

# COMPILATION OF PPP TERMS AND CONDITIONS OF CONTRACT

## PUBLIC SECTOR VERSION

### CLAUSE 49: PPP CO DEFAULT TERMINATION

#### DBFOM CONTRACT

#### **DBOM CONTRACT**

## INTRODUCTION

We repeat SOPC3: The Contract should specify the events of Contractor Default which may lead to termination. As far as practicable, these should be objective, clear and provide for reasonable tolerances, bearing in mind the undesirable consequences of a termination.

## CORE CONTRACT DRAFTING

### **49. PPP CO DEFAULT**

#### **49.1 Notification of Events of Default**

The PPP Co undertakes that it shall notify the Authority of the occurrence and details of any Event of Default and of any event or circumstance which would, with the passage of time or otherwise, constitute or give rise to an Event of Default, in either case promptly upon the PPP Co becoming aware of the occurrence thereof.

#### **49.2 Remedies**

Upon the occurrence of an Event of Default, the Authority, may at its option and without prejudice to any of its other rights or remedies and to any rights of action which shall accrue or shall have already accrued to the Authority, do any or all of the following:

- (a) suspend payment of the Unitary Charge and any other payments otherwise due under this Agreement and/or retain any amount due from the Authority to the PPP Co howsoever arising provided that:
  - (i) the amount the Authority continues to pay to PPP Co shall be proportionate to the proportion of those Services under this Agreement which the PPP Co is continuing to perform;
  - (ii) there shall be no entitlement to suspend payment of amounts due by the Authority immediately prior to the occurrence of the Event of Default;
  - (iii) if the PPP Co remedies such Event of Default in accordance with this Clause 49.2, the Authority shall deduct all costs and expenses incurred by it in relation to such Event of Default from the suspended or retained sums and pay the remainder to the PPP Co; and
  - (iv) the Authority shall not be entitled to make Deductions for the non-

performance of those Services in respect of which the Unitary Charge has been suspended provided that nothing in this Clause 49.2 shall limit the Authority's ability to make Deductions in relation to any Service Failure in respect of those Services, which the PPP Co is continuing to perform;

- (b) apply any sums standing to the credit of the Retention Account in accordance with Clause 55.5 (Retention Account);]
- (c) in the case of the Events of Default referred to in paragraphs 1.2, 1.6 (insofar as it applies to paragraph 1.2, 2, 3, 9, 11, 15, 16, and 17 of [Clause 49 - Schedule] (Events of Default), terminate this Agreement in its entirety by notice in writing having immediate effect;
- (d) in the case of any Event of Default other than those referred to in Clause 49.2(c) or 49.2(e) considered by the Authority (acting reasonably) to be remediable, serve notice of default on the PPP Co requiring the PPP Co at the PPP Co's option either:
  - (i) to remedy the breach or breaches referred to in such notice of default within [•][•] Working Days of such notice (or such longer period as may be agreed by the Authority in its absolute discretion); or
  - (ii) to put forward within [•][•] Working Days of such notice a reasonable programme for the remedying of the breach or breaches, such programme to specify in reasonable detail the manner in which such breach or breaches is or are proposed to be remedied and the latest date by which it is proposed that such breach or all such breaches shall be remedied, and the provisions of Clause 49.3 (Remedial Programme) shall apply; and
- (e) issue a demand under the terms of the Performance Bond. For the avoidance of doubt, the Authority may only issue such a demand upon terminating this Agreement for the default of the PPP Co.

### 49.3 Remedial Programme

- (a) Where the PPP Co puts forward a programme in accordance with Clause 49.2(d)(ii) (or a response in accordance with Clause 49.2(e)) the Authority shall have [•][•] Working Days from receipt of such programme within which to notify the PPP Co that it does not accept such programme as being reasonable, failing which the Authority shall be deemed to have accepted such programme. Where the Authority notifies the PPP Co that it does not accept such programme as being reasonable, the parties shall endeavour within the following [•][•] Working Days to agree any necessary amendments to the programme put forward. In the absence of agreement within such [•][•] Working Day period, the question of whether or not the programme (as the same may have been amended by agreement) is reasonable may be referred by either party to the Disputes Resolution Procedure.
- (b) If:
  - (i) the breach or breaches notified in a notice of default served by the Authority under Clause 49.2(d) or the notice served by the Authority under Clause 49.2(e) is or are not remedied:
    - (A) before the expiry of the period referred to in Clause 49.2(d)(i) (if applicable); or
    - (B) where the PPP Co puts forward a programme pursuant to Clause 49.2(d)(ii) or 49.2(e) (ii) (A) which has been accepted by the

Authority or determined by the Disputes Resolution Procedure as being reasonable, in accordance with such programme; or

- (ii) such programme or response as is put forward by the PPP Co pursuant to Clause 49.2(d)(ii) or 49.2(e) is rejected by the Authority as not being reasonable, and the Adjudicator under Disputes Resolution Procedure does not find against that rejection,

the Authority may, if the Event of Default is continuing unremedied and unwaived, terminate this Agreement in its entirety by notice in writing having immediate effect.

#### **49.4 Compensation on Termination**

Upon termination of this Agreement pursuant to this Clause 49 (PPP Co Default Termination), Clause 54.2 (Termination for PPP Co Default) shall apply.

**Comment: This concerns compensation, and is discussed in Clause 55 (Handback).**

#### **49.5 Savings**

The rights of the Authority under this Clause 49 (Default) are in addition and without prejudice to any other right the Authority may have to claim the amount of any Loss suffered by the Authority on account of the acts or omissions of the PPP Co, whether pursuant to any bond or guarantee given in accordance with the requirements of this Agreement or otherwise.

### **[CLAUSE 49 – SCHEDULE]**

#### **EVENTS OF DEFAULT**

The following are Events of Default:-

1. the occurrence of any act of insolvency in respect of the PPP Co or any Contracting Associate or any Sponsor, including:
  - 1.1 the convening of a meeting of creditors of the person in question for the purposes of Section 266 of the Companies Act 1963 (as amended) or any meeting of creditors of the person in question being held for the purposes of considering an arrangement or composition with or for the benefit of its creditors under Sections 201 to 204 of the Companies Act 1963 (as amended) by or in relation to the person in question; or
  - 1.2 a supervisor, receiver, administrator, administrative receiver, trustee or encumbrancer taking possession of or being appointed over, or any distress, execution or other process being levied or enforced (and such distress, execution or other process not being discharged within [●] ([●]) Working Days) upon the whole or any part of the assets of the person in question; or
  - 1.3 the person in question ceasing or threatening to cease to carry on business, or being or becoming unable to pay its debts within the meaning of Section 214 of the Companies Act 1963 (as amended) (in the case of Section 214(c) it will not be necessary to actually prove any fact or matter to the satisfaction of the court); or
  - 1.4 a petition being presented (other than in the case of a petition under Part II of the Insolvency Act 1986 of the United Kingdom or pursuant to Section 2 of the Companies (Amendment) Act 1990), and not being dismissed within [●]([●]) Working Days of presentation thereof, or a meeting being convened for the purpose of considering a resolution, for the making of an administration order or the winding-up, bankruptcy,

- 1.5 examination or dissolution of the person in question; or a petition is presented to appoint an examiner to such person, or any order is made appointing an examiner to that person or to a “related company” (within the meaning of the Section 4 of Companies (Amendment) Act 1990); or
  - 1.6 if the person in question shall suffer any event analogous to any of the foregoing in any jurisdiction in which it is incorporated or resident,
- but in the case of any of the foregoing affecting a Contracting Associate or Sponsor, only if the occurrence will have a material adverse effect on the ability of the PPP Co to perform its obligations under this Agreement;
2. the PPP Co sells, transfers, leases or otherwise disposes of the whole or any part (which has a material adverse effect in the context of the performance of the PPP Co’s obligations under this Agreement) of its undertakings, properties or assets by a single transaction or a number of transactions (whether related or not and whether at the same time or over a period of time and other than in respect of the grant of security pursuant to Clause 17.2(b) (Assignment)) without the prior consent of the Authority;
  3. the repudiation of this Agreement by the PPP Co or the Abandonment by the PPP Co of the Project and/or the [Project Facility] or any material part thereof;
  4. the PPP Co completely ceasing to maintain or operate the [Project Facility], or any material part thereof;
  5. the PPP Co being in breach of any of its obligations under this Agreement or the Project Documents, which breach has a material adverse effect on the Project or on the interests of the Authority:
    - 5.1 in relation to the discharge by the Authority of its Statutory Duties; or
    - 5.2 as a party to this Agreement;
  6. any of the warranties in or referred to in Clause 15 (Warranties), Clause 20 (General Project Undertakings) and Clause 21 (Specific Project Undertakings) shall prove to be materially untrue or incorrect, to the extent that such breach of warranties has a material adverse effect on the Project or the interests of the Authority:
    - 6.1 in relation to the discharge by the Authority of its Statutory Duties; or
    - 6.2 as a party to this Agreement;
  7. any breach by the PPP Co of Clause 31(a) (Protestors and Trespassers);
  8. the PPP Co:
    - 8.1.1 failing to take out and maintain in force the Insurances set out in Clause 48 (Insurance) and [Clause 48 - Schedule] (Insurance) for the benefit of the relevant parties referred to therein; or
    - 8.1.2 failing to comply with any other material requirement of Clause 48 (Insurance);
  9. failure by the PPP Co to furnish the guarantee as provided for in Clause 33 (Employment Transfer Guarantee);
  10. breach by the PPP Co of its obligations under Clause 17 (Assignment);
  11. breach by the PPP Co of its obligations under Clause 18 (Sub-Contracting);

12. the occurrence of any change in control without the prior consent of the Authority as contemplated by Clause 16.2 (Change in Control);
13. other than where Clause 52.3 (Termination on Change in Law) this Agreement or any of the Project Documents:
  - 13.1 ceases to be in full force and effect or no longer constitutes the valid, binding and enforceable obligations of the parties thereto other than the Authority; or
  - 13.2 is materially amended, varied or departed from (other than in accordance with Clause 21.1 (Project Documents)),
 

and, in any such case (other than in relation to this Agreement) this would materially adversely affect the ability of the PPP Co to perform its obligations under this Agreement or any right of the Authority under this Agreement or its ability to enforce any such right or to perform its obligations under this Agreement or to perform any statutory duty;
14. the PPP Co fails to pay any sum due to the Authority hereunder (which sum is not in dispute) and such failure continues for [●] ([●]) days;
15. there is an occurrence of a Persistent Breach in accordance with the terms of Clause 11.3;

**Comment: The following defaults will be contract-specific, the Core Contract drafting is illustrative.**

16. the PPP Co has received a total of [[●]] or more Warning Notices in any period of [[●] ([●])] consecutive months;
17. the Authority has been entitled pursuant to [Clause 39 - Schedule] (Payment Mechanism) to reduce the amount of the Monthly Unitary Charge (as defined in [Clause 39 – Schedule] (Payment Mechanism) by more than [[●]] per cent in each of any [[●]] Payment Periods within a rolling [●] ([●]) month period;
18. the cumulative total of Performance Points accumulated by the PPP Co in any rolling [[●]] Payment Periods is equal to or greater than [[●]]; and
19. failure to complete the Works by the Longstop Date; and

**Comment: This is not a default in the NRA Model Contract, but there is a provision for liquidated damages for delay.**

20. The cumulative total of ICD Deductions which the Authority has been entitled to make in accordance with Part 7 of [Clause 39 - Schedule] (Payment Mechanism) in any rolling [●] ([●]) Contract Years is equal to or greater than [●] % of the amount which would equate to the Unitary Charge for a single Contract Year, as adjusted in accordance with Part 3 of [Clause 39 - Schedule] (Payment Mechanism).

## CROSS REFERENCES

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

- Clause 5 (Design and Construction Certificates)

- Clause 11 (Monitoring of Performance)
- Clause 36 (Delays to Completion and Compensation Events)
- Clause 37 (Relief Events)
- Clause 38 (Force Majeure)
- Clause 53 (Effect of Termination)
- Clause 54 (Compensation on Termination)
- Clause 55 (Handback)

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

- G4 (Contractor Default)