

# COMPILATION OF PPP TERMS AND CONDITIONS OF CONTRACT

## PUBLIC SECTOR VERSION

### CLAUSE 45: TAXES

#### DBFOM CONTRACT

#### CONCESSION CONTRACT

#### DBFM CONTRACT

#### DBF CONTRACT

#### DBOM CONTRACT

#### DBM CONTRACT

#### OMF CONTRACT

#### O&M CONTRACT

## INTRODUCTION

These provisions are concerned with the tax treatment of sums paid between the parties under the contract. The VAT clause provides a procedure for either party to challenge VAT rulings. As discussed at Clause 35 (Change in Law) taking the PPP Co outside the VAT net (so that the PPP Co can no longer recoup the VAT it pays) is an Authority risk.

The Core Contract introduces a provision regarding measures to address the understatement of tax in the Financial Model, through deductions from the Unitary Charge at 45.7(c).

One further tax issue – the grossing up of termination payments for tax – is dealt with at Clause 54 (Compensation on Termination).

The preference from a taxation perspective is that all private partners should (and generally do) set up special purpose companies (SPC's) from which they deliver the services required under the contract. Some exceptions to this rule exist most notably in relation to the Operate Only PPP contracts where the service provider has a short term contract, usually in the region of 5 years and is not responsible for the construction of, or payment for the assets used in the delivery of the service. Bidders should be asked to confirm whether the SPC will be within the charge to Irish Corporation tax and if not, the Revenue Commissioners should be consulted.

When considering this clause, State Authorities should be cognisant of the VAT and Corporation tax guidance available on the Central PPP Unit website at [www.ppp.gov.ie](http://www.ppp.gov.ie) and bidders should be asked

to confirm that they are compliant with this tax guidance.

## CORE CONTRACT DRAFTING

### 45. TAXES

#### 45.1 Deductions and Withholdings from Payments by the Authority – General

All payments to be made by the Authority under this Agreement are stated on a gross basis but the Authority may make any deduction or withholding on account of tax as is required by Law or Legal Requirement or as the Authority is entitled under this Agreement. For the avoidance of doubt, the Authority may also make any deduction or withholding on account of tax which does not arise under the requirements of any Law or Legal Requirement at the Effective Date but which may arise at any future date under any circumstances, including any Change in Law or Legal Requirement. The PPP Co shall accept the net amount paid after deduction or withholding in discharge of the Authority's liability to the same extent as if the deduction or withholding had not been made.

#### 45.2 Specific Deductions and Withholdings from Payments

Without prejudice to the generality of Clause 45.1 (Deductions and Withholdings from Payments by the Authority - General) the Authority may make any of the deductions or withholdings as are referred to in this Clause 45.2. For the avoidance of doubt, the parties do not intend the specific deductions and withholdings cited in this Clause 45.2 to be an exhaustive list of all circumstances in which a deduction or withholding may arise.

- (a) The Authority may make any deduction or withholding from any payment which is required under Chapter 2 of Part 18 of the Taxes Act (Payments to sub-contractors in certain industries) unless the PPP Co produces a valid certificate of authorisation (C2) at least [•] ([•]) Working Days before the date of the payment by the Authority and the Authority receives a valid relevant payments card (RCT 47), both of which cover the payment in question, and also unless all relevant Laws and Legal Requirements in relation to deductions or withholdings on account of tax are complied with. The Authority and the PPP Co shall comply with their respective obligations under Chapter 2 of Part 18 of the Taxes Act and the regulations. If such compliance and/or compliance with this Clause 45.2(a) involves the Authority or the PPP Co in not complying with any other of the terms of this Agreement, then the requirements in order to so comply and the said provisions shall prevail over any other terms of this Agreement. Any Dispute arising out of the application of this Clause 45.2(a) shall be resolved in accordance with the Disputes Resolution Procedure.
- (b) The Authority may make any deduction or withholding required under Section 980 of the Taxes Act (Deduction from consideration on disposal of certain assets) unless the PPP Co produces a valid certificate under that Section dispensing with the Authority's obligation to make a deduction or withholding.
- (c) The Authority may make any deduction or withholding required or referred to under Section 1041 of the Taxes Act (Rents payable to non-residents).
- (d) The Authority may make any deduction or withholding required under Section 238 of the Taxes Act (Annual payments not payable out of taxed income).
- (e) The Authority may make any deduction or withholding required under Chapter 1 of Part 18 of the Taxes Act (Payments in respect of professional services by certain persons) and regulations made thereunder.
- (f) The Authority may make any deduction or withholding required under Section 246 of the Taxes Act (Interest payments by companies and to non-residents).

#### **45.3 Tax Clearance Certificates in relation to Public Sector Contracts**

The PPP Co shall comply with all relevant obligations referred to in Section 1095 of the Taxes Act (Tax clearance certificates in relation to public sector contracts), shall obtain an appropriate Tax Clearance Certificate referred to in that Section and shall comply with all relevant obligations under the scheme referred to in that Section. In the event of any of the foregoing obligations not being complied with or actions not being undertaken or in the event of non-continuation of compliance the Authority may refuse to make any payments under this Agreement.

#### **45.4 Other Tax Certificates**

The PPP Co shall comply with any provision of the Taxes Act or regulations thereunder which require the obtaining and/or production of a Tax Clearance Certificate or other relevant certificate. In the event of non-compliance, the Authority may make any deductions or withholdings or may refuse to make any payments as required by Law or Legal Requirement.

#### **45.5 Payments by the PPP Co**

All payments by the PPP Co on foot of this Agreement shall be made free and clear of any and all present Taxes except to the extent otherwise required by Law.

#### **45.6 Payments to Sub-contractors**

The PPP Co shall comply with its obligations under Chapter 2 of Part 18 of the Taxes Act and any regulations thereunder and shall procure that all other sub-contractors to whom payments are made in relation to activities contemplated by this Agreement shall also so comply.

#### **45.7 Warranty**

(a) The PPP Co shall, on the last Working Day of each Contract Year, make an annual declaration to the Authority with regard to any payment or any benefit of whatever nature derived by it from any tax based incentives, allowances, exemptions and/or reliefs that it may claim solely and directly as a result of its involvement in the Project or confirmation that none exist ("**Annual Declaration**") and shall provide a copy of such Annual Declaration to the Revenue Commissioners.

(b) The Annual Declaration will be accompanied by a statement of compliance from the tax adviser of the PPP Co.

(c) The Authority shall be entitled to deduct from the Unitary Charge:

- (i) in the Contract Year to which any Annual Declaration relates; or
- (ii) in the following year; or
- (iii) where the Annual Declaration relates to a Contract Year in the Design and Construct Period, in the first year in the Operational Period,

the value of any such payment or other benefit which has not been accounted for in the Financial Model and:

- A. is not a tax based incentive, allowance, exemption and/or relief that was envisaged in the Financial Model or in the declaration made by PPP Co in relation to the same in response to section [●] (Taxation) and appendix [●] (Financial Checklist) of the invitation to

negotiate in respect of the Project; and/or

- B. does not result from a change in taxation treatment resulting from a change in current Revenue Commissioners' guidance in relation to PPP projects or a Change in Law pursuant to this Agreement,

provided that, in any Contract Year, the aggregate of such deduction shall not exceed [€[•] ([•] Euro)] and that such deduction shall not apply to the extent that the Revenue Commissioners have otherwise recouped same from PPP Co.

**Comment: Such a warranty is unusual and should only be requested in exceptional circumstances.**

#### **45A VALUE ADDED TAX**

##### **45A.1 Exclusive of VAT**

All amounts stated to be payable by either party under this Agreement shall be exclusive of any VAT properly chargeable thereon.

##### **45A.2 Payment of VAT**

Each party shall pay to the other party any VAT properly chargeable to it in respect of any supply made to it under this Agreement provided that it shall first have received from the other party a valid VAT invoice in respect of that supply which complies with the requirements of Section 17 of the Value Added Tax Act, 1972 and any related regulations made by the Revenue Commissioners relating to the issue of invoices.

##### **45A.3 Ruling from the Revenue Commissioners**

If either party, (the "First Party") shall consider that any VAT which the other party, (the "Second Party") claims to be properly chargeable in respect of a supply under this Agreement is not in fact properly so chargeable, the First Party shall be entitled to require the Second Party to obtain a ruling from the Revenue Commissioners as to the VAT (if any) properly so chargeable. The Second Party shall forthwith request the Revenue Commissioners for such a ruling and both the First Party and the Second Party shall at all times use their best endeavours to facilitate such ruling and in dealing with all related matters under Clauses 45A.4, 45A.5, 45A.6 and 45A.7. In the event that the Revenue Commissioners rule that the relevant VAT is chargeable the First Party shall bear the costs incurred by both parties in connection with the Revenue Commissioners' ruling on the matter, provided however, in the event that the Revenue Commissioners rule that the relevant VAT is non-chargeable, the Second Party shall bear the costs incurred by both parties in connection with the Revenue Commissioners' ruling on the matter.

##### **45A.4 Procedures for Obtaining a Ruling from the Revenue Commissioners**

The following further provisions shall apply in respect of the application for a ruling in accordance with Clause 45A.3 (Ruling from the Revenue Commissioners):

- (a) prior to submitting its request for such a ruling and any further communication to the Revenue Commissioners in connection with the obtaining of the ruling, the Second Party shall first obtain the agreement of the First Party to the contents of such request and any such further communication (such agreement not to be unreasonably withheld or delayed);
- (b) the Second Party shall provide to the First Party copies of all written communications received from the Revenue Commissioners in connection with the application for a ruling as soon as practicable after receipt; and

- (c) the Second Party shall use all reasonable efforts (including without limitation the provision of such additional information as the Revenue Commissioners may require) to obtain such a ruling as soon as reasonably practicable following the initial request.

#### **45A.5 Obligation to Pay on Receipt of Ruling**

If a ruling is required by the First Party under Clause 45A.3 (Ruling from the Revenue Commissioners), the First Party shall not be obliged to pay the VAT so claimed by the Second Party unless and until a ruling is received from the Revenue Commissioners which states that a sum of VAT is properly so chargeable. In the event of the receipt of a ruling which states that a sum of VAT (the "VAT Sum") is properly so chargeable, then subject to Clause 45A.6 (Disagreement) and Clause 45A.7 (Further Provisions) and provided that the First Party shall first have received a valid VAT invoice (as described in Clause 45A.2) (Payment of VAT) which states the VAT Sum to be the amount of VAT chargeable to the First Party, the First Party shall pay the VAT Sum to the Second Party together with any penalties or interest thereon.

#### **45A.6 Disagreement**

In the event that the First Party disagrees with any ruling obtained pursuant to Clause 45A.3 (Ruling from the Revenue Commissioners) by the Second Party from the Revenue Commissioners, then the Second Party (provided that it is indemnified to its reasonable satisfaction against all costs, penalties, interest and expenses which it may incur in relation thereto) shall take such action and give such information and assistance to the First Party as the First Party may require to challenge such ruling or otherwise to resist or avoid the imposition of VAT on the relevant supply.

#### **45A.7 Further Provisions**

The following further provisions shall apply in the event that the First Party shall exercise its rights under Clause 45A.6 (Disagreement):

- (a) the action which the First Party shall be entitled to require the Second Party to take shall include (without limitation) contesting any assessment for VAT or other relevant determination of the Revenue Commissioners before the Appeal Commissioners or court of competent jurisdiction and appealing any judgment or decision of the Appeal Commissioners or such Court;
- (b) in the event that the Second Party shall be required to pay to or deposit with the Revenue Commissioners a sum equal to the VAT interest or penalties assessed or assessable as a condition precedent to its pursuing any appeal, the First Party shall, at its election, either pay such sum to the Revenue Commissioners on behalf of the Second Party or on receipt of proof in a form reasonably satisfactory to the First Party that the Second Party has paid such sum to or deposited such sum with the Revenue Commissioners the First Party shall pay such sum to the Second Party;
- (c) save as specifically provided in Clause 45A.7(b) and provided that the Second Party is indemnified against all interest or penalties which it may incur in connection hereto, the First Party shall not be obliged to pay to the Second Party any sum in respect of the VAT in dispute or in respect of VAT on any further supplies made by the Second Party to the First Party which are of the same type and raise the same issues as the supplies which are the subject of the relevant dispute unless and until the final outcome of the relevant dispute is that it is either determined or agreed that VAT is properly chargeable on the relevant supply or supplies; and
- (d) the Second Party shall account to the First Party for any costs awarded to the Second Party on any appeal (to the extent that such costs have been discharged by the First Party), shall account for any sum paid to or deposited with the Revenue Commissioners in accordance with Clause 45A.7(b) which is repayable to the

Second Party and for any interest to which the Second Party is entitled in respect of such sums.

## **CROSS REFERENCES**

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

- Clause 53 (Effect on Termination)

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

- F5 (Tax Assumptions)
- F6 (General Tax Changes)