

COMPILATION OF PPP TERMS AND CONDITIONS OF CONTRACT

PUBLIC SECTOR VERSION

CLAUSE 24: RECORDS

DBFOM CONTRACT

CONCESSION CONTRACT

INTRODUCTION

Again, a practical issue: the maintenance and retention of records.

The PPP Company may be required to make available to the Comptroller and Auditor General for inspection, as appropriate, the accounts, books and other records of the PPP Company relating to the project in accordance with the provisions of the Comptroller and Auditor General (Amendment) Act 1993. (The parties may agree to such a provision even where there is no statutory requirement in the Act.)

In addition, in considering a report of the Comptroller and Auditor General in regard to a PPP project, the Dáil Committee on Public Accounts may call for persons, papers and records and/or may compel the production of information in accordance with the provisions of the Committees of the Houses of the Oireachtas (Compellability, Privileges and Immunities of Witnesses) Act, 1997.

Furthermore, section 6(9) of the Freedom of Information Act (FOI Act) may have implications for PPP contracts where departments and bodies covered by the FOI Act are parties. However, the protections in the FOI Act relating to commercially sensitive material would apply.

CORE CONTRACT DRAFTING

24 RECORDS

24.1 Required Records

- (a) The PPP Co shall maintain and update those records relating to the Project set out in Part 2 of [Clause 24 – Schedule) (Reports and Records) [*below*].
- (b) The Authority shall be entitled, at its own cost, within [•] ([•]) days after the Effective Date to deliver up to the PPP Co the existing records of the Authority (or copies thereof) in respect of the [Project Facility] (or any part thereof). In such event, the PPP Co shall retain such records in safe storage at its own cost and such records shall thereafter be treated for all purposes as though they were part of the records referred to in Clause 24.1(a).

- (c) In addition to the records set out in Part 2 of [Clause 24 - Schedule] (Reports and Records), the PPP Co shall at all times:
- (i) maintain a full records of particulars of the costs of performing the Operations, including those relating to the design, construction, maintenance, operation and finance;
 - (ii) when requested by the Authority, provide a summary of any of the costs referred to in Clause 24.1(c)(i), including details of any funds held by the PPP Co specifically to cover such costs, in such form and detail as the Authority may reasonably require to enable the Authority to monitor the performance by the PPP Co of its obligations under this Agreement; and
 - (iii) at the request of the Authority, provide to the Authority any information provided by it to the Senior Credit Providers during the term of the Agreement.
- (d) Compliance with the above shall require the PPP Co to keep (and where appropriate shall procure that the Principal Sub-Contractors shall keep) books of accounts in accordance with best accountancy practice with respect to the Agreement showing in detail:
- (i) administrative overheads;
 - (ii) payments made to the Principal Sub-Contractors;
 - (iii) capital and revenue expenditure;
 - (iv) such other items as the Authority may reasonably require to conduct costs audits for verification of Estimated Changes in Project Costs, for the purposes of Clause 36 (Delays to Completion and Compensation Events), Clause 35 (Qualifying Change in Law), Clause 34.1 (Authority Changes) and Clause [●] (Market Testing and Benchmarking),

and the PPP Co shall have (and procure that the Principal Sub-Contractors shall have) the books of account evidencing the items listed in Clauses 24.1(d)(i) to 24.1(d)(iv) available for inspection by the Authority (and any expert) upon reasonable notice, and shall present a report of those to the Authority as and when requested.

24.2 Audit

The records referred to in Clause 24.1 (Required Records) shall be kept in good order and in such form as to be capable of audit (including by electronic means) by the Authority's Representative. The PPP Co shall make such records available for inspection by or on behalf of the Authority and the Authority's Representative at all reasonable times.

24.3 Copies

The Authority and the Authority's Representative (acting reasonably) shall be entitled to take copies of all such records at the PPP Co's cost and for that purpose to use such copying facilities as are maintained at the place where the records are kept.

24.4 Retention of Records

- (a) Without prejudice to any Legal Requirement, all records referred to in Clause 24.1 (Required Records) shall be retained for no less than the period specified in respect of such records in Part 2 of [Clause 24 - Schedule] (Reports and Records) or, if no such period is specified, a period of [●][●]years after the end of the Contract Year to which such records relate.

- (b) Where the period for the retention of any records (as set out against the relevant class

of records in Part 2 of [Clause 24 - Schedule] (Reports and Records)) has expired, then the PPP Co shall notify the Authority as to what it intends to do with such records. If it intends to dispose of them or subsequently decides to dispose of them, the PPP Co shall notify the Authority, and if the Authority shall within [●] ([●]) days of such notice elect to receive those records or any part of them the PPP Co, at its own cost, shall deliver up such records to the Authority in the manner and at such location as the Authority shall reasonably specify.

- (c) At any time in the [●][●] year period commencing on expiry of the Contract Period, the PPP Co shall, at its own cost and when so requested by the Authority, deliver up to the Authority, in the manner and at such location as the Authority shall reasonably specify, all such records as are referred to in Clause 24.1 (Required Records) which were in existence at the end of the Contract Period (or, where those records are required by statute to remain with the PPP Co, copies thereof) or such part of such records as the Authority may by notice to the PPP Co specify. The Authority shall make available to the PPP Co all the records the PPP Co delivers up pursuant to this Clause 24.4(c), subject to reasonable notice.
- (d) The PPP Co shall retain in safe storage at a location to be identified by the PPP Co and agreed by the Authority's Representative for a period of not less than [●] ([●]) years following the end of the Contract Period all such records as are referred to in Clause 24.4(c) which the Authority does not require to be delivered up to it. The costs of retaining those records in safe storage shall be borne:
 - (i) by the PPP Co, in the case of termination as a result of an Event of Default;
 - (ii) by the Authority, in the case of termination as a result of an Authority Default; and
 - (iii) in cases other than those governed by Clauses 24.4(d)(i) and 24.4(d)(ii), by the PPP Co and the Authority in equal proportions.
- (e) Upon termination of the Agreement for whatever reason, and in the event that the Authority wishes to enter into another contract for the operation and management of the Project the PPP Co shall (and shall ensure that the Principal Sub-Contractors will) comply with all reasonable requests of the Authority to provide information relating to the PPP Co's costs of operating and maintaining the Project.

24.5 Computer Records

To the extent that the records of the PPP Co are to be created or maintained on a computer or other electronic storage device, then the PPP Co shall agree with the Authority's Representative a procedure for back-up and adjacent storage for copies of such records and shall adhere to such agreed procedure and shall cause the Contractor, the Designer, the Operator and its or their sub-contractors to implement and adhere to such agreed procedure.

[CLAUSE 24 - SCHEDULE]

Comment: Here again, the required records will be project-specific. We have included the Core Contract list for illustration.

REPORTS AND RECORDS

PART 2

Records

1. General

1.1 The records listed below shall be supplied by the PPP Co and copies retained in a single location approved by the Authority's Representative for the periods indicated.

2. Design

2.1 A Design manual containing all relevant Design standards, codes of practice, design loadings, design parameters and product data sheets for all components and parts. Until the [●] anniversary of the Commencement Date.

2.2 Full set of all relevant Design assumptions and final Design calculations for all parts of the Works including details of the influence on Design of actual construction methods, and any changes or any remedial works during construction. Until termination of this Agreement.

2.3 Full set of drawings issued for Construction. Until the issue of the Completion Certificate.

2.4 Full specification issued for Construction plus detailed records of any and all revisions made thereto. Until the issue of the Completion Certificate.

2.5 Full set of all certificates relating to the Design of the Works issued in accordance with the Certification Procedure in accordance with [Clause 5 – Schedule A] (Review and Certification Procedure) of the Agreement. [●] years from issue date of certificate.

2.6 All records of all Planning Applications, Compliance Certificates, Planning Permissions (Approvals), Appeals, refusals, and other related documents and records. [●] years from the Effective Date.

3. Construction

3.1 Full set of progress photographs recording the construction of the Works including but not limited to aerial photographs and all other photographs recording important operations. [●] year after issue of the Completion Certificate.

3.2 Full set of Construction site records relating to progress, testing of materials, monitoring of standards of workmanship, meteorological conditions, instructions issued and other correspondence. [●] years after issue of the Completion Certificate.

3.3	Full set of As-Built Records incorporating all changes to the Design and all remedial works during Construction, and all final As-Built details and dimensions of the Works. These records shall include permanent modifications made to suit the construction method.	Until termination of this Agreement.
3.4	All correspondence relating to the Design.	Until termination of this Agreement.
3.5	Full set of records of major temporary works during construction.	[●] years issue of the records. Until termination of this Agreement.
3.6	Full list of suppliers of plant and materials, detailing which of their products have been used and their location in the Works.	Until termination of this Agreement.
3.7	Full set of all Certificates relating to the construction of the Works issued in accordance with the Certification Procedure in [Clause 5 –Schedule] (Certification Procedure) of this Agreement.	Until termination of this Agreement.
3.8	Full/set of survey reports, including ground, topographical, environmental, traffic and CCTV.	Until termination of this Agreement.
3.9	Geotechnical reports obtained by the PPP Co during the construction of the works.	Until termination of this Agreement.
4.	Operation and Maintenance	
4.1	Full records of all incidents and accidents that affect the Operation and/or maintenance of the [Project].	[●] years from date of incident.
4.2	Full records of any audit, inspections and surveys and results of such audits, inspections and surveys, including photographs where applicable.	Until termination of this Agreement.
4.3	Details of all works of repair and/or replacement, including photographs, as-built drawings and other documentary records.	Until termination of this Agreement.
4.4	Full set of Monthly Reports, Annual Reports, Annual Performance Reports and PPP Co's Five Year Management Plans.	[●] years from date of issue of the Report or Plan.
4.5	Adequate records of adverse meteorological conditions.	3 years from date of record.
4.6	Monthly records of availability of the [Project Facility].	Until Termination of this Agreement.
4.7	Records of all landscape planting and of management and maintenance of landscape areas.	Until termination of this Agreement.
4.8	Records of all drainage systems.	Until termination of this Agreement.
4.9	Schedule of all permanent project, wayfinding, statutory and traffic signs for the [Project].	Until termination of this Agreement.
4.10	Maintenance manuals, structure registers and structure files for all special structures on the [Project].	Until termination of this Agreement.

4.11	Such of the records referred to in Paragraphs 2 and 3 of this Part 2 as shall be applicable to any maintenance works or other works in connection with the maintenance, repair or improvement of the Project.	For the periods specified in paragraphs 2 and 3 of this Part 2 as applicable.
4.12	Full set of all certificates relating to the operation and maintenance of the [Project Facility] issued in accordance with the Certification Procedure.	[●] years from the date of certification.
4.13	Records of third party claims as described in Clause 47A of the Agreement.	[●] years after settlement of the claim.
4.14	Comprehensive database for the Maintenance Management Plan.	Until termination of this Agreement.
4.15	Records of Defects identified by Safety and Detailed inspection, safety patrols, or following other reports and complaints with details of the action taken.	Until termination of this Agreement.
4.16	Full set of maintenance assessment survey records.	Until termination of this Agreement.
4.17	The monthly register relating to queries and complaints received concerning the [Project Facility].	[●] years after the date when the query/ complaint is logged unless the query/ complaint remains unresolved.
4.18	All information relating to the Handback inter alia reports, and programmes as described in Schedule [●] (Handback Requirements) of the Agreement.	Until issue of Handback Certificate.
4.19	Full set of land ownership boundary plans.	Until termination of this Agreement.
4.20	Records relating to the maintenance of electrical and electronic equipment as described in Schedule [●] (O&M Requirements) of the Agreement.	Until termination of this Agreement.
4.21	General Correspondence Files.	[●] years from date of receipt or production of correspondence.
4.22	Safety Audits.	[●] years from date of the safety audit.
4.23	Health and Safety File.	Until termination of this Agreement.
4.24	Noise assessments.	[●] years after final noise assessment.
4.25	Full set of survey reports including ground, topographical, environment, traffic and CCTV.	[●] years from date of issue of the final report.

4.26 Dilapidation surveys.

Until termination of this Agreement.

5. Additional Requirements

5.1 When there is a conflict between the requirements of Part 1 of [Clause 23 – Schedule] and a requirement stated elsewhere in the Agreement, the latter shall take precedence.

5.2 The requirements set out in Part 2 of [Clause 24 – Schedule] indicate the minimum requirements to be complied with and the PPP Co is expected to exceed these requirements. The requirements set out in Part 1 of [Clause 23 – Schedule] are without prejudice to any Legal Requirement, which would require the keeping of specified records for a longer period or the keeping of additional records.

5.3 Records shall be retained as follows:

5.3.1 all records of operational aspects of the record keeping system shall be retained indefinitely. They shall be systematically and periodically up-dated and filed so as to be readily retrievable;

5.3.2 subject to Clause 24 of the Agreement, records which have been superseded but are still of historical, contractual or legal importance shall be retained and filed in electronic digital format or other machine readable form as agreed with the Authority's Representative for at least [●] years after being superseded;

5.3.3 subject to Clause 24 of the Agreement, records which are obsolete and are of no historical, contractual or legal significance shall be retained and filed on electronic digital format or other machine readable form and can be disposed of [●] years after becoming obsolete;

5.3.4 subject to Clause 24 of the Agreement, superseded and obsolete plans and drawings shall be retained either digitally on disc or tape or in other machine readable form, using software agreed with the Authority's Representative; and

5.3.5 subject to Clause 24 of the Agreement, texts of all documents shall be prepared and recorded using software systems agreed with the Authority's Representative and retained in hard form and on diskette or CD ROM, with full back-up diskettes or CD ROM available in case of diskette corruption.

CROSS REFERENCES

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

- Clause 22 (Quality and Environmental Management)
- Clause 41 (Payments)
- Clause 53 (Effect of Termination)

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