to procure that each Contracting Associate shall, perform its obligations under and observe all of the terms of the Project Documents to which it is a party and shall not (and shall use all reasonable endeavours to procure that no Contracting Associate shall):
- (i) once a Key Project Document to which it is a party has come into full force and effect:
    - A. terminate it or permit its termination; or
    - B. in any material respect waive, or fail to enforce, any rights it may have under such Key Project Document (including the form of any Key Project Document in Agreed Form) which action would have a material adverse effect on the Project;
  - (ii) make or agree to any amendment to, or variation of, the terms and conditions of any Key Project Document (including the form of any Key Project Document in the Agreed Form) other than if the PPP Co informs the Authority's Representative of a proposal to make such an amendment or variation and the Authority's Representative considers that such an amendment or variation is immaterial and does not warrant consideration under Commercial Review;

unless the proposed course of action or relevant amendment or variation has received Approval in accordance with the Commercial Review.

- (b) Without prejudice to any other provision in this Agreement, the PPP Co undertakes to perform, during the Contract Period, the duties, functions and obligations of the Authority from

time to time under the Title Documents.

**Comment: Sub-clause (c) is only relevant where there are obligations under Title Documents.**

- (c) Subject to Clause 43A (Amendment to the Funding Agreements) and Part 11 (Refinancing) of [Clause 43 - Schedule] (Payment Mechanism), the PPP Co shall not enter into any agreements:
- (i) to raise additional or substitute finance or financial facilities of any description; or
  - (ii) relating to the rescheduling of its indebtedness or the re-financing of the Project,
- other than the Funding Agreements, unless the relevant document or proposed course of action has received Approval in accordance with the Commercial Review.

**Comment: This gives the Authority control over the PPP Co's various contracts, through commercial review (discussed in Clause 29), of which a review procedure is set out in [Clause 5 – Schedule B]. The review procedure will state the basis on which the Authority can refuse approval. The control over finance is to give effect to the refinancing provisions, dealt with under Clause 43.**

## 21.2 Variations to the Project Documents

If at any time any Project Document is terminated, an amendment or variation is made to any Project Document, the PPP Co or any Contracting Associate is granted a non-administrative waiver or release of any of the obligations under any Project Document, any agreement is entered into which would affect the interpretation or application of any of the Project Documents, or any Funding Agreement is entered into, then the PPP Co shall deliver to the Authority a certified copy of each such document or (so far as it is not in writing) a true and complete record thereof in writing within [●] ([●]) Working Days of the date of its execution or creation, certified as a true copy by an officer of the PPP Co.

## 21.3 Complaints

The PPP Co shall deal with any complaints received (whether received orally or in writing, and whether from a User or others) relating to or in connection with the Project and/or the [Project Facility] in a prompt, courteous and efficient manner in accordance with Part 1 of [Clause 14 - Schedule] (Liaison Procedures).

## 21.4 Planning

- (a) On or before the Anticipated Planning Date, PPP Co shall use its best endeavours to obtain full Eligible Planning Approval necessary for the Works with satisfactory conditions such that it can fully comply with its obligations in respect of the Project.
- (b) The Anticipated Planning Date will be extended in the event of an appeal or judicial review in accordance with Clauses 21.4(f) and 21.4(g).
- (c) If at the Anticipated Planning Date, Planning Approval has been granted, but any of the relevant periods referred to in the definition of Eligible Planning Approval have not then expired, or such proceedings (as envisaged by the definition of Eligible Planning Approval) are then in progress or otherwise the matter has not been finally disposed of then the Anticipated Planning Date shall be further extended until [●] ([●]) Working Days after the determination or decision is issued or the time periods have expired or the matter has been disposed of.
- (d) On the Commencement Date PPP Co warrants to the Authority that it is doing and undertakes it will continue to do everything necessary to obtain full Eligible Planning Approval necessary for the Works with satisfactory conditions such that it can fully comply with its obligations in

respect of the Project.

- (e) PPP Co will consult and liaise with the Authority in all material respects relating to the Planning Approval and in particular will:
  - (i) keep the Authority and its relevant professional advisers informed of all relevant information with respect to the Planning Approval, including copies of all correspondence, documents, notifications, meeting notes, dates of meetings, instructions to and advice of counsel and evidence of expert and other witnesses; and
  - (ii) have proper regard to any representations that the Authority or its professional advisers may make in relation to the Planning Approval.
- (f) Subject to Clause 21.4(h) PPP Co may appeal against or apply for judicial review of a refusal to grant Planning Approval pursuant to the Planning Application.
- (g) Subject to Clause 21.4(h) PPP Co shall not appeal against or apply for judicial review of the conditions of any grant of Planning Approval without the written consent of the Authority. Such consent shall not be unreasonably withheld if the PPP Co can demonstrate to the reasonable satisfaction of the Authority that the direct effect of any such condition would be to:
  - (i) increase the capital cost of the Works by an amount in excess of [[●] %] of the construction cost as set out in the Base Case; and/or
  - (ii) delay the completion of the Works by more than [[●] ([●]) months] after the Target Service Commencement Date; and/or
  - (iii) prevent PPP Co from carrying out its material obligations under this Agreement.

and that the appeal or judicial review has a reasonable chance of success. Any dispute as to the effect of the planning condition or the chance of success of the appeal or judicial review shall be determined in accordance with Clause 21.4(i).

- (h) Any appeal or judicial review made by PPP Co pursuant to Clauses 21.4(f) and 21.4(g):
  - (i) shall be made at PPP Co's expense;
  - (ii) PPP Co shall pursue any such appeal or judicial review to a final determination unless PPP Co is of the view that such appeal has no reasonable prospect of success and the Authority agrees (such agreement not to be unreasonably withheld or delayed). Any dispute shall be determined in accordance with Clause 21.4(i);
  - (iii) PPP Co will pursue any such appeal or judicial review with all due diligence;
  - (iv) In pursuing the appeal or judicial review PPP Co will:
    - (A) keep the Authority and its relevant professional advisers informed of all relevant information with respect to the appeal or judicial review, including copies of all correspondence, notifications, meeting notes, dates of meetings, instructions to and advice of counsel, evidence of expert and other witnesses materially relevant to the conduct thereof and the dates of any hearing or for the submission of written representations materially relevant to the conduct thereof;
    - (B) have proper regard to any representations that the Authority or its professional advisers may make in relation to such appeal or judicial review; and
    - (C) give to the Authority reasonable notice of and permit the Authority and its relevant professional advisers to attend any meetings held between PPP Co

and its professional advisers to discuss any appeal or judicial review.

- (i) Any dispute between the PPP Co and the Authority as to whether an appeal or judicial review has a reasonable prospect of success and whether the terms of 21.4(h)(i) or 21.4(h)(ii) are satisfied shall be referred by either party to a Planning Consultant acting as an expert. Each party shall bear its own costs in relation to any reference of a dispute to a Planning Consultant.

**Comment: The planning provisions in Clause 21.4 are relevant only to projects in which the PPP Co is to obtain planning permission after the contract is signed, and therefore will be project-specific.**

## CROSS REFERENCES

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

- Clause 3 (Effectiveness of the Agreement)
- Clause 18 (Sub-Contracting)

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

- A1 (Planning Permission)
- A3 (Time and Cost Overruns)
- A4 (Public Consultation)
- C9 (Works)
- C12 (Working Practices)
- D20 (Subcontractor Performance)