

COMPILATION OF PPP TERMS AND CONDITIONS OF CONTRACT

PUBLIC SECTOR VERSION

CLAUSE 37: RELIEF EVENTS

DBFOM CONTRACT

CONCESSION CONTRACT

DBFM CONTRACT

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INTRODUCTION

Under the Relief Events regime, the Authority will not be entitled to terminate the contract if certain specific events occur.

SOPC3 GUIDANCE

5.3 RELIEF EVENTS

5.3.1 Purpose

5.3.1.1 Relief Events are events which prevent performance by the Contractor of its obligations at any time, in respect of which the Contractor bears the financial risk in terms of increased costs and reduced revenue but for which it is given relief from termination for failure to provide the full Service. The events listed in Section 5.3.2 (Scope of Relief Events) may be outside the Contractor's control, but that is not the appropriate measure of whether an event should appear on the list, as many events beyond a person's control at the time they occur could in fact have been prevented by proper precautions (e.g. fire). In fact, the list of events has been arrived at because the risk of the events concerned occurring is better borne by the Contractor as it is in a better position than the Authority to mitigate and manage the consequences. In some cases this will be with insurance, in others with a combination of insurance and proper planning and in others still, by risk management and planning (i.e. the events can be worked around for the period they exist).

5.3.1.2 It is clear in most cases that termination should not follow a Relief Event. This is because any replacement Contractor would be similarly affected and so the Authority's position would not be improved by termination. Relief Events do not, however, require the same treatment as Force Majeure Events (see Section 5.4 (Force Majeure Events)) as their consequences are not likely to be as severe and will usually only last for a finite period.

5.3.1.1 In the past it has been argued that a right to terminate should exist for the prolonged occurrence of a Relief Event. Other than in certain defence projects, this is not appropriate for two reasons. First there is a risk of there being no proper incentive on the Contractor to manage the risk (depending on any compensation payable on termination) and secondly the occurrence of such an event is likely either to be short-lived (e.g. strikes by a supplier) and/or lead to an alternative sourcing of the supply concerned by the Contractor (e.g. any shortage of fuel). In any event, the appropriate measure for a termination payment in such circumstances (i.e. Contractor Default – see Section 20.2.5 (Compensation on Termination

for Contractor Default) [of the SoPC3 Guidance]) would be unlikely to be agreed to by Contractors.

5.3.2 Scope of Relief Events

5.3.2.1 [NOT USED]

5.3.2.2 *The Contract will have similar provisions during both the construction/development phase and the Service Period. In addition, as mentioned in Section 5.1.5, the above list of events may be extended to include other similar events if the circumstances warrant. This approach is accepted during the construction phase in certain Highways Agency projects (see Section 2 (Duration of Contract), footnote 1). Force majeure delays should be excluded (see Section 5.4 (Force Majeure Events)) as they are treated separately. In addition, in circumstances where the Contract imposes a long-stop date for Service Commencement (see Section 4.5 (Long-Stop Date)) the scope of Relief Events may be extended to cover further events (e.g. extreme adverse weather conditions and/or unforeseen ground conditions) given that the financial risks associated with such events will remain with the Contractor.*

5.3.3 Consequences

5.3.3.1 *The financial effects of delays caused by Relief Events are borne by the Contractor, so no compensation should be paid by the Authority on the occurrence of such delays. If a Relief Event occurs prior to Service Commencement any long-stop termination date will be put back by a period equal to the relevant delay. In most cases the only relief given will be relief from termination (i.e. Relief Events are separate and distinct from Compensation Events and Force Majeure Events).*

5.3.3.2 *There should be no extension to the Contract owing to a Relief Event. The Authority should not regard an extension of the Contract as a concession without significant cost. This is because if an extension is given, then although the Contractor does not receive the Unitary Charge during a Relief Event (save to the extent the Service is delivered), the Contractor's revenue period would be kept whole. If this occurs, then there is a reduced incentive on the Contractor to manage the effects of the Relief Event and restore the Service as soon as possible. In addition, the Authority's exposure to any risks it bears under the Contract is extended indefinitely as the Expiry Date may be continually extended. By extending the Contract, therefore, the Authority can be taking a large element of the risk of the occurrence of Relief Events (as the economic effects of an extension can be substantial).*

5.3.3.3 *The parties should consider, on a project specific basis, whether or not the Contractor should be relieved of any liability for liquidated damages, although availability and performance deductions should continue to be made where necessary in respect of the period of delay caused by the Relief Event (see Sections 4 (Protections Against Late Service Commencement), 7 (Service Requirements and Availability), 9 (Performance Monitoring) and 10 (Price and Payment Mechanism) [of the SoPC3 Guidance]). Liquidated damages prior to Service Commencement (to the extent they exist) are designed to compensate the Authority for specific losses due to late Service delivery so that if the Contractor fails to commence provision of the Service due to a Relief Event, the Authority will still suffer this loss. Depending on the nature of the Project, however, the Authority may feel that it will obtain better value for money if it allows any liability of the Contractor for liquidated damages to be postponed by the period of the delay.*

5.3.3.4 *When a Relief Event has occurred and the Authority has been informed, the parties should consult to discuss relevant issues, such as the likely duration of the Relief Event and the action to be taken to mitigate its effects.*

5.3.3.5 *The Authority should not normally expect to exercise any step-in rights it has during a Relief Event (see Section 28 (Authority Step-In)). If the Contractor is not using reasonable endeavours to rectify matters and mitigate the consequences, it will not obtain the relief*

afforded by Relief Events and will be at risk of termination for default (see Clause 5.3 (b) (Delays due to a Relief Event)). This should provide a sufficient spur for the Contractor to perform (depending, in part, on the approach taken to relief from other obligations under the Contract).

CORE CONTRACT DRAFTING

37 RELIEF EVENTS

37.1 Relief Request

During the Contract Period, the PPP Co shall be entitled to request relief from any right of the Authority to terminate this Agreement pursuant to Clause 49 (PPP Co Default Termination), to the extent that its ability to perform the same is adversely affected by any Relief Event. Any such request shall be made by service of a notice on the Authority's Representative within [●] ([●]) Working Days of the PPP Co becoming aware of the relevant Relief Event or, if later, of its failure to perform. Such initial notice shall give sufficient details as are necessary to identify the particular event claimed to be a Relief Event and shall, within a further [●] ([●]) Working Days, be followed by a Relief Request from the PPP Co to the Authority's Representative containing such relevant information relating to the Relief Event and/or any failure to perform as is available to the PPP Co, including:

- (a) full details of the Relief Event, including its nature, the date of its occurrence and its duration;
- (b) the effect of the Relief Event on the PPP Co's ability to perform any of its obligations under this Agreement, including details of the relevant obligations, the precise effect on each such obligation and the likely duration of that effect; and
- (c) an explanation of any measures that the PPP Co proposes or intends to adopt to mitigate the consequences of the Relief Event.

37.2 Further Information

If, following the issue of any Relief Request, the PPP Co receives or becomes aware of any further information relating to the Relief Event and/or any failure to perform, 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 to fulfil its obligations under Clause 37.3 (Relief Notice) and the PPP Co shall supply the same within a reasonable period after such request.

37.3 Relief Notice

Subject to compliance by the PPP Co with its obligations under Clauses 37.1 (Relief Request) and 37.2 (Further Information), the Authority shall procure that the Authority's Representative shall, having satisfied himself (acting reasonably) of the occurrence of the Relief Event and its effect on the ability of the PPP Co to perform its obligations under this Agreement, issue a Relief Notice specifying the Relief Period during which the Authority shall not be entitled to terminate this Agreement pursuant to Clause 49 (PPP Co Default Termination).

37.4 Dispute

The Authority shall procure that the Authority's Representative acts reasonably in performing his obligations pursuant to Clause 37.3 (Relief Notice). Where any of the matters set out in

a Relief Notice is Disputed by the PPP Co, the parties shall each use all reasonable endeavours to reach agreement in relation to the same. If any matter is not agreed within [●] ([●]) Working Days of the date of issue of the Relief Notice, the matter shall be referred to the Disputes Resolution Procedure.

37.5 Deductions

Nothing in this Clause 37 (Relief Events) shall affect the ability of the Authority to make Deductions in accordance with Schedule [●] (Payment Mechanism) [*Parts 9, 10 and 11 at [Clause 11 – Schedule], [Clause 27 – Schedule] and [Clause 43 – Schedule] respectively*].

37.6 Mitigation

Notwithstanding the provisions of Clause 37.1 (Relief Request) or the issue of any Relief Notice, the PPP Co shall take all steps necessary and consistent with Good Industry Practice to mitigate the consequences of any Relief Event.

KEY DEFINITION – USED IN CLAUSE 37 CORE CONTRACT DRAFTING

“Relief Event” means any of the events set out in Part 2 of [Clause 36 – Schedule] (Compensation, Relief Events and Force Majeure).

CROSS REFERENCES

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

- Clause 31 (Protestors and Trespassers)
- Clause 33 (Employment Issues)

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

- C7 (Weather Conditions)
- C15 (Utilities)
- C17 (Interruptions)
- C18 (Time Extensions)
- C25 (Material Resources)
- C26 (Labour Resources)
- C27 (Industrial Action)
- C28 (Authority Staff)
- D5 (Utilities)
- D22 (Staff Training)
- D23 (Industrial Action)