

# COMPILATION OF PPP TERMS AND CONDITIONS OF CONTRACT

## PUBLIC SECTOR VERSION

### CLAUSE 5: DESIGN AND CONSTRUCTION CERTIFICATES

#### DBFOM CONTRACT

#### CONCESSION CONTRACT

#### DBOM CONTRACT

## INTRODUCTION

Most PPP contracts will have a procedure for development of tender design, and review by the Authority of that design development. The important elements of a design development procedure are:

- What parts of the design have to be submitted for review.
- How the Authority may respond: The Authority does not usually “approve” designs: it responds using words such as “acknowledged” or “no comment”. If the Authority has the right to object, the basis for objections must be set out. Both parties must be protected against design development being used to change the specification.
- Timing: Usually, if the Authority does not respond in the time allowed, it is taken not to have objected, and the PPP Co may proceed.
- The consequences of the Authority’s response: As noted above, usually the Authority does not approve designs. However, in some types of projects, certain requirements of the Authority are regarded as satisfied if the design passes Authority review. The Accommodation Contract, quoted below, has a provision for this. In the UK, this concept is mostly associated with hospital projects.

For design and build roads contracts (not just those involving private sector finance or operations), a very detailed procedure has been adopted for each design element to be accompanied by a certificate of the designer, and also a certificate of a “checker” who has checked the design. There are different categories of checker: some have to be completely independent of the designer. There are also certificates for matters other than design, such as consultation with third parties, quality and environmental documentation, operation and maintenance manuals, and handback. The contract documents set out the required language for each individual certificate, and what sort of check is required. The NRA Model Contract adopts this approach. Accommodation PPP projects usually use a simpler form of design review procedure. The Accommodation Contract text quoted below is an example. The Core Contract form has an amalgam: Clause 5.1 and Parts 1

and 3 of [Clause 5 – Schedule A] adopt the ‘roads’ model with certificates and checkers, but Part 4 of [Clause 5 – Schedule A] adds a design review procedure using the more conventional approach for building PPP projects.

**Comment: The risk allocation in the project can be affected where the State Authority makes changes to the design and construction clauses or otherwise dilutes the risk transferred.**

## CORE CONTRACT DRAFTING

### 5 DESIGN AND CONSTRUCTION CERTIFICATES

#### 5.1 Responsibility

- (a) The PPP Co shall be responsible for the Design and the Construction, which shall be carried out in accordance with the Construction Requirements, the PPP Co Proposals, the Conceptual Design and the Review and Certification Procedure.
- (b) In the event of a breach of Clause 5.1(a), the Authority may require the PPP Co to make as soon as reasonably practicable, a submission in respect of such breach to Commercial Review, including in such submission:
  - (i) a full statement of the circumstances in which such breach took place together with a full explanation of the reasons for, and the impact of, such breach and, if appropriate, for any delay in providing notification under Part 9 (Monitoring and Reporting) of [Clause 11 – Schedule] (Payment Mechanism) and/or Clause 49.1 (Notification of Events of Default);
  - (ii) a full statement of the measures, if any, which the PPP Co proposes to adopt and the time period within which any such measure is to be carried out in order to rectify such breach and/or to preclude or mitigate the consequences thereof (if any); and
  - (iii) if such breach relates to a variation in the design, quality or quantity of the Works, a PPP Co Notice of Change.

**Comment: Commercial Review is a parallel procedure under Clause 29.1 and Part 4 of [Clause 5 – Schedule B] [Certificate Procedure] (set out below).**

- (c) The Authority’s Representative shall deal with a submission pursuant to Clause 5.1(b) in accordance with the Commercial Review. The Authority’s Representative shall be entitled to raise comments in respect of such a submission in his absolute discretion, but in deciding upon the appropriate response to such submission, the Authority’s Representative shall have regard to all of the circumstances, including, without limitation:
  - (i) whether the breach is inadvertent on the part of the PPP Co or the relevant Principal Sub-Contractor or any person referred to under the Review and Certification Procedure;
  - (ii) whether there has been culpable delay in making the relevant submission under Clause 5.1(b); and
  - (iii) whether similar breaches occurred previously and, if so, the gravity of such breaches and the measures, if any, adopted by the PPP Co to prevent their re-occurrence.
- (d) For the avoidance of doubt, the procedure set out in this Clause 5.1(b) shall be without prejudice to the Authority’s rights against the PPP Co under this Agreement in respect of such breaches.

#### 5.2 Review and Certification Procedure

- (a) Where there is a requirement under this Agreement for the PPP Co to make a submission under the Review Certification Procedure, the submission shall be dealt with in accordance

- with the relevant provisions of the Review and Certification Procedure.
- (b) Notwithstanding the application of the Review and Certification Procedure, the PPP Co shall not be entitled to recover from the Authority, its advisers, consultants, servants, contractors and/or agents any Losses or Claims which may arise out of or in connection with any inadequacy, error or failure of the Disclosed Data and/or any matter which has been subject to the Review and Certification Procedure and any comments made by the Authority's Representative in the course thereof. The PPP Co shall obtain from each Principal Sub-Contractor, prior to any such party carrying out any part of the Project, a waiver of liability in favour of the Authority and, if requested, its advisers, consultants, servants, contractors and/or agents and shall furnish same to the Authority in respect of any such Losses and Claims. The return by the Authority of any document marked Acknowledged or Acknowledged with Comments in the course of the Review and Certification Procedure shall in no way relieve the PPP Co of any of its obligations under this Agreement in connection with the Project.
  - (c) Without limitation to the generality of Clause 5.1(a), the PPP Co shall procure that:
    - (i) the Designer shall prepare the Design in accordance with the Construction Requirements and the Conceptual Design and shall comply with the Review and Certification Procedure and the relevant other provisions of this Agreement;
    - (ii) the Checker shall review the Special Structures and acoustics to ensure that they have been prepared in accordance with the Construction Requirements and the Design and shall comply with the Review and Certification Procedure and the relevant other provisions of this Agreement;
    - (iii) the Contractor shall procure that the Construction is carried out in accordance with the Construction Requirements and the Design and shall comply with the Review and Certification Procedure and the relevant other provisions of this Agreement; and
    - (iv) any other Principal Sub-Contractor shall carry out its obligations in relation to the Design or Construction in accordance with the Construction Requirements, the Design and shall comply with the Review and Certification Procedure and the relevant other provisions of this Agreement.
  - (d) The PPP Co shall procure that the procedures referred to in the Review and Certification Procedure are complied with by the appropriate persons referred to therein, including but not limited to the Principal Sub-Contractors, and that such persons are at all relevant times duly authorised to carry out such procedures and to sign the relevant Certificates.
  - (e) Without limitation to Clause 5.1 (Responsibility) and Clause 5.1 (Responsibility), any failure by any person referred to in the Review and Certification Procedure, including but not limited to the Principal Sub-Contractors, to fulfil its obligations under the Review and Certification Procedure shall be a breach of the PPP Co's obligations under this Agreement.
  - (f) Any matter which is subject to submission under the Review and Certification Procedure and in respect of which a Certificate has been Acknowledged pursuant to the Review and Certification Procedure shall not be departed from otherwise than pursuant to [Clause 34 – Schedule A] (Variations).
  - (g) The PPP Co shall not commence or permit the commencement of the Construction until all relevant Certificates have been deemed Acknowledged pursuant to the Review and Certification Procedure and all Necessary Consents required in respect of the relevant part of the Works have been obtained. Relevant Certificates, for the purposes of this Clause 5.2(g) shall include, without limitation, the Certificates referred to in Annex [●] and Annex [●] to Part 3 of [Clause 5 – Schedule A] (Review and Certification Procedure) which relate to the Design under the Review and Certification Procedure.
  - (h) If the PPP Co proposes to vary or amend the Conceptual Design after the Commencement Date, including making additions, omissions, substitutions, alterations in design and/or variations in or to the Conceptual Design, such proposal shall be submitted in accordance

- with the Review and Certification Procedure as a proposed change to the Conceptual Design.
- (i) If the PPP Co objects to any Certificate having been Rejected by the Authority's Representative, it may refer the matter to the Disputes Resolution Procedure for determination.

## KEY DEFINITIONS - USED IN CLAUSE 5 CORE CONTRACT DRAFTING

"Review and Certification Procedure" means the Review and Certification Procedure set out in Schedule [●] (Review and Certification Procedure) [Parts 1, 3 and 4 at [Clause 5 – Schedule]] and 5.2 (Review and Certification Procedure) this Agreement.

"Commercial Review" means the review to be undertaken by the Authority's Representative in accordance with Clause 29.1 (Commercial Review).

## ADDITIONAL CORE CONTRACT DRAFTING

### 29.1 Commercial Review

- (a) Any proposed document or proposed course of action on the part of the PPP Co which is not subject to the Review and Certification Procedure and which, under the terms of this Agreement, is required to be submitted for Commercial Review shall be dealt with in accordance with the provisions of Part 2 of [Clause 5 – Schedule B] (Representatives).
- (b) Without limitation to Clause 29.2 (Effect of Consents, Approvals and Inspections), notwithstanding the application of the Commercial Review, the PPP Co shall not be entitled to recover from the Authority any Losses or Claims which may arise out of or in connection with any inadequacy, error or failure of any matter which has been subject to the Commercial Review and any comments made by the Authority's Representative in the course thereof. The PPP Co shall obtain from the Principal Sub-Contractors, prior to any such party carrying out any part of the Project, waivers of liability in favour of the Authority and the Authority's Representative in respect of any such Losses and Claims. No comments or absence of comments on any matter in the course of the Commercial Review shall relieve the PPP Co of any of its obligations under this Agreement in connection with the Project.

### [CLAUSE 5 – SCHEDULE A]

#### PART 1

#### Certification Procedure

##### General

- 1.1. This Certification Procedure details Certificates and other information that shall be issued by either the Authority's Representative or by the PPP Co in accordance with the requirements detailed in Parts 2 and 3 of this Schedule. Compliance with these procedures shall not relieve the PPP Co of any of its other obligations under the Agreement.
- 1.2. Two copies of each Certificate issued shall be provided by the issuing party, each bearing original signatures as appropriate to the Certificate. Following counter signature by the recipient, one copy of the Certificate shall be retained by the Authority's Representative, and one copy shall be retained by the PPP Co.

- 1.3. The PPP Co shall provide to the Authority's Representative, and maintain throughout the duration of the Agreement, a register recording the current status of all Certificates.
- 1.4. Any Certificates submitted to the Authority under these Certification Procedures shall be null and void if such Certificates and or the supporting data or information required to be included within such Certificates have not been properly executed in accordance with the Agreement.
- 1.5. For the avoidance of doubt, if such an event occurs no related part of the Works can be progressed until such time as such Certificates together with all supporting data and information has been re-submitted in accordance with the Certification Procedure.
- 1.6. The Certificates referred to in paragraph 1.4 of this Part 1 shall be null and void whether such Certificates have been returned Acknowledged by the Authority's Representative and whether or not any Works have been commenced or completed subsequent to such acknowledgement.
- 1.7. In the event that such Works have:
  - (a) commenced they shall be immediately stopped until such relevant Certificates have been re-submitted in accordance with the Certification Procedure; and
  - (b) achieved Substantial Completion or Completion any such subsequent and related Acknowledged Certificates shall be null and void until such relevant Certificates have been re-submitted in accordance with the Certification Procedure.
- 1.8. All subsequent Certificates issued relating to Works which are the subject matter of such Certificates shall be null and void and shall require all such affected Works to be re-certified once the relevant Certificates referred to in paragraph 1.4 of this Part 1 have been properly executed.
- 1.9. The effective date for Certificates issued under the PPP Co's Certification Procedure shall be the date when such certificates have been acknowledged.

### **PART 3**

#### **PPP Co's Certification Procedure**

##### **1. General**

- 1.1. The PPP Co's Certification Procedure shall apply to those Certificates that are to be supplied to the Authority's Representative by the PPP Co.
- 1.2. The Authority's Representative shall return one copy of the Certificates, which shall be signed by the Authority's Representative with one of the following responses:
  - (a) "Acknowledged", following which the PPP Co may proceed on the basis of there being no objection to the material supplied to the Authority's Representative; or
  - (b) "Acknowledged with Comments", following which full details of the Authority's Representative's comments shall be supplied to the PPP Co by the Authority's Representative. The PPP Co shall amend its proposals in accordance with such comments and any proposal so amended shall require resubmission of amended Certificates reflecting such comments. The resubmitted Certificates (as amended in accordance with such comments) shall be deemed to be Acknowledged if not objected to within [three] Working Day after resubmission to, and receipt by, the Authority's Representative; or
  - (c) "Rejected", and following which full details of the reasons for the rejection shall be supplied to the PPP Co by the Authority's Representative, and the PPP Co shall amend and revise its proposals and shall prepare new Certificates for submission to the Authority's Representative in respect of such amended proposals in accordance with the PPP Co's Certification

Procedure. Grounds for such rejection are as set out in paragraph 2 of this Part 3.

- 1.3. The PPP Co shall not be permitted to proceed with the Works or Operations which are the subject matter of a Certificate until such time as the Certificate has been Acknowledged.
- 1.4. Should the PPP Co propose to vary any of the information submitted in accordance with the PPP Co's Certification Procedure and returned with the relevant Certificates stated as Acknowledged or Acknowledged with Comments or Rejected, other than as required by any comments of the Authority's Representative or the other provisions of this Part 3, the PPP Co shall issue new Certificates together with the relevant information to the Authority's Representative in accordance with the PPP Co's Certification Procedure.
- 1.5. If the Authority's Representative so requests, the PPP Co shall submit any further information relating to the Works or Operations, any Design Data and any comments or any other information which may be considered by the Authority's Representative as necessary for a full evaluation of a submission under the PPP Co's Certification Procedure, and shall take all such steps as may be required to satisfy the Authority's Representative that the proposal complies with this Agreement and is appropriate.
- 1.6. The Authority's Representative shall return one copy of the Certificate within **[[●]]** Working Days of the later of:
  - (a) receipt by the Authority's Representative of the Certificate; and
  - (b) the date on which the information referred to in paragraph 1.5 of this Part 3 has been fully supplied, duly signed and certified in accordance with paragraph 1.2 of this Part 3. Failure to return any Certificate to the PPP Co within the relevant period shall render the relevant Certificate to be deemed to be Acknowledged. Notwithstanding the provisions of paragraph 1.5 of this Part, all Design Data shall be available to the Authority's Representative at a location on or near to the Site at all times.
- 1.7. The particular procedures to be complied with by the PPP Co in respect of the individual Certificates referred to in this Part 3 are contained in paragraphs 2 to 19 inclusive of this Part 3.

## 2. **Grounds for Comment**

- 2.1. Except where otherwise provided for in this Agreement, the sole grounds for comment under the Certification Procedures shall be on the basis that the matter, document or proposed course of action by the PPP Co does not, or will not, if implemented or proceeded with, comply with the provisions of the Agreement or would result in some aspect of the Works or Operations not complying with this Agreement including the requirement to deliver the standard of performance set out in Clause 20.4 of the Agreement.
- 2.2. Notwithstanding the generality of paragraph 2.1 of this Part 3, where the Authority's Representative:
  - (a) is satisfied that the matter, document or proposed course of action by the PPP Co will not represent a reduction in the overall quality of the Conceptual Design or Design and the PPP Co has obtained the consent of any relevant third party and satisfied the other requirements of this Agreement, the Authority's Representative shall return the relevant Certificate signed Acknowledged; or
  - (b) considers the matter, document or proposed course of action by the PPP Co represents a reduction in the quality of the Conceptual Design or Design, the Authority's Representative may accept the proposal subject to any such variations it requires and specifies and may return the relevant Certificate signed Acknowledged with Comments; or
  - (c) considers that the matter, document or proposed course of action by the PPP Co represents a reduction in the quality of the Conceptual Design or Design, the Authority's Representative may reject the proposal on grounds specified and may return the relevant Certificate signed Rejected.

- 2.3. For the purposes of this [Clause 5 – Schedule A] Part 3, a reduction in quality means, without limitation, a lower standard of construction, durability, stability, performance, operation, safety or of the aesthetic quality of the external appearance of any part of the Works as determined by the Authority.
- 2.4. For the avoidance of doubt, and without limitation to the other provisions of the Agreement, no Certificate:
- (a) which has been signed and returned Acknowledged or Acknowledged with Comments or Rejected shall entitle the PPP Co to treat such Certificate or its qualified terms to represent a Variation or deemed Variation that will entitle the PPP Co to recover compensation of whatsoever nature under the other provisions of the Agreement; and
  - which is not returned signed by the Authority's Representative shall entitle the PPP Co to treat such failure to return a Certificate to represent a Variation or deemed Variation that will entitle the PPP Co to recover compensation of whatsoever nature under the other provisions of the Agreement.

**Comment: The rest of this part deals with the specific requirements for each type of certificate.**

## **PART 4**

### **Review Procedure**

#### **1. General**

- 1.1 This Review Procedure details design data and other information that shall be issued by the PPP Co in accordance with the requirements detailed in Part 4 of this Schedule. Compliance with these procedures shall not relieve the PPP Co of any of its other obligations under the Agreement.
- 1.2 The Authority shall be entitled to review design data of a type or category specified in Table [●] of this Part [●] ("Reviewable Design Data") whenever any item, document or course of action is required to be reviewed, approved or otherwise processed in accordance with this Schedule.
- 1.3 The PPP Co shall submit the reviewable Design Data in an orderly fashion for Approval. Each submission under this Part 4 of this Schedule shall be accompanied by [four] copies of the proposed document to be reviewed (the entire contents of a submission being referred to in this Schedule as a "Submitted Item").
- 1.4 [●] copies of each submission provided shall be provided by the PPP Co.
- 1.5 Notwithstanding any provisions of this Schedule the Authority is not under any obligation to check Design Data, including drawings, calculations and specifications for compliance with Legislation or the User Requirements.
- 1.6 The PPP Co shall provide to the Authority's Representative, and maintain throughout the duration of the Agreement, a register recording the current status of all Reviewable Design Data.
- 1.7 Any submission made to the Authority under these Review Procedures shall be null and void if such submission and or the supporting data or information required to be included within such Reviewable Design Data has not been properly executed in accordance with the Agreement.
- 1.8 The Authority's Representative shall respond within [●] working days of the date of receipt of the Submitted Item (or re-submission of the Submitted Item) as the case may be.
- 1.9 The response of the Authority's Representative may be made in the following ways:-

- 1.9.1 Return an item of Reviewable Design Data to the PPP Co marked “no comment” which shall mean:-
- (a) That the Authority has no objection to the item of Reviewable Design Data and/or Approves the relevant item for the purposes of this Agreement
  - (b) That the item shall become part of the Design and Construction Specification or Operations Management Plan
  - (c) The Operator may proceed with the Works on the basis of the Reviewable Design Data as submitted.
- 1.9.2 Return an item of Reviewable Design Data to the PPP Co with the comment “proceed subject to comments as noted” and thereafter the PPP Co may proceed with the part of the Works or Services to which such item relates subject to taking into account all of the Authority’s comments, but without the requirement for the PPP Co to refer that item of Reviewable Design Data back to the Authority’s Representative.
- 1.9.3 Return an item of Reviewable Design Data with the comment “re-submit subject to amendment as noted” in which case the PPP Co must:
- (a) re-submit that item to the Authority’s Representative; and
  - (b) not proceed to the next level of design to which that item relates until such item of Reviewable Design Data has been approved by the Authority’s Representative under this Part 4.
- 1.9.4 Reject an item of Reviewable Design Data in which case the PPP Co shall:-
- (a) re-submit that item to the Authority’s Representative; and
  - (b) not proceed to the next level of design to which that item relates until such item of Reviewable Design Data has been approved by the Authority’s Representative under this Part 4.

Provided always that any such response shall not otherwise relieve the PPP Co of its obligations under this Agreement nor is it an acknowledgement by the Authority that the PPP Co has complied with such obligations

- 1.10 PPP Co shall submit any further or other information, data and documents that the Authority's Representative reasonably requires in order to determine its response to any submitted item of Reviewable Design Data in accordance with this Schedule. If PPP Co does not submit any or sufficient such information, data and documents, the Authority's Representative shall be entitled to:-
- (a) return the item of Reviewable Design Data with comments on the basis of the information, data and documents which have been provided; or
  - (b) reject the item of Reviewable Design Data on the grounds that insufficient information, data and documents have been provided to enable the Authority's Representative to determine whether he has a legitimate basis for commenting or rejecting the Submitted Item in accordance with this Schedule.

## 2. **Design Data other than Reviewable Design Data**

- 2.1 The Authority’s Representative shall have access to all Design Data in addition to Reviewable Design Data and may comment on such information.

**3. Changes**

- 3.1 No approval or comment or any failure to give or make an Approval or comment under this Schedule shall constitute a Variation save to the extent expressly provided in this Schedule.
- 3.2 If, having received comments from the Authority's Representative, the PPP Co considers that compliance with those comments would amount to a Variation, the PPP Co shall before complying with the comments notify the Authority's Representative of the same and if it is agreed by the parties or determined pursuant to Clause 56 (Dispute Resolution Procedure) of the Agreement that a variation would arise if the comments were complied with the Authority may if it wishes implement the Variation and it shall be dealt with in accordance with [Clause 34 – Schedule A] of the Agreement (Variations). Any failure by the PPP Co to notify the Authority that it considers that compliance with any comments of the Authority's Representative would amount to a Variation shall constitute an irrevocable acceptance by PPP Co that any compliance with the Authority's comments shall be without cost to the Authority and without any extension of time to the Target Services Commencement Date or Contract Period.
- 3.3 No alteration or modification to the design, quality and or quantity of the Works or Services arising from the development of the detailed design or from the coordination of the design shall be construed or regarded as a Variation.

Table [●] Reviewable Design Data

[Sets out the design subject to review]

**[CLAUSE 5 - SCHEDULE B)**

**PART 2**

**Commercial Review**

1. A submission by the PPP Co pursuant to Clause 29.1(Commercial Review) of the Agreement shall be made to the Authority's Representative, accompanied by two copies of the proposed document or statement of a proposed course of action together with two copies of all necessary supporting information, and the following procedure shall apply:
- 1.1 The Authority's Representative shall, as soon as practicable and in any event within [●] Working Days following receipt of the relevant documents (or such other period as may be specified in this Agreement or otherwise agreed between the parties), return one copy of the relevant submission document with one of the following responses:
- (a) "Approved" means that the Authority's Representative has no material objection to the proposals supplied by the PPP Co and the PPP Co may proceed to implement the proposals;
  - (b) "Approved with Comments" means that the Authority's Representative has raised comments in accordance with paragraph 3 of this Part 2 of [Clause 5 - Schedule B] of the Agreement and the PPP Co must amend its proposals in accordance with such comments and any such amended proposals must be resubmitted to the Authority's Representative. Such resubmitted proposals shall be deemed to be Approved if not responded to within [●] Working Day(s) following resubmission to, and receipt by, the Authority's Representative;
  - (c) "Rejected" means that the Authority's Representative has material objections to the proposals supplied by the PPP Co, in accordance with paragraph 3 of this Part 2 of [Clause 5 – Schedule B], and the PPP Co must amend and revise its proposals or prepare new proposals

for submission to the Authority's Representative in accordance with the procedure set out in paragraph 1 of this Part 2 of [Clause 5 – Schedule B] of the Agreement.

- 1.2 If the PPP Co Disputes that any reason given for returning a submission marked Approved with Comments or Rejected is on grounds permitted by this Agreement, the PPP Co or the Authority's Representative may refer the matter to the Disputes Resolution Procedure.
- 1.3 If the Authority's Representative fails to return any such submission document (including any re-submitted submission document) duly endorsed within the period set out in paragraph 1.1 (or such other period as may be specified in this Agreement or otherwise agreed between the parties), it shall be deemed to have returned such submission document to the PPP Co marked Approved.
- 1.4 The PPP Co may not proceed to implementation in the case of any submission endorsed Approved with Comments or Rejected until such proposals have been amended and re-submitted by the PPP Co in accordance paragraph 1.1 (b) and (c) respectively of this Part 2 of [Clause 5 – Schedule B] of the Agreement.
- 1.5 The PPP Co shall provide to the Authority's Representative and maintain throughout the duration of the Agreement, a register recording the status of all submissions made under this Commercial Review procedure.

## 2. FURTHER INFORMATION

- 2.1 The Authority's Representative may request the PPP Co to submit further information, data and documents in order to assess a submission under paragraph 1 of this Part 2 of [Clause 5 – Schedule B] of the Agreement. The PPP Co shall take all steps as may be required to satisfy the Authority's Representative that the proposed document or proposed course of action complies with this Agreement or is appropriate. The period for review referred to in paragraph 1.1 of this Part 2 of [Clause 5 – Schedule B] of the Agreement shall commence on the date of receipt of such further information.

## 3. GROUNDS FOR COMMENT

- 3.1 The Authority's Representative may raise comments or reject any submission in accordance with any provision set out in this Agreement or on the grounds that the proposed document or course of action would be inconsistent with the Authority's statutory duties or the provisions of this Agreement or in breach of any Legal Requirement or on the ground that the PPP Co has not provided all information required in respect of such submission.
- 3.2 In relation to a document or proposed course of action submitted pursuant to Clause 21.1 (Project Documents) of the Agreement, the Authority's Representative shall be entitled to raise comments or reject submissions if the adoption of such document or proposed course of action could:
  - 3.2.1 materially and adversely affect the PPP Co's ability to perform its obligations under this Agreement;  
or
  - 3.2.2 materially adversely affect any right of the Authority under this Agreement or his ability to enforce any such right or to perform its obligations under this Agreement or to carry out any Legal Requirement;  
or
  - 3.2.3 without limitation to paragraph 3.2.2 of this Part 2 of [Clause 5 – Schedule B] of the Agreement, where it relates to any proposed Funding Agreement or document or course of action in respect of any of the Funding Agreements, increase any liability (present or future, actual or contingent) of the Authority to the PPP Co (including without limitation under Clause 54 (Compensation on Termination) or [Clause 34 – Schedule A] (Variations) of the Agreement.

4. NO OBJECTION

- 4.1 For the avoidance of doubt, a reference in this Agreement to there being no objection under the Commercial Review in relation to a particular matter means that such matter shall have been submitted in accordance with the provisions of this Part 2 of [Clause 5 – Schedule B] of the Agreement and returned (or deemed returned) with an endorsement of Approved.

## ACCOMMODATION CONTRACT DRAFTING

### [•] RESPONSIBILITY FOR DESIGN OF THE FACILITY

#### [•].1 Development of Detailed Design

From the date of this Agreement the Operator shall continue to develop the design of the Works in accordance with the Design Development Procedure set out in Schedule [•] (Design Development Procedure).

#### [•].2 Approval of Design Proposals

The Operator and the Minister shall comply with their respective responsibilities set out in the Design Development Procedure.

### SCHEDULE [•]

#### Design Development Procedure

1. The Minister shall be entitled to review design data of a type or category specified in table [•] of this Schedule [•] (Reviewable Design Data) whenever any item, document or course of action is required to be reviewed, approved or otherwise processed in accordance with Schedule [•].
  - 1.1 in this Schedule [•] Approval means the approval in writing of [•] but not further or otherwise and without prejudice to the generality thereof the giving of any Approval shall not constitute any representation or acknowledgment that the subject matter of the Approval:-
    - 1.1.1 complies with Legislation; or
    - 1.1.2 would not have an adverse effect on the overall co-ordination of all other aspects of the Facility; or
    - 1.1.3 will not have an adverse effect on the ability of the Operator to provide the Services or to achieve the Availability criteria or to otherwise comply with its obligations under this Agreement.
  - 1.2 [•]
- 2 The Operator will submit the Reviewable Design Data in an orderly fashion for Approval. Each submission under this Schedule shall be accompanied by a copy of the proposed document to be reviewed (the entire contents of a submission being referred to in this Schedule as a Submitted Item).
- 3 Notwithstanding any provision of this Schedule the Minister's Contract Manager is not under any obligation to check drawings or specifications for compliance with Legislation or the User Requirements or the Design and Construction Specification.
- 4 The Minister's Contract Manager shall respond within [•] ([•]) Working Days of the date of receipt of the Submitted Item (or re-submission of the Submitted Item as the case may be). If the Minister's Contract

Manager does not respond within such timeframe, the submitted item shall be deemed to have been returned to the Operator marked no comment and the provisions of paragraph [●] shall apply.

5 The response of the Minister's Contract Manager may be made in the following ways:

5.1 return an item of Reviewable Design Data to the Operator marked no comment which shall mean:

- 5.1.1 that the Minister has no objection to the item of Reviewable Design Data and/or Approves the relevant item for the purposes of this Agreement;
- 5.1.2 that the item shall become part of the Design and Construction Specification; and
- 5.1.3 the Operator may proceed with the Works on the basis of the Reviewable Design Data as submitted;

5.2 return an item of Reviewable Design Data to the Operator with the comment proceed subject to amendment as noted and thereafter the Operator may proceed with the part of the Works to which such items relate, subject to taking all of the Minister's Contract Manager amendments into account, but without the requirement for the Operator to refer that item of Reviewable Design Data back to the Minister's Contract Manager;

5.3 return an item of Reviewable Design Data to the Operator with the comment re-submit subject to amendment as noted in which case the Operator must:

- 5.3.1 re-submit that item to the Minister's Contract Manager; and
- 5.3.2 not proceed to the next level of design to which that item relates until such item of Reviewable Design Data has been approved by the Minister's Contract Manager under paragraphs 5.1 and 5.2 above; or

5.4 reject an item of Reviewable Design Data in which case the Operator must:

- 5.4.1 re-submit that item to the Minister's Contract Manager; and
- 5.4.2 not proceed to the next level of design to which the that item relates until such item of Reviewable Design Data has been approved by the Minister's Contract Manager under paragraphs 5.1 or 5.2 above

provided always that any such response shall not otherwise relieve the Operator of its obligations under this Agreement nor is it an acknowledgment by the Minister that the Operator has complied with such obligations.

**6 Finishes at the Facility**

6.1 The Operator shall within [●] ([●]) Working Days of the date hereof propose to the Minister's Contract Manager a range or selection of aspects of finishes (Range of Finishes) listed in Table A below in accordance with the User Requirements and Design and Construction Specification that will be available for selection by the Minister within the relevant selection period listed in Table A below (Selection Period);

6.2 The Minister's Contract Manager shall after the receipt of the Range of Finishes listed in Table A below notify the Operator of its selection within the Selection Period (but not less than [●] ([●]) Working Days) for each of the Finishes and if no selection of a Finish has been made by the Minister's Contract Manager and notified to the Operator in accordance with paragraph 6.2 by the end of the relevant Selection Period, the Operator shall be entitled to (a) propose the selection of a particular finish and (b) make that selection once written notice has been given to the Minister's Contract Manager.

Table A [sets out items for which finishes are to be provided, aspects of finish to be reviewed, lead time and selection period]

## **7 Grounds of Objection**

7.1 The expression raise comments in this paragraph shall be construed to mean raise comments or make objections unless the contrary appears from the context. The Minister's Contract Manager may raise comments in relation to any Submitted Item on the following grounds:

7.1.1 Where the Submitted Item which does not comprise [●]:[●] scale room layout drawings the Minister's Contract Manager may raise comments, subject to and in accordance with paragraph 5 on the grounds that the Submitted Item is not in accordance with:

7.1.1.1 the User Requirements; and/or

7.1.1.2 the Design and Construction Specification;

7.1.2 where the Submitted Item comprises a [●]:[●] scale room layout drawing in respect of which there is a corresponding generic room layout drawing for the relevant room type (which has previously been reviewed and commented upon by the Minister's Contract Manager in accordance with this Schedule), the Minister's Contract Manager may raise comments, subject to and in accordance with paragraph 5, on the ground that the Submitted Item does not conform to the generic room layout drawing; and

7.1.3 where the Submitted Item comprises a [●]:[●] scale Room Layout Drawing in respect of which there is no corresponding generic room layout drawing for the relevant room type (which has previously been reviewed and commented upon by the Minister's Contract Manager may raise comments, subject to and in accordance with paragraph 5 the Minister's Contract Manager on the grounds that the Submitted Item:

7.1.3.1 is not in accordance with the User Requirements and/or Design and Construction Specification; or

7.1.3.2 is inconsistent with the guidance contained in any Guidance which is applicable to a room of that function.

## **8 Design Data other than Reviewable Design Data**

The Minister's Contract Manager shall have access to all design information in addition to Reviewable Design Data and may comment on such information. The Operator may accept or reject such comments as it thinks fit.

## **9 Documentation Management**

9.1 The Operator shall issue [●] ([●]) copies of all Reviewable Design Data to the Minister and compile and maintain a register of the date and contents of the submission of all Reviewable Design Data.

9.2 The Operator shall compile and maintain a register of the date of receipt and content of all Reviewable Design Data that are returned by the Minister's Contract Manager.

9.3 No review, comment or approval by the Minister shall operate to exclude or limit Operator's obligations or liabilities under the Agreement (or the Minister's right under the Agreement).

## **10 Changes**

10.1 No approval or comment or any failure to give or make an Approval or comment under this

Schedule shall constitute a Minister Change save to the extent expressly provided in this Schedule.

10.2 If, having received comments from the Minister's Contract Manager, the Operator considers that compliance with those comments would amount to a Minister Change, the Operator shall, before complying with the comments, notify the Minister of the same and, if it is agreed by the Parties or determined pursuant to Clause [●] (Dispute Resolution Procedure) that a Minister Change would arise if the comments were complied with, the Minister may, if it wishes, implement the Minister Change and it shall be dealt with in accordance with Schedule [●] (Change Procedure). Any failure by the Operator to notify the Minister that it considers that compliance with any comments of the Minister's Contract Manager would amount to a Minister Change shall constitute an irrevocable acceptance by the Operator that any compliance with the Minister's comments shall be without cost to the Minister and without any extension of time.

10.3 No alteration or modification to the design, quality and/ or quantity of the Works arising from the development of the detailed design or from the co-ordination of the design shall be construed or regarded as a Minister Change.

## CROSS REFERENCES

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

- Clause 3 (Effectiveness of this Agreement)
- Clause 10 (Standard of Operations and Maintenance)
- Clause 18 (Sub-Contracting)

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

- B1 (Information Quality)
- B2 (Design Standards)
- C10 (Construction codes of Practice)
- C12 (Working Practices)