

# COMPILATION OF PPP TERMS AND CONDITIONS OF CONTRACT

## PUBLIC SECTOR VERSION

### CLAUSE 53: EFFECT OF TERMINATION

#### DBFOM CONTRACT

#### CONCESSION CONTRACT

## INTRODUCTION

These provisions are concerned with the actual steps that must be taken to ensure the effective and complete expulsion of the PPP Co from the facility upon termination. The PPP Co does not retain any rights in the facility, the ownership of which has always remained with the Authority. These provisions ensure that the Authority is reinstated at the facility. The Authority may take over the PPP Co's operations on a temporary basis when a termination notice has been served, even before the termination takes effect.

On termination the State Authority should also ensure that the PPP Co transfer / novate all necessary licences.

## SOPC3 GUIDANCE

*SOPC3 provides the following commentary regarding the effect of termination:*

### **18. TERMINATION**

**18.1.1** *A Contract will terminate either on the Expiry Date (see Section 19 Termination on Expiry of Service Period) [of the SoPC3 Guidance] or as a result of early termination. Early termination can be caused by Authority Default (see Section 20.1 (Termination on Authority Default) [of the SoPC3 Guidance]), Contractor Default (see Section 20.2 (Termination on Contractor Default) [of the SoPC3 Guidance]), force majeure (see Section 20.3 (Termination on Force Majeure) [of the SoPC3 Guidance]) and corrupt gifts (see Section 20.4 (Corrupt Gifts and Fraud) [of the SoPC3 Guidance]). It can also be caused by the Authority exercising a right to terminate the contract voluntarily (see Section 20.5 (Voluntary Termination by Authority) [of the SoPC3 Guidance]).*

**18.1.2** *The Contract should deal comprehensively with the consequences of all types of termination and, in particular, it must address what happens to the Assets and what level of termination payment (if any) is payable by the Authority. The level of compensation payable by the Authority should be determined by:*

- *the reason for the termination;*
- *which party retains the Assets; and*
- *whether those Assets have any alternative use.*

## CORE CONTRACT DRAFTING

### 53. EFFECT OF TERMINATION

**53.1** Subject to the exercise by the Authority of any right under Clause 11.6(a), the parties shall continue to perform their obligations under this Agreement notwithstanding the giving of any notice of default or notice of termination until the termination of this Agreement becomes final in accordance with the provisions of this Clause 53 (Effect of Termination).

### 53.2 Disputed Termination

Notwithstanding the provisions of Clause 49.2 (Remedies), Clause 49.3 (Remedial Programme), Clause 51 (Authority Default Termination), Clause 52 (Force Majeure or Uninsurable Risk), Clause 35 (Change in Law), Clause 43.2 (Termination for breach of the Refinancing Provisions) and Clause 52.4 (Voluntary Termination), where either party has given notice of termination of this Agreement and the other party has within 10 (ten) Working Days of receipt of such notice referred the question of whether or not the purported termination is wrongful to the Disputes Resolution Procedure, the termination of this Agreement shall not take effect pursuant to such notice of termination unless and until it is agreed by the parties or finally determined in accordance with the Disputes Resolution Procedure that such termination is not wrongful.

**Comment: The right to step-in under the Accommodation Contract only arises in very limited circumstances.**

### 53.3 Savings

(a) Save as otherwise expressly provided in this Agreement:

- (i) termination of this Agreement shall be without prejudice to any accrued rights and obligations of either party under this Agreement as at the Termination Date (including without limitation the right of the Authority to recover damages from the PPP Co where the termination has arisen as a result of an Event of Default); and
- (ii) termination of this Agreement shall not affect the continuing rights and obligations of the PPP Co and the Authority under Clause 26 (Intellectual Property), Clause 23 (Reports), Clause 24 (Records), Clause 39 (Calculation of Payments), Clause 40 (Payment Requests), Clause 41 (Payments), Clause 43.2 (Termination for breach of the Refinancing Provisions), Clause 45 (Taxes), Clause 45A (Value Added Tax), Clause 46 (Rates), Clause 47 (Indemnities), Clause 48 (Insurance), Clause 52.2 (Force Majeure or Uninsurable Risk), Clause 52.3 (Change in Law), Clause 54 (Compensation on Termination), Clause 56 (Disputes Resolution Procedure), Clause 57 (Confidentiality), Clause 64 (Governing Law and Jurisdiction), [[Clause 23 - Schedule] and [Clause 24 – Schedule]] (Reports and Records), [Clause 54 - Schedule] (Compensation on Termination), [Clause 56 - Schedule] (Disputes Resolution Procedure) and this Clause 53 (Effect on Termination) or under any other clause which is expressed to survive termination or which is required to give effect to such termination or the consequences of such termination.

**Comment: The contract as a whole will have to be reviewed to decide what survives termination. The definitions and interpretation clauses should be added.**

Save as provided in this Clause 53.3, all rights and obligations of the Authority and the PPP Co under this Agreement shall cease and be of no further force and effect upon the termination of this Agreement.

- (b) Notwithstanding any breach of this Agreement by either party and without prejudice to any other rights which the other party may have in relation thereto, the other party may elect to continue to treat this Agreement as in full force and effect and to enforce its rights hereunder, and failure of either party to exercise any right hereunder including any right to

terminate this Agreement and any right to claim damages shall not be deemed a waiver of such right for any continuing or subsequent breach. In the event that it is so determined that the Authority has wrongfully terminated this Agreement, the PPP Co shall be so compensated as if the Authority had exercised its right to voluntarily terminate this Agreement pursuant to Clause 52.4 (Voluntary Termination).

#### **53.4 Transfer of Assets**

Where the Authority has exercised its step-in rights under Clause 11.6(a) (Step-In Rights), on and for the duration of the exercise by the Authority of such step-in rights Part 1 of [Clause 53 - Schedule] (Transfer of Assets) shall apply.

#### **53.5 Handover**

On the termination of this Agreement for any reason Parts 1 and 2 of [Clause 53 - Schedule] (Transfer of Assets) shall apply.

### **[CLAUSE 53 – SCHEDULE]**

#### **TRANSFER OF ASSETS**

##### **PART 1**

1. The following provisions shall apply pursuant to Clause 53.4 (Transfer of Assets) and Clause 53.5 (Handover):

subject to the Authority exercising its option under Clause 54.2(a)(iii), the rights of access under Clause 28.1 (Access for PPP Co) shall automatically terminate;

**Comment: The option referred to is to transfer the Site back to the PPP Co instead of paying compensation on termination.**

- 1.2 subject to the Authority exercising its option under Clause 54.2(a)(iii), if, prior to the Completion Date, the PPP Co shall transfer to and there shall vest in the Authority such part of the Works as shall have been carried out and, if the Authority so elects:
  - 1.2.1 all plant and all materials on the Site and/or the Off-Site Areas or adjacent thereto shall remain available to it for the purposes of completing the Works; and
  - 1.2.2 the plant materials and equipment used or to be used by the Contractor in the construction of the Works, but not including Plant, shall remain available to the Authority for the purposes of completing the Works subject to payment therefor of a reasonable hire charge;
- 1.3 the PPP Co shall hand over to and there shall vest in the Authority or its nominee any interest of the PPP Co in the [Project Facility], which in the case of the termination of this Agreement in accordance with Clause 4 (Duration), shall be in the state required in accordance with Clause 55 (Handback);
- 1.4 if the Authority so elects, the Design Contract and/or the Construction Contract and/or the Operation Contract and/or any other contract of engagement with those persons listed in Clause 18.2 (Principal Sub-Contractors) and the Performance Guarantee referred to in this Agreement shall be novated to the Authority (and upon such election the PPP Co shall take all necessary steps as soon as reasonably practicable to procure such novation to the Authority) or where applicable, the provisions of the relevant Principal Sub-Contractor's Direct Agreement shall apply;
- 1.5 the Authority shall have an option to purchase or (where the Authority has exercised its step-in rights under Clause 17.1 (Step-In Rights)) hire from the PPP Co or any of its Associated Companies at a

fair market value (as between willing counterparties, with any disputes as to such fair market value being determined in accordance with Clause 56 (Disputes Resolution Procedure)) and free from any security interest all or any part of the stocks of material, vehicles, spare parts and other moveable property owned by the PPP Co or any of its Associated Companies and reasonably required in connection with the operation and maintenance of the [Project Facility];

- 1.6 the PPP Co shall deliver to the Authority As-Built Records showing all alterations made since the Services Commencement Date;
- 1.7 the PPP Co shall deliver to the Authority operation and maintenance manuals, user manuals and all training material for the [Project Facility];
- 1.8 the PPP Co shall procure that the benefit of all manufacturer's warranties in respect of mechanical and electrical equipment included in the [Project Facility] is assigned to the Authority;
- 1.9 the PPP Co shall deliver to the Authority the records referred to in Clause 24 (Records) and [Clause 24 - Schedule] (Reports and Records); and
- 1.10 on payment of compensation by the Authority pursuant to Clause 54 (Compensation on Termination), the PPP Co shall assign the benefit of any rights and Claims it may have relating to insurance proceeds and/or sums due and payable from third parties which have not been determined or have been determined but not yet paid, and in respect of any such rights and Claims that are not assigned by the PPP Co to the Authority, the PPP Co shall hold in trust for the Authority any proceeds received on account of such rights and Claims.

## PART 2

1. The following provisions shall apply pursuant to Clause 53.5 (Handover):
  - 1.1 the PPP Co shall co-operate fully with the Authority and any successor operator of the [Project Facility] in order to achieve a smooth transfer of the operation of the [Project Facility], so as to protect the safety of and avoid undue delay or inconvenience to the members of the public;
  - 1.2 the PPP Co shall, as soon as practicable, remove from the Site [the Off-Site Areas] all plant, materials, equipment, temporary buildings, vehicles, spare parts and other property not required by the Authority pursuant to Clause 53.4 (Transfer of Assets) or acquired or hired by the Authority pursuant to Clause 53.4 (Transfer of Assets), and if it has not done so within [●] ([●]) Working Days after any notice from the Authority requiring it to do so the Authority may (without being responsible for any Loss) remove and sell any such property and shall hold any proceeds less all costs incurred to the credit of the PPP Co, save that to the extent that any such proceeds are received after payment of compensation by the Authority pursuant to Clause 54 (Compensation on Termination) then such proceeds shall be retained by the Authority;
  - 1.3 the PPP Co shall provide all such information concerning the Project to the Authority or any successor operator of the [Project Facility] and provide any necessary training in relation to the control of the [Project Facility] as is reasonably required for the efficient transfer of responsibility for its operation;
  - 1.4 the PPP Co shall allow the Authority or any such successor operator access (at reasonable times and on reasonable notice) to the [Project Facility] but not so as to interfere with or impede the provision of the Operations;
  - 1.5 the PPP Co shall, at least [●] ([●]) weeks prior to the Termination Date deliver to the Authority's

Representative:

- 1.5.1 keys to all buildings forming part of the [Project Facility];
  - 1.5.2 operation and maintenance manuals, user manuals and all training material for the [Project Facility]; and
  - 1.5.3 codes and passwords to all computers and computerised systems;
- 1.6 the PPP Co shall deliver all other material and take all other necessary actions as required by Clause 53.5 (Handover) and this [Clause 53 – Schedule] as soon as possible and in any events within [●] ([●]) of the Termination Date; and
- 1.7 the PPP Co shall as soon as practicable vacate the Site [and/or the Off-Site Areas] and shall leave the Site [and/or the Off-Site Areas] in a clean and orderly condition.

## ACCOMMODATION CONTRACT DRAFTING

### (Regarding Leased Equipment)

[●].1.1 In relation to any Leased Equipment the Minister shall have the rights following service of a notice under Clause [●], to require the Operator to transfer to the Minister, (or such third party as the Minister may nominate), the benefit and burden of any or all of the leases or other agreements under which any Leased Equipment is used, subject to the Minister or such third party complying with all obligations arising to be performed thereunder following such assignment, (save any arising or made more onerous by any failure to perform any obligation to be performed thereunder before such assignment). Such right shall be exercisable by one or more written notices served by the Minister on the Operator provided such notice or notices is/are served within [●] ([●]) Working Days following termination of this Agreement.

**Comment: This drafting was required on the Accommodation Contract project because there was leased equipment on that project.**

## ACCOMMODATION CONTRACT DRAFTING

### (Regarding the Removal of Assets)

[●].1.1 The Operator undertakes that it shall not have removed, and shall ensure and/or procure that no Sub-Contractor has removed, any [assets are identified] or other items referred to in Clause [●] prior to the expiry of the period for serving a notice pursuant to Clause [●] or following the service of such notice. Upon such notice being served the Operator shall procure that the benefit of all material documentation, including, without limitation, the [●] Agreement, guarantees, warranties and service agreements relating to [●] is assigned to the Minister, (or such third party as the Minister may nominate).

**Comment: The Accommodation Contract contains an express provision indicating that items will not be removed from the facility upon termination. In building contracts, if the contractor becomes insolvent, it is common for sub-contractors to remove items from a site, notwithstanding the employer's rights of ownership over those items. We therefore advocate the approach of drawing attention to this matter.**

## ACCOMMODATION CONTRACT DRAFTING

### (Regarding Retendering upon Expiry)

#### [●].1 Retendering of the Service

[●].1.1 On or before a date falling no later than [●] ([●]) months prior to the Expiry Date, the Minister shall notify the Operator in writing whether it wishes to retender the provision of the Services.

[●].1.2 If the Minister wishes to retender the provision of the Services then the retendering shall be carried out on the basis that the Minister will contract with a successor operator to provide the Services on and from the Expiry Date.

[●].1.3 Subject to Clause [●] (Information and Confidentiality) and in order to assist the Minister with the retendering process, the Operator shall give the Minister full access to such of its records and books of account as the Minister shall reasonably request and shall permit third parties duly authorised by the Minister reasonable access to inspect and view the Facility.

[...]

#### [●].2 Assistance with transition

Where the Minister have retendered the provision of the Services pursuant to Clause [[●].1] (Retendering of the Services) [*above*] or has served a Termination Notice in accordance with Clause [●] (Service of a Termination Notice by the Minister), then, at the expiry of this Agreement or on earlier termination the Operator shall, (and shall use its best endeavours to ensure any Sub-Contractors shall), co-operate for a period of up to [●] ([●]) months, to ensure an orderly and efficient transition from the management of the Facility by the Operator to that by the Minister or such other person as the Minister shall nominate), (including the provision of relevant information and assistance in re-tendering any of the Services). Save where this Agreement has been terminated pursuant to Clause [●] (Service of a Termination Notice by the Minister), the Minister shall reimburse the Operator's reasonable costs and expenses in providing such assistance.

**Comment: The Accommodation Contract expressly anticipates the retendering of the services and contains drafting to reflect the process that will take place.**

## ACCOMMODATION CONTRACT DRAFTING

### (Regarding Costs)

#### 0[●] Costs

If termination has occurred pursuant to Clause [●] (Termination for Minister's Default), or Clause [●] (Voluntary Termination) the Minister shall reimburse to the Operator its reasonable costs and expenses incurred in complying with this Clause [●]. In all other circumstances the Operator shall bear its own costs incurred under all parts of this Clause [●] including without limitation all fees, costs or other expenses payable so as to enable the Operator to perform its obligations under this Clause [●]. For the avoidance of doubt, nothing in this Clause [●] shall require the Minister to reimburse to the Operator its costs and expenses to the extent that such costs and expenses relate to the obligations of the Operator under this Agreement.

## ACCOMMODATION CONTRACT DRAFTING

### (On Condition of the Facility)

#### [•] Condition of Facility on termination

The Operator represents, warrants and undertakes that on termination of this Agreement for whatever reason, including expiry, after the Final Certification Date, the Facility shall, (subject to the effect of Force Majeure Events), be in a condition consistent with performance of the Operator's obligations under this Agreement and in compliance with the Operator's obligations to maintain the Facility pursuant to Clause [•] (Maintenance of the Facility).

## CROSS REFERENCES

There are no cross references to this clause in the Compendium.

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

- F10 (Insurance Scope)
- G1 (General Change in Law)
- G2 (Discriminatory Change of Law)
- G3 (Authority Default Termination)
- G4 (Contractor Default)
- G5 (Voluntary Termination)
- G6 (Force Majeure)