

# COMPILATION OF PPP TERMS AND CONDITIONS OF CONTRACT

## PUBLIC SECTOR VERSION

### CLAUSE 47: INDEMNITIES

#### DBFOM CONTRACT

#### DBFM CONTRACT

#### DBF CONTRACT

#### DBOM CONTRACT

#### DBM CONTRACT

#### OMF CONTRACT

#### O&M CONTRACT

## INTRODUCTION

Indemnities are agreements by one party to take responsibility for claims made against the other, sometimes also for losses suffered by the other. The Core Contract below contains broad indemnities in favour of the Authority, we note where they may have to be narrowed in some cases. While the Core Contract does not include any indemnity on the Authority's part, sometimes the Authority gives indemnities to the PPP Co.

The indemnity clause also sets out procedures for how claims that the indemnity catches are to be defended.

## SOPC3 GUIDANCE

*SOPC3 provides the following commentary regarding indemnities:*

### **23.3 INDEMNITIES**

**23.3.1** *The Authority will want to ensure the Contract requires the Contractor to indemnify the Authority against certain costs and the Contractor will make provision for such contingent liability in its bid price.*

**23.3.2** *The general principle in civil procurement is that there should be no limit on indemnities provided to the Authority. This principle can be overridden, however, if commercial necessities demand. In PFI projects there will be restricted instances where the Authority should consider limiting the scope or amount of the indemnity, as set out in paragraph 23.3.4 below.*

**23.3.3** *An analysis of the limits on liabilities under the Contract will be part of the assessment by the Authority of the strength of its counterparty. The existence and extent of any indemnity should be considered in conjunction with other obligations imposed on the Contractor and Sub-contractor (e.g. under collateral warranties). In this context Section 23.6 (Damages Claims) [of the SoPC3 Guidance] is relevant. The levels of insurance in respect of any likely claim are also relevant in the consideration of what an appropriate limit is.*

**23.3.4** *Broadly, there are four heads of liability that the Authority will be concerned to be indemnified against if the liability arises as a result of the Contractor's operations. These are:*

- death and personal injury;
- property damage;
- breach of statutory duty; and
- third party claims.

The Contractor (and the Senior Lenders) will be particularly concerned with the potential scope of third party claims<sup>1</sup> or claims relating to Authority Property. Therefore the Authority should consider the value for money implications of seeking an uncapped indemnity from the Contractor in this respect<sup>2</sup> (particularly bearing in mind the extent or potential extent of Authority Property in the context of the project). The Contractor's liability in respect of the other heads of claim described above should, however, not generally be capped.

**23.3.5** The Authority should not generally use the indemnity provisions in the Contract as an additional layer of protection for specific remedies set out in the Contract. For example, if the deductions being made to the Unitary Charge under the performance mechanism are a genuine reflection of the losses that the Authority will incur as a result of the Contractor's non-performance, the Authority should not generally seek to rely on the indemnity as an additional or alternative means of claiming against the Contractor in respect of that loss.

**23.3.6** Given the project specific nature of many of the employment issues that arise on projects no guidance can be given on either employment indemnities or issues arising out of the Transfer of Undertakings (Protection of Employment) Regulations 1981 SI No. 1794, save that they are appropriate in some cases.

**23.3.7** The Authority may be faced with a request for a reciprocal indemnity from the Contractor. A general indemnity from the Authority should not be offered in response to such a request. If the request relates to possible breach of the Authority's obligations under the Contract, this should be dealt with under Compensation Events (see Section 28.5.1 [of the SoPC3 Guidance]); and if the request relates to acts of the Authority during a Step-In this is dealt with separately as part of any Step-In arrangements (see Section 28.5.1[of the SoPC3 Guidance]). Exceptionally an Authority may be faced with project specific issues which require it to offer a reciprocal indemnity, in which case the Authority should ensure that the indemnity is limited to the specific issue.

**23.3.9** This clause will also need to deal with:

- giving notice of claims (stating in reasonable detail the nature of the matter and the amount claimed). This will enable the proceedings to be contested before any judgment in respect of such proceedings is given;
- taking any action insurers may request to dispute the matter or enforce rights against any person;
- the exclusive conduct of the proceedings by the party giving the indemnity although it may be that certain politically sensitive issues would require the Authority to control proceedings which will require specific agreement; and
- there being no admission of liability or settlement of the matter without the consent of the indemnifying party.

<sup>1</sup> The Authority should consider whether or not it is appropriate to exclude consequential loss from the scope of the indemnity provisions. This approach has been adopted in the NHS sector, although in other sectors (e.g. transport) the potential for claims from third parties in relation to consequential loss may be greater.

<sup>2</sup> For example, liabilities relating to environmental risk will typically be capped for value for money reasons.

## CORE CONTRACT DRAFTING

### 47. INDEMNITIES

#### 47.1 PPP Co's Indemnities

The PPP Co hereby undertakes at all times to indemnify and hold harmless on demand the Authority and the Authority's officers, consultants, contractors, agents, servants and/or employees (each an "Indemnified Person") from and against all and any Claim and/or Loss which may arise out of, or in the course of the Project or the performance of or failure to perform directly or indirectly by or for and on behalf of the PPP Co any obligations under this Agreement and, without prejudice to the generality of the foregoing:

**Comment: The word "the Project" make this a very broad indemnity, covering, for example, payments the Authority has to make to advisers, and even, on a literal reading, payments to the PPP Co under the contract. If these words are retained, it is likely that more exceptions will have to be added to 47.2.**

- (a) as a result of any act or omission which invalidates any of the insurances required by this Agreement provided that, to the extent that any of the insurances required by this Agreement are invalidated by an Indemnified Person, such Indemnified Person shall not be entitled to the benefit of this Clause 47.1(a); or
- (b) as a consequence of any design, article or material relating to, or used in connection with the Project or the operation or use thereof constituting an infringement of patent, copyright, trademark, design or other proprietary right or a breach of any obligation of confidentiality owed to any person; or
- (c) the failure by PPP Co to provide the level of performance specified or required by this Agreement and/or as a consequence of the breach by PPP Co of any provision of this Agreement and/or any Required Document and/or as a consequence of any Event of Default; or
- (d) as a consequence of the Authority exercising its rights under Clause 47.4(d) (Conduct of Claims Subject to PPP Co's Indemnities); or
- (e) as a result of any loss or damage caused by or suffered by any User of the [Project Facility].

**Comment: It may be appropriate to include an express reference to environmental damage, defined as follows in the Accommodation Contract: "any injury or damage to persons, living organisms, premises or other property or any pollution or impairment of the environment resulting from the discharge, emission, presence, escape or migration of any substance, energy, noise or vibration".**

Provided that the PPP Co shall not be liable to indemnify any Indemnified Person under this Clause 47.1 (PPP Co's Indemnities) and shall not have any other liability under any other indemnity given under this Agreement in respect of a particular Loss or Claim to the extent to which such Loss or Claim:-

- (i) arises as a result of the negligence or wilful misconduct of any Indemnified Person; or
- (ii) results from a breach or failure to perform by any Indemnified Person of the Authority's obligations under this Agreement; or
- (iii) arises as a consequence of the PPP Co acting in accordance with the instructions of any Indemnified Person; or
- (iv) relates to the loss of profit or opportunity cost; or

(v) [not used]

**Comments: The reference here is to business interruption insurance.**

(vi) arises out of:

- (A) agreements entered into by the Authority prior to the Effective Date, of which the PPP Co is not aware and which have not been disclosed in the Disclosed Data; or
- (B) agreements entered into by the Authority after the Effective Date to which the PPP Co is not a party,

provided that nothing contained in this Clause 47.1(vi) shall exclude the PPP Co's liabilities hereunder in respect of Losses or Claims arising under any agreements contemplated by the provisions of this Agreement; or

- (vii) is suffered or incurred by the Indemnified Person in connection with the monitoring of the PPP Co under this Agreement, provided however that such Loss or Claim is not caused by any breach or failure to perform by the PPP Co of this Agreement and/or any of the Project Documents; or
- (viii) such Loss or Claim is in respect of costs incurred by the Authority in employing the Authority's Representative and discharging the costs and expenses associated with such employment (other than as contemplated by this Agreement and/or arising as a result of the breach or failure by PPP Co to perform its obligations under this Agreement and/or the Project Documents); or
- (ix) arises as a result of any act or omission occurring after the end of the Contract Period; or
- (x) arises as a result of a breach by the Authority of its obligations pursuant to public procurement law or of any other statutory duty in respect of the Project except to the extent to which such breach arises as a result of the breach or failure by PPP Co to perform its obligations under this Agreement and/or the Project Documents; or
- (xi) arises as a result of or in connection with the discharge or performance by any Indemnified Person of any of the Authority's obligations and functions under this Agreement except to the extent to which such Loss or Claim is not caused by any breach or failure by the PPP Co to perform its obligations under this Agreement and/or the Project Documents.

**Comment: Other potential exclusions are :**

- costs before contract;
- consequences or relief events and force majeure;
- consequences of Authority acts outside the agreement;
- consequences of agreements with third parties (of which the PPP Co is not aware).

#### 47.2 Savings

The PPP Co's liability to the Authority arising under any indemnity in this Agreement shall be without prejudice to any other right or remedy available to the Authority and shall be without limitation to any indemnity by the PPP Co under any other provision of this Agreement.

#### 47.3 Mitigation

In respect of any Loss which is the subject of any Claim under Clause 47.1 (PPP Co's Indemnities) which is suffered or incurred by the Authority, the Authority shall take all reasonable steps to minimise

such Loss.

#### 47.4 Conduct of Claims Subject to the PPP Co's Indemnities

- (a) If the Authority receives any notice, demand, letter or other document concerning any Claim from which it appears that the Authority is or may become entitled to indemnification under this Agreement, the Authority shall give notice in writing to the PPP Co as soon as reasonably practicable.
- (b) Subject to the following provisions of this Clause 47.4, on the giving of a notice pursuant to Clause 47.4(a), the PPP Co shall be entitled to and shall resist the Claim in the name of the Authority at its own expense and shall have the conduct of any defence, dispute, compromise or appeal of the Claim and of any incidental negotiations, and the Authority will give the PPP Co all reasonable co-operation, access and assistance for the purposes of considering and resisting such Claim.
- (c) With respect to any Claim being resisted by the PPP Co in accordance with Clause 47.4(b):
  - (i) the PPP Co shall keep the Authority fully informed and consult with it about the conduct of the Claim;
  - (ii) to the extent that the Authority is not entitled to be indemnified by the PPP Co for all of the liability arising out of the act or omission which is the subject of the Claim, no action shall be taken pursuant to Clause 47.4(b) which shall increase the amount of any payment to be made by the Authority in respect of that part of the Claim which is not covered by the indemnity from the PPP Co; and
  - (iii) the PPP Co shall not pay or settle such Claim without the consent of the Authority (such consent not to be unreasonably withheld).

**Comment: There may be a monetary threshold, so that small claims can be settled without the Authority's consent.**

- (d) Subject to complying with the provisions of the relevant Insurances, the Authority shall be free to pay or settle any Claim on such terms as it may, in its absolute discretion, think fit and without prejudice to its rights and remedies under this Agreement (including, without limitation, Clause 47.1 (PPP Co's Indemnities)) if:
  - (i) within [●] ([●]) Working Days of the issue date of the notice from the Authority under Clause 47.4(a) the PPP Co fails to notify the Authority of its intention to dispute the Claim; or
  - (ii) the PPP Co fails to comply in any material respect with the provisions of Clause 47.4(c).
- (e) Subject to complying with the provisions of the relevant Insurances, the Authority shall be free at any time to give notice to the PPP Co that it is taking-over the conduct of any defence, dispute, compromise or appeal of any Claim subject to Clause 47.4(b) or of any incidental negotiations. Upon receipt of such notice the PPP Co shall promptly take all steps necessary to transfer the conduct of such Claim to the Authority and shall provide to the Authority all reasonable co-operation, access and assistance for the purposes of considering and resisting such Claim. If the Authority gives any notice pursuant to this Clause 47.4(e), then the PPP Co shall be released from its indemnity in respect of such Claim save where such notice was given as a consequence of the failure of the PPP Co, in the opinion of the Authority (acting reasonably), to deal properly with any such Claim.

## 47A. CONDUCT OF CLAIMS AGAINST THIRD PARTIES

### 47A.1 Conduct of Claims

- (a) Subject to the prior consent of the Authority (such consent not to be unreasonably withheld, provided that the withholding of consent by the Authority on grounds of public interest shall constitute reasonable grounds for so withholding), the PPP Co may if necessary bring any action against any person in the name of the Authority, provided that the PPP Co shall indemnify and keep indemnified the Authority against any Loss or Claim arising out of any such action.
- (b) With respect to any action brought under Clause 40.1(a) and without prejudice to any terms which the Authority may require in accordance with such Clause 40.1(a):
  - (i) the PPP Co shall keep the Authority fully informed about the conduct of any such action:
  - (ii) the PPP Co shall consult with the Authority about the conduct of any such action and shall take account of the requirements of the Authority in the conduct of such action; and
  - (iii) the PPP Co shall not settle any such action without the consent of the Authority.
- (c) For the avoidance of doubt, nothing in Clause 40.1(a) shall affect:
  - (i) any right or remedy of the Authority to make or recover any Claim against any person for damage suffered by the Authority, its agents or contractors (other than the PPP Co) or sub-contractors of any tier or the employees of any of them; or
  - (ii) any right of the PPP Co to make or recover any Claim against any person (other than the Authority) for damage suffered by the PPP Co.

## KEY DEFINITIONS – USED IN CLAUSE 47 CORE CONTRACT DRAFTING

“Claim” means any claim, demand or proceeding.

“Loss” means any loss, damage, cost, expense, charge, fee or liability.

## NRA MODEL CONTRACT DRAFTING

**Comment: The NRA Model Contract includes the following Authority indemnity and disclaimer:**

### [•].5 Authority’s Indemnities

The Authority shall indemnify and keep indemnified the PPP Co in respect of:

- (a) any Loss or Claim resulting from any negligent act or omission or wilful default of the Authority, its agents (including, for the avoidance of doubt, the Authority’s Representative) or employees (not being directly or indirectly employed by, or contracted with, the PPP Co) save in respect of:

- (i) any Loss or Claim to be borne by the PPP Co in accordance with Part [●] of Schedule [●] (Land Issues, Roads and Orders) or which arises out of or in connection with any measures taken or which ought to have been taken by the PPP Co against or in connection with Protestors or Trespassers; or
- (ii) any matter referred to in Clause [●] (Indemnity); or

**Comment: This is a PPP Co indemnity in relation to employee claims.**

- (iii) any Loss or Claim arising from any inaccuracy, error, omission, unfitness for purpose, defect or inaccuracy of any kind whatsoever in the Disclosed Data or material referred to in Clause [●] (Disclaimers) (for the avoidance of doubt, whether or not arising from any negligence on the part of the Authority, the Local Authorities, their respective advisers, consultants, servants, contractors and/or agents); or
  - (iv) acts or omissions occurring prior to the Commencement Date; and
- (b) any Claim made by any person in respect of any works of accommodation, other than any Accommodation Works which the PPP Co has performed or agreed to perform whether pursuant to any requirement of this Agreement or otherwise; and
  - (c) any Loss which is to be borne by, or Claim made against, the Authority in accordance with Clause [●] (Force Majeure); and
  - (d) any Claim or Loss contemplated by Clause [●] (Claims for Injurious Affection).

[●].6 Disclaimer

Save as expressly provided in this Agreement, the Authority (save in respect of its contractual liability for a breach of its obligations under this Agreement), the Local Authorities (but only to the extent of the Disclosed Data) and in each case, their respective advisers, consultants, servants, contractors and/or agents shall not under any circumstances be liable to the PPP Co, whether in contract, tort, by statute or otherwise and whether or not arising from any negligence on the part of the Authority, the Local Authorities, their respective advisers, consultants, servants, contractors and/or agents, for any Claim or Loss of any person arising out of, or in the course of, or in connection with, the Project.

[●].7 Conduct of Claims Subject to Authority's Indemnities

- (a) If the PPP Co receives any notice, demand, letter or other document concerning any Claim from which it appears that the PPP Co is or may become entitled to indemnification under this Agreement, the PPP Co shall give notice in writing to the Authority as soon as reasonably practicable.
- (b) Subject to the following provisions of this Clause [●].7, on the giving of a notice pursuant to Clause [●].7(a) the Authority shall be entitled to resist the Claim in the name of the PPP Co at its own expense and to have the conduct of any defence, dispute, compromise or appeal of the Claim and of any incidental negotiations, and the PPP Co will give the Authority all reasonable co-operation, access and assistance for the purpose of considering and resisting such Claim.
- (c) With respect to any Claim being resisted by the Authority in accordance with Clause [●].7(b):
  - (i) the Authority shall keep the PPP Co fully informed and consult with it about the conduct of the Claim;
  - (ii) to the extent that the PPP Co is not entitled to be indemnified by the Authority for all of the liability arising out of the act or omission which is the subject of the Claim, no action shall be taken pursuant to Clause [●].7(b) which shall increase the amount of any payment to be made by the PPP Co in respect of that part of the Claim which is not covered by the indemnity from the Authority; and
  - (iii) the Authority shall not pay or settle such Claim without the consent of the PPP Co, such consent not to be unreasonably withheld or delayed.
- (d) The PPP Co shall be free to pay or settle the Claim on such terms as it may in its absolute discretion think fit and without prejudice to its rights and remedies under this Agreement if:

- (i) within 20 (twenty) Working Days of receipt of the notice from the PPP Co under Clause [●].7(a) the Authority fails to notify the PPP Co of its intention to dispute the Claim; or
- (ii) the Authority fails to comply in any material respect with the provisions of Clause [●].7(c).

## ACCOMMODATION CONTRACT DRAFTING

**Comment:** The Accommodation Contract drafting in relation to conduct of claims differs from the above, in emphasising the role of the insurer. This reflects the reality of how the claim will be handled.

### [●].6.2 Conduct of claims

In the event of a claim being made or threatened against an Indemnified Party in respect of any of the matters referred to in this Clause [●] or any other indemnity under this Agreement:

- [●].6.2.1. the Indemnified Party and the Parties shall have full regard for the requirements of any relevant insurer;
- [●].6.2.2. the Indemnified Party shall allow any relevant insurer to defend, settle or compromise the relevant claim;
- [●].6.2.3. where, pursuant to Clause [●].6.2.2 [above], a relevant insurer does elect to defend, settle or compromise a claim made or threatened against an Indemnified Party, the Indemnifying Party shall:
  - [●].6.2.3.1. on demand indemnify and hold harmless the Indemnified Party against all claims, costs, demands, liabilities and expenses whatsoever (including legal expenses on an indemnity basis) arising as a result; and
  - [●].6.2.3.2. provide to the Indemnified Party at all times as full information as is practicable concerning matters associated with and progress concerning the relevant claim;
- [●].6.2.4. where either there is no relevant insurer or a relevant insurer elects not to (or does not elect to) defend, settle or compromise a claim made or threatened against an Indemnified Party, the Indemnified Party, if it chooses to defend, settle or compromise the claim itself, shall do so with due diligence and shall consult with the Indemnifying Party;
- [●].6.2.5. where an Indemnified Party defends, settles or compromises a claim made or threatened against it, the Indemnifying Party shall on demand indemnify and hold harmless the Indemnified Party against all claims, costs, demands, liabilities and expenses whatsoever (including legal expenses on an indemnity basis) arising out of and reasonably incurred in connection with the Indemnified Party so doing subject to its obligation in Clause [●].

## CROSS REFERENCES

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

- Clause 3 (Effectiveness of this Agreement)
- Clause 11 (Monitoring of Performance)
- Clause 53 (Effect of Termination)

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

- B14 (Claims against the Authority)
- C19 (Other Facilities)