

COMPILATION OF PPP TERMS AND CONDITIONS OF CONTRACT

PUBLIC SECTOR VERSION

CLAUSE 52: NON-DEFAULT TERMINATION

DBFOM CONTRACT

CONCESSION CONTRACT

DBOM CONTRACT

INTRODUCTION

This issue deals with termination which is necessary for reasons for which neither party can be blamed. These are:

- Expiry
- Force majeure (see Clause 38)
- Uninsurable risk (Clause 48)
- Change of law, making further performance impossible
- Termination at will by the Authority.
- The compensation payable in these circumstances is dealt with in Clause 54. While the first four are regarded as 'neutral', termination at will by the Authority is treated the same as a termination by the Contractor for Authority default.

SOPC3 GUIDANCE

20.3 TERMINATION ON FORCE MAJEURE

20.3.1 Failure to agree

20.3.1.1 *As set out in Section 5.4 (Force Majeure Events) [of the SoPC3 Guidance], the Contract should define the Force Majeure Events that can lead to termination and determine the rights of the relevant parties if this occurs. If a Force Majeure Event occurs and the parties cannot agree a solution within a specified period (6 months is typical), either party is entitled to terminate the Contract with compensation payable to the Contractor as set out in Section 20.3.4 (Compensation on Termination for Force Majeure) [of the SoPC3 Guidance]. The Contract should, however, give the Authority the right to prevent termination by paying the Contractor as if the Service were being fully provided after such period. In such circumstances the Authority should specify a fixed period for which it will make such payment, before reconsidering the situation, so that the Contractor can plan accordingly.*

CORE CONTRACT DRAFTING

52. NON-DEFAULT

52.1 Expiry of Term

This Agreement shall terminate automatically upon the Expiry Date.

52.2 Force Majeure or Uninsurable Risk

- (a) If a Force Majeure occurs in the circumstances referred to in Clause 38.5 (Right to terminate for Force Majeure), either party may, so long as such circumstances are continuing at the time of giving notice, terminate this Agreement by notice to the other having immediate effect.
- (b) In the event that a risk becomes Uninsurable the Authority may terminate this Agreement by notice to the PPP Co having immediate effect.
- (c) On termination pursuant to Clause 52.2(a) or Clause 52.2(b), the Authority shall pay to the PPP Co the amounts determined in accordance with Clause 54 (Compensation on Termination).
- (d) If the PPP Co gives notice to the Authority under Clause 52.2(a) above that it wishes to terminate this Agreement, then the Authority has the option either to accept such notice or to respond in writing on or before the date falling [●] ([●]) days after the date of its receipt stating that it requires the Agreement to continue. If the Authority gives PPP Co such notice, then:
 - (i) the Authority shall pay to PPP Co the Unitary Charge from the day after the date on which this Agreement would have terminated under Clause 52.2(a) as if the Operations were being fully provided; and
 - (ii) the Agreement will not terminate until expiry of written notice (of at least [●] ([●]) days) from the Authority to PPP Co that it wishes the Agreement to terminate.

52.3 Termination on Change in Law

- (a) If a Change in Law comes into effect which renders illegal or impossible (but not merely more expensive) all or substantially all of the PPP Co's obligations or rights under this Agreement, then the parties shall consult with each other in good faith and act reasonably and propose any lawful amendments to this Agreement to mitigate the effect of a Change in Law which are acceptable to both parties for [●] ([●]) days or such longer period as the Authority may, in its absolute discretion, determine to agree on an acceptable outcome to both parties (unless agreement is reached earlier), failing which either party may terminate this Agreement by written notice to the other having immediate effect.
- (b) In the event of any termination pursuant to Clause 52.3(a), the Authority shall pay to the PPP Co the amounts determined in accordance with Clause 54.1 (Change in Law).

52.4 Voluntary Termination

- (a) The Authority shall be entitled to terminate this Agreement at any time on [●] ([●]) Working Days notice to the PPP Co. In the event of notice being given by the

Authority in accordance with this Clause 52.4, the Authority shall, at any time before the expiration of such notice be entitled to direct the PPP Co, where the Works, the Additional Works or the Renewal Works (or any part or parts of any of them) or any Operations (or any element or elements of any Operations) have not been commenced, to refrain from commencing any such Works, Additional Works or Renewal Works (or any part or parts of any of them) or Operations (or any element or elements of any Operations), or to procure the same.

- (b) The Agreement will terminate on the date falling [●] ([●]) Working Days after the date of receipt of the notice referred to in Clause 52.4(a) above.
- (c) In the event of any termination pursuant to Clause 52.4(a) the Authority shall pay to the PPP Co the amounts determined in accordance with Clause 54 (Compensation on Termination).

CROSS REFERENCES

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

- Clause 38 (Force Majeure)
- Clause 51 (Authority Default Termination)
- Clause 53 (Effect of Termination)
- Clause 54 (Compensation on Termination)

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

- F10 (Insurance Scope)
- G1 (General Change of Law)
- G2 (Discriminatory Change of Law)
- G5 (Voluntary Termination)
- G6 (Force Majeure)