

# COMPILATION OF PPP TERMS AND CONDITIONS OF CONTRACT

## PUBLIC SECTOR VERSION

### CLAUSE 38: FORCE MAJEURE

#### DBFOM CONTRACT

#### CONCESSION CONTRACT

## INTRODUCTION

Force majeure is narrowly defined in PPP contracts because the Authority takes much of the risk. If force majeure prevents performance for a significant period, the Authority will become responsible for the Contractor's senior debt. The Core Contract drafting below (which follows UK guidance) provides flexibility as to what will be done if force majeure happens, with a fall-back right to terminate for extended delays.

The NRA Model Contract approach (based on the UK roads model) is different, with separate treatment of "Eligible Force Majeure" events and other "Force Majeure" events.

## SOPC3 GUIDANCE

### 5.4 FORCE MAJEURE EVENTS

#### 5.4.1 Scope of Force Majeure

**5.4.1.1** *The purpose of force majeure provisions is to give the Affected Party relief from liability and, if the event continues for a certain period, to give the parties an opportunity to terminate the Contract. The definition of Force Majeure Events (see Section 5.4.1.2) should only include events which, unlike Relief Events, are likely to have a catastrophic effect on either party's (although usually the Contractor's) ability to fulfil its obligations under the Contract. In practice, such events are highly unlikely to occur. As neither party is likely to be in a better position than the other to manage either the occurrence or the effects of force majeure, and the events may continue for a long period of time, such events are given a different treatment from Relief Events and the financial consequences shared.*

**5.4.1.2** [NOT USED].

**5.4.1.3** *Relief for Force Majeure Events applies only to the extent that the Contractor or the Authority is unable to comply with all or a material part of its obligations under the Contract and the parties cannot agree within a limited period (say 6 months) how to restart the Project.*

**5.4.1.4** *The Authority should not automatically be obliged to pay the Contractor any amount simply to service the Contractors' debt obligations in whole or in part, but the parties should recognise that the Contractor may wish to include certain tolerances into its Contract to allow for this. If termination occurs, the Authority will in any event compensate the Contractor for outstanding Senior Debt<sup>48</sup>. If termination does not occur, then the parties will be discussing continuation of the Contract against a back drop of such a compensation payment.*

## **5.4.2 Consequences of Force Majeure**

**5.4.2.1** *On the occurrence of a Force Majeure Event, the parties should consult to attempt to find a way to continue the Project, such as agreeing how it can be reinstated if destroyed (although neither party will be obliged to do this). The solution will depend on the nature of the event and its effects, but may involve altering the service requirement, amending the payment mechanism or even extending the term of the Contract. The required drafting for dealing with the effects of Force Majeure Events is set out in Section 20.3 (Termination on Force Majeure).*

**Comment:** *While the Core Contract drafting follows the SOPC model, as noted before, the NRA Model Contract differs somewhat, following UK roads precedent.*

## **CORE CONTRACT DRAFTING**

### **38 FORCE MAJEURE**

#### **38.1 Relief from Liability**

- (a) The parties shall be relieved from liability and shall not be in default under this Agreement to the extent that by reason of Force Majeure they are not able to perform their obligations under this Agreement and Performance Points shall not be allocated to those obligations to the extent that they are incapable of performance. The provisions of this Clause shall not apply in respect of either party's obligations to make any payment which has accrued under this Agreement prior to the Force Majeure. Any Event of Default which arises solely and directly as a consequence of the occurrence of a Force Majeure Event shall not entitle the Authority to terminate this Agreement pursuant to Clause 49 (PP Co Default Termination). For the avoidance of doubt, nothing in this Clause 38.1 shall affect the ability of the Authority to make Deductions in accordance with Part [●] of Schedule [●] (Payment Mechanism).
- (b) When the Force Majeure ceases or no longer causes the parties to be unable to comply with their obligations under this Agreement, the Agreement shall continue to be performed on the terms existing immediately prior to the occurrence of the Force Majeure.

#### **38.2 Notice**

Relief under Clause 38.1 (Relief from Liability) shall not be given unless the party intending to claim relief has, by notice to the other party within [●] ([●]) Working Days of becoming aware of the event of Force Majeure or, if later, of the failure to perform, informed the other party that it intends to claim relief. Such notice shall contain such relevant information relating to such failure as is available, including (without limitation) the actions being taken to remedy such failure to perform and an estimate of the period of time required to remedy such failure.

#### **38.3 Obligation to Remedy**

- (a) As soon as practicable after the occurrence of an event of Force Majeure the party affected shall take all reasonable steps to remedy the failure to perform and relief under this Clause 38 shall cease to be available to a party if it fails so to take all such steps to remedy the failure.
- (b) The parties shall at all times following the occurrence of Force Majeure use all reasonable endeavours to prevent and mitigate the effects of any delay and the PPP Co

shall at all times during which Force Majeure is subsisting take all steps in accordance with Good Industry Practice to overcome or minimise the consequences of Force Majeure.

#### **38.4 Consequences of Force Majeure**

If the parties agree or it is determined through the Disputes Resolution Procedure that Force Majeure:

- (a) has, in relation to the part of the Works which will form part or all of the [Project Facility], prior to the issue of the Services Commencement Certificate, delayed the PPP Co in completing the Works or after the issue of the Services Commencement Certificate, the Operations are substantially suspended, then the Expiry Date shall be extended by a period equal to the period of such delay or suspension, provided that such extensions in aggregate shall not, in any event, exceed [●] ([●]) days;
- (b) has, in relation to the part of the Works which will form part or all of the [Project Facility], prior to the issue of the Services Commencement Certificate, caused damage to the Works then:
  - (i) the PPP Co shall give notice thereof to the Authority's Representative together with details of the effect thereof and the proposed steps to rectify the damage and the costs thereof;
  - (ii) the parties shall enter into discussions concerning the event of Force Majeure and the damage with the intent that, as soon as possible after the cessation of the event of Force Majeure, rectification work can be commenced; and
  - (iii) following agreement between the parties on the rectification works to be carried out, or, in default of agreement, upon a decision being made under the Disputes Resolution Procedure, the PPP Co shall procure that such rectification works are carried out as though the Authority had submitted an Authority Notice of Change in respect of such works and the provisions of [Clause 34 – Schedule A] (Variations) shall apply, except that:
    - A. the PPP Co shall not be entitled to refuse to effect an Authority Change; and
    - B. for the purpose of any adjustment to the Unitary Charge in accordance with Part 10 of [Clause 27 – Schedule] (Payment Mechanism) no change to the Programme shall be taken into account;
- (c) has, after the issue of the Services Commencement Certificate, caused damage to the [Project Facility] then:
  - (i) the PPP Co shall give notice thereof to the Authority's Representative together with details of the effect thereof and the proposed steps to rectify the damage and the costs thereof;
  - (ii) the parties shall enter into discussions concerning the event of Force Majeure and the damage with the intent that, as soon as possible after the cessation of the event of Force Majeure, rectification work can be commenced; and
  - (iii) following agreement between the parties on the rectification works to be carried out, or in default of agreement, upon a decision being made under the Disputes Resolution Procedure, the PPP Co shall procure that such rectification works are carried out as though the Authority had submitted an Authority Notice of Change and the provisions of [Clause 34 – Schedule A] (Variations) shall apply.

### **38.5 Right to Terminate for Force Majeure**

Where an occurrence of Force Majeure:

- (a) occurring prior to the issue of the Services Commencement Certificate, has rendered financially or practicably impossible the performance of this Agreement for a period of time so as to have a fundamental effect on the rights or obligations of either of the parties; or
- (b) has a material adverse effect on the performance by either party of this Agreement for a period longer than [●] ([●]) days; or
- (c) has a fundamental adverse effect on the performance by either party of this Agreement for a period longer than [●] ([●]) days,

then either party may, following consultation for a further period of not less than [●] ([●]) days to reach a solution acceptable to both parties, terminate this Agreement in accordance with Clause 52.2 (Force Majeure or Uninsurable Risk).

### **38.6 Limit on Liability**

For the avoidance of doubt, save as expressly set out in this Clause 38 (Force Majeure) (other than this Clause 38.6) the Authority shall have no liability to the PPP Co in relation to any Loss or Claim which the PPP Co suffers or incurs as a result of any event of Force Majeure and, accordingly, as between the parties any such Loss or Claim shall be borne by the PPP Co.

## **[CLAUSE 38 - SCHEDULE A]**

### **COMPENSATION EVENTS, RELIEF EVENTS AND FORCE MAJEURE**

#### **PART 3**

#### **FORCE MAJEURE**

1. "Force Majeure" means:
  - 1.1 pressure waves caused by aircraft or other aerial devices travelling at sonic or supersonic speeds;
  - 1.2 any act of terrorism causing physical damage to the [Project Facility];
  - 1.3 war, hostilities (whether declared or undeclared), invasion, armed conflict or act of foreign enemy (but for the avoidance of doubt not including terrorism) in each case within and involving the State;
  - 1.4 rebellion, revolution, riot, or insurrection (but for the avoidance of doubt not including terrorism) which causes physical damage and long term disruption to the [Project Facility], in each case within the State; or
  - 1.5 nuclear explosion, combustion of nuclear fuel, radioactive or chemical contamination or ionising radiation, which event is not caused or contributed to by an act, omission or default of the PPP Co, its servants, agents or contractors, biological contamination arising from war or terrorism;

but in any such case excluding any act by or damage by or caused by any Protestor or Trespasser or by the presence on or around or entry onto or around the Site [or the Off-Site Areas] of, or any other interference with or affecting the Site [or the Off-Site Areas] or the vicinity of it [them] or the Operations by or caused by, any Protestor or Trespasser.

## NRA MODEL CONTRACT DRAFTING

**Comment: Clauses 38.1 – 38.3 and 38.6 above of the Core Contract are essentially the same in the NRA Model Contract.**

### [●].4 Consequences of Eligible Force Majeure

If the parties agree or it is determined through the Disputes Resolution Procedure that Eligible Force Majeure:

- (a) has, in relation to the part of the Works which will form part or all of the Project Road, prior to the issue of the Completion Certificate, delayed the PPP Co in completing the Works or after the issue of the Completion Certificate, the Operations are substantially suspended, then the Expiry Date shall be extended by a period equal to the period of such delay or suspension, provided that such extensions in aggregate shall not, in any event, exceed 180 (one hundred and eighty) days;
- (b) has, in relation to the part of the Works which will form part or all of the Project Road, prior to the issue of the Completion Certificate, caused damage to the Works then:
  - (i) the PPP Co shall give notice thereof to the Authority's Representative together with details of the effect thereof and the proposed steps to rectify the damage and the costs thereof;
  - (ii) the parties shall enter into discussions concerning the event of Eligible Force Majeure and the damage with the intent that, as soon as possible after the cessation of the event of Eligible Force Majeure, rectification work can be commenced; and
  - (iii) following agreement between the parties on the rectification works to be carried out, or, in default of agreement, upon a decision being made under the Disputes Resolution Procedure, the PPP Co shall procure that such rectification works are carried out as though the Authority had submitted an Authority's Notice of Construction Variation in respect of such works and the provisions of [Clause 34 – Schedule B] (Variations) shall apply, except that:
    - (A) the PPP Co shall not be entitled to refuse to effect a Construction Variation or an Operation Variation required by the Authority; and
    - (B) for the purpose of Re-Optimising the Financial Model in accordance with [Clause 34 – Schedule B] (Variations) no Change in Traffic or change to the Programme or Milestone Event shall be taken into account;
- (c) has, after the issue of the Completion Certificate, caused damage to the Project Road then, and subject always to Clause [●].6 (Right to Terminate for Force Majeure) [*below*]:
  - (i) the PPP Co shall give notice thereof to the Authority's Representative together with details of the effect thereof and the proposed steps to rectify the damage and the costs thereof;

- (ii) the parties shall enter into discussions concerning the event of Eligible Force Majeure and the damage with the intent that, as soon as possible after the cessation of the event of Eligible Force Majeure, rectification work can be commenced; and
- (iii) following agreement between the parties on the rectification works to be carried out, or in default of agreement, upon a decision being made under the Disputes Resolution Procedure, the PPP Co shall procure that such rectification works are carried out as though the Authority had submitted an Authority's Notice of Construction Variation and the provisions of [Clause 34 – Schedule B] (Variations) shall apply, except that for purposes of Re-Optimising the Financial Model in accordance with [Clause 34 – Schedule B] (Variations) no Change in Traffic shall be taken into account.

**[●].5 Right to Terminate for Eligible Force Majeure**

Where an occurrence of Eligible Force Majeure:

- (a) occurring prior to the issue of the Completion Certificate, has rendered financially or practicably impossible the performance of this Agreement for a period of time so as to have a fundamental effect on the rights or obligations of either of the parties; or
- (b) has a material adverse effect on the performance by either party of this Agreement for a period longer than 180 (one hundred and eighty) days; or
- (c) has a fundamental adverse effect on the performance by either party of this Agreement for a period longer than 90 (ninety) days,

then either party may, following consultation for a further period of not less than 90 (ninety) days to reach a solution acceptable to both parties, terminate this Agreement in accordance with Clause [●] (Termination for Eligible Force Majeure or Uninsurable Risk).

**[●].6 Right to Terminate for Force Majeure**

- (a) Where an occurrence of Force Majeure, excluding Eligible Force Majeure:
  - (i) has a material effect on the traffic volume of the Project Road; or
  - (ii) is the direct cause of a delay in the achievement of the Completion Certificate,

for a period not less than 270 (two hundred and seventy) days, either party may, subject to Clause 38 below, terminate this Agreement by 10 (ten) Working Days notice to the other party.

- (b) If the Authority gives notice to the PPP Co under Clause [●] that it proposes to terminate this Agreement, then the PPP Co has the option either to accept such notice or to respond by notice in writing on or before the date falling 10 (ten) Working Days after the date of its receipt electing to continue this Agreement. If the PPP Co gives the Authority such notice, then without prejudice to Clause [●] (Limit on Liability) and for the avoidance of doubt:
  - (i) the Authority shall not compensate the PPP Co for any rectification works which the PPP Co carries out after the date of the notice served by the Authority; and
  - (ii) there shall be no further extension of the Expiry Date to compensate for the relevant event of Force Majeure for any period after the date of the notice served by the Authority, and

this Agreement shall continue in accordance with Clause 38.6(b)(i) and 38.6(b)(ii) and the Authority's notice shall not take effect.

**[CLAUSE 38 – SCHEDULE B]**

**DELAY EVENTS, RELIEF EVENTS AND FORCE MAJEURE**

**PART 3**

**Force Majeure**

1. **"Force Majeure"** means:
  - 1.1 Eligible Force Majeure;
  - 1.2 pressure waves caused by aircraft or other aerial devices travelling at sonic or supersonic speeds; or
  - 1.3 any act of terrorism causing physical damage to the Project Road,  
  
but in any such case excluding any act by or damage by or caused by any Protestor or Trespasser or by the presence on or around or entry onto or around the Site or the Off-Site Areas of, or any other interference with or affecting the Site or the Off-Site Areas or the vicinity of them or the Operations by or caused by, any Protestor or Trespasser.
2. **"Eligible Force Majeure"** means:
  - 2.1 war, hostilities (whether declared or undeclared), invasion, armed conflict or act of foreign enemy (but for the avoidance of doubt not including terrorism) in each case within and involving the Republic of Ireland;
  - 2.2 rebellion, revolution, riot, or insurrection (but for the avoidance of doubt not including terrorism) which causes physical damage and long term disruption to the Project Road, in each case within the Republic of Ireland; or
  - 2.3 nuclear explosion, combustion of nuclear fuel, radioactive or chemical contamination or ionising radiation, which event is not caused or contributed to by an act, omission or default of the PPP Co, its servants, agents or contractors, biological contamination arising from war or terrorism;  
  
but in any such case excluding any act by or damage by or caused by any Protestor or Trespasser or by the presence on or around or entry onto or around the Site or the Off-Site Areas of, or any other interference with or affecting the Site or the Off-Site Areas or the vicinity of them or the Operations by or caused by, any Protestor or Trespasser.

**CROSS REFERENCES**

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

- Clause 52 (Non-Default Termination)

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

- D13 (Infrastructure Damage)
- G6 (Force Majeure)