

COMPILATION OF PPP TERMS AND CONDITIONS OF CONTRACT

PUBLIC SECTOR VERSION

CLAUSE 36: DELAYS TO COMPLETION AND COMPENSATION EVENTS

DBFOM CONTRACT

CONCESSION CONTRACT

INTRODUCTION

This clause deals with events that can delay completion, for which the Contractor's time to complete can be extended. They fall into two groups: those for which the Contractor gets additional time to complete and those in which he also gets compensation. A third category, Force Majeure Events, is dealt with at Clause 38. The SOPC3 extract quoted below explains the rationale underlying this drafting.

SOPC3 GUIDANCE

5. SUPERVENING EVENTS

5.1 INTRODUCTION

5.1.1 *The Contractor undertakes to ensure Service Commencement usually by a particular fixed date and to continue to provide the Service for the duration of the Contract. There may, however, be circumstances in which the Contractor should fairly be relieved from liability for failure to commence or provide the Service. A balance must be struck between encouraging the Contractor to manage the risk and protecting the Authority from non-performance.*

5.1.2 *Supervening events for which some relief is appropriate should be divided into three categories:*

- *Compensation Events – i.e. events which are clearly at the Authority's risk and in respect of which the Contractor should be compensated (see Section 5.2 (Compensation Events) [of the SoPC Guidance]);*
- *Relief Events – i.e. events which are best managed by the Contractor (although not necessarily in its control) and for which the Contractor bears the financial risk, but in respect of which no rights of termination should arise (see Section 5.3 (Delays Due to a Relief Event) [of the SoPC Guidance]); and*
- *Force Majeure Events – a limited set of events which arise through no fault of either party, which are best managed by the Contractor (although not in its control) and in respect of which rights of termination can arise (see Section 5.4 (Force Majeure Events) [of the SoPC Guidance]).*

5.1.3 *The distinction between Compensation Events and Relief Events is sometimes expressed as being the difference between the Contractor being given 'time and money' and 'time' only.*

5.1.4 Certain events may be dealt with differently in specific projects, depending on the nature of the Project, the likelihood of the event occurring and the value for money obtainable if the Contractor prices the risk of such event occurring into its price. Given the effect on the Authority of adding risks to Compensation Events, this should only be done after careful consideration in specific cases. For example, in a project in which Government use means that delays during the construction phase are a high risk, the Authority may accept that the event leading to such increased risk should be a Compensation Event. In a project where such risks do not exist, the parties may agree that a Relief Event is the way to deal with that risk. An alternative way of dealing with the risk of discovery of fossils or antiquities during the construction phase, which lies somewhere between the Compensation Event and Relief Event approach, is for the Contractor to bear a pre-determined initial level of loss (both financial and in terms of delays to the construction timetable), as defined in the Contract, with further losses above that prescribed level being shared by the parties in accordance with an agreed formula².

The typical structure will require the Contractor to ensure Service Commencement either by a scheduled date for completion of construction (i.e. the Planned Service Commencement Date) or at any time from the date of the Contract or the Effective Date (depending upon the presence of conditions precedent) but by a pre-agreed long-stop date (see Section 4.5 (Long-Stop Date) [of the SoPC3 Guidance]). This alternative approach may be applied in a wide range of projects, but should only be used ordinarily when dealing with the risk of discovery of fossils or antiquities and not other risks. A different approach is justified here because of:

- (a) the potential impact of such risk being greater than is the case with other possible Relief Events;
- (b) the public benefit that is derived from the discovery of fossils and antiquities.

5.1.5 Similarly, the risk of planning delays may require different treatment in different projects. For example, the Authority may accept some planning delay risk in order to obtain value for money if it wants the Contract to be signed before full detailed planning consent is obtained or challenge periods in respect of such consents have expired¹. As far as the discovery of adverse ground conditions and historic contamination is concerned, this should not usually be at the Authority's risk as the Contractor should have carried out appropriate surveys in relation to such matters prior to signing the Contract and can often assess and accept such risks more economically than the Authority. The situation may be different in specific circumstances such as where the Contractor has been prevented from carrying out appropriate surveys or it is not reasonable or good value for money for surveys to be undertaken (e.g. because of the number of sites involved in the project)².

5.2 COMPENSATION EVENTS

5.2.1 Purpose and Scope

5.2.1.1 Compensation Events are designed to cater for events which arise before the Service Commencement Date which are at the Authority's risk and which result in a delay to Service Commencement and/or increased costs to the Contractor, although the concept can be extended to the Service Period (see Section 5.2.1.4). Such events are more appropriately dealt with by compensation methods than by being an Authority Default (see Section 20.1.2.1 (Contractor's Right to Terminate for Authority Default) [of the SoPC3 Guidance]) as termination should in all circumstances be a last resort (although if an event renders the parties' contractual relationship untenable the Authority may choose to exercise its voluntary termination rights). In fact, even a delay is not strictly necessary for the occurrence of a

¹

In these circumstances the Authority should consider very carefully how its liabilities in the event of planning failure can be mitigated.

²

See Section 6 (Information Warranties).

Compensation Event (see Clause 5.2 (a) [of the SoPC Guidance]) as cost increases can arise without any timetable changes.

5.2.1.2 Events which can arise before the Service Commencement Date and which are at the Authority's risk (i.e. for which compensation should be paid to the Contractor) are:

- 3 *Authorities should ensure that their obligations under the Contract are both limited and specific.*
- 4 *Compensation claims should be very much the exception. Particularly where the Works are to be carried out on buildings that remain in use, the Contract should require the Contractor to co-operate with and work around other third party contractors wherever possible, and the effects should be anticipated and factored into the programme up front. As mentioned in Section 5.1.5, it may, after careful consideration in certain projects, be appropriate to add other (or sector) specific events. As Authority Changes and Qualifying Changes in Law are dealt with in Sections 12 and 13 [of the SoPC3 Guidance] respectively.*
- 5 *If it is appropriate for the Authority to give the Contractor compensation for Authority breaches arising during the Service Period, the Contract will need to incorporate an appropriate compensation mechanism.*
- 6 *A Compensation Event may not affect the Contractor's ability to achieve the Planned Service Commencement Date but increase the Contractor's costs.*
- 7 *If "bonus payments" are to be made for early Service Commencement (see Section 4.6 (Bonus Payments for Early Service Commencement)) [of the SoPC3 Guidance] the parties will need to consider what, if any, further compensation should be paid to the Contractor where early Service Commencement has been prevented by the occurrence of a Compensation Event.*
- 8 *If this is being calculated during the Service Period and no further drawings are possible, then this is arrived at by dividing:
(a) forecast net revenues until the final maturity date of the loan (including any payments from the Authority, any business interruption insurance receipts, as well as other similar payments (such as additional shareholder contributions) that any person is obliged to pay to the Contractor), discounting back future revenues to the date of calculation (at the interest rate payable under the Senior Debt (including hedging)).
(b) the Senior Debt outstanding (having deducted credit balances on bank accounts) on the date of calculation. If further drawings are possible, then the above calculation will have to take into account the forecast level of Senior Debt up to the maximum committed debt.*
- 9 *Significant Authority changes are likely to be acceptable to the Contractor only if compensation is paid by the authority, so as to match the timing of the agreed costs of the change. Although the issue is dealt with in this way in the drafting, it is important to stress that for Authority breach it is also perfectly acceptable for the Authority simply to reimburse the Contractor on the basis of costs incurred (for example, as a result of any delay in giving an approval).*
- 10 *As stated in Section 5.2.3.3 this approach should not be used for Authority breach, but will be a common option to include, for example, for Authority Changes and Qualifying Changes in Law (see Sections 12 (Change in Service) and 13 (Change in Law) [of the SoPC3 Guidance]).*
- 11 *Particularly to avoid the time and expense of engaging advisers for what may be minor compensation sums (if this approach is used), it is recommended that the parties agree and record in the Contract the incremental impact on Unitary Charge of minor capital expenditure and operational expenditure changes.*
- 12 *If the original Unitary Charge over the chosen annuity payment period is profiled, then the supplementary Unitary Charge should similarly be profiled. Annuities being based upon nominal discount rates would be excluded from any indexation provisions of the Unitary Charge.*
- 13 *See Clauses 12.4 (Authority Changes) and 13.8 (Qualifying Change in Law) [of the SoPC3 Guidance] which provides for the approach set out in the second bullet point to Section 5.2.3.5. Required drafting is as follows: [omitted]*

- Authority breach of an obligation³ (which includes a breach occasioned by
- third parties for whom the Authority is responsible,⁴ such as teachers or doctors);
- Authority Changes (see Section 12.3 (Authority Changes) [of the SoPC3 Guidance]); and
- discriminatory or specific changes in law (see Section 13.6 (Discriminatory, Specific and General Changes in Law) [of the SoPC3 Guidance]).

The Authority should bear the effects of Authority Changes and Qualifying Changes in Law in accordance with the principles set out in Section 12 (Change in Service) and Section 13 (Change in Law) [of the SoPC3 Guidance] respectively. The only significant difference in relation to how the approaches are dealt with during the Service Period is referred to in Section 5.2.3 (Calculation of Compensation).

- 5.2.1.3** It is of course possible that Authority Changes and changes in law will occur during the Service Period. The Authority should bear the risk of these events in accordance with the principles set out in Section 12 (Change in Service) and Section 13 (Change in Law) [of the SoPC3 Guidance].
- 5.2.1.4** The Authority may be faced with a request by the Contractor and its financiers to give compensation for Authority breaches which occur during the Service Period. This will not always be appropriate and the Authority should consider carefully the nature of its obligations during the Service Period⁵. If its sole obligation is to make payment, then there is no need to give compensation as non-payment in the Service Period is addressed through the provisions dealing with interest on late payment (see Section 10.2.5 and Clause 29.8 (Interest on Late Payments) [of the SoPC3 Guidance]) and, in extreme cases, through termination for Authority Default (see Section 20.1 (Termination on Authority Default)). During an insurance reinstatement, however, the concept of Compensation Events would apply irrespective of the position for the treatment of Compensation Events in the Service Period, as the construction phase will effectively be starting again until reinstatement is completed. The issues relating to reinstatement are dealt with in depth in Section 24.6 (Reinstatement and Change of Requirement After Insured Event) [of the SoPC3 Guidance]. Compensation is relevant if the Authority fails to release surplus land at the required date.
- 5.2.1.5** If, however, the Authority has significant ongoing obligations and breach of such obligations would seriously adversely affect the Contractor's ability to perform (e.g. if the Authority failed to carry out procedures for certifying operating matters) or materially affect the cost of performance, then it may be appropriate to give compensation if such breach occurs. This can most easily be address by extending the scope of the Compensation Event concept.

5.2.2 Consequences

- 5.2.2.1** A practical consequence of a Compensation Event occurring is that the Planned Service Commencement Date may have to be postponed, usually by the length of any delay caused (any long-stop date will be similarly put back)⁶. This means that the start date of the Contractor's revenue stream is also delayed and/or additional costs are incurred (see Section 5.2.2.6). As a result, the Contractor may incur finance charges and additional costs which could involve the Contractor in significant expense⁷.
- 5.2.2.2** A decision has to be made prior to contract signature as to how to compensate the Contractor for any delay to Service Commencement resulting directly from a Compensation Event. The recommended approach is to retain the original Expiry Date and compensate the Contractor for its loss. This does not mean that payment of the Unitary Charge is made for a month in which no Service has been provided although the monetary value of the compensation may be the same as the Unitary Charge.

5.2.2.3 *If the Contract contains liquidated damages provisions (see Section 4 (Protections Against Late Service Commencement) [of the SoPC3 Guidance]), then the Contractor's liability for liquidated damages will also be relieved for the period of delay caused by the Compensation Event. The Contractor should, of course, also be relieved of any other liability for the Authority's losses in respect of the compensation Event. This should be taken into account in determining the consequences for the Authority of a Compensation Event.*

5.2.2.4 *The main advantages of the recommended approach are first, simplicity and second, it will be preferable to financiers, since the senior debt loan life cover ratio and equity return can be preserved. This approach also means that the Authority has an incentive to manage its rights and obligations in the construction phase in a way that does not result in delay. The detail of how this approach should work in practice can be seen by reference to Section 5.2.3 (Calculation of Compensation).*

5.2.2.5 *Some projects have sought to compensate the Contractor by paying up-front for its additional Sub-contractor's costs, but dealt with financing costs by extending the Expiry Date. This is unlikely to be financeable and so is not recommended. If the Contractor is fully compensated for the delay, there is no need to extend the Expiry Date and a danger exists of unnecessary complication by doing this. Provided compensation has been paid as set out below, extension of the Expiry Date is not appropriate.*

5.2.2.6 *The Contractor should be obliged to use reasonable endeavours to mitigate its losses and costs (for example, by rescheduling its works timetable or by redeploying staff). Such mitigation may result in there being no delay in the Planned Service Commencement Date (although extra costs may result from steps taken to mitigate).*

5.2.3 Calculation of Compensation

5.2.3.1 *The Unitary Charge may need to be adjusted if the Compensation Event concerned involves an additional cost or a time delay which has cost or loss of revenue implications. It is important that the Contract contains an appropriate method for dealing with any changes that arise as a result of a Compensation Event. The approach set out in the drafting is referred to in Section 5.2.3.3 below. The treatment of issues here is equally applicable to costs arising as a result of an Authority Change (see Clause 12.4 [of the SoPC3 Guidance]) or Qualifying Change in Law (see Section 13.8 (General Change in Law as a Shared Risk) [of the SoPC3 Guidance]).*

5.2.3.2 *One common way of dealing with such events is to rely on the financial model to deal with the issue and for both parties to use this to calculate how and when compensation should be paid.*

Typically this would require the Authority to agree that the senior debt loan life cover ratio and equity return are to remain unchanged. Whilst there is no objection in principle to the parties referring to a financial model (provided both parties fully understand all of its various aspects), there are three principal problems that can arise in using a financial model to calculate compensation payable for Compensation Events (and for that matter the effects of an Authority Change (see Clause 12.4) [of the SoPC3 Guidance] and Qualifying Changes in Law (see Section 13.8 (General Change in Law as a Shared Risk) [of the SoPC3 Guidance]):

- the financial model may obscure the process being followed in reaching the answer, unless there is clarity on all sides on how the relevant formulae used in the model work. For example, if something has happened which was not originally modelled for and audited, there could be conflict arising on how to model it, which could impact on the calculation concerned;*
- if the Authority has access to a financial model in sufficient detail and to all of the internal costs, returns and other assumptions (to the level of detail required), then more information than is relevant simply to value the consequences of the event may have to be provided by the Contractor, which may not be acceptable to it (and, in addition, certain of the assumptions may need to be updated); and*
- the result of preserving the ratios and equity return can be achieved in a number of different ways (these are referred to in Section 5.2.3.4).*

The guidance recommends that as simple an approach as possible is followed as the only concern of this Section is to ensure fair compensation for a limited number of events which can be calculated in a straightforward manner. If the Unitary Charge is to change, then financial advice is likely to be needed.

5.2.3.3 *The approach taken in the drafting to the various events that may lead to a change in the Unitary Charge is as follows:*

- *if the event concerned requires Capital Expenditure (whether before or during the Service Period), then in most cases, it will be more practicable to deal with this by a lump sum reimbursement (subject of course to the possibility of staged payments)⁹ (see Clause 5.2(c)(ii)); and*
- *if the event concerned requires a change in operating costs, then an alteration in the Unitary Charge is the appropriate means of payment (see Clause 5.2(c)(iii)).*

5.2.3.4 *The approach referred to in the drafting and Section 5.2.3.3 ensures that a minimum of additional financing costs are incurred. Other reasons, including affordability constraints may, however, mean that an Authority wishes to reserve the right to ask the Contractor to use reasonable endeavours to finance the event where Capital Expenditure is required. If this is done¹⁰ then careful scrutiny of the value for money implications should be undertaken.*

5.2.3.5 *Where the compensation involves an increased obligation to incur Capital Expenditure, other possibilities¹¹ to that referred to in the drafting and Section 5.2.3.3 include:*

- *a lump sum payment from the Authority paid immediately on Service Commencement, the amount payable to exceed the amount of the relevant increase in Capital Expenditure by any incremental increase in financing costs consequent on a more rapid drawdown of Senior Debt and/or Junior Debt than originally anticipated and the agreed costs incurred in arranging any such financing;*
- *an adjustment to the Unitary Charge to take account of the Contractor's additional funding outstanding for the event concerned. This adjustment would reflect the actual terms and conditions of the funding, which would have been agreed between the parties at the outset, and be applied on the basis that the financiers are no worse and no better off, from the perspective of risk and return, than they would have been had the increase in Capital Expenditure not arisen. As stated above, in practice this generally means that an increase is made to the Unitary Charge (over the term of amortisation of the additional dedicated funding) to restore the senior debt loan life cover ratio and equity return to their values had the additional funding not been required. This calculation can only be made by using the financial model (as to which see Section 5.2.3.2 above). The Authority should not seek a grace period on paying higher Unitary Charge even if this would satisfy the senior debt loan life cover ratio and equity return (as this could cause inappropriate distortion to the cash flow profile); or*
- *particularly if the Authority cannot afford to pay compensation in the form of a lump sum but wishes to avoid having to use a financial model, it may offer to pay a supplementary Unitary Charge over a period of its choosing as an annuity equivalent of the Capital Expenditure. If this approach is adopted, the discussion can be reduced to a single issue, namely the annuity rate to be applied. In this case, the Authority need not be concerned with how and at what cost the Contractor has arranged additional dedicated funding, if any.¹²*

5.2.3.6 *If the event concerned involves a Capital Expenditure reduction (e.g. cancellation of a wing of a*

building), this would involve:

- a reduction in Unitary Charge. The size of reduction will depend upon not only savings in Capital Expenditure but also consequent savings in finance and operating costs. The decision on whether or not to cancel any excess committed finance prior to project completion (if this is possible with the financing structure concerned) will be taken jointly with the Contractor and its financiers. The concept of lump sum payment (or refund), whether single or by instalment, does not arise as a possibility in this context.
- there are two alternative approaches to determining the appropriate reduction in Unitary Charge: either to use the financial model (see Section 5.2.3.2 above); or to determine the annuity equivalent reduction. With an annuity equivalent reduction the term of the annuity should be the term of the Contract, unless the parties otherwise agree.

5.2.3.7 If the compensation arises only because of a change in operating costs then appropriate changes in the Unitary Charge should be by negotiation and may be possible without reference to the financial model, even where the impact on operating costs is periodic or irregular over time. The change in Unitary Charge should be made at the time of the Compensation Event to reflect forecast operating costs changes, as to amount and timing. The use of lump sum compensation payments or annuity equivalents are also inappropriate for changes in operating costs. As many of the above issues have complicated financial consequences, financial advisers should be consulted as to the most appropriate approach for a particular project.

5.2.3.8 In any event, (even if this approach is taken in relation to Authority Changes and Qualifying Changes in Law) it is not appropriate in any circumstances for breach by the Authority of its obligations to give rise to an obligation on the Contractor to finance any Capital Expenditure consequences¹³.

5.2.3.9 In assessing the consequences of a Compensation Event, other causes of delays to the Service Commencement Date will be relevant as to whether the Contractor will receive relief from its obligations and/or compensation. The Contractor's losses should be calculated as accurately as possible at the time and payment made as appropriate.

CORE CONTRACT DRAFTING

36 DELAYS TO COMPLETION AND COMPENSATION EVENTS

36.1 Notices

If, at any time, the PPP Co becomes aware that:

- (a) any part of the Works will not be or is unlikely to be completed; or
- (b) the Operations will not be or are unlikely to be Operational in relation to any part of the [Project Facility],

in each case, in accordance with the Programme and/or by the Target Service Commencement Date the PPP Co shall, as soon as reasonably practicable after becoming so aware, but in any case within [•] ([•]) Working Days of such event becoming apparent, give notice to the Authority's Representative to that effect specifying the relevant delay or impediment.

36.2 Delay Details

As soon as practicable after any notification pursuant to Clause 36.1 (Notices) but, in any event, within [●] ([●]) Working Days of issue of such notification the PPP Co shall provide the Authority's Representative with details of the delay or impediment including:

- (a) a statement of the reasons for any delay or impediment and the circumstances giving rise to such reasons;
- (b) an explanation of the effect of the delay or impediment on the critical path of the Works attaining Completion and/or any Operation becoming Operationally Complete;
- (c) an estimate of the likely effect of the delay or impediment on the Target Service Commencement Date;
- (d) an explanation of any measures that the PPP Co proposes or intends to adopt to mitigate the consequences of delay or impediment;
- (e) a statement of which of the Compensation Events (if any) has caused the delay or impediment;
- (f) a statement of which of the Relief Events (if any) has caused the delay or impediment; and
- (g) a statement of which of the Force Majeure events (if any) has caused the delay or impediment.

36.3 Further Information

If the PPP Co receives or becomes aware of any further relevant information relating to the delay or impediment, it shall submit such further information to the Authority's Representative as soon as possible. The Authority's Representative may request from the PPP Co any further information which the Authority's Representative may reasonably require in order to fulfil its duties pursuant to Clause 36.4 (Extension of Time), 36.5 (Mitigation) and 36.6 (Compensation) inclusive and the PPP Co shall supply the same within a reasonable period after such request.

36.4 Extension of Time

- (a) Subject to compliance by the PPP Co with Clauses 36.1 (Notices) and 36.2 (Delay Details), the Authority shall procure that the Authority's Representative shall, if relevant and having satisfied himself (acting reasonably) that a delay or impediment as referred to in Clause 59 (Notices) has arisen as a result of the occurrence of a Compensation Event, a Relief Event or a Force Majeure event, either prospectively or retrospectively allow the PPP Co such extension of time as shall be reasonable by fixing a new Target Service Commencement Date which shall replace the existing Target Service Commencement Date.
- (b) No extension of time for delay shall be given hereunder, otherwise than pursuant to this Clause 36.4, and Clause 36.5 (Mitigation). Any Dispute relating to a decision made pursuant to these clauses shall be referred to the Disputes Resolution Procedure.
- (c) If PPP Co delays notification of a Compensation Event beyond the period referred to in Clauses 36.1 (Notices) or 36.2 (Delay Details) and all such delay is solely due to an administrative error, the PPP Co shall still be entitled to relief or compensation in accordance with Clause 43, provided that such relief or compensation shall be limited to

the same as it would have obtained had it complied with the relevant time periods specified in Clauses 36.1 (Notices) and 36.2 (Delay Details).

Comment: Clause 36.4(c) is unusual as it allows PPP Co to argue that a notification was not given due to an administrative error and should only be inserted in exceptional circumstances.

36.5 Mitigation

- (a) The PPP Co shall take all steps reasonably necessary and consistent with Good Industry Practice to mitigate the consequences of any Compensation Event or any Relief Event.
- (b) Notwithstanding Clause 36.5 above, where any Compensation Event or Relief Event has arisen, the Authority may request the PPP Co to accelerate the execution of the Works so that the effects of the Compensation Event or Relief Event are alleviated. The PPP Co shall act reasonably in considering any such request and in pricing the cost of such acceleration. The PPP Co shall have no obligation to effect any works in respect of such acceleration before the relevant cost has been agreed between the parties. Following agreement of any acceleration cost, the Authority shall pay the same as if an Authority Change had been agreed, mutatis mutandis, in accordance with [Clause 34 – Schedule A] (Variations).

36.6 Compensation

- (a) Following the occurrence of any Compensation Event the PPP Co shall be entitled to be compensated by the Authority in an amount equal to the Compensation Event Amount in respect of that Compensation Event and to relief from performance of such part of its obligations for such period as is reasonable in the opinion of the Authority's Representative having regard to the effect of the Compensation Event. For the avoidance of doubt, no Performance Points will be awarded and no Deductions will be made by the Authority to the PPP Co in respect of the non-performance by the PPP Co of any of its obligations under this Agreement to the extent that such non-performance is due solely and directly to the occurrence of a Compensation Event.
- (b) If the PPP Co is entitled to receive compensation under Clause 36.6 (a) above, the Authority's Representative and the PPP Co's Representative shall (acting jointly and reasonably) determine the amount of the Compensation Event Amount, having regard to the effect of the Compensation Event and the Construction Cost Breakdown and assuming compliance by the PPP Co with Clause 36.5 (Mitigation).
- (c) The Authority's Representative and the PPP Co's Representative may request from the PPP Co any further information which they may reasonably require in order to determine the amount of the Compensation Event Amount and the PPP Co shall supply the same within a reasonable period after such request.
- (d) In respect of any Compensation Event Amount payable by the Authority pursuant to a Compensation Event:
 - (i) arising from an event described in paragraph 1.1 and/or paragraph 1.2 of Part 1 of [Clause 36 – Schedule] (Compensation Events, Relief Events and Force Majeure), the amount thereof shall be paid to the PPP Co by the Authority within 30 (thirty) Working Days of such amount being agreed or determined or, if later, within [●] ([●]) Working Days of the PPP Co submitting a payment request;
 - (ii) arising from an event described in paragraph 1.3 of Part 1 of [Clause 36 - Schedule] (Compensation Events, Relief Events and Force Majeure),

- the Authority shall pay the same as if an Authority Change had been agreed mutatis mutandis in accordance with paragraph 1 of [Clause 34 – Schedule A] (Variations); and
- (iii) arising from an event described in paragraph 1.4 of Part 1 of [Clause 36 – Schedule] (Compensation Events, Relief Events and Force Majeure), the Authority shall pay the same as if a Qualifying Change in Law had been agreed mutatis mutandis in accordance with Schedule [●] (Change in Law) [Part 1 at [Clause 35 – Schedule]].
- (e) The parties shall use reasonable endeavours to agree the amount of the Compensation Event Amount within [●] ([●]) days of receipt by the Authority's Representative and the PPP Co's Representative of the information required under Clause 49.1 (Notification of Events of Default).

[CLAUSE 36 – SCHEDULE]

COMPENSATION EVENTS, RELIEF EVENTS AND FORCE MAJEURE

PART 1

Compensation Events

1. Compensation Events are:-
 - 1.1 breach by the Authority of its obligations under this Agreement or any of the Project Documents;
 - 1.2 an Authority Change to the Works pursuant to paragraph 1 of [Clause 34 – Schedule A] (Variations); and
 - 1.3 a Qualifying Change in Law.

COMPENSATION EVENTS, RELIEF EVENTS AND FORCE MAJEURE

PART 2

Relief Events

1. Relief Events are:-
 - 1.1 fire, explosion, lightning, storm, tempest, flood, bursting or overflowing pipes, ionizing radiation (to the extent it does not constitute a Force Majeure Event), earthquakes, riot and civil commotion, threat of terrorist attack where such threat is notified to PPP Co or to the Authority by the Gardai or other appropriate authority;
 - 1.2 failure in whole or in part by a Statutory Undertaker, Utility Company, or Local Authority (or any of their successors or replacements from time to time) to carry out works or provide services, where such failure is ongoing for a period in excess of [●] ([●]) Working Days;
 - 1.3 any accidental loss or damage to the Works;
 - 1.4 any failure or shortage of power, fuel or transport, where such failure or shortage is ongoing for a period in excess of [●] ([●]) Working Days;

- 1.5 any blockade or embargo which does not constitute Force Majeure, where such blockade or embargo is ongoing for a period in excess of [●] ([●]) Working Days;
- 1.6 any official or unofficial strike, lockout, go slow or other dispute generally affecting the construction, building maintenance, or facilities management industries or a significant sector thereof, where such event is ongoing for a period in excess of [●] ([●]) Working Days; and
- 1.7 the presence of an unexploded bomb or other ammunition;

Comment: The NRA Model Contract has the following additional Compensation Events.

- 1.8 [the discovery at the Site and/or Off Site Areas of Monuments, Antiquities and Archaeological objects];
- 1.9 the occurrence of an outbreak of foot and mouth disease, where such outbreak is ongoing for a period in excess of [●] ([●]) Working Days and which materially adversely affects the ability of the PPP Co. to carry out the Works.

but, in each case, only to the extent that the same does not arise from or is not contributed to by any breach by the PPP Co of its obligations under this Agreement or any of the Project Documents or any other neglect, default, act or omission of the PPP Co or its Staff; and

2. For the purposes of paragraph 1.2, "Utility Company" means a provider of water, telecommunications, gas, electricity or sewage disposal.

KEY DEFINITIONS – USED IN CLAUSE 36 CORE CONTRACT DRAFTING

“Compensation Event Amount” means, in the case of a Compensation Event referred to in Part 1 of [Clause 36 - Schedule] (Compensation Events, Relief Events and Force Majeure) and/or in the event that issuance of the Services Commencement Certificate is postponed pursuant to Clause [●], the cost and expense (including, for the avoidance of doubt, loss of revenue) properly incurred by the PPP Co. due to such occurrence, as though the effects thereof were the subject of an Authority Notice of Change which cost and expense (including, for the avoidance of doubt, loss of revenue) shall not, for the avoidance of doubt, include any costs and/or expenses taken into consideration previously in accordance with Part 10 of [Clause 27 - Schedule] (Payment Mechanism).

CROSS REFERENCES

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

- Clause 9 (Services Commencement Certificate)
- Clause 24 (Records)
- Clause 27 (Custody of Financial Model)
- Clause 54 (Compensation on Termination)

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

- A5 (Variations)
- C6 (Archaeology)

- C17 (Interruptions)
- C18 (Time Extensions)
- C23 (Time and Cost Overruns)
- D1 (Decanting risk)
- D24 (Authority Staff)