

# COMPILATION OF PPP TERMS AND CONDITIONS OF CONTRACT

## PUBLIC SECTOR VERSION

### CLAUSE 29: CONSENTS AND APPROVALS

#### DBFOM CONTRACT

#### CONCESSION CONTRACT

#### DBFM CONTRACT

#### DBF CONTRACT

#### DBOM CONTRACT

#### DBM CONTRACT

#### OMF CONTRACT

#### O&M CONTRACT

## INTRODUCTION

The issue concerns commercial approvals by the Authority under the contract. It sets out a procedure for approvals, separate from the procedure for design review, and provides for the consequences of approvals. It also sets out a procedure for the PPP Co to deal with third party applications to the Authority and third party activities concerning the project.

## CORE CONTRACT DRAFTING

### 29 CONSENTS AND APPROVALS

#### 29.1 Commercial Review

- (a) Any proposed document or proposed course of action on the part of the PPP Co which is not subject to the Review and Certification Procedure and which, under the terms of this Agreement, is required to be submitted for Commercial Review shall be dealt with in accordance with the provisions of Part 2 of [Clause 5 – Schedule B] (Representatives).
- (b) Without limitation to Clause 29.2 (Effect of Consents, Approvals and Inspections), notwithstanding the application of the Commercial Review, the PPP Co shall not be entitled to recover from the Authority any Losses or Claims which may arise out of or in connection with any inadequacy, error or failure of any matter which has been subject to the Commercial Review and any comments made by the Authority's Representative in the course thereof. The PPP Co shall obtain from the Principal Sub-Contractors, prior to any such party carrying out any part of the Project, waivers of liability in favour of the Authority and the Authority's Representative in respect of any such Losses and Claims. No comments or absence of comments on any matter in the course of the Commercial Review shall relieve the PPP Co of any of its obligations under this Agreement in connection with the Project.

## **29.2 Effect of Consents, Approvals and Inspections**

- (a) Neither the giving of any Approval, knowledge of the terms of any agreement or document (including without limitation the Project Documents), nor the review of any document or course of action pursuant to the Review and Certification Procedure or Commercial Review by or on behalf of the Authority, or the Authority's Representative shall relieve the PPP Co of any of its obligations under this Agreement or of its duty to ensure the correctness, accuracy or suitability of the matter or thing which is the subject of the Approval, knowledge or review under the Review and Certification Procedure or Commercial Review.
- (b) Without limitation to Clause 29.2 (a), no examination or lack of examination by the Authority or the Authority's Representative of the PPP Co's drawings, documents, calculations, or details relating to the Project or otherwise nor any comment, rejection or Approval expressed by such person in regard thereto, either with or without modifications, shall in any respect relieve or absolve the PPP Co from any obligations or liability under or in connection with this Agreement whether in relation to accuracy, safety, suitability, adequacy of performance or practicality of its design or howsoever otherwise arising.
- (c) Without limitation to Clause 29.2 (a), notwithstanding any inspection by the Authority or the Authority's Representative under this Agreement or the failure of the Authority or the Authority's Representative to make any inspection under this Agreement, the PPP Co's responsibility under this Agreement shall not be relieved or absolved or otherwise modified.
- (d) Any Approval shall be final, subject only to being opened up, reviewed or revised:
  - (i) if errors or further material relevant facts are revealed after the Approval has been given; or
  - (ii) where Clause 29.3 (Withdrawal of Approval) applies.
- (e) Without prejudice to the preceding provisions of this Clause 29.2, any Approval, endorsement, decision, opinion, instruction, notice, statement of objection, finding, determination, requirement, or certificate of the Authority or the Authority's Representative and any determination of an Adjudicator shall be final, subject to the exercise by either party of any rights of objection under this Agreement and to the terms of the Disputes Resolution Procedure.

## **29.3 Withdrawal of Approval**

Without prejudice to Clause 29.2 (Effects of Consents, Approvals and Inspections), which shall apply whether or not an Approval is withdrawn under this Clause 29.3, an Approval other than the Services Commencement Certificate may be withdrawn if it has been given:

- (a) on the basis of materially inaccurate or misleading facts, information or calculations provided to the Authority or the Authority's Representative or the Relevant Authority's Representative by the PPP Co or any Principal Sub-Contractor; or
- (b) without all relevant material facts, information or calculations known by the PPP Co or any Principal Sub-Contractor at such time having been given to the Authority, the Authority's Representative or the Relevant Authority's Representative and where, had such facts, information or calculations been given to the Authority, the Authority's Representative or the Relevant Authority's Representative such Approval would not have been given.

## 29.4 Applications, Appeals, Directions and Objections

**Comment: This provision is appropriate when the Authority has statutory limitations in relation to third party applications and actions in relation to the project, for example as a road authority.**

(a) In relation to:

- (i) an Application by any person other than the PPP Co to the Authority, the PPP Co shall assemble all requisite documentation in its possession, and shall use all reasonable endeavours to assemble all requisite documentation not in its possession, to analyse and evaluate the relevant Application and shall prepare a recommendation (if requested by the Authority) in respect of:
  - A. any terms and conditions to be attached to any consent to the Application (if relevant);
  - B. the merits of the relevant Application, and submit the same to the Authority; andupon the Authority (acting reasonably) granting or refusing such an Application, the PPP Co shall upon notice from the Authority take all necessary steps to give effect to any such grant or refusal and comply with the terms thereof;
- (ii) any proceedings commenced by a third party relating to any decision made or condition imposed on an Application to the Authority (an "Appeal"), the PPP Co shall assemble all requisite documentation and evidence in its possession, and shall use all reasonable endeavours to assemble all requisite documentation and evidence not in its possession, to defend the Appeal and shall prepare a recommendation in respect of the merits of the relevant Appeal and submit the same to the Authority;
- (iii) any power to carry out any works to the [Project Facility] by or on behalf of the Authority and to recover the expenses from any third party, the PPP Co shall assemble all relevant documentation and evidence in its possession, and shall use all reasonable endeavours to assemble all requisite documentation and evidence not in its possession, necessary to explain why the said works should be carried out and prepare a recommendation as to how the said expenses should be recovered;
- (iv) any requirement for a notice or a direction to a third party which is required by Legal Requirement to be made by or on behalf of the Authority (a "Direction"), the PPP Co shall assemble all requisite documentation in its possession, and shall use all reasonable endeavours to assemble all requisite documentation not in its possession, to support and explain the Direction and prepare a recommendation (if requested by the Authority) as to whether the Direction should be made and the terms thereof. Upon the Authority making a Direction the PPP Co shall serve the Direction on the relevant third party on behalf of the Authority;
- (v) any power to manage, maintain or provide facilities to any part of the [Project Facility] by or on behalf of the Authority, the PPP Co shall prepare recommendations to the Authority as and when required by the Authority in respect of the exercise of the aforementioned powers in relation to the [Project Facility]; and
- (vi) the right of the Authority to object to a proposed course of action by a third party ("Objection"), the PPP Co shall assemble all requisite documentation and evidence in its possession, and shall use all reasonable endeavours to assemble all requisite documentation and evidence not in its possession, in relation to the Objection and

prepare a recommendation in relation to the Objection and submit the same to the Authority.

- (b) The PPP Co shall deal with all matters relating to its obligations pursuant to this Clause 29.4 in a timely and expeditious manner so as to ensure as far as it is able that the Authority is able to discharge or exercise any relevant duty, power or discretion within the time required by Law or Legal Requirement.
- (c) In carrying out its services pursuant to this Clause 29.4, the PPP Co shall not do any of the following:
- (i) contract with, or
  - (ii) enter into binding commitments with, or
  - (iii) compromise with, or
  - (iv) give a notice of intention to proceed to, or
  - (v) impose obligations upon, or
  - (vi) respond to any Application from or Appeal by, or
  - (vii) issue any Direction to or seek to recover costs from, or
  - (viii) carry out works affecting

any third party, in each case, without prior Approval, such Approval not to be unreasonably withheld.

- (d) For the purposes of this Clause 29.4, Approval may be given from time to time either in terms relating to a particular matter or upon terms relating to particular classes of such matters.
- (e) Actions taken by the PPP Co pursuant to this Clause 29.4 shall not in any way limit or fetter the absolute discretion of the Authority in the discharge or exercise of its duties or powers. The decision of the Authority on the merits of any recommendations made by the PPP Co pursuant to this Clause 29.4 shall not be subject to review under the Disputes Resolution Procedure.

## KEY DEFINITIONS – USED IN CLAUSE 29 CORE CONTRACT DRAFTING

“Application” means any application for permission, consent, authorisation or other approval relating to, or affecting, the project, the grant of which is required by a Legal Requirement.

## CROSS REFERENCES

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

- Clause 3 (Effectiveness of this Agreement)
- Clause 20 (General Project Undertakings)
- Clause 14 (Liaison Procedures)
- Clause 18 (Sub-Contracting)

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

- A1 (Planning Permission)
- A2 (Consequences of the Planning Permission)

- A6 (Environmental Impact)
- A10 (Consents and Licenses)