

COMPILATION OF PPP TERMS AND CONDITIONS OF CONTRACT

PUBLIC SECTOR VERSION

CLAUSE 50: CORRUPT GIFTS AND FRAUD

DBFOM CONTRACT

CONCESSION CONTRACT

DBFM CONTRACT

DBF CONTRACT

INTRODUCTION

Most PPP contracts include provision designed to protect the public interest against fraud and corruption. This includes, in certain cases, the right to terminate the contract. The compensation payable is dealt with under Clause 54 (Compensation on Termination). The Operating Contract has specific provisions prohibiting entertainment and gifts, and the Public Works Contract has specific conflict of interest provisions.

SOPC3 GUIDANCE

20.4 TERMINATION ON CORRUPT GIFTS AND FRAUD

20.4.1 Introduction

20.4.1.1 *The Contract must deal comprehensively with termination as a result of corrupt acts or fraud involving the Contractor, any Sub-contractor and any servant of the Crown.*

20.4.1.2 *A balance must be struck between the Authority's proper desire for the right to free itself from a corrupt or fraudulent partner and the financiers' fear of losing their funding for reasons beyond their control due to the corrupt actions of the Contractor or third parties or an individual within either of them.*

20.4.2 Scope of Corrupt Gifts and Fraud

20.4.2.1 *The corrupt gifts and fraud provision is aimed at all types of bribery, corruption and fraudulent acts perpetrated against the Authority, in connection with the procurement of the Contract and the ongoing contractual relationship.*

20.4.2.2 *As the Authority's ultimate sanction to terminate for such acts is severe, the recommended approach allows the Contractor the opportunity to avoid termination where the act has been carried out by a Sub-contractor or employee acting on his own. Within a specified reasonable time period, the Contractor has to ensure that any relationship with the relevant party is terminated and, if applicable, a replacement procured for such party.*

20.4.2.3 *The following approach is the most appropriate way of dealing with the issue:*

- *if the relevant breach is committed by the Contractor or one of its employees and this is*

not the action of an employee acting independently (i.e. it is in some way “corporate corruption”), the Authority may terminate the Contract on payment of the Revised Senior Debt Termination Amount and can recover from the Contractor either any losses it suffers as a result of the breach or the amount of the value of the corrupt gift in question. If the breach is the result of the action of an employee acting independently, then the Contractor should terminate the person’s employment and procure a replacement within [30] days of notice of the breach. If this is not done, then the Contract can be terminated on payment of the Revised Senior Debt Termination Amount and recovery of the Authority’s losses;

- if the breach is committed by one of the Contractor’s main sub-contractors (e.g. the Operating Sub-contractor or Construction Sub-contractor) or their employee and this is not the action of an employee acting independently (it is in some way “corporate corruption”), the Authority may terminate the contract as above, unless the Contractor terminates the relevant main subcontract and procures the performance of such service by another person within [30] days of notice of the breach. If the breach is the result of the action of an employee acting independently, then the Sub-contractor should terminate that person’s employment and procure a replacement within [30] days of notice of the breach. If this is not done, then the Contract can be terminated on payment of the Revised Senior Debt Termination Amount and recovery of the Authority’s losses;*
- if the breach is committed by any other party, the Authority may terminate as above unless within 30 days of notice of the breach the Contractor procures the termination of the employment of such person and of their employer (if not employed by the Contractor or its main Sub-contractors) and the performance of such service by another person.*

CORE CONTRACT DRAFTING

50. CORRUPT GIFTS AND FRAUD

50.1 Prohibited Acts

The PPP Co shall not do and warrants that prior to the Commencement Date and at the Effective Date, it has not done nor have any of the Staff done, nor shall they do any of the following (“**Prohibited Acts**”):

- offer or give or agree to give to any employee or representative of the Authority any gift or consideration of any kind as an inducement or reward for doing or for having done or forborne to do any act in relation to the obtaining or execution of this Agreement or for showing or forbearing to show favour or disfavour to any person in relation to this Agreement; or
- enter into any agreement (including this Agreement) with the Authority in connection with which commission has been paid or agreed to be paid by the PPP Co or on its behalf, or to its knowledge, unless before such agreement is made particulars of any such commission and of the terms and conditions of any agreement for the payment thereof have been disclosed in writing to a duly authorised representative of the Authority.

50.2 Consequences of Prohibited Acts

If the PPP Co (or anyone acting on its behalf) does any of the Prohibited Acts or commits any offence under the Prevention of Corruption Acts, 1889 to 2001, and the Ethics in Public Office Act, 1995 with or without the knowledge of the PPP Co then, subject to Clause 50.3 (Remedies for Prohibited Acts) the following provisions shall apply:

- If a Prohibited Act is committed by the PPP Co or by the Staff (or any member of the Staff) not acting independently of the PPP Co, then the Authority may terminate this

- Agreement by giving notice to the PPP Co.
- (b) If a Prohibited Act is committed by the Staff (or any member of the Staff) acting independently of the PPP Co, then the Authority may give notice to the PPP Co of termination and this Agreement will terminate, unless within [●] ([●]) Working Days of receipt of such notice the PPP Co terminates (or procures the termination) of the employment of the Staff (or the relevant member of Staff as the case may be) (which shall unless otherwise agreed with the Authority include the employer of any employee in addition to the relevant employee) and (if necessary) procures the performance of such part of the PPP Co's obligations under this Agreement by another person.
 - (c) Any notice of termination under this Clause 50 shall specify:
 - (i) the nature of the Prohibited Act;
 - (ii) the identity of the party whom the Authority believes has committed the Prohibited Act; and
 - (iii) the date on which this Agreement will terminate, in accordance with the applicable provision of this clause.
 - (d) Upon termination under this Clause 50, the provisions of Clause 54.6 (Corrupt Gifts and Fraud) shall apply.

50.3 Remedies for Prohibited Acts

In exercising its remedies under this Clause 50, the Authority shall:

- (a) act in a reasonable and proportionate manner having regard to such matters as the gravity of the Prohibited Act and the identity of the person committing the Prohibited Act; and
- (b) give all due consideration where appropriate to action other than termination including (without being limited to):
 - (i) requiring the PPP Co to procure the termination of a sub-contract where the Prohibited Act is that of a sub-contractor; and
 - (ii) requiring the PPP Co to procure the dismissal of an employee (whether its own or that of a Principal Sub-Contractor) where the Prohibited Act is that of an employee.

OPERATING CONTRACT DRAFTING

CORRUPT GIFTS AND PAYMENTS

[●].1 Inducements

The Operator shall not, and shall use all reasonable endeavours to procure that Sub-contractors and its or their agents and employees shall not, offer or give or agree to give to any representative of any public authority (a "Relevant Person") any gift or consideration of any kind as inducement or reward for doing or for having done or forborne to do any kind or showing in favour or forbearing to show disfavour to any person in relation to this Contract.

[●].2 The Operator's Representation

The Operator represents and warrants to [the Authority] that:

[●].2.1 it has not offered or agreed to give any gift or consideration of any kind to a

Relevant Person as an inducement or reward for doing or having done or forborne to do any act in relation to the obtaining or execution of this Contract; and

[●].2.2 In connection with the obtaining or execution of this Contract, no commission has been paid or agreed to be paid to a Relevant Person by the Operator or to its knowledge on its behalf.

[●].3 Entertainment and gifts

The Operator shall not, and shall use all reasonable endeavours to procure that its subcontractors and agents shall not favour employees, officers or agents of [the Authority] with gifts or entertainment of significant cost or value.

[●].4 Exceptions

Nothing contained in Clauses [●],[●] or [●] shall prevent an employer from paying any proper commission or bonus to its employees within their agreed terms of employment or providing legitimate corporate hospitality in accordance with an agreed protocol.

[●].5 Consequences

Subject as provided in Clause [●], any breach of Clause [●] or [●] by the Operator or the commission of any offence by the Operator or any of its directors, employees, agents or subcontractors under any Legal Requirements in relation to the Contract (including the Prevention of Corruption Acts 1889 to 2001) entitle [the Authority] to act as follows:

[●].1.1 in respect of a breach of Clause [●] arising from the act of the chief executive of the Operator or any director or senior manager of the Operator in the tier below director or senior manager level reporting directly to a director or senior manager or the chief executive (a "Senior Employee") to terminate the Contract (such termination having been approved by a resolution of [the Authority]) if as a result of such breach there is a conviction on indictment against any Senior Employee of the Operator or against the Operator or any agent instructed by a Senior Employee to commit such act under the relevant Legal Requirement;

[●].1.2 subject to [the Authority] being entitled to exercise and exercising its rights to terminate under Clause [●], to terminate any other agreement entered into between the Operator and [the Authority] in relation to this Project;

[●].1.3 without prejudice to the other rights under this Clause [●], if a conviction on indictment against any director, senior manager or the chief executive of the Operator under the relevant Legal Requirement has been obtained and such conviction is not the subject of appeal then [the Authority] shall (without prejudice to its other rights under this Clause [●]) be entitled to require the Operator to dismiss the chief executive, senior manager or director;

[●].1.4 without prejudice to its other rights under this Clause [●] [the Authority] shall be entitled to require the Operator to dismiss any director, senior manager or the chief executive or any employee who reports directly to the chief executive, senior manager or a director of the Operator who was aware of any act of corruption which gave rise to any conviction not the subject of an appeal referred to in this Clause [●] and who did not use his best endeavours to stop such an act of corruption;

[●].1.5 without prejudice to its other rights under this Clause [●], [the Authority] shall be entitled to require the Operator to take such actions (including, if applicable,

dismissal) as accords with its then current applicable disciplinary procedure against any employee of the Operator who has been responsible for any act on the part of the Operator which constitutes a breach of Clause [●],[●] or [●]; and

[●].1.6 [the Authority] shall be entitled to recover from the Operator:

[●].5.6.1 the amount of any loss (excluding consequential loss) resulting from such breach; and

[●].5.6.2 the amount or value of any such gift, consideration or commission.

[●].6 [the Authority's] exercise of rights and remedies

In exercising its rights or remedies under this Clause [●], [the Authority] shall:

[●].6.1 act in a reasonable and proportionate manner having regard to such matters as the gravity of, and the identity of the person performing, the act prohibited under this Clause [●] and any actions of the Operator pursuant to Clauses [●] and [●]; and

[●].6.2 give all due consideration, where appropriate, to action other than termination of the Contract under Clause [●] including requiring the Operator to take the action set out in Clause [●].

[●].7 Notifications and investigation

Subject to the provisions of Clause [●], in the event that [the Authority] or any director, or senior manager of the Operator (other than any director alleged to have taken action in breach of Clauses [●],[●] or [●]) becomes aware of or reasonably believes that there has been or there is continuing a breach of Clauses [●],[●] or [●] by the Operator or the commission of any offence by the Operator or any senior manager, directors, employees, agents or subcontractors of the Operator under the relevant Legal Requirements in relation to the Contract, each Party shall notify the other Party and:

[●].7.1 the Operator shall:

[●].7.1.1 investigate with the assistance of [the Authority] the existence of any action by its senior managers, directors, employees, agents or subcontractors which would give rise to a breach of Clauses [●],[●] or [●] or give rise to an offence under the relevant Legal Requirements in relation to the Contract; and

[●].7.1.2 promptly, and with the assistance of [the Authority], conduct an investigation into the facts giving rise to a breach of Clauses [●],[●] or [●] or the commission of the offence under the relevant Legal Requirements and the surrounding circumstances and the effect and future effect on the Contract, such investigation to be completed (to the extent consistent with the terms and conditions of employment of the relevant employee) within 14 days of the commencement of such investigation and promptly provide RPA with the results of such investigation; and

[●].7.1.3 if the investigation referred to in Clause [●] above gives rise

to a reasonable belief by the Operator that there has been, or there is continuing to be, a breach of Clauses [●],[●] or [●] by the Operator or the commission of any offence by the Operator or any of its directors, senior managers or employees under the relevant Legal Requirements, immediately remove the senior manager, director or employee concerned from any involvement with the provision of Services under the Contract; and

[●].7.1.4 consult with [the Authority] on the action to take to prevent any further occurrences and also the action required (if any) to mitigate any adverse effect on the Contract; and

[●].7.1.5 after consultation with [the Authority] as described in Clause [●] above prepare a plan within [●] days detailing such actions which shall be implemented within such period as agreed with [the Authority].

[the Authority] shall investigate and take appropriate action with regard to which of the employees or directors, agents or subcontractors of [the Authority] has been involved with the Operator or its employees or directors or subcontractors such as to give rise to a breach by the Operator or any of its directors or employees under the relevant Legal Requirements and shall consult with the Operator in respect of the action to be taken in respect of such employee, director, agent or subcontractor, the action required to mitigate any adverse effect on the Operator and/or [the Authority] and to prevent any further occurrences.

[●].7.2 Issues or matters and termination

Any issues or matters relating to this Clause [●] may be referred by either Party to the Disputes Resolution Procedure in accordance with Clause [●] and [the Authority] shall not be entitled to terminate the Contract pursuant to Clause [●] until such issue or matter has been agreed or determined. If [the Authority] terminates the Contract pursuant to Clause [●], Clause [●] shall apply.

[●].7.3 Annual certification

The Operator shall put in place procedures requiring each of its directors, senior managers and employees to certify on an annual basis that he/she has not offered to give or agreed to give to any person in the employ of [the Authority] any gift, or entertainment of significant value, or consideration of any kind as an inducement or reward for doing or for having done or forborne to do any kindness showing favour or forbearing to show disfavour to any person in relation to this Contract.

[●].7.4 Consequences of Convictions

Following any conviction of a director, senior manager or employee of the Operator of any offence under the relevant Legal Requirements the Operator will increase the monitoring of the acts of the senior managers, directors and employees.

PUBLIC WORKS CONTRACTS

[●] Ethics in Public Office

The Contractor warrants that:

- neither the Contractor nor any person on the Contractor's behalf has offered, given or agreed to give to the Employer or to any of the Employer's Personnel any gift or consideration of any kind in connection with the Contract, nor shall they make such an offer, gift or agreement and
- neither the Contractor nor any person on the Contractor's behalf has committed any offence under the Prevention of Corruption Acts 1889 to 2001 or the Ethics in Public Office Acts 1995 and 2001 in connection with the Contract, nor shall they commit any such offence and
- no Minister of the Government or Minister of State, or officer or employee of the Employer shall have, or receive, any share or part of the Contract or any benefit from the Contract and
- unless fully disclosed to and agreed by the Employer in advance:
 - (1) no former officer nor employee of the Employer nor of a consultant to the Employer whose duties related to the Works shall, for 12 months after leaving such employment or office, be engaged as Contractor's Personnel and
 - (2) no consultant or former consultant to the Employer in relation to the Works (except for a Specialist whose contract is to be novated from the Employer to the Contractor) whose duties related to the Works shall be engaged as Contractor's Personnel.

CROSS REFERENCES

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

- Clause 3 (Effectiveness of this Agreement)
- Clause 54 (Compensation on Termination)

There are no references to this clause in the Risk Matrix.