

COMPILATION OF PPP TERMS AND CONDITIONS OF CONTRACT

PUBLIC SECTOR VERSION

CLAUSE 51: AUTHORITY DEFAULT TERMINATION

DBFOM CONTRACT

CONCESSION CONTRACT

DBFM CONTRACT

DBF CONTRACT

DBOM CONTRACT

DBM CONTRACT

INTRODUCTION

The principles are set out in the SoPC3 Guidance provided below.

SOPC3 GUIDANCE

20.1 TERMINATION ON AUTHORITY DEFAULT

20.1.1 Introduction

20.1.1.1 *The Contract should define the events that give the Contractor the right to terminate and determine the rights of the relevant parties under this scenario.*

20.1.2 Contractor's Right to Terminate for Authority Default

20.1.2.1 *The Contractor should be allowed the right to terminate the Contract where the Authority or Government acts in a way which renders their contractual relationship untenable or completely frustrates the Contractor's ability to deliver the Service. A minor breach will not fall into this category and even a material breach of itself is likely to be insufficient if the Authority's actions do not have the effect described above.*

20.1.2.2 *Beyond this, the circumstances in which the Contractor is permitted to terminate for Authority Default must be considered on a project by project basis. The Authority needs to examine the nature of its obligations during the Contract and should only extend the list of Authority Default events to include breaches of other obligations which will render the contractual relationship untenable or completely frustrate the Contractor's ability to deliver the Service.*

20.1.2.3 *Termination by the Contractor should be a last resort and it is important to ensure that there are no "hair triggers" which could put the Authority at risk of termination before it has had an opportunity to remedy its default. There can be no question of reciprocity with the defaults that trigger a Contractor Default as the obligations of the Authority are principally payment obligations and approval rights, rather than detailed performance or other credit related obligations.*

20.1.2.4 *The Contractor should bear in mind that a failure by the Authority to comply with the provisions of the Contract before Service Commencement (for example issuing approvals)*

and sometimes after that date, can in most cases be adequately dealt with by way of a Compensation Event (see Section 5 (Compensation Events) [of the SoPC3 Guidance]). In addition, any failure by the Authority to pay sums when due should give rise to interest on late payment (see Section 10.2.5 and Clause 29.8 (Interest on Late Payments) [of the SoPC3 Guidance]) and so a reasonable grace period for non-payment should be built into the Contract and so neither of these should trigger termination.

20.1.2 Termination on Authority Default

- (a) *If an Authority Default has occurred and the Contractor wishes to terminate the Contract, it must serve a termination notice on the Authority within [45] days of becoming aware of the Authority Default.*
- (b) *The termination notice must specify the type of Authority Default which has occurred entitling the Contractor to terminate.*
- (c) *The Contract will terminate on the day falling [45] days after the date the Authority receives the termination notice, unless the Authority rectifies the Authority Default within [30] days of receipt of the termination notice.*

CORE CONTRACT DRAFTING

51. AUTHORITY DEFAULT TERMINATION

- 51.1** Within [●] ([●]) days of becoming aware of an Authority Default, the PPP Co may, at its option, serve notice on the Authority of the occurrence of such Authority Default. If the relevant matter or circumstance has not been rectified or remedied by the Authority or otherwise within [●] ([●]) days of the receipt of such notice, the PPP Co may serve a further notice on the Authority terminating this Agreement with immediate effect.
- 51.2** Upon a termination of this Agreement pursuant to Clause 51.1 the PPP Co shall be entitled to compensation in accordance with Clause 54 (Compensation on Termination).
- 51.3** The PPP Co may give notice to the Authority terminating this Agreement only in accordance with the provisions of this Clause 51 or Clause 52.2(a) (Force Majeure or Uninsurable Risk).

[CLAUSE 51 – SCHEDULE]

AUTHORITY DEFAULT

- 1. The following are Authority Default:
 - 1.1 the Government, or any person acting pursuant to powers delegated by Government, sequesters, requisitions or otherwise seizes the Works or the [Project Facility] or any material part of any of them otherwise than pursuant to this Agreement or the Project Documents or otherwise than as a result of any default by the PPP Co;
 - 1.2 the Authority is in material breach of its obligations under Clause 28.1 (Access for PPP Co) and such breach materially adversely affects the ability of the PPP Co to perform its obligations under this Agreement for a period of not less than [●] ([●]) days;
 - 1.3 breach by the Authority of Clause 17.2(c) and/or Clause 17.3 (Assignment); and
 - 1.4 the Authority fails to pay any sum equal to or exceeding the amount which would equate to the Monthly Unitary Charge for [●] ([●]) Payment Periods (indexed) that is due and payable to the PPP Co hereunder (which sum is not in dispute) within [●] ([●]) days of service of a formal

written demand by PPP Co, where that amount fell due and payable [•] ([•]) or more months prior to the date of service of the written demand.

CROSS REFERENCES

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

- Clause 9 (Services Commencement Certificate)
- Clause 53 (Effect of Termination)
- Clause 54 (Compensation on Termination)

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

- G3 (Authority Default Termination)
- G8 (Judicial Implications)