

COMPILATION OF PPP TERMS AND CONDITIONS OF CONTRACT

PUBLIC SECTOR VERSION

CLAUSE 48: INSURANCE

DBFOM CONTRACT

CONCESSION CONTRACT

DBM CONTRACT

INTRODUCTION

These provisions relate to the requirement to obtain insurance, the form that the insurance policies must take and the procedure for dealing with rising insurance costs, or insurance becoming unavailable.

We have included the entirety of the insurance schedule from the Core Contract which sets out the details of the required insurances, such as the level of excess and the scope of cover. These provisions will vary from project-to-project and from year-to-year but the Core Contract contains all the requirements that we would expect to see in an accommodation project in 2007.

SOPC3 GUIDANCE

24. INSURANCE

24.1 INTRODUCTION

24.1.1 Traditionally, central government has chosen not to take out commercial insurance against most risks retained under conventional procurement techniques as the premiums payable have not been seen to represent good value for money compared to self-insurance.

24.1.2 Under PFI a greater range of risks is transferred to the private sector. The financing arrangements behind most Contracts and the need to ensure continuity of service means that self-insurance for the full range of risks is not a practical option for the Contractor. Indeed insurance requirements of the Senior Lenders will usually be extensive, although the Authority should not rely on them. It is essential for the Authority to seek professional insurance advice on what requirements should be imposed on the Contractor at an early stage in the procurement process (before issuing the ITN) and during negotiations.

24.1.3 The main issues are whether and the extent to which the Authority should require the Contractor to take out and maintain certain insurances as a means of managing particular risks, what should happen if any required insurance becomes unavailable and ensuring that the proceeds of any claim under any required insurance are used correctly by the Contractor.

24.2 AUTHORITY'S REQUIREMENTS

24.2.1 In order to optimise risk transfer, the Authority should allow the Contractor to manage its

insurance arrangements as far as possible. In general terms, the Contractor will be expected to insure in accordance with good industry practice¹.

24.2.2 There will be a number of required insurances, however, which the Authority will want to know are being taken out and maintained by the Contractor, to ensure that insurance proceeds are available to cover certain types of claims. Such required insurances should include: third party liability claims, construction all risks, material damage claims and employer's liability insurance.

24.2.3 The Contractor should only be required to take out insurances from which the Authority derives a benefit. In respect of those risks that the Contractor is required to insure against, the Authority should ensure that the uninsurability protection² does not extend to cover risks if it would have the effect of undermining the essence of the commercial principle that the risk being covered is a risk that the Contractor is required to manage. For example, if the Contractor is given uninsurability protection in respect of professional indemnity or nonviolation³ insurance and cover subsequently becomes uninsurable, the Authority may be required to insure the Contractor against claims relating to the Contractor's (or its subcontractors') negligence. Authorities should therefore ensure that any professional indemnity and non-vitiating insurances are carved out from the uninsurability protection provided under Clause 24.8 (Risks that become Uninsurable).

24.2.4 The Senior Lenders will require the Contractor to take out delay in start-up and business interruption insurance. The effect of these insurances is to ensure that during any period of reinstatement of the Project the Contractor will be able to fund its debt service obligations under the Senior Financing Agreements. If such insurances become unavailable in the market and material damage to the Project subsequently arises, the Contractor may (depending on the period of reinstatement) default under the terms of the Senior Financing Agreements. Without the benefit of uninsurability protection for delay in start-up and business interruption insurances, Senior Lenders are likely to require contingencies to be put in place by the Contractor to cover such eventualities. In such circumstances the Authority should, on value for money grounds, extend uninsurability protection in the Contract to cover business interruption insurance⁴ and, in limited circumstances, delay in start-up insurance⁵. The Authority should not, however, allow uninsurability protection to be given in respect of any advance loss of profits insurance that the Contractor may take out.

24.2.5 Insurance requirements should reflect the degree of risk transfer, the ability of the Contractor to make the premium payments (relative to the size of the risks), value for money considerations and the specifics of the Project. There are, of course, standard insurances that are required during the construction and operating phases of all projects although the sums insured and deductibles will clearly be different. The scope of insurances (the risks,

¹ What constitutes good industry practice should be part of the advice sought by the Authority from its professional insurance adviser (see Section 24.1.2 above).

² See Section 24.8 (Risks that become Uninsurable).

³ See Section 24.2.8 below.

⁴ See footnote 35 below.

⁵ Generally, the delay in start-up policy (as distinct from business interruption insurance) will be placed at financial close, will be non-cancellable by the insurers and will cover the entire construction period. In some projects, however, the construction period may be so long that the Contractor is unable to place a delay in start-up policy at financial close that covers the entire construction period. Only in such rare circumstances is it appropriate for delay in start-up insurance to benefit from the uninsurability protection.

the exclusions, the endorsements, the amounts of cover and the deductibles) will vary from project to project and sector to sector⁶. The Authority and its advisers must focus on the value of the risks to be insured when assessing what is the appropriate level of insurance to require.

24.2.6 If the Authority wishes to increase the limits or scope of the insurances during the life of the Contract, then this should be treated as an Authority Change (see Section 12.3 (Authority Changes)).

24.2.7 As central Government often self-insures, there should be no requirement for any insurance to cover those risks retained under the Project by a central Government Authority.

It is, however, reasonable to seek third party public liability insurance where appropriate (this should be checked with the relevant policy unit within the Authority). The Authority should protect its position by being a co-insured for its own interests (where it has an insurable interest) and requiring its interests to be noted as appropriate on the insurances taken out by the Contractor. This should be acceptable to the Contractor⁷.

24.2.8 The Authority should consider the value for money benefits of requiring the Contractor to take out “non-vitiation” protection in respect of certain required insurances. Non-vitiation protection allows the Authority to claim as a co-insured under a policy even if the insurer would be able to avoid a claim made by the Contractor on the basis that the Contractor, for example, withheld material or information from the insurer (e.g. the Contractor does not make the insurer aware that it is intending to use highly flammable substances during the construction period). The Senior Lenders may also require nonvitiation cover. However, absence of such cover should not be covered by the protection given to the Contractor in respect of unavailability of insurance cover⁸.

24.3 MECHANISM TO INCREASE INSURED AMOUNTS

24.3.1 It is difficult to place insurance to cover the full life of a Contract. Aside from the construction phase, policies are often renewable annually. There must be a mechanism to ensure that the insured amount increases over the duration of the Contract in order to keep pace with

⁶ Salient information as to the scope of the required insurances specified in Section 24.2.2 should be included within the schedules to the Contract referred to in paragraphs (a) and (b) of Clause 24.2 (Insurance).

⁷ Where possible, the Authority should be a co-insured on the Contractor’s insurance policies. This is a much stronger position for the Authority than being named as “loss payee” under the policy, as a co-insured can make the claim itself and is not (as in the case of a “loss payee”) reliant on the insured party making the claim.

⁸ See Section 24.8 (Risks that become Uninsurable).

⁹ This will not be necessary where the insured amount is an unspecified amount (e.g. the reinstatement cost of a property) rather than a specific sum (as is usually the case for third party liability cover).

¹⁰ This risk relates not only to increased premia but also to increased levels of deductibles. See Section 24.8.1.

¹¹ See Section 24.8 (Risks that become Uninsurable).

¹² See Clause 24.6(c)(ii)(D).

¹³ If the Authority decides to reinstate with a lower level of service requirement following an insured event, the Unitary Charge should remain the same unless compensation is paid to the Contractor. The Authority should also be aware of the fact that a decision not to reinstate fully may impact upon the amount of insurance proceeds recoverable.

¹⁴ This is particularly important if the Contract is terminated for Contractor Default and the Authority elects (and is able) to retender the Contract.

¹⁵ See Section 24.2.4.

inflation⁹. This is commonly done through an index linking mechanism. Alternatively it may be by agreement on expiry of policies.

24.3.2 Index-linking can cause a problem for liability insurance if it cannot be bought in odd amounts (i.e. £50, £51.15, £52.53 etc) although this is normally dealt with by rounding up annually to the nearest whole insurable amount.

24.3.3 The risk of increases in insurance costs should be borne by the Contractor¹⁰. Whilst there may ultimately be an indirect partial pass-through (e.g. via indexation and benchmarking (see Section 14.2 (Indexation) and Section 14.4 (Benchmarking) [of the SoPC3 Guidance]), the Contract should not include any provisions which expose the Authority to direct pass-through of such extra costs (save as described in Section 24.8 (Risks That Become Uninsurable) [below]). Increases in insurance premiums which result from Authority Changes (see Section 12.3 (Authority Changes) [of the SoPC3 Guidance]) should be taken into account in any price variations resulting from the change in Service. The Contractor should bear any premium increases resulting from any change in Service it proposes (see Section 12.5 (Contractor Generated Changes in Service) [of the SoPC3 Guidance]).

24.3.4 Notwithstanding the principles stated in Section 24.3.3 above, it does not represent best value for money if bidders price worst case scenarios for future insurance premium levels into their bids. HMT is currently considering ways in which this can be addressed and is working with consultees from the public and private sector to agree an appropriate mechanism for dealing with increases in insurance costs over the term of the Contract that are attributable to market movements. In the meantime, Authorities should refer to HMT Guidance on Insurance Issues and should contact HMT or PUK if they are facing requests from bidders for price protection in respect of insurances to be included in the Contract. In no circumstances should the Authority introduce benchmarking of insurance provisions into the Contract. It is intended that the proposed price protection mechanism will operate in addition to the uninsurability protection set out in the Contract¹¹ and that the uninsurability provisions will be amended to allow the Authority to claim that a risk has become uninsurable.

24.4 ENSURING THE QUALITY OF THE INSURANCES

24.4.1 The Contract should require that all insurances are placed through a reputable insurer of good standing. In practice financiers will ensure that insurances will be arranged by and placed with brokers and insurers approved by them (or that fall within a particular category) and on terms acceptable to them.

24.4.2 There is usually no need to limit the market within which the Contractor must insure the relevant risks (e.g. the worldwide market is not unusual).

24.5 CHANGES IN THE TERMS OF INSURANCE POLICIES

Insurers should inform the Authority of changes in the policy (see Clause 24.2(d) above).

24.6 REINSTATEMENT AND CHANGE OF REQUIREMENT AFTER INSURED EVENT

24.6.1 If an insured event occurs and certain Assets require replacement or reinstatement¹², the Authority may decide to change the service requirement. If it does so, the cost of reinstatement may be more or less than the cost of exact replacement. Clearly there is no problem where the cost is less. Where insurance proceeds do not cover the full reinstatement, and the additional cost is due to an Authority Change (and not underinsurance by the Contractor of the original asset), then the extra cost must be funded by the Authority in accordance with the change in Service mechanism (see Section 12.3 (Authority Change) [of the SoPC3 Guidance]).

24.6.2 Insurance should be available for full reinstatement and the Contractor should be required to negotiate insurance to reflect the fact that the Authority's requirements may change after an insurance events occurs and that it is possible that there will be a requirement for something other than full or exact reinstatement¹³.

24.6.3 In practice, the parties are likely to discuss and negotiate whether (and how) to reinstate the Project after the occurrence of an insured event. Accordingly, the Contract should set out provisions regarding how the parties will agree a plan for the reinstatement of the project. The Contract must be clear as to the remedy in the event of disputes over reinstatement.

24.6.4 The Authority has a clear interest in the application of any insurance proceeds received by the Contractor under the physical damage policies that are to be applied in reinstatement of the project. Although the Authority agrees a Reinstatement Plan with the Contractor, the Authority should also be concerned to ensure that that any insurance proceeds are utilised in accordance with the agreed Reinstatement Plan. Additionally, the Authority must ensure that upon termination of the Contract (either through natural expiry or early termination) the Authority receives the benefit of any insurance proceeds so that it can continue with the reinstatement of the project¹⁴.

24.7 APPLICATION OF INSURANCE PROCEEDS

24.7.1 The Contractor should always be obliged to reinstate the asset and the Service if an insurance event occurs. If the Authority does not require reinstatement, then any insurance proceeds should go to the Contractor but the Authority should be aware that this effectively results in a voluntary termination and the Authority will be obliged to make a full payout to the Contractor (see Section 20.5 (Voluntary Termination) [of the SoPC3 Guidance]), but deducting such amounts from the payment.

24.7.2 In some projects, Senior Lenders want to impose a project economic test to determine whether reinstatement will enable them to recover their outstanding debt in full. If the economic test shows that this is not possible, Senior Lenders prefer to "head for the hills" and appropriate the insurance proceeds instead of allowing reinstatement. This should not be a first resort for the Senior Lenders and there should be good reasons for the Authority to agree to the inclusion of an economic reinstatement test in the Contract. Senior Lenders should focus instead on ensuring that the amount insured under the advance loss of profits and business interruption insurances is sufficiently high or that there is sufficient contingency in the Contractor to deal with their concerns.

24.7.3 A project economic test should not be necessary where there is a low risk of total destruction of the asset (such as with a road or rail project, or a project that has a large number of geographically diverse sites). Where the risk exists (e.g. a single site project), the Authority may have to accept a project economic test but this should be based on a default senior loan life cover ratio so that Senior Lenders cannot abandon the Project if the test shows that debt service is achievable (even if there is a minimal amount of headroom). Certain projects include debt service cover ratios in an economic test. This is not recommended for inclusion in an economic test (as the debt service cover ratio contains only an annual "snapshot" of performance, which is not relevant here). There should be no need to specify a threshold amount of insurance proceeds below which the economic test should not be applied because the test should in any event only be applied in cases of total or near total destruction.

24.7.4 If the result of the project economic test allows the Senior Lenders to take the insurance proceeds or an amount equal to the outstanding Senior Debt (whichever is the lesser), the Contractor remains under an obligation to reinstate the asset. If, as is likely, it is not financially able to do so, it will be in breach of contract and the Authority will terminate for Contractor Default in the usual way (see Section 20.2 (Termination for Contractor Default) [of the SoPC3 Guidance]). The Authority can then rebuild the asset through a new competition.

24.8 RISKS THAT BECOME UNINSURABLE

24.8.1 *The Contract must address the situation where a risk required to be insured against (i.e. a risk covered by a required insurance) and which was previously insurable becomes uninsurable. The approach adopted concentrates upon the availability of insurance cover for a particular risk rather than the availability of cover upon particular terms or with particular levels of deductibles. The consequences of uninsurability (ranging from Contractor Default to the Authority accepting liability for occurrence of the event) will depend on the type of risk involved and whether either party was responsible for the uninsurability.*

24.8.2 *The Contractor should not be required to insure risks which become Uninsurable. The following clause should be included to reflect this principle.*

Nothing in this clause shall oblige the Contractor to take out insurance in respect of a risk which is Uninsurable.

If, however, a key insurance risk becomes Uninsurable, the Contractor will be in breach of Contract where it has caused the relevant insurance to be unavailable, which will give rise to a termination right for Contractor Default (see Section 20.2.2 (Events Leading to Termination) [of the SoPC3 Guidance]).

24.8.3 *Unavailability of insurance should not be at the sole risk of the Authority. If either:*

- *insurance becomes unavailable in respect of a risk which is a particular defined sector specific risk; or*
- *a particular risk usually covered by construction all risks, material damage business interruption (but not loss of profits)¹⁵ or statutory insurances (including employer's liability insurance) becomes uninsurable to the extent that the Contractor and other contractors operating in similar sectors shut down their operations as the means of managing the particular risk,*

then neither party should be entitled to terminate the Contract. If (in respect of the risk concerned) insurance becomes unavailable for reasons outside the control of the Contractor, then the parties should consider alternative approaches to the risk to consider if they can agree a means by which it can be managed. If, however, no agreement is reached and the risk reverts to the Authority then (subject to Section 24.8.4 below) the amount of the premium previously paid is deducted from the Unitary Charge. If the risk then occurs, the Authority can choose either to pay an amount equal to the insurance proceeds that would have been payable (in which case termination will not occur) or terminate the Contract and pay compensation equivalent to the amount payable on a force majeure termination to the Contractor. As sector specific risks should not apply to most projects, this approach will be limited to the second scenario outlined above in the majority of projects.

24.8.4 *The Contractor should not be obliged to continue to provide services under the Contract where third party liability cover has ceased to become insurable and the Authority and the Contractor are unable to agree how to manage that risk. In the event that third party liability insurance becomes unavailable for reasons that are outside of the control of the Contractor and the parties are unable to agree the means by which the risk should be managed by the Contractor, the Authority should be able to elect to either self-insure the risk or terminate the Contract and pay compensation to the Contractor equivalent to the amount payable on a Force Majeure termination. If it is agreed that the Contract should continue then the amount of the premium previously paid should be deducted from the Unitary Charge.*

24.9 CONTROL OF THE DEFENCE ON LITIGATION OF AN INSURED EVENT

24.9.1 *The Authority may wish to control the defence of any litigation against the Contractor which is likely to have implications for the Authority itself or wider Government. If the Authority is*

likely to become a co-defendant in the relevant litigation or a defendant in a number of similar litigations which will be based on the precedent in law set by the relevant litigation, it is likely to want to control the litigation from an early stage. This may involve prolonging litigation in order to establish a clear precedent instead of settling out of court.

Alternatively, the Authority may wish to settle the litigation as soon as possible for public policy reasons and, in such cases, these will override commercial considerations (this may be the case, for example, in prison and hospital projects).

24.9.2 *The Contractor's insurer will usually expect to be in control of any litigation which may lead to a claim under one of its policies. It will be reluctant to pay out for claims over which it has had no control of the defence. This might include claims which the Authority has settled out of court where the courts may have awarded a lesser amount had the action been fully pursued or claims which the insurer believes it could have settled out of court for a lesser amount than is awarded by the courts. The degree of control by the Authority which the insurer will accept should be examined on a project specific basis.*

24.9.3 *Generally, the Authority should expect to take back some liability for litigation costs if it wishes to insist on controlling such litigation. In practice, it is extremely difficult to determine what such liability should be. In principle, the Authority should be liable for any difference between what the insurer would have paid and the final amount settled or decided.*

It would be very hard to establish, however, what amount would have been an acceptable settlement to all parties (including the plaintiff) in either case outlined in Section 24.9.2. In practice, the Authority may find it is obliged to take on the majority, or even all, the relevant litigation costs in return for the right to control the defence.

CORE CONTRACT DRAFTING

48. INSURANCE

48.1 Insurance Cover

- (a) Subject to Clause 48.9 (Risks that Become Uninsurable), the PPP Co shall take out and maintain in force, or shall procure the taking out and maintenance in force, of the Insurances specified in Part 1 of [Clause 48 - Schedule] (Insurance) throughout the relevant stages of the Contract Period as set forth therein.
- (b) The PPP Co, subject to Clause 48.9 (Risks that Become Uninsurable) shall procure that the policies referred to at paragraphs 1.5 and 2.4 of Part 1 of [Clause 48 - Schedule] (Insurance) contain a provision indemnifying the Authority against any Claim made in respect of which the PPP Co is entitled to an indemnity.
- (c) The Insurances shall be:
 - (i) provided by Approved insurers (such Approval not to be unreasonably withheld or delayed); and
 - (ii) contain the terms, conditions (including without limitation) policy limits, sub-limits, attachments and endorsements as have been Approved (such Approval not to be unreasonably withheld) and set out in [Clause 48 – Schedule].
- (d) The Insurances, once taken out in accordance with the terms of this Agreement, shall not be assigned (other than pursuant to any of the Funding Agreements) or changed or replaced and no amendment, waiver, deletion, or addition to any of the provisions of the insurances or of any endorsements or attachments thereto shall be permitted and no rights of the PPP Co under the Insurances or to the proceeds thereof shall be assigned (other than pursuant to any of the Funding Agreements) unless the Authority's Representative, in his absolute discretion, agrees the insurer, the terms and conditions

of the Insurances and, where applicable, any assignment, change, replacement, amendment, waiver, deletion or addition thereto.

Comment: The absolute discretion provided for here may not be necessary.

- (e) Neither party shall take any action or fail to take any reasonable action, or (insofar as it is reasonably within its power) permit anything to occur in relation to it, which would entitle any insurer to refuse to pay any Claim (in whole or in part) under any of the Insurances, in which that party is an insured, co-insured or additional insured person. In the event that the Authority breaches its obligations pursuant to this Agreement, which breach solely and directly causes an increase in the cost of the Insurances, such increased costs shall be borne by the Authority.
- (f) As soon as practicable and in any event within [●] Working Days of the Commencement Date, the parties shall set up and at all times maintain the Joint Insurance Account.

48.2 Policies and Information Provided to Insurers

The PPP Co shall:

- (a) when requested by the Authority's Representative, provide copies of all information given to insurers and/or underwriters, either at the time of placing the policies or during the currency thereof, and procure and take all steps necessary to ensure that this information (and any held by third parties acting on the PPP Co's behalf) is retained for a period of not less than [●] ([●]) years after the end of the Contract Period;
- (b) furnish all insurance policies, placing slips, cover notes, and endorsements or attachments, and amendments and replacements of the same and other relevant documents (or copies certified in a manner acceptable to the Authority's Representative) to the Authority's Representative on request, together with evidence that the premiums payable thereunder have been paid and that the Insurances are in full force and effect; and
- (c) subject to Clauses [●] and [●] of the [insert applicable Funding Agreement] procure that the said original policies and the original of the documents referred to in this Clause 48.2 are held to the order of the Authority, whose prior consent shall be required for their release.

48.3 Rights of Subrogation, Non-Vitiation, Changes to Policy Provisions, Waiver of Disclosure Obligation and Notice of Cancellation

- (a) Subject to Clause 48.9 (Risks that Become Uninsurable) the Insurances required to be taken out and maintained shall:
 - (i) provide that the insurer waives any right to receive from the Authority disclosure of material information;
 - (ii) incorporate a non-vitiation/severability clause to the effect that all the provisions of the policies (except the sums insured/limits of liability) shall operate as if there were a separate policy for each named insured and that the non-compliance with any policy, term, condition or warranty or the non-disclosure and/or misrepresentation of material information by the PPP Co or any other co-insured will not affect the rights and/or interests of the Authority under the policies;
 - (iii) provide for a waiver of all insurers' rights of subrogation against the Authority and its servants and agents;
 - (iv) provide that no reduction in limits or coverage or increases in deductibles,

exclusions or exceptions shall be made to the policy without the prior consent of the Authority (not to be unreasonably withheld or delayed);

- (v) provide that all monies payable in respect of the policy shall be paid without deduction or set-off (howsoever and whensoever arising), unless such deductions or withholdings are required by Law; and
 - (vi) provide that the Insurances shall be primary to and not excess to or contributing with any other insurance cover maintained by the PPP Co or the Authority provided however that it is agreed that this term or the Authority does allow for the seamless layering of primary and excess layer policies.
- (b) All such policies of insurance shall provide for [●] ([●]) days notice to be given to the Authority prior to any cancellation, non-renewal or modification of any such policy.

48.4 Evidence of Renewal

Evidence of renewal in relation to the Insurances shall be obtained by the PPP Co from the insurer or the PPP Co's insurance broker, as and when necessary, and such evidence (or copies thereof certified in a manner acceptable to the Authority's Representative) shall be forwarded to the Authority's Representative as soon as possible. In the event that the terms of the Insurances to be renewed have not been finalised before the relevant renewal date, the PPP Co shall provide confirmation from the insurer or the PPP Co's insurance broker that the relevant Insurance cover shall remain in force (on terms no less favourable to the Authority) until such Insurance is renewed in accordance with the terms of this Agreement. In addition, the PPP Co shall forward a report to the Authority's Representative as soon as possible and in any event at least [●] ([●]) days before the relevant renewal date setting out details of the steps being taken by it to secure the relevant Insurances and shall set out in detail the extent of the cover (including, but not limited to, details of the terms, conditions, exclusions, deductibles and sums insured) proposed in respect of the renewal period.

48.5 Authority's Right to Insure

If the PPP Co fails or refuses to obtain or maintain in force any insurance required to be effected by it under the provisions of this Clause 48 (Insurance) or to provide the Authority's Representative with the renewal certificates in relation thereto (or copies thereof certified in a manner acceptable to the Authority's Representative) as and when required, the Authority shall, without prejudice to any of its rights under this Agreement or otherwise, have the right itself to procure such insurances, in which event any sums so paid by the Authority in this regard shall immediately become due and payable to the Authority by the PPP Co and shall be paid on demand. The Authority shall also be entitled to deduct such sums from any monies due or which may become due to the PPP Co.

48.6 Notification of Claims

- (a) The PPP Co shall promptly notify the Authority's Representative of all Claims involving injury or death or with a value in excess of [●] ([●]) Euro (Indexed) or circumstances which might result in such a Claim under any of the insurance policies referred to in this Clause 48 (Insurance) and the PPP Co shall keep the Authority's Representative informed, on a(n) [●] basis, of any action taken in relation to the Claim and/or of any information relevant to the Claim.
- (b) The PPP Co shall promptly notify the insurers of all Claims or circumstances which may give rise to a Claim as required by the relevant policy of insurance and shall provide to the insurer such further information, assistance and/or documentation as the said insurer may reasonably require.
- (c) The PPP Co shall maintain a register of all claims or circumstances that might result in a Claim and provide a copy to the Authority's Representative promptly on request.

48.7 Application of Insurance Proceeds – All Risks and Property Damage

- (a) Subject to Clause 48.7(d) and Clause 48.7(e) all proceeds paid by the insurer under the policies referred to at paragraphs 1.1 and 2.1 of Part 1 of [Clause 48 - Schedule] (Insurance) shall be paid into the Joint Insurance Account. Subject to Clause 48.7A (Economic Test), the said proceeds shall be applied to repair, reinstate and replace each part or parts of the Works and/or the [Project Facility] in respect of which the proceeds were received.
- (b) In the event that proceeds are to be paid by an insurer under the policies of insurance referred to in paragraphs 1.1 and 2.1 of Part 1 of [Clause 48 - Schedule] (Insurance) in respect of works which have been carried out and paid for by the PPP Co, the Authority shall upon request from the PPP Co submit a written notification to the insurer instructing such insurer to pay the proceeds directly to the PPP Co. In the event that the insurer does not comply with such notification and instead pays the relevant proceeds into the Joint Insurance Account, the Authority shall promptly pay such proceeds to the PPP Co.
- (c) Where a Claim is made or proceeds of insurance are received or are receivable under the policies of insurance referred to in paragraphs 1.1 and 2.1 of Part 1 of [Clause 48 - Schedule] (Insurance) and such Claims or proceeds are less than the sum of [●] ([●]) Euro (Indexed), upon request from the PPP Co, the relevant amount shall be paid directly to the PPP Co and not into the Joint Insurance Account.
- (d) Subject to Clause 48.7A (Economic Test) and Clause 48.1(e) (Insurance Cover), where a Claim is made or proceeds of insurance are received or are receivable under the policies of insurance referred to in paragraphs 1.1 and 2.1 of Part 1 of [Clause 48 – Schedule] (Insurance) and such Claim or proceeds exceed, or are expected to exceed, the sum of [●] ([●]) Euro (Indexed):
 - (i) the PPP Co shall deliver to the Authority's Representative, as soon as practicable and in any event within [●] ([●]) Working Days after the making of the Claim, proposals prepared by the PPP Co for the carrying out of the works necessary to repair, reinstate or replace the Works and/or the [Project Facility] (or part thereof) which are the subject of the relevant claim or claims. The proposals shall set out the proposed works and programme for the carrying out of such works required to repair, reinstate or replace the damaged works; and
 - (ii) without prejudice to the PPP Co's obligation to deliver proposals in accordance with Clause 48.7(d)(i), in the event that the underwriters of the policies referred to at paragraphs 1.1 and 2.1 of Part 1 of [Clause 48 - Schedule] (Insurance) so require, the PPP Co shall (without first seeking the Authority's Approval in accordance with Clause 48.7(e) but upon giving notice to the Authority) be entitled immediately to carry out the repair, reinstatement or replacement of the Works and/or the [Project Facility] (or part thereof) in respect of which insurance proceeds have been claimed or received for the purposes of avoiding or dealing with an Emergency and/or to make safe and/or prevent further damage to the Works and/or the [Project Facility] (or part thereof). On receipt, the relevant insurance proceeds shall be dealt with in accordance with Clause 48.7(b).
- (e) Subject to Clause 48.7(d)(ii), if the proposals prepared by the PPP Co pursuant to Clause 48.7(d)(i) are Approved, the PPP Co shall proceed with the carrying out of the proposed work in accordance with the proposed programme. In such event the proceeds paid into the Joint Insurance Account may be withdrawn by the Authority, acting without unreasonable delay, as required to enable it to make payments to the PPP Co in accordance with the terms of the contractual arrangements entered into for the carrying out of the work in accordance with the proposal prepared by it and/or to meet other costs and expenses of the PPP Co related to the undertaking of the necessary works of reinstatement and replacement. Upon the works being completed to the reasonable satisfaction of the Authority, the Authority's Representative shall, acting without unreasonable delay, permit withdrawal by the PPP Co of any balance held in the Joint Insurance Account, relating to loss or damage in respect of which the proceeds were paid, that had not been paid from the Joint Insurance Account together

with any interest accrued.

- (f) Where insurance proceeds are used, in accordance with this Agreement, to repair, reinstate or replace any part of the Works and/or the [Project Facility], the PPP Co shall carry out the work in accordance with the requirements of this Agreement so that on completion of the work, the provisions of this Agreement have been fully complied with.
- (g) The Authority agrees that unless the sums received from insurers are in respect of Claims made by the Authority itself or are Claims in respect of which the Authority is entitled to an indemnity under the policy, all sums will be paid immediately, and in any event, within [●] ([●]) Working Days of their receipt, into the Joint Insurance Account. The PPP Co hereby accepts and shall procure that the sums paid to it from the Joint Insurance Account are applied to repair, reinstate or replace those elements of the Works and/or the [Project Facility] in respect of which proceeds of insurance were required or are applied to reimburse the party who has already undertaken the repair, reinstatement or replacement.
- (h) After the repair, reinstatement and/or replacement work (as proposed by the PPP Co and Approved by the Authority's Representative) has been implemented to the reasonable satisfaction of the Authority's Representative and in accordance with Clause 48.7(f) the Authority shall (prior to the payment of compensation by the Authority pursuant to Clause 54 (Compensation on Termination)) permit the withdrawal by the PPP Co of excess sums in the Joint Insurance Account that are not required to be paid in respect of such repair, reinstatement and/or replacement work.

48.7A Economic Test

Comment: The provision for an economic test is project specific: it is likely to be a requirement for projects comprising a single asset which could be destroyed in a single occurrence. So, this provision might not be required in, for example, a road project or a large bundle of separate schools. The economic test is likely to match the financial covenants in the PPP Co's loan agreement.

If all of the Assets are destroyed or substantially destroyed in a single event and the insurance proceeds (when taken together with any other funds available to the PPP Co) are equal to or greater than the amount required to repair or reinstate the Assets, then PPP Co shall calculate the senior debt loan life cover ratio (on the assumption that the Assets are repaired or reinstated in accordance with Clause 48.7).

- (b) If the calculation referred to in Clause 48.7A(a) above shows that the senior debt loan life cover ratio (based on an assumption that the usage of the [Project Facility] is zero) is greater than or equal to [event of default level] then PPP Co shall be subject to the procedure set out in Clause 48.7 (Application of Insurance Proceeds).
- (c) If the calculation referred to in Clause 48.7A(a) above shows that the senior debt loan life cover ratio (based on an assumption that the usage of the [Project Facility] is zero) is less than [event of default level] then an amount equal to the lesser of:
 - (i) the insurance proceeds; and
 - (ii) the Base Senior Debt Termination Amount, or if any Additional Permitted Borrowing has been advanced, the Revised Senior Debt Termination Amount,

shall be released from the Joint Insurance Account to the PPP Co.

Comment: See Clause 54 (Compensation on Termination), for definition of these amounts.

- (d) If pursuant to Clause 48.7A(c) above, insurance proceeds are released from the Joint Insurance Account PPP Co shall be in breach of its obligations under this Agreement (and shall not be relieved of its obligations pursuant to Clause 48.7) unless it can demonstrate, to the satisfaction of the Authority, that it can carry out the works

necessary to repair, reinstate or replace the assets which are subject to the relevant Claims in accordance with Clause 48.7 above (Application of Insurance Proceeds) and within a reasonable timescale.

48.8 Application of Insurance Proceeds – Delay in Start-Up and Business Interruption

All proceeds paid by the insurer under the policies referred to in paragraphs 1.2 and 2.2 of Part 1 of [Clause 48 – Schedule] (Insurance) shall be paid into the Joint Insurance Account except to the extent contemplated herein. The proportion of such proceeds that covers any loss of Revenue may be paid directly into an account held by the PPP Co. Where proceeds are paid into the Joint Insurance Account, such proceeds shall be applied from the Joint Insurance Account in the manner agreed by the parties to compensate them for Losses in respect of which the proceeds were received. Where agreed by the insurers, such proceeds may be paid directly into separate accounts held by the Authority and the PPP Co respectively in the proportionate amounts due to each of them to compensate them for the Losses in respect of which the proceeds are to be applied. Any Dispute or failure to reach agreement arising out of this Clause 48.8 shall be referred to the Disputes Resolution Procedure.

48.9 Risks that become Uninsurable

- (a) Nothing in this clause shall oblige the PPP Co to take out insurance in respect of a risk which is Uninsurable.
- (b) If a risk usually covered by those insurances referred to in paragraphs 1.1 (Construction All-Risks), 1.2 (Delay in Start-Up) 1.3 (Third Party Liability), 1.4 (Environmental Impairment Liability), 1.5 (Employers Liability), 1.7 (Other Insurances required by Law), 2.1 (All Risks of Physical Damage), 2.2 (Business Interruption Insurance), 2.3 (Third Party Liability), 2.4 (Employers Liability), and 2.5 (Other Insurances required by Law) of Part 1 of [Clause 48 – Schedule] (Insurances) becomes Uninsurable then:
 - (i) PPP Co shall notify the Authority within [●] ([●]) Working Days of becoming aware of the risk becoming Uninsurable; and
 - (ii) if both parties agree, or it is determined in accordance with clause 56 (Dispute Resolution) that the risk is Uninsurable and that:
 - (A) the risk being Uninsurable is not caused by the actions of the PPP Co or its Staff; and
 - (B) in respect of clause 48.9 (b), PPP Co has demonstrated to the Authority that PPP Co and a prudent board of directors of a company operating the same or substantially similar PPP businesses in the State to that operated by PPP Co would in similar circumstances (in the absence of the type of relief envisaged by this clause) be acting reasonably and in the best interests of the company if they resolved to cease to operate such businesses as a result of that risk becoming Uninsurable, taking into account inter alia (and without limitation) the likelihood of the uninsurable risk occurring (if it has not already occurred), the financial consequences for such company if such uninsurable risk did occur (or has occurred) and other mitigants against such consequences which may be available to such company,

the parties shall meet to discuss the means by which the risk should be managed (including considering the issue of self-insurance by either party).

Comment: Excluded from this clause are delays in start up (this is included in the NRA Model Contract– the NRA benefits from this cover) and professional indemnity insurance. On the other hand the NRA Model Contract does not provide this protection to the PPP Co for employer’s liability insurance.

- (c) If the requirements of Clause 48.9 (b) are satisfied, but the parties cannot agree as to how to manage the risk, then:
 - (i) in respect of third party liability insurance only the Authority shall (at the Authority's option) either pay to PPP Co an amount equal to the amount set out in Clause 54.1 (Compensation on Termination for Force Majeure and Uninsurable Risk and Change in Law) and the Agreement will terminate, or elect to allow the Agreement to continue and Clause 48.9 (c) (ii) below shall thereafter apply in respect of such risk; and
 - (ii) in respect of those insurances listed in Clause 48.9(b) including third party liability (if relevant) the Agreement shall continue and on the occurrence of the risk (but only for as long as such risk remains Uninsurable) the Authority shall (at the Authority's option) either pay to PPP Co an amount equal to insurance proceeds that would have been payable had the relevant insurance continued to be available and the Agreement will continue, or an amount equal to the amount set out in Clause 54.1 (Compensation on Termination for Force Majeure and Uninsurable Risk and Change in Law) plus (in relation to third party liability insurance only) the amount of insurance proceeds that would have been payable to PPP Co whereupon the Contract will terminate.
- (d) Where a risk which was previously Uninsurable ceases to be so, either party may notify the other of the same. If the parties agree, or it is determined in accordance with the Dispute Resolution Procedure, that such a risk is no longer Uninsurable, the PPP Co shall forthwith take out and maintain insurance in accordance with the requirements of this Agreement in respect of the risk.

48.9A Insurance Terms that become Unavailable

- (a) If, upon the renewal of any insurance which the PPP Co is required to maintain or to procure the maintenance of pursuant to this Agreement:
 - (i) any Insurance Term is not available to the PPP Co in the insurance market of the United Kingdom and Republic of Ireland with reputable insurers of good standing; and/or
 - (ii) the insurance premium payable for insurance incorporating such Insurance Term is such that the Insurance Term is not generally being incorporated in insurance procured in the insurance market of the United Kingdom and Republic of Ireland with reputable insurers of good standing by contractors in the European Union,
 (other than, in each case, by reason of one or more actions of the PPP Co and/or any sub-contractor of the PPP Co (of any tier)) then paragraph (b) shall apply.
- (b) If it is agreed or determined that paragraph (a) applies then the Authority shall waive the PPP Co's obligations in Clause 48.1 and/or [Clause 48 – Schedule] (Required Insurances) in respect of that particular Insurance Term and the PPP Co shall not be considered in breach of its obligations regarding the maintenance of insurance pursuant to this Agreement as a result of the failure to maintain insurance incorporating such Insurance Term for so long as the relevant circumstances described in paragraph (a) continue to apply to such Insurance Term.
- (c) To the extent that the Parties agree (acting reasonably), or it is determined pursuant to the Dispute Resolution Procedure, that an alternative or replacement term and/or condition of insurance is available to the PPP Co in the insurance market of the United Kingdom and Republic of Ireland with reputable insurers of good standing which if included in the relevant insurance policy would fully or partially address the PPP Co's inability to maintain or procure the maintenance of

insurance with the relevant Insurance Term, at a cost which contractors in the market of the United Kingdom and Republic of Ireland are (at such time) generally prepared to pay, the PPP Co shall maintain or procure the maintenance of insurance including such alternative or replacement term and/or condition. Notwithstanding any other provision of this Agreement, the costs of such insurance shall be subject to the premium costs sharing mechanism set out at Clause 48.12(Risk-sharing).

- (d) Where the Authority has exercised the waiver pursuant to paragraph (b), it shall be entitled to deduct from the annual Unitary Charge the “**Adjusted Amount**”, such amount being an amount equal to the amount paid for the particular Insurance Term in the preceding year (using a reasonable estimate of such amount where a precise figure is not available) less any annual amount paid or payable to the PPP Co to maintain and/or procure the maintenance of such Insurance Term pursuant to paragraph (c).
- (e) While paragraph (a) applies, the annual Unitary Charge shall be reduced each Payment Year by the Adjusted Amount, indexed from the date that the particular Insurance Term is no longer available.
- (f) The PPP Co shall notify the Authority as soon as reasonably practicable and in any event within [●] ([●]) days of becoming aware that paragraph (a)(i) and/or paragraph (a)(ii) are likely to apply or (on expiry of the relevant insurance then in place) do apply in respect of an Insurance Term (irrespective of the reason for the same). The PPP Co shall provide the Authority with such information as the Authority reasonably requests regarding the unavailability of the Insurance Term and the parties shall meet to discuss the means by which such unavailability should be managed as soon as is reasonably practicable.

In the event that paragraph (a)(i) and/or paragraph (a)(ii) apply in respect of an Insurance Term, (irrespective of the reasons for the same) the PPP Co shall approach the insurance market at least every four months to establish whether paragraph (a)(i) and/or paragraph (a) (ii) remain applicable to the Insurance Term. As soon as the PPP Co is aware that paragraph (a)(i) and/or paragraph (a)(ii) has ceased to apply to the Insurance Term, the PPP Co shall take out and maintain or procure the taking out and maintenance of insurance (to be incepted as soon as is reasonably practicable) incorporating such Insurance Term in accordance with this Agreement.

48.10 Savings

- (a) Neither failure to comply nor full compliance with the insurance provisions of this Agreement shall limit or relieve the PPP Co of its liabilities and obligations under this Agreement and in particular the PPP Co's obligation to hold the Authority harmless in compliance with any indemnity provisions contained in this Agreement.
- (b) Unless Approved by the Authority's Representative (such Approval not to be unreasonably withheld or delayed), the supply to the Authority's Representative of any draft insurance policy or certificate of insurance or other evidence of compliance with this Clause 48 shall not imply acceptance by the Authority's Representative that the extent of insurance cover is sufficient or that the terms and conditions thereof are satisfactory, in either case for the purposes of this Agreement.

48.11 Broker's Letter of Undertaking

Prior to or on the Commencement Date, the PPP Co shall procure and furnish to the Authority a letter of undertaking, substantially in the form of the specimen letter of undertaking contained in Part 2 of [Clause 48 - Schedule] (Insurance), addressed to the Authority and signed by a reputable broker appointed by the PPP Co in connection with the procurement of the Insurances specified in Part 1 of [Clause 48 - Schedule] 19 (Insurance). The PPP Co shall similarly procure and furnish to the Authority such a letter of undertaking from any replacement broker appointed by the PPP Co during the Contract Period.

48.12 Risk-sharing

- (a) Within [●] ([●]) days of the first anniversary of the Services Commencement Date and every [●] anniversary thereafter until the Expiry Date or (as the case may be) the Termination Date (each such date a “**Review Date**”), the Authority and the PPP Co will meet to review the respective annual costs incurred by the PPP Co in maintaining the Operational Period Insurances (the “**Actual Costs**”) during each of the previous [●] ([●]) years (each such [●] ([●]) year period, being a “**Review Period**”). In the event that the Review Date falls on a day other than a Working Day, then the Review Date will be deemed to occur on the next Working Day.
- (b) If the sum of the Actual Costs incurred during a Review Period exceeds the sum of the three Base Costs during the same Review Period (the aggregate amount of such Base Costs being the “**Base Reference Amount**”), after deducting from the Actual Costs any increases which are not due solely to circumstances generally prevailing in the insurance market of the United Kingdom and Republic of Ireland, then an “**Increased Insurance Cost**” equal to this excess will have arisen. The Authority will compensate the PPP Co in respect of Increased Insurance Costs as follows:
- (i) if the Increased Insurance Cost is less than or equal to an amount being [●]% ([●]percent) of the Base Reference Amount (“**First Increase Threshold**”) then the PPP Co shall be responsible for the whole of the Actual Costs for the relevant Review Period;
- (ii) if the Increased Insurance Cost is greater than the First Increase Threshold but less than an amount being [●]% ([●]percent) of the Base Reference Amount (“**Second Increase Threshold**”), then:
- (A) the PPP Co shall be responsible for the whole of the Increased Insurance Cost up to and including the First Increase Threshold; and
- (B) the Authority and the PPP Co shall share on a [●]:[●]basis any amount of the Increased Insurance Cost that exceeds the First Increase Threshold (with the Authority compensating the PPP Co for any amount for which it is liable);
- (iii) if the Increased Insurance Cost is greater than or equal to the Second Increase Threshold, but less than an amount being [●]% ([●] percent) of the Base Reference Amount (the “**Third Increase Threshold**”) then:
- (A) the PPP Co shall be responsible for the whole of the Increased Insurance Cost up to and including the First Increase Threshold;
- (B) the Authority and the PPP Co shall share on a [●]:[●] basis any amount of the Increased Insurance Cost which is greater than the First Increase Threshold but less than or equal to the Second Increase Threshold (with the Authority compensating the PPP Co for any amount for which it is liable); and
- (C) the Authority shall compensate the PPP Co for [●]% ([●] percent) of any amount of the Increased Insurance Cost which is greater than the Second Increase Threshold but less than or equal to the Third Increase Threshold and the PPP Co shall be responsible for [●]% ([●] percent) of any amount of the Increased Insurance Cost which is greater than the Second Increase Threshold but less than or equal to the Third Increase Threshold;
- (iv) if the Increased Insurance Cost is greater than the Third Increase Threshold but less than an amount being [●] % ([●] percent) of the Base Reference Amount (the “**Fourth Increase Threshold**”), then:

- (A) the PPP Co shall be responsible for the whole of the Increased Insurance Cost up to and including the First Increase Threshold;
 - (B) the Authority and the PPP Co shall share on a [●]:[●] basis any amount of the Increased Insurance Cost which is greater than the First Increase Threshold but less than or equal to the Second Increase Threshold (with the Authority compensating the PPP Co for any amount for which it is liable);
 - (C) the Authority shall compensate the PPP Co for [●]% ([●] percent) of any amount of the Increased Insurance Cost which is greater than the Second Increase Threshold but less than or equal to the Third Increase Threshold and the PPP Co shall be responsible for [●]% ([●] percent) of any amount of the Increased Insurance Cost which is greater than the Second Increase Threshold but less than or equal to the Third Increase Threshold; and
 - (D) the Authority shall compensate the PPP Co for [●]% ([●] percent) of any amount of the Increased Insurance Cost which is greater than the Third Increase Threshold but less than or equal to the Fourth Increase Threshold and the PPP Co shall be responsible for [●]% ([●] percent) of any amount of the Increased Insurance Cost which is greater than the Third Increase Threshold but less than or equal to the Fourth Increase Threshold; and
- (v) if the Increased Insurance Cost is greater than the Fourth Increase Threshold then:
- (A) the Authority will meet the PPP Co to discuss possible alternative arrangements, including, without limitation, any possible reduction in the scope of the Operational Period Insurances so as to decrease the projected Actual Costs below this threshold; and
 - (B) in the event the parties fail to agree any such alternative arrangements pursuant to Clause 48.12(b)(v)(A) above, the Authority shall either:
 - (1) to the extent of the proportions specified in Clause 48.12(b)(iv) above, bear the cost of that increase up to the Fourth Increase Threshold, and compensate the PPP Co for the entire of the excess over the Fourth Increase Threshold; or
 - (2) the Authority shall elect to deem all or part of the Operational Period Insurances as Uninsurable.

For the avoidance of doubt but subject to Clause 48.12(c), the PPP Co shall, in all circumstances, be liable for that element of the Actual Costs which equates to, or is less than, the amount of the Base Reference Amount for the relevant Review Period.

- (c) If the sum of the Actual Costs incurred during a Review Period is less than the Base Reference Amount for that Review Period, then a **“Decreased Insurance Cost”** equal to this decrease will have arisen. The PPP Co will share with the Authority the benefit of the Decreased Insurance Cost as follows:
 - (i) if the Decreased Insurance Cost is less than or equal to an amount being [●]% ([●] percent) of the Base Reference Amount (**“First Decrease Threshold”**), then the PPP Co shall retain the whole of the benefit of the Decreased Insurance Cost;

- (ii) if the Decreased Insurance Cost is greater than the First Decrease Threshold but less than an amount being [●]% ([●] percent) of the Base Reference Amount (“**Second Decrease Threshold**”), then:
 - (A) the PPP Co shall retain the benefit of the Decreased Insurance Cost up to and including the First Decrease Threshold; and
 - (B) the Authority and the PPP Co shall share on a [●]:[●] basis any amount of the Decreased Insurance Cost that exceeds the First Decrease Threshold;
- (iii) if the Decreased Insurance Cost is greater than or equal to the Second Decrease Threshold then:
 - (A) the PPP Co shall retain the benefit of the Decreased Insurance Cost up to and including the First Decrease Threshold; and
 - (B) the Authority and the PPP Co shall share on a [●]:[●] basis any amount of the Decreased Insurance Cost which is greater than the First Decrease Threshold but less than or equal to the Second Decrease Threshold; and
 - (C) the Authority and the PPP Co shall share on a [●]:[●] basis (for the avoidance of doubt, the Authority’s share being [●]% ([●] percent) and the PPP Co’s share being [●]% ([●] percent) any amount of the Decreased Insurance Cost which is greater than the Second Decrease Threshold,

such payments to be made by the PPP Co to the Authority within [●] ([●]) days of such amounts being agreed or determined in accordance with the Dispute Resolution Procedure.

- (d) The PPP Co shall provide the Authority with written notice of the Actual Costs for all Operational Period Insurances broken down by category of insurance for each year within a Review Period, as soon as practicable after it becomes aware of the same and prior to the renewal of such Operational Period Insurances.

48.13 Any amounts which the Authority must compensate the PPP Co in accordance with the above Clauses 48.12(b)(i) to (v) (an “**Additional Payment**”), shall be paid in accordance with Clause 41 (Payments). It will be the responsibility of the PPP Co to demonstrate that any claim for an Additional Payment is valid and proper. The Authority reserves the right to require such information as it may reasonably require to compare the Actual Costs against generally prevailing market pricing and conditions. If the Authority and the PPP Co cannot agree on the Additional Payment or any payments to be made by the PPP Co to the Authority pursuant to Clauses 48.12(c)(ii) to (iii), the matter will be referred to the Disputes Resolution Procedure.

48.14

Comment: This drafting follows the concept to be introduced into SoPC. There is some discussion in the market regarding what is an insurance “risk” and what is an insurance “term”, and a conclusive distinction has yet to be drawn. SoPC states the following:

A “risk” for these purposes is generally an insured peril which oulc be the proximate cause for a loss. The proximate cause is the initial act which sets off a natural and continuous sequence of events that produces physical loss or damage under a Material Damage policy, loss of revenue under a Delay in Start Up and Business interruption policy, or injury and/or physical loss or damage to third parties and/or third party property under a Third Party Liability policy. For example, lightning causes a fire in school premises and this results in material damage to the school. In this example, the lightning is the proximate cause. Fire is not the proximate cause in the circumstances of this example (but could be a proximate cause for other claims).

KEY DEFINITION – USED IN CLAUSE 48 CORE CONTRACT DRAFTING

“Uninsurable” means in relation to a risk either that:

- (a) insurance is not available to the PPP Co in respect of the Project in the insurance market of the European Union with reputable insurers of good standing in respect of that risk; or
- (b) the insurance premium payable for insuring that risk is at such a level that the risk is not generally being insured against in the insurance market of the European Union with reputable insurers of good standing by contractors in the State.

NRA MODEL CONTRACT DRAFTING

Comment: Under the NRA Model Contract, if the Authority wants to require the PPP Co to carry on without public liability (PL) insurance, it must take responsibility for claims that would be covered had the PL policy remained available.

[●].9 Risks that Become Uninsurable

- (a) Without prejudice to the remainder of the PPP Co’s obligations under this Clause [●].9, if the PPP Co is unable to comply with its obligations under Clause [●] (Evidence of Renewal) in respect of the policies referred to in paragraphs [●] and [●] of Part 1 of Schedule [●] (Insurance) (the “PL Policies”) which will otherwise expire because the PPP Co has been unable to obtain a quotation, the PPP Co shall promptly so inform the Authority and shall provide the Authority with such information as the Authority may reasonably require to satisfy itself that such quotation is unobtainable in the insurance market of any of the member states of the European Union. Prior to the date that such PL Policy is due to expire, the PPP Co shall use its best endeavours to obtain a quotation and shall keep the Authority informed of the steps it is taking to comply with such obligation.
- (b) The PPP Co shall promptly notify the Authority if it has reasonable grounds to believe that a risk required to be insured under the PL Policies is likely to become Uninsurable on the expiry of the existing PL Policy.
- (c) Subject to Clause [●].9(g) [*below*], if a risk, required to be covered by the policies referred to in paragraphs [●] to [●] of Part [●] of Schedule [●] (Insurance), becomes Uninsurable then:
 - (i) the PPP Co shall notify the Authority as soon as reasonably practicable, and in any event within [●] ([●]) Working Days of the PPP Co becoming aware of the risk becoming Uninsurable; and
 - (ii) if both parties agree, or it is determined in accordance with Clause 56 (Disputes Resolution Procedure), that the risk is Uninsurable then the PPP Co, for so long as the risk remains Uninsurable, shall not be required to maintain insurance in respect of such risk and the procedures as set out at Clause [●].9(d) shall apply.
- (d) When a risk is agreed, or alternatively determined to be, Uninsurable in accordance with Clause [●].9(c); and
 - (i) the risk being Uninsurable is not caused by the actions of the PPP Co, its

Associated Company or Staff; and

(ii) the PPP Co has provided reasonable evidence to the Authority that prudent directors of a company, operating the same or substantially similar road concession businesses to that operated by the PPP Co, would if faced with the same Uninsurable risk:

(A) in the absence of the type of relief envisaged by Clause [●].9(e); and

(B) assuming that compensation equivalent to that set out in Part [●] of Schedule [●] would be payable on a termination of this Agreement on account of the occurrence of such risk,

be acting reasonably and in the best interests of the company if they resolved to cease to operate such a business as a result of that risk becoming Uninsurable, taking into account the likelihood of the Uninsurable risk occurring (if it has not already occurred) and the financial consequences for such company if such Uninsurable risk did occur (or has occurred),

(iii) then the parties shall meet to discuss the means by which the risk should be managed (including considering the issue of self-insurance by either party).

(e) If the requirements at Clause [●].9(d) are satisfied but the parties cannot agree how to manage the risk, then:

(i) where the Uninsurable risk relates to a risk under a PL Policy (an “Uninsurable PL Risk”) either (A) this Agreement shall continue and the PPP Co shall pay to the Authority an amount (Indexed) equal to the premium which would have been payable for insurance for such Uninsurable PL Risk immediately prior to it becoming Uninsurable, or (B) the Authority may (at its option) elect to terminate this Agreement. If the Authority elects to terminate this Agreement, the Authority shall so notify the PPP Co prior to the expiry of the relevant PL Policy whereupon this Agreement shall terminate and the provisions of Clause [●] (Termination for Eligible Force Majeure or Uninsurable Risk) shall apply; and

(ii) in respect of all other Uninsurable risks, this Agreement shall continue and the PPP Co shall pay to the Authority an amount (Indexed) equal to the premium which would have been payable for insurance for such risk immediately prior to it becoming Uninsurable.

For the avoidance of doubt, the payment of premia under this Clause [●].9(e) shall continue for such period as the Uninsurable risk continues and this Agreement has not been terminated.

(f) On the occurrence of the Uninsurable risk then the Authority shall (at its option) either:

(i) (if the risk is an Uninsurable PL Risk) pay to the injured party an amount equal to the proceeds that would have been payable in respect of the claim had the relevant PL Policy continued to be available. Thereafter, the Authority may, within a period of 20 Working Days from the date it made such payment, elect to terminate this Agreement and the provisions of Clause [●] (Termination for Eligible Force Majeure or

Uninsurable Risk) shall apply; or

- (ii) (if the risk is not an Uninsurable PL Risk) either:
 - (A) pay to the PPP Co an amount equal to the insurance proceeds that would have been payable had the relevant insurance continued to be available and this Agreement shall continue; or
 - (B) notify the PPP Co that it intends to treat the event as if it were an Eligible Force Majeure event and to exercise its rights to terminate pursuant to the provisions of Clause [●] (Termination for Eligible Force Majeure or Uninsurable Risk).
- (g) If a risk required to be covered by the policies referred to in paragraph 1.6 or (to the extent that such policies are, or following the Commencement Date become, insurances that are required by Law or Legal Requirement) paragraphs [●] or [●] of Part [●] of Schedule [●] (Insurance) becomes Uninsurable and the risk being Uninsurable is not caused by the actions of the PPP Co or its Staff then the PPP Co shall not be considered to be in breach of its obligations to the extent and for the period that the risk is Uninsurable and this Agreement shall continue in effect provided however that:
 - (i) the PPP Co shall remain liable for any Claims which may arise in respect of the risk which has become Uninsurable; and
 - (ii) paragraphs (c) to (f) of this Clause [●].9 shall not apply to risks required to be covered by such policies.

Comment: The NRA Model Contract also has provision excusing the PPP Co if any of the insurance terms required by the contract become unobtainable in the market, but do not fall within the specific provisions for 'uninsurable' risks.

- (h) If a term which is required by this Agreement for inclusion in an insurance policy is not generally available to persons engaged in the same or substantially similar business to the PPP Co in the insurance market of any of the member states of the European Union from insurers of good repute and substance from time to time (an "Unobtainable Term") and such Unobtainable Term is not the result of the actions of the PPP Co or its Staff, the PPP Co shall not be considered to be in breach of its obligations under Clause [●] (Insurance) to the extent and for the period that the term remains an Unobtainable Term and this Agreement shall continue provided that:-
 - (i) the PPP Co shall remain liable for any Claims or Losses relating to the risk which would otherwise be covered but for the non-availability of such term;
 - (ii) the foregoing provisions of this Clause [●].9 shall not apply to such Unobtainable Term; and
 - (iii) the PPP Co shall use its best endeavours to secure the next best optimal term available.

[●].10 Savings

- (a) Neither failure to comply nor full compliance with the insurance provisions of this Agreement shall limit or relieve the PPP Co of its liabilities and obligations under this Agreement and in particular the PPP Co's obligation to hold the Authority harmless in compliance with any indemnity provisions contained in this

Agreement.

- (b) Unless Approved by the Authority's Representative (such Approval not to be unreasonably withheld or delayed), the supply to the Authority's Representative of any draft insurance policy or certificate of insurance or other evidence of compliance with this Clause [●] shall not imply acceptance by the Authority's Representative that the extent of insurance cover is sufficient or that the terms and conditions thereof are satisfactory, in either case for the purposes of this Agreement.

[●].11 Broker's Letter of Undertaking

Prior to or on the Commencement Date, the PPP Co shall procure and furnish to the Authority a letter of undertaking, substantially in the form of the specimen letter of undertaking contained in Part [●] of Schedule [●] (Insurance), addressed to the Authority and signed by a reputable broker appointed by the PPP Co in connection with the procurement of the Insurances specified in Part [●] of Schedule [●] (Insurance). The PPP Co shall similarly procure and furnish to the Authority such a letter of undertaking from any replacement broker appointed by the PPP Co during the Contract Period.

[●].12 Risk-sharing

- (a) At Effective Date and within 60 (sixty) days of the third anniversary of the Effective Date and every third anniversary thereafter until the Expiry Date or (as the case may be) the Termination Date (each such date a "Review Date"), the Authority and the PPP Co will meet to review the respective annual costs incurred by the PPP Co in maintaining the Operational Period Insurances (the "Actual Costs") during each of the previous 3 (three) years (each such 3 (three) year period, being a "Review Period"). In the event that the Review Date falls on a day other than a Working Day, then the Review Date will be deemed to occur on the next Working Day.
- (b) If the sum of the Actual Costs incurred during a Review Period exceeds the sum of the three Base Costs during the same Review Period (the aggregate amount of such Base Costs being the "Base Reference Amount"), after deducting from the Actual Costs any increases which are not due solely to circumstances generally prevailing in the insurance market of the European Union, then an "Increased Insurance Cost" equal to this excess will have arisen. The Authority will compensate the PPP Co in respect of Increased Insurance Costs as follows:
 - (i) if the Increased Insurance Cost is less than or equal to an amount being 50% (fifty percent) of the Base Reference Amount ("First Increase Threshold") then the PPP Co shall be responsible for the whole of the Actual Costs for the relevant Review Period;
 - (ii) if the Increased Insurance Cost is greater than the First Increase Threshold but less than an amount being 100% (one hundred percent) of the Base Reference Amount ("Second Increase Threshold"), then;
 - (A) the PPP Co shall be responsible for the whole of the Increased Insurance Cost up to and including the First Increase Threshold; and
 - (B) the Authority and the PPP Co shall share on a 50:50 basis any amount of the Increased Insurance Cost that exceeds the First Increase Threshold (with the Authority compensating the PPP Co for any amount for which it is liable);

- (iii) if the Increased Insurance Cost is greater than or equal to the Second Increase Threshold, but less than an amount being 250% (two hundred and fifty percent) of the Base Reference Amount (the “Third Increase Threshold”) then:
 - (A) the PPP Co shall be responsible for the whole of the Increased Insurance Cost up to and including the First Increase Threshold;
 - (B) the Authority and the PPP Co shall share on a 50:50 basis any amount of the Increased Insurance Cost which is greater than the First Increase Threshold but less than or equal to the Second Increase Threshold (with the Authority compensating the PPP Co for any amount for which it is liable); and
 - (C) the Authority shall compensate the PPP Co for 75% (seventy-five percent) of any amount of the Increased Insurance Cost which is greater than the Second Increase Threshold but less than or equal to the Third Increase Threshold and the PPP Co shall be responsible for 25% (twenty-five percent) of any amount of the Increased Insurance Cost which is greater than the Second Increase Threshold but less than or equal to the Third Increase Threshold;
- (iv) if the Increased Insurance Cost is greater than the Third Increase Threshold but less than an amount being 400% (four hundred percent) of the Base Reference Amount (the “Fourth Increase Threshold”), then:
 - (A) the PPP Co shall be responsible for the whole of the Increased Insurance Cost up to and including the First Increase Threshold;
 - (B) the Authority and the PPP Co shall share on a 50:50 basis any amount of the Increased Insurance Cost which is greater than the First Increase Threshold but less than or equal to the Second Increase Threshold (with the Authority compensating the PPP Co for any amount for which it is liable);
 - (C) the Authority shall compensate the PPP Co for 75% (seventy five percent) of any amount of the Increased Insurance Cost which is greater than the Second Increase Threshold but less than or equal to the Third Increase Threshold and the PPP Co shall be responsible for 25% (twenty five percent) of any amount of the Increased Insurance Cost which is greater than the Second Increase Threshold but less than or equal to the Third Increase Threshold; and
 - (D) the Authority shall compensate the PPP Co for 90% (ninety percent) of any amount of the Increased Insurance Cost which is greater than the Third Increase Threshold but less than or equal to the Fourth Increase Threshold and the PPP Co shall be responsible for 10% (ten percent) of any amount of the Increased Insurance Cost which is greater than the Third Increase Threshold but less than or equal to the Fourth Increase Threshold; and
- (v) if the Increased Insurance Cost is greater than the Fourth Increase Threshold then:
 - (A) the Authority will meet the PPP Co to discuss possible alternative

arrangements, including, without limitation, any possible reduction in the scope of the Operational Period Insurances so as to decrease the projected Actual Costs below this threshold; and

- (B) in the event the parties fail to agree any such alternative arrangements pursuant to Clause [●].12(b)(v)(A) above, the Authority shall either:
 - (1) to the extent of the proportions specified in Clause [●].12(b)(iv) above, bear the cost of that increase up to the Fourth Increase Threshold, and compensate the PPP Co for the entire of the excess over the Fourth Increase Threshold; or
 - (2) the Authority shall elect to deem all or part of the Operational Period Insurances as Uninsurable.

For the avoidance of doubt but subject to Clause [●].12(c), the PPP Co shall, in all circumstances, be liable for that element of the Actual Costs which equates to, or is less than, the amount of the Base Reference Amount for the relevant Review Period.

- (c) If the sum of the Actual Costs incurred during a Review Period is less than the Base Reference Amount for that Review Period, then a “Decreased Insurance Cost” equal to this decrease will have arisen. The PPP Co will share with the Authority the benefit of the Decreased Insurance Cost as follows:
 - (i) if the Decreased Insurance Cost is less than or equal to an amount being 25% (twenty five percent) of the Base Reference Amount (“First Decrease Threshold”), then the PPP Co shall retain the whole of the benefit of the Decreased Insurance Cost;
 - (ii) if the Decreased Insurance Cost is greater than the First Decrease Threshold but less than an amount being 50% (fifty percent) of the Base Reference Amount (“Second Decrease Threshold”), then:
 - (A) the PPP Co shall retain the benefit of the Decreased Insurance Cost up to and including the First Decrease Threshold; and
 - (B) the Authority and the PPP Co shall share on a 50:50 basis any amount of the Decreased Insurance Cost that exceeds the First Decrease Threshold;
 - (iii) if the Decreased Insurance Cost is greater than or equal to the Second Decrease Threshold then:
 - (A) the PPP Co shall retain the benefit of the Decreased Insurance Cost up to and including the First Decrease Threshold; and
 - (B) the Authority and the PPP Co shall share on a 50:50 basis any amount of the Decreased Insurance Cost which is greater than the First Decrease Threshold but less than or equal to the Second Decrease Threshold; and
 - (C) the Authority and the PPP Co shall share on a 75:25 basis (for the avoidance of doubt, the Authority’s share being 75% (seventy-five percent) and the PPP Co’s share being 25% (twenty-five percent) any amount of the Decreased Insurance

Cost which is greater than the Second Decrease Threshold,

such payments to be made by the PPP Co to the Authority within 45 (forty-five) days of such amounts being agreed or determined in accordance with the Dispute Resolution Procedure.

- (d) The PPP Co shall provide the Authority with written notice of the Actual Costs for all Operational Period Insurances broken down by category of insurance for each year within a Review Period, as soon as practicable after it becomes aware of the same and prior to the renewal of such Operational Period Insurances.

- [●].13 Any amounts which the Authority must compensate the PPP Co in accordance with the above Clauses [●].12(b)(i) to (v) (an "Additional Payment"), shall be paid in accordance with Clause [●] (Payments). It will be the responsibility of the PPP Co to demonstrate that any claim for an Additional Payment is valid and proper. The Authority reserves the right to require such information as it may reasonably require to compare the Actual Costs against generally prevailing market pricing and conditions. If the Authority and the PPP Co cannot agree on the Additional Payment or any payments to be made by the PPP Co to the Authority pursuant to Clauses [●].12(c)(ii) to [●].12(c)(iii), the matter will be referred to the Disputes Resolution Procedure.

ADDITIONAL CORE CONTRACT DRAFTING

[CLAUSE 48 – SCHEDULE]

Insurances

PART 1

Insurances

The insurance terms, conditions, limits and deductibles set forth herein are minimum requirements and do not constitute estimates of the anticipated levels of Project risk or exposure. The PPP Co is responsible for assessing and determining the degree of risk and exposure associated with the Project and ensuring that it, or the relevant party, procures adequate and satisfactory insurance at the appropriate levels to cover such risk and exposure.

[●] DESIGN AND CONSTRUCTION

[●].1 Construction All Risks Insurances

Property Insured

All works and all materials, equipment, contents and other goods for use in connection with or for incorporation therein, all facilities (including designs, drawings, specifications and plans to be provided and work to be done by the Contractors of any tier under their Contracts relating to the project together with the temporary works or any other property goods (excluding constructional plant tools and equipment) for use in connection with or incorporation into construction of the project whether supplied by or on behalf of PPP Co and installed by the Contractors.

Interest

"All risks" of physical loss, destruction or damage to the Property Insured from a cause not excluded including Terrorism cover.

Co Insureds

PPP Co;

The Authority;
Other parties with an insurable interest yet to be agreed;
Each for their respective rights and interests

Period

Throughout the Design and Construction Period plus an additional [●] ([●]) months thereafter in respect of the maintenance and defects liability period.

Sum Insured

A sum representing the full reinstatement at the time of any loss value of the Property Insured including adequate provision for the policy extensions.

Geographical limits

The Site and elsewhere in Ireland in connection with the Project, including inland transit and offsite temporary storage.

Maximum Deductible

[€[●].]

Principal Extensions (for discussion)

- 72 hours clause;
- Professional fees;
- Removal of debris;
- Automatic increase clause
- Expediting expenses;
- Automatic reinstatement;
- EU and Local Authority Clause;
- Minimisation of loss;
- Munitions of war;
- Waiver of Subrogation against all Insured Parties except for “vitiating acts” as defined in the policy;
- Suspension/cessation of works, minimum [●] ([●]) months;
- Taking into use for the purposes of Testing and Commissioning;
- 50/50 Clause; and
- Additional Contract Costs
- Deletion of Marine Exclusion;
- Subsidence;

Permissible Exclusions

- Loss of any of the Property Insured by theft or disappearance when the loss is revealed only in the course of an inventory undertaking;
- The cost of making good wear and tear, gradual deterioration, etc. but not consequential damage;
- War, invasion, acts of foreign enemies, hostilities, civil war, rebellion, revolution, insurrection or military or usurped power;
- Nuclear Risks;
- Sonic bangs;
- Consequential losses not otherwise insured hereunder;
- Faulty design, workmanship and materials DE5 Clause with DE3 option

[●].2 Delay in Start Up Insurance

Insured
PPP Co;

Indemnity

In respect of loss of advance gross revenue and/or increased costs of working and additional expenditure incurred as a result of a delay in the commencement of the Services arising from loss or damage to the Property Insured (as defined in paragraph 1 of this Part 1) by a cause not

otherwise excluded under the Construction "All Risks" insurance referred to in paragraph 1 above.

Increased cost of working - the additional expenditure necessarily and reasonably incurred for the purpose of avoiding or reducing delay which, without such expenditure would have taken place, less any sums saved during the Indemnity Period in respect of such costs, as may cease or be reduced in consequence of the delay.

Period

Throughout the Design and Construction Period.

Sum Insured

A sum sufficient to cover the sums that are the subject of the indemnity, for the indemnity period

Indemnity Period

[•] ([•]) months

Maximum Deductible

[•] ([•]) days

Principal Extensions

- Delay arising from loss or damage to the premises of named suppliers from the perils of fire lightning and explosion and aircraft where materials/ plant/equipment for incorporation into the Project is in the process of manufacture and/or storage
- Premises
- Utilities Clause
- Denial of access following damage only
- Additional Increased Cost of Working
- Munitions of war
- Accountants fees.

Permissible Exclusions

- Non availability of funds;
- Fines and penalties; and
- Delays due to modifications or improvements.

[•].3 Third Party Liability Insurance

Cover

Legal liability of the Insured to pay (including claimants' costs and expenses) as damages in respect of:

- death or bodily injury to or illness or disease contracted by any person;
- loss of or damage to property; and
- interference to property or the enjoyment of use thereof by obstruction, trespass, nuisance or any like cause;

Happening during the Period of Insurance, arising out of the performance of the Project.

Co Insureds

PPP Co

The Authority

Other parties with and insurable interest yet to be agreed.

Each for their respective rights and interests.

Period

Throughout the Design and Construction Period plus an additional 24 (twenty-four) months thereafter in respect of the maintenance and defects liability period.

Minimum Limit

€[●] any one occurrence/unlimited in the aggregate other than pollution and contamination which shall be in the aggregate

Maximum Deductible

€[●] each and every occurrence of property damage (personal injury claims will be paid in full).

Geographical limits

World-wide (excluding USA & Canada)

Principal Extensions

- Cross liabilities;
- Contractual liability clause;
- Costs, incurred with the written consent of the insurer, in addition to the limit;
- Contingent motor vehicle liability;
- Health and safety legislation clause;
- Products liability (it is accepted that the indemnity limit is in the aggregate); and
- Insured to include the respective officers, directors, agents (excluding advisors), servants and employees of an insured.

Permissible Exclusions

- Employers Liability;
- Motor Vehicle liability [(other than contingent cover as above)];
- Fines, penalties, punitive or exemplary damages;
- Liquidated damages;
- War, invasion, acts of foreign enemies, hostilities (whether declared or not), civil war, rebellion, revolution, insurrection of military or usurped power;
- Nuclear Risks;
- Sonic Bangs
- Seepage, pollution or contamination unless caused by a sudden, unintended and unexpected happening;
- Aircraft
- Professional Indemnity, but not excluding personal or bodily injury;
- Property belonging to or in the charge or under the control of the insured; and
- The contract works insured under the Construction "All Risks" Insurance.

[●].4 Environmental Impairment Liability Insurance.

The Insured:

PPP Co (including all sub-contractors) and The Authority

Cover

- Contractor's Pollution Liability (CPL) Insurance
- Site-Specific Pollution Liability Insurance for off-site, pre-existing pollution conditions
- Environmental Professional Indemnity Insurance (either via Professional Indemnity extension or separate environmental policy) for design and management of site remediation works

Period

- CPL:
 - a) Duration of the Design and Construction Period, plus [●] years completed operations, if on a claims made basis or
 - b) Duration of the Design and Construction Period, if on an occurrence basis
- Site-Specific Pollution Liability: Duration of the Design and Construction Period
- Environmental Professional Indemnity: Duration of Design and Construction Period, plus [●] years

Limit of Indemnity

- CPL: €[●]
- Site-Specific: €[●]
- Professional Indemnity: €[●]

Maximum Deductibles

- CPL €[●] each and every claim
- Site Specific €[●] each and every claim
- Professional Indemnity €[●]

Principal Extensions

- CPL and Environmental PI: Cover for asbestos removal operations and both marine and land operations

Permissible Exclusions:

- Criminal Fines
- Damage to Owned Property
- Employers Liability
- Identified Underground Storage Tanks
- Insured v. Insured Suits
- Insured's Completed Goods or Services
- Internal Expenses
- Liability assumed via contract that would not otherwise exist
- Material change in use
- Microbial matter / mould
- Non-compliance with law
- Non-disclosure or prior knowledge of known pollution incidents
- Nuclear Materials / Radioactive Materials
- War / Terrorism

[●].5 Employers Liability Insurance

Insured

PPP Co

Indemnity

Legal Liability for bodily injury or disease suffered by employees as a result of their employment.

Period

Throughout the Contract Period.

Minimum Limit

€[●] any one occurrence

Maximum Deductible

€[●]

Principal Extensions

Extend definition of employees to include:

- Any labour master and person supplied by him
- Any person employed by labour only contractor
- Any director (including non executive directors)
- Any self employed person
- Any person hired from any Public Authority company Firm or individual
- Voluntary Workers
- Consultants
- Include in Business Description:
- Indemnity for:
- Principals and Directors and employees

- Full Contractual Liability
- Temporary visits abroad
- Legal Costs and Other Expenses for representation arising out of any prosecution of the Insured under the Safety, Health and Welfare at Work Act or any similar legislation including an appeal against improvement and prohibition notices and costs of the prosecution against the Insured. The extension to apply irrespective of injury.
- Compensation for Court attendance
- Indemnity for Insured Directors and Senior Employees arising out of private duties of employees.
- Cross Liability Clause
- Conflict of Interest Clause
- Include cover for repairs and renovations to own property or any property for which Insured act as agent or factor.

[●].6 Professional Indemnity Insurance

Insured:

- (a) Project specific: the insurance to cover the acts of the PPP Co (where applicable), and all of its contractors and sub-contractors of any tier; or
- (b) Annually renewable: the insurance to cover the acts of the PPP Co (where applicable), the Contractor and the Designer.

Indemnity Period:

From the date of the Agreement and throughout the Design and Construct Period plus [●] years thereafter.

Minimum Limit:

- (a) Project specific: minimum limit of cover for each and every occurrence and in the aggregate for the indemnity period [€[●]] ([●] Euro); or
- (b) Annually renewable: minimum limit of cover for each and every occurrence and in the aggregate for the indemnity period [€[●]] ([●]Euro).

Deductible:

Maximum deductible €[●] each and every claim.

Principal Extensions and Conditions:

Indemnity to the Authority for claims made against them by independent third parties provided such claims emanate from the professional activities of the PPP Co or their sub contractors.

- Rectification endorsement limit €[●]
- Policy interpretation subject to Irish Law and practice.
- Retroactive date to include professional services carried out during the tender stage.
- Dishonesty of employees.
- Libel and slander
- Loss of Documents.
- Including project supervisor duties for design and construction stage.
- Extended reporting period [●] years.

Permitted Exclusions:

- War and Terrorism
- Nuclear and radioactive risks
- Pollution unless sudden and accidental.

[●].7 Such other insurances as are required by Law or Legal Requirement and are in accordance with Good Industry Practice, to be taken out prior to the commencement of the Works and maintained in force until the issue of the Services Commencement Certificate.

OPERATION

[•].1 All Risks of Physical Damage Insurance

Property insured

All material property (or part thereof), fixed, mobile or in transit, of every kind and description not otherwise excluded, either owned, leased, hired or borrowed by any of the Insureds or held in the care, custody or trust of any of the Insureds or for which any of the Insureds are responsible or have assumed responsibility all forming part of or in connection with the Project.

Interest

All risks of damage to the Property Insured occurring during the period of insurance (as described below) by any cause not otherwise excluded including Terrorism.

Co Insureds

PPP Co

The Authority

Other parties with an insurable interest yet to be agreed

Each for their respective rights and interests

Period of Insurance

From the Services Commencement Date for [•] ([•]) months and annually renewable thereafter or as otherwise agreed.

Sum Insured

A sum not less than the total reinstatement as new value, including Allowance for Policy Extensions.

Maximum Deductible

€[•].

Principal Extensions

- Replacement/reinstatement basis of claims settlement;
- Architects and Surveyors fees;
- 72 hours clause;
- Debris removal clause;
- Expediting expenses and additional hire charges;
- Capital additions clause;
- Inflation Clause;
- Lost/damaged plans, documents and computer records extension;
- Additional costs of complying with public/local authority requirements;
- Automatic reinstatement of sum insured;
- Interim payments clause;
- EU and Local Authority Clause;
- Minimisation of loss; and
- Waiver of Subrogation against all Insured Parties.

Permissible Exclusions

- The costs of making good, wear and tear and/or gradual deterioration but consequent damage to be covered;
- War and civil war; and
- Radioactive contamination.

[•].2 Business Interruption Insurance

Co Insured

PPP Co

The Authority

Other parties with an insurable interest yet to be agreed
Each their respective rights and interests.

Period of Insurance

From the Services Commencement Date for [●] ([●]) months and annually renewable thereafter or as otherwise agreed by the Parties.

Basis of Indemnity

The loss of revenue sustained in consequence of an interruption caused by an event insured under the All Risks of Physical Damage insurance described above.

Indemnity Period

[●] ([●]) months from the date of loss.

Sum Insured

A sum sufficient to represent the basis of indemnity.

Deductible

€[●]

Principal Extensions

- Denial of access;
- Utilities clause;
- Customers premises;
- Suppliers Premises;
- Additional Increased Cost of Working; and
- Professional fees.

Allowable Exclusions

- The costs of making good, wear and tear and/or gradual deterioration but consequent damage to be covered;
- War and civil war; and
- Radioactive contamination.

[●].3 Third Party Liability Insurance

Cover

To indemnify the insured against legal liability to pay compensation (including claimants' costs fees and expenses) consequent upon:

- bodily injury, death, illness or disease to any person;
- damage to property of third parties; or
- interference with traffic or property or any easement, right of air, light, water, support or way, or obstruction, trespass, loss of amenities, nuisance or any like cause,
- arising out of the operation of the Project.

Insureds

PPP Co;
The Authority;
Other insured parties with an insurable interest yet to be agreed
Each for their respective rights and interests.

Period of Insurance

From the Services Commencement Date for [●] ([●]) months and annually renewable thereafter or as otherwise agreed by the Parties.

Minimum Limit

€[●] (indexed) for any one occurrence and, with respects to Products and Pollution Liability, in the

aggregate.

Maximum Deductible

€[•] (indexed) each and every occurrence in respect of damage to property otherwise nil.

Principal Extensions

- Cross liabilities;
- Contractual liability clause;
- Costs, incurred with the written consent of the insurer, in addition to the limit;
- Contingent motor vehicle liability;
- Health and safety legislation clause;
- Products liability (it is accepted that the indemnity limit is in the aggregate); and
- Insured to include the respective officers, directors, agents (excluding advisors), servants and employees of an insured.

Permissible Exclusions

- Employers Liability;
- Motor Vehicle liability [(other than contingent cover as above)];
- Fines, penalties, punitive or exemplary damages;
- Liquidated damages;
- War, invasion, acts of foreign enemies, hostilities (whether declared or not), civil war, rebellion, revolution, insurrection of military or usurped power;
- Nuclear Risks;
- Sonic Bangs
- Seepage, pollution or contamination unless caused by a sudden, unintended and unexpected happening;
- Aircraft
- Professional Indemnity, but not excluding personal or bodily injury;
- Property belonging to or in the charge or under the control of the insured; and
- The contract works insured under the Construction All Risks Insurance.

[•].4 Employers Liability Insurance

Insured

PPP Co

Indemnity

Legal Liability for bodily injury or disease suffered by employees as a result of their employment.

Period

From the Services Commencement Date for [•] ([•]) months and annually renewable thereafter or as otherwise agreed.

Minimum Limit

€[•] any one occurrence

Maximum Deductible

€[•]

Principal Extensions

Extend definition of employees to include:

- Any labour master and person supplied by him
- Any person employed by labour only contractor
- Any director (including non executive directors)
- Any self employed person
- Any person hired from any Public Authority company Firm or individual
- Voluntary Workers
- Consultants
- Include in Business:

- Indemnity for:
 - Principals
 - Directors and employees
 - Committees and members of canteen sports etc. organisations and first aid fire etc. services.
 - Full Contractual Liability
 - Temporary visits abroad
 - Legal Costs and Other Expenses for representation arising out of any prosecution of the Insured under the Safety, Health and Welfare at Work Act or any similar legislation including an appeal against improvement and prohibition notice and costs of the prosecution against the Insured. The extension to apply irrespective of injury.
 - Compensation for Court attendance
- Indemnity for Insured Directors and Senior Employees arising out of private duties of employees.
- Cross Liability Clause
- Conflict of Interest Clause
- Include cover for repairs and renovations to own property or any property for which Insured act as agent or factor.

Such other insurances as are required by Law or Legal Requirement and in accordance with Good Industry Practice.

PART 2

INSURANCE

Broker's Letter of Undertaking

Dear Sirs

Commissioners of Public Works PPP Contract for [●] ("Project Facility")

We confirm that in consideration of your approving our appointment as the nominated brokers in connection with the policies of insurance (the "policies") described in Clause 48 (Insurance) and [Clause 48 - Schedule] of the PPP Contract [to be] entered into on [this day] between [●] (the "Authority") and [the PPP Co]¹⁶ (the "PPP Contract") and placed by us as brokers to [the PPP Co]¹⁷ we hereby irrevocably undertake:

- to use our reasonable endeavours to ensure that the policies incepted (or any policy taken out in substitution therefore or as a supplement thereto) conforms in every respect with Clause 48 (Insurance) and [Clause 48- Schedule] of the PPP Contract;
- to ensure that the policies are underwritten by insurers of good repute;
- to advise you with regard to any particular clauses of the policies which are unusual, onerous or may give rise to difficulties;
- in respect of any policy where you are co-assured, to provide you with the usual assistance regarding the prosecution of claims against insurers (and, for the avoidance of doubt, it is understood that this assistance will be provided even if we are no longer acting

¹⁶

Details to be inserted.

¹⁷

Details to be inserted.

as nominated broker in connection with the placing of the particular policy in respect of which a claim is made, save where any broker appointed instead of us in connection therewith has agreed to assume responsibility for the handling of claims);

- to notify you as soon as reasonably practicable of any proposals by insurers or any other interested party to amend, waive, enforce, cancel or terminate any of the policies or of any provisions thereof or of any other matters which come to our attention and which could reasonably be expected to be material in the context of the insurance arrangements described in Clause 48 (Insurance) and [Clause 48 – Schedule] of the PPP Contract (including, without limitation to notify you as soon as is reasonably practicable if any premiums due under the policies remain unpaid by the due date);
- to notify you forthwith upon becoming aware of any claims which have or which may be made under the policies;
- to pay any and all monies received from insurers in respect of claims and/or returned premiums into an account in the names of the Authority and the PPP Co (the “Joint Insurance Account”), except where otherwise provided for by Clause 48.7 (Application of Insurance Proceeds – Advanced Loss of Revenue and Business Interruption) of the PPP Contract, save where the monies received from insurers are in respect of payment of claims brought by the Authority on its own behalf (in which case the monies shall be paid direct to the Authority) or save in respect of those third party, employer’s and public liability and professional indemnity policies referred to in Clause 48 (Insurance) and [Clause 48 – Schedule] (Insurance) of the PPP Contract where the party claiming to have suffered the loss or damage in respect of which a claim under the policy is made (the “Claimant”) is someone other than the Authority (in which case, it is accepted and understood that the monies received from insurers shall be paid directly to the Claimant);
- to pay any and all proceeds received from insurers, including monies paid into the Joint Insurance Account, without any deduction or set-off of any kind howsoever or whensoever arising;
- to notify you at least [●] ([●]) days prior to the expiry of the policies if we have not received instructions to renew and, in the event of our receiving written instructions to renew, to advise you promptly of the details thereof, including, without limitation, to provide copies of the renewal certificates and a summary of any proposals to amend the terms of the policies in accordance with paragraph 5 above;
- and warrant that the levels of cover provided by the policies are sufficient to meet the requirements of [Clause 48 - Schedule] of the PPP Contract and to notify you promptly if we become aware of any fact, circumstances or occurrence which have or which may have the effect of changing that position;
- to retain (and make available for your inspection), all information provided to underwriters at the time of the placing of any of the policies and any contracts, insurance slips or policies or any renewals thereof or substitutes therefore in safe keeping for as long as it is possible that a claim may be made in respect of the contract, slip or policies;
- forthwith to notify you on becoming aware that we may cease to act as nominated brokers in connection with any or all of the policies; and
- warrant that the costs of each of the insurance policies referred to in Clause 48 and [Clause 48 - Schedule] (Insurance) of the PPP Contract which have been included in the Financial Model are true, accurate, valid and proper and reflect availability in the insurance market.

The Authority acknowledges that these undertakings do not entitle the Authority to instruct us to place or amend (or not to place or amend) in any way the insurances and that any such instructions may only be received from [the PPP Co]¹⁸ .

This letter shall be governed by and construed in all respects in accordance with the laws of Ireland.

Yours faithfully

CROSS REFERENCES

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

- Clause 3 (Effectiveness of this Agreement)
- Clause 7 (Health, Safety and Security)
- Clause 53 (Effect of Termination)

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

- D12 (Insurances)
- D13 (Infrastructure Damage)
- D17 (Third Party Claims)
- F10 (Insurance Scope)
- F11 (Insurance Cost)