

COMPILATION OF PPP TERMS AND CONDITIONS OF CONTRACT

PUBLIC SECTOR VERSION

CLAUSE 54: COMPENSATION ON TERMINATION

DBFOM CONTRACT

CONCESSION CONTRACT

INTRODUCTION

On early termination, the facility reverts to the Authority. Whether the Authority has to pay, and if so, how much, depends on what led to the termination: whether it was the PPP Co's default, the Authority's default (or election), or nobody's fault.

We look at the drafting for each kind of termination separately, as follows:

1. No fault termination;
2. PPP Co default termination;
3. Corrupt gifts, fraud and breach of refinancing provisions; and
4. Authority Default or Authority election to terminate.

We then set out provisions regarding the general requirements in relation to termination and, finally, we have set out the definitions in respect of this area from the Core Contract.

Compensation is generally paid in the event of termination. It is important that the same method of calculation ("market value" or "base case return") is used for both equity and junior debt; it is not appropriate to repay Junior Debt in full and give market value for the equity because PPP Co is given the opportunity of the upside (i.e. the increase in the value of the equity) but insulated from the downside as Junior Debt is repaid in full.

Note: It is advisable for the procuring authority in conjunction with the NDFA to identify the discount rate (in the contract) to be used.

INTRODUCTION TO COMPENSATION FOR NO FAULT TERMINATION

Circumstances which typically lead to no fault termination are:

- Force majeure
- Uninsurable risk
- Change in law making the project impossible

In these cases the pain of termination must be shared. Typically, the PPP Co will be paid enough to pay off its senior debt (including hedge breakage costs), pay back its investors what they have not yet recouped of their original investment, and meet any redundancy payments and subcontract breakage costs.

The complex parts of this drafting are how senior debt is figured and what deductions are taken; in particular, the control over additional borrowing (especially to ensure that the Authority does not have to pay off additional borrowing raised to improve investors' returns) and use of standby facilities.

SOPC3 GUIDANCE

20.3.2 Compensation on Termination for Force Majeure

20.3.2.1 *If the Contract terminates for Force Majeure, the Authority should pay compensation to the Contractor reflecting the principle that Force Majeure is neither party's fault and the financial consequences should to some extent be shared. There is, however, no equitable reason for "full" compensation (i.e. repayment of debt plus equity service and equity with profits) as this would involve the Authority in bearing all the pain.*

20.3.2.2 *The Contract should in addition provide the Authority with the option to retain or walk away from the Assets. Whatever the Authority decides, only the payment outlined in Clause 20.3.4 (Compensation on Termination for Force Majeure) should be made (see also paragraph 20.1.3.9 [of the SoPC3 Guidance] for explanation where there has been Additional Permitted Borrowing).*

Comment: If there is termination by reason of uninsurable risk the force majeure provisions apply in respect of compensation.

CORE CONTRACT DRAFTING

54.1 Termination for Force Majeure, Uninsurable Risk and Change in Law

If this Agreement is terminated pursuant to Clause [●] (where Clauses [●] (i) and (ii) are satisfied), Clause 52.2 (Force Majeure or Uninsurable Risk), or Clause 52.3 (Termination on Change in Law), then the Authority shall pay compensation to the PPP Co in accordance with Part 2 of [Clause 54 – Schedule] (Compensation on Termination).

[CLAUSE 54 – SCHEDULE]

PART 2

Termination for Force Majeure, Uninsurable Risk and Change In Law

1. Compensation on Termination for Force Majeure, Uninsurable Risk or Change in Law
 - 1.1. On termination of the Agreement under Clause 52.2 (Force Majeure or Uninsurable Risk) or Clause 52.3 (Change in Law), the Authority shall pay to the PPP Co the "Force Majeure Termination Sum" in accordance with Clause 54 (Compensation on Termination).

Subject to paragraphs 1.3 to 1.5 below the Force Majeure Termination Sum shall be an

amount equal to the aggregate of:

- (a) the Base Senior Debt Termination Amount;
- (b) the Junior Debt less an amount equal to the aggregate of payments of interest and principal made by the PPP Co under the Junior Debt Documents;
- (c) all amounts paid to the PPP Co by way of subscription for shares in the capital of the PPP Co less dividends and other distributions paid to the shareholders of the PPP Co (save to the extent deducted under paragraph 1.1(b) above); and
- (d) redundancy payments for employees of the PPP Co that have been or will be reasonably incurred by the PPP Co as a direct result of termination of the Contract and any Sub-contractor Breakage Costs.

1.2. If the amounts referred to in paragraphs 1.1(b) and/or 1.1(c) are less than zero, then, for the purposes of the calculation in paragraph 1.1 they shall be deemed to be zero.

1.3. If the aggregate of the amounts referred to in paragraphs 1.1(a), 1.1(b) and 1.1(c) is less than the Revised Senior Debt Termination Amount, then the Force Majeure Termination Sum shall be increased so that it is equal to the aggregate of the Revised Senior Debt Termination Amount and the amount referred to in paragraph 1.1(d) provided always that:

- (a) the amount referred to in paragraph 1.1(d) shall only be paid to the extent that the PPP Co has demonstrated to the reasonable satisfaction of the Authority that the amount will not be paid in payment (in whole or in part) of any Distribution and
- (b) if at the time of termination, there are any Additional Permitted Borrowings outstanding, no Sub-Contractor Breakage Costs shall be paid in respect of any Principal Sub-Contract in circumstances where there is an event of default under such Principal Sub-Contract which would entitle the PPP Co to terminate such Principal Sub-Contract.

1.4. If a Distribution is made whilst any Additional Permitted Borrowing is outstanding and the PPP Co has willfully, or through gross negligence, failed to comply with the obligations under Clause [●] of the Direct Agreement then in addition to the deduction of the Distribution referred to in paragraph (v) of the definition of Revised Senior Debt Termination Amount, the Authority shall be entitled to set off the value of that Distribution a second time against the Force Majeure Termination Sum will never be less than the Revised Senior Debt Termination Amount.

1.5. If the PPP Co has wilfully or through gross negligence failed to comply with its obligations under Clause [●] of the Credit Providers' Direct Agreement [to notify the Authority monthly of Distributions and credit balances while Additional Permitted Borrowings are outstanding] and there has been an overstatement of the cash balances by the PPP Co as at that date which has caused the Authority to reasonably believe that it would be required to pay a lesser sum at the Termination Date than it actually is required to pay under the terms of this Part 2 of [Clause 54 – Schedule], then the Force Majeure Termination Sum, shall be reduced by the amount of such overstatement (to the extent that such overstatement is still applicable at the Termination Date), provided that the amount of the Force Majeure Termination Sum will never be less than the Revised Senior Debt Termination Amount.

1.6. Such amount shall be determined and paid in accordance with Clause 54 (Compensation on Termination).

Comment: The effect of paragraphs 1.3 and 1.4 (which must be read in conjunction with the definitions below) above is to allow for a certain amount of additional borrowing to be taken into account in the senior debt.

KEY DEFINITIONS – USED IN CLAUSE 54.1 AND [CLAUSE 54 – SCHEDULE] PART 2 CORE CONTRACT DRAFTING

“Sub-Contractor Breakage Costs” means Losses that have been or will be reasonably and properly incurred by the PPP Co under the terms of the Construction Contract and the O&M Contract as a direct result of the termination of this Agreement, but only to the extent that:

- (a) the Losses are incurred solely in connection with the Project and in respect of the provision of the Operations or the completion of Works, including:
 - (i) any materials or goods ordered or sub-contracts placed that cannot be cancelled without such Losses being incurred;
 - (ii) any expenditure incurred in anticipation of the provision of services or the completion of works in the future;
 - (iii) the cost of demobilisation including the cost of any relocation of equipments used in connection with the Project; and
 - (iv) redundancy payments; and
- (b) the Losses are incurred under arrangements and/or agreements entered into by PPP Co in connection with its obligations in relation to the Project on terms that are consistent with terms that have been entered into in the ordinary course of business and on reasonable commercial terms at arms’ length; and
- (c) the PPP Co and the Contractor and/or the Operator has each used its reasonable endeavours to mitigate the Losses; and
- (d) the Losses have not arisen as a result of the breach of this Agreement or any sub-contract by PPP Co relating to the Project;

“Base Senior Debt Termination Account” means:

- (a) all amounts outstanding at the Termination Date, including interest and Default Interest accrued as at that date, from the PPP Co to the Senior Credit Providers under the Senior Credit Providers’ Agreements and in respect of Permitted Borrowings; and
- (b) all amounts including costs of early termination of interest rate hedging arrangements and other breakage costs, payable by the PPP Co to the Senior Credit Providers as a result of a prepayment under the Senior Credit Providers’ Agreements and in respect of Permitted Borrowings subject to the PPP Co and the Senior Credit Providers mitigating all such costs to the extent reasonably possible;

less, to the extent it is a positive amount, the aggregate of (without doubt counting in relation to the calculation of the Base Senior Debt Termination Amount or the amounts below):

- (i) all credit balances on any bank accounts (but excluding the Joint Insurance Account) held by or on behalf of the PPP Co on the Termination Date;
- (ii) any amounts claimable on or after the Termination Date in respect of Contingent Funding Liabilities;
- (iii) all amounts, including costs of early termination of interest rate hedging arrangements and other breakage costs, payable by the Senior Credit Providers to the PPP Co as a result of prepayment of amounts outstanding under the Senior Credit Providers’ Agreements and in respect of Permitted Borrowings;

- (iv) any Additional Permitted Borrowings and any interest and Default Interest on such Additional Permitted Borrowings; and
- (v) all other amounts received by the Senior Credit Providers on or after the Termination Date and before the date on which any compensation is payable by the Authority to the PPP Co. as a result of enforcing any other rights they may have;

“Contingent Funding Liabilities” means [to be completed when Preferred Tenderer is appointed]

“Revised Senior Debt Termination Amount” means, subject to Clause 43A (Amendments to the Funding Agreements):

- (a) all amounts outstanding at the Termination Date, including interest and Default Interest accrued as at that date, from the PPP Co to the Senior Credit Providers under the Senior Credit Providers’ Agreements including in respect of Permitted Borrowings other than any such amounts that are in respect of Additional Permitted Borrowings;
- (b) all amounts of Additional Permitted Borrowings including interest but excluding Default Interest outstanding at the Termination Date, including such Additional Permitted Borrowings accrued at that date; and
- (c) all amounts including costs of early termination of interest rate hedging arrangements and other breakage costs, payable by the PPP Co to the Senior Credit Providers as a result of a prepayment under the Senior Credit Providers’ Agreements including in respect of Permitted Borrowings, subject to the PPP Co and the Senior Credit Providers mitigating all such costs to the extent reasonably possible,

less, to the extent it is a positive amount, the aggregate of (without double counting in relation to the calculation of the Revised Senior Debt Termination Amount or the amounts below):

- (i) all credit balances on any bank accounts (but excluding the Joint Insurance Account held by or on behalf of the PPP Co) on the Termination Date;
- (ii) any amounts claimable on or after the Termination Date in respect of Contingent Funding Liabilities;
- (iii) all amounts, including costs of early termination of interest rate hedging arrangements and other breakage costs, payable by the Senior Credit Providers to the PPP Co as a result of prepayment of amounts outstanding under the Senior Credit Providers’ Agreements including in respect of Permitted Borrowings;
- (iv) all other amounts received by the Senior Credit Providers on or after the Termination Date and before the date on which any compensation is payable by the Authority to the PPP Co as a result of enforcing any other rights they may have; and
- (v) all APB Distributions.

“Permitted Borrowings” means, without double counting, any:

- (a) advance to the PPP Co under the Senior Credit Provider’s Agreements, provided that such advance is not made under any committed standby facility;
- (b) Additional Permitted Borrowing; and
- (c) interest and, in respect of the Funding Agreements only (prior to any subsequent amendment), other amounts accrued or payable under the terms of the Senior Credit Provider’s Agreements;

except where the amount referred to in paragraphs (a) to (d) above is or is being used to fund a payment at a Default Interest Rate on any Permitted Additional Borrowing.

“Additional Permitted Borrowing” means on any date, the amount equal to any amount of principal outstanding under the Senior Credit Providers’ Agreements in excess of the amount of principal that the

Senior Credit Providers' Agreements at Financial Close contemplate will be outstanding at that date; but only to the extent that:

- (a) this amount is less than or equal to the Additional Permitted Borrowings Limit; and
- (b) in respect of any Additional Permitted Borrowing the Senior Credit Providers' Agent is not in material breach of its obligations under Clause [●] of the Credit Providers' Direct Agreement as it applies to such Additional Permitted Borrowing; and
- (c) any such excess amount of principal which has been drawn down in connection with the funding of any Variation shall not be counted as Additional Permitted Borrowing.

"Additional Permitted Borrowings Limit" means an amount equal to:

- (a) [●]% of the Original Senior Debt for any Additional Permitted Borrowing subsisting in the period from the date of Financial Close to the date on which the amount outstanding under the Senior Credit Providers' Agreements is reduced to [●]% or less of the Original Senior Debt;
- (b) on and/or after the expiry of the period referred to in paragraph (a), the higher of:
 - (i) [●]% of the Original Senior Debt; and
 - (ii) the amount of any Additional Permitted Borrowing outstanding on the last day of the period referred to in paragraph (a).

"APB Distribution" means for the period during which the Additional Permitted Borrowing subsists, an amount equal to the aggregate of all Distributions made during that period up to an amount equal to the principal of the Additional Permitted Borrowing on the first day of that period.

NRA MODEL CONTRACT DRAFTING

Comment: The matching provisions of the NRA Model Contract apply only to termination for force majeure and uninsurable risk: if change in law results in a termination, that is treated the same as an Authority default. The NRA Model Contract protects the Authority against having to pay too much for senior debt on termination by the control over amendments to the funding documents, discussed in Clause 43, Refinancing, rather than in the termination provisions. So, the definition of senior debt for these purposes is less complex. However, the NRA Model Contract does have a more extensive list of deductions from this compensation.

[CLAUSE 54 - SCHEDULE A]

Compensation On Termination

PART 1

Compensation on Termination for Termination by PPP Co, Voluntary Termination or Change in Law

1. If this Agreement is terminated pursuant to Clause [●] (Termination by PPP Co), Clause [●] (Termination on Change in Law) or Clause [●] (Voluntary Termination) the Authority shall, subject to Clause [●] (Tax Equalisation) and [●] (Rights of Set Off), pay to the PPP Co the Authority's Default Termination Sum as

such amount is determined pursuant to paragraph [●] of this Part 1 of [Clause 54 – Schedule A] (the “Authority’s Default Termination Sum”).

2. The Authority’s Default Termination Sum shall, subject to paragraph 3, be an amount equal to:

2.1 the aggregate of:

2.1.1 the Senior Debt Amount at the Termination Date (together with interest which accrues at the Funding Interest Rate under the Senior Credit Providers Agreement on the Senior Debt Amount from the Termination Date to the date on which payment of the Authority’s Default Termination Sum is made by the Authority to the PPP Co);

2.1.2 Redundancy Payments and Sub-Contractor Losses;

2.1.3 the Equity Value; and

2.1.4 an amount equal to the Junior Debt less an amount equal to the aggregate of interest paid and interest accrued and unpaid on the Junior Debt,

2.2 less to the extent it is a positive amount the aggregate of:

2.2.1 an amount equal to:

2.2.1.1 all credit balances on any bank accounts held by or on behalf of the PPP Co on the Termination Date (other than the Retention Account);

2.2.1.2 the insurance proceeds received by the PPP Co or any Credit Provider at any time during the period between the Termination Date and the date on which a Compensation Payment is made by the Authority to the PPP Co pursuant to this Part 1 of [Clause 54 – Schedule A] (save to the extent such insurance proceeds are (i) held in the Insurance Account and are to be applied in reinstatement, or (ii) to be or have been applied in payment of third party liabilities incurred for the purposes of the Project (unless such third party is a Sponsor or a Contracting Associate) and provided such third party liabilities do not fall within any of the items in paragraph 2.1); and

2.2.1.3 any sums due and payable from third parties (but only when received from such third parties) at any time during the period between the Termination Date and the date on which a Compensation Payment is made by the Authority to the PPP Co pursuant to this Part 1 of [Clause 54 – Schedule A];

2.2.2 to the extent it is a positive amount, the amount realised during the period between the Termination Date and the date on which any Compensation Payment is made by the Authority to the PPP Co in respect of any other assets and rights of the PPP Co (other than those transferred to the Authority pursuant to this Agreement) less the liabilities of the PPP Co properly incurred in carrying out its obligations under this Agreement as at the Termination Date or such later date as such assets are being realised but in any event calculated prior to the date on which any Compensation Payment is made by the Authority to the PPP Co provided that no account shall be taken of any such liabilities of the PPP Co arising out of:

2.2.2.1 agreements or arrangements entered into by the PPP Co to the extent that such agreements or arrangements were not entered into in connection with the PPP Co’s obligations in relation to the Project; and/or

2.2.2.2 agreements or arrangements entered into by the PPP Co to the extent that such agreements or arrangements were not entered into in the ordinary

course of business and on commercial arm's length terms,

provided that (a) the PPP Co shall be obliged to use all reasonable endeavours to realise such assets and (b) to the extent realisation of an asset is not effected on an arms-length basis and to the extent the market value is greater than the amount realised for such asset, the market value of the asset being realised shall be substituted for the amount realised in this calculation;

provided that any deduction referred to in this paragraph 2.2 may only be made if the amount which is to be deducted has not been applied in reduction of any amount referred to in paragraphs 2.1.1 to 2.1.4 (inclusive) or the Authority's Default Termination Sum prior to the calculation thereof or pursuant to another sub-paragraph of this paragraph 2.2.

- 3 There shall be excluded from the amount calculated pursuant to paragraph 2 (but only to the extent they would otherwise be included in such calculation) the following amounts:
- 3.1 the amount of any additional obligation or liability incurred or arising under any of the Funding Agreements (other than (but without prejudice to paragraph 3.3) in respect of any element of interest payable as a result of a default by the PPP Co under any of the Funding Agreements) which arises as a result of :
- 3.1.1 any breach of any undertaking, warranty or representation under the terms of any of the Funding Agreements;
- 3.1.2 the occurrence of any event of default (however described) under any of the Funding Agreements;
- 3.1.3 any failure to satisfy any condition under the terms of any of the Funding Agreements; or
- 3.1.4 the cancellation, suspension or revocation by the PPP Co of a request by it for the advance to it of funds or for the issue of any guarantee, letter of credit, or the Performance Guarantee,
- (except to the extent that any of the events referred to in paragraphs 3.1.1 to 3.1.3 (inclusive) arises as a result of termination of this Agreement or arises as a result of any breach by the Authority of its obligations under this Agreement) provided that nothing in this paragraph 3.1 shall be deemed to exclude any principal sums outstanding under the Funding Agreements and any interest thereon (excluding default interest);
- 3.2 any amount payable under any of the Funding Agreements in respect of any demand under the Performance Guarantee;
- 3.3 any liability of the PPP Co in respect of any interest payable as a result of a default by the PPP Co under the agreement in respect of which the interest is payable save to the extent such interest arises as a result of a breach by the Authority of any of its obligations under this Agreement;
- 3.4 any liability of the PPP Co in respect of subscription monies paid by or any other obligations owed to holders of the Ordinary Shares in respect of such Ordinary Shares and any liability of the PPP Co in respect of any moneys advanced or other financial accommodation made available to the PPP Co by any Associated Company of the PPP Co;
- 3.5 any amounts which would not have been payable under the Funding Agreements but are otherwise payable by reason of replacements of or amendments to such Funding Agreements which have not been submitted to the Authority's Representative pursuant to the Commercial Review, or are otherwise payable by reason of replacements of or amendments to such Funding Agreements to which the Authority's Representative has objected pursuant to the

Commercial Review and such objections have not been addressed to the satisfaction of the Authority's Representative;

- 3.6 all liabilities and obligations arising out of agreements or arrangements entered into by the PPP Co prior to such termination, to the extent that such agreements or arrangements were not entered into in the ordinary course of business and on commercial arms' length terms unless such agreements or arrangements were approved as a Project Document prior to execution of this Agreement or submitted to the Authority's Representative who has not objected pursuant to the Commercial Review or who has objected pursuant to the Commercial Review and such objections have been addressed to the satisfaction of the Authority's Representative;
 - 3.7 all liabilities and obligations arising out of agreements or arrangements entered into by the PPP Co on or following termination of this Agreement and any agreements or arrangements entered into at whatever time with any professional advisers or consultants of the PPP Co, the Credit Providers or any Contracting Associate in respect of the payment of any amounts due as a consequence of the termination of the engagement of any such adviser or consultant which are not directly attributable to work done or services performed or costs reasonably incurred by such adviser or consultant as a consequence of the termination of this Agreement;
 - 3.8 any sum payable or liability in respect of any loss of profit for work not executed, loss of income or indirect or consequential loss;
 - 3.9 all liabilities and obligations of the PPP Co arising as a result of a breach of a contract relating to the Project other than (but without prejudice to paragraph 3.1) a Funding Agreement (except any breach of contract arising as a result of any breach by the Authority of its obligations under this Agreement or arising as a result of termination of this Agreement);
 - 3.10 any liability of the PPP Co, under or in respect of any contract relating to the Project, to pay any amount by way of reimbursement of, or indemnification in respect of, costs and expenses incurred by any other party to any such contract if and to the extent that:
 - 3.10.1 such costs and expenses were not properly incurred; or
 - 3.10.2 such costs and expenses were properly incurred but exceed a reasonable amount,
 - 3.11 any liability of the PPP Co in respect of Irish taxation; and
 - 3.12 any amount payable by way of, or determined by reference to (directly or indirectly):
 - 3.12.1 (but without limitation to paragraph 3.1) any deduction or withholding of tax other than Irish tax; and/or
 - 3.12.2 any stamp or documentary duties or taxes levied otherwise than in the Republic of Ireland on any agreement, document or other instrument.
- 4 The Authority's Default Termination Sum is in full and final settlement of all the PPP Co's Claims and rights against the Authority for breaches and/or termination of this Agreement and any other Project Document whether under contract, tort, restitution or otherwise but without prejudice to:
- 4.1 any antecedent liability of the PPP Co to the Authority which may be set off pursuant to this Schedule;
 - 4.2 any antecedent liability of the Authority to the PPP Co that arose prior to the Termination Date (but not from the termination itself) to the extent such liability has not already been taken into account in determining or agreeing the Authority's Default Termination Sum;
 - 4.3 any breach by either party of their obligations under this Agreement which continues after the

Termination Date; or

4.4 Clause [●] (Rights of Set-off) of this Agreement.

5 The Authority's Default Termination Sum shall be paid by the Authority to the PPP Co within 40 (forty) days after the date (the "Payment Request Date") that is the later of:

5.1 the date that the Authority a payment request from the PPP Co for the Authority's Default Termination Sum; and

5.2 the date that the Authority receives sufficient supporting evidence reasonably satisfactory to the Authority justifying the amount of the Authority's Default Termination Sum including a breakdown of the individual elements of such the Authority's Default Termination Sum.

6 In addition to the Authority's Default Termination Sum, the Authority will pay to the PPP Co interest on the Authority's Default Termination Sum (or any part that remains outstanding) at the Funding Interest Rate from (but excluding) the Termination Date to (and including) the date which is 40 (forty) days after the Payment Request Date or if earlier the date of payment of the Authority's Default Termination Sum (or part thereof) by the Authority and thereafter if the PPP Co have still not received the Authority's Default Termination Sum (or any part thereof) interest on the Authority's Default Termination Sum (or such outstanding part) at the Default Interest Rate provided that nothing in this paragraph 6 shall require the Authority to pay interest on any amount payable in respect of:

6.1 any Senior Debt Amount in respect of which interest continues to accrue under the Funding Agreements from the Termination Date as contemplated in paragraph 2.1.1; or

6.2 interest which accrues under the Funding Agreements referred to in paragraph 6.1.

7 The PPP Co will give to the Authority the payment request and supporting information referred to in paragraphs 5.1 and 5.2 (respectively) above as soon as practicable and in any event within 15 (fifteen) Working Days of the Termination Date.

INTRODUCTION TO COMPENSATION FOR PPP CO DEFAULT TERMINATION

Where the contract is terminated because of the PPP Co's default (with a few exceptions, discussed next) the Core Contract adopts the UK PFI approach of providing for the PPP Co to receive, as compensation, the re-tendered value of the contract. If the contract is not re-tendered, either because the Authority so elects, or there is no 'liquid market', or the lenders have stepped in, the value is estimated, and the PPP Co gets the amount of the estimate. However, this is capped at the outstanding senior debt. The Core Contract form gives the Authority an unusual third option: if the termination occurs before construction is completed the Authority can return the site to the PPP Co, instead of paying compensation.

The NRA Model Contract is different. There the Authority keeps the road and the PPP Co gets nothing.

SOPC3 GUIDANCE

SOPC3

20.2.5 Compensation on Termination for Contractor Default

- 20.2.5.1** *One question that may be asked is why compensation should be paid to the Contractor when it has failed to perform in accordance with the Contract. Under a typical service contract, not only would no compensation be paid but the non-performing party could expect the innocent party to bring claims for damages. The reason that compensation is paid is that a failure to compensate could unfairly benefit the Authority. This would be the case, for example, where a particular asset is developed to deliver a particular service and the Authority is entitled to have the asset transferred to it on a termination without compensating the Contractor for its value. The question that is then relevant is how best to assess what an appropriate level of compensation is for Contractor Default.*
- 20.2.5.2** *The amount of compensation payable on Contractor Default termination is one of the key commercial issues for all parties concerned. The market value approach described below is the recommended approach for all PFI projects outside of the roads and prisons sectors.*
- 20.2.5.3** *In order to understand why the market value principle has been adopted, and accepted by the PFI market, it is helpful to understand the variety of alternatives which preceded it. These ranged from roads projects, which provided for no compensation for Contractor Default; prisons projects, which offered no compensation for termination during the construction period; early accommodation, schools and hospital projects, which were based on a wide range of calculations usually linked during the construction period to capital costs less rectification costs and during the Service Period to the NPV of future cashflows; and some contracts which virtually guaranteed (implicitly or explicitly) full payout of Senior Debt.*
- 20.2.5.4** *The market value approach represents a balance between protecting the Authority's interests and not imposing unreasonable deductions on the Contractor for its default. It also encourages the Senior Lenders to step-in and rescue the Project instead of simply relying on the termination payment to pay their outstanding debt (see Section [●] (Direct Agreement)).*
- 20.2.5.5** *The "no compensation" models have been driven by a proper concern that, on Contractor Default, Senior Lenders should be encouraged to step-in and work the Project out. They do expose, however, the public sector to the charge that it is seeking a possible windfall gain in the event that termination occurs (e.g. if it takes over a valuable asset), although this may be refuted by the Authority agreeing to pay the market value for any assets to be transferred to it. They may also serve to increase the cost of projects to the public sector by forcing bidders to take a conservative approach to risk pricing, liquidated damages and the limits on liability they require from their sub-contractors.*
- 20.2.5.6** *On the other hand, calculations based on the NPV of future cashflows proved extremely complex and difficult to negotiate. In practice, they are unlikely to take full account either of the performance history of the defaulting Project (and so expectations of future performance), the extra costs accruing to the Authority over the period of the Contract or of the risk transfer to the Contractor (particularly in relation to whole life costing). Equally, if payments based on NPV calculations were sufficient to pay Senior Debt in full, the Senior Lenders would have less incentive to rescue the ailing Project. This might well result in terminations which would otherwise have been avoidable and would be to the detriment of Authorities and Contractors.*

20.2.6 Market Value

- 20.2.6.1** *The recommended approach follows the principle set out in Section 20.2.5.4 [above]. It facilitates the Senior Lenders' rights to step-in, manage and rescue or sell the Project if the Contractor defaults, but, if they fail to do so, offers compensation on termination based on the market value of the unexpired term of the Contract.*

- 20.2.6.2** *The recommended approach:*

- does not require the Senior Lenders to make attempts to take responsibility and seek to transfer the Project if there is no liquid market for similar PFI projects;
- does not penalise Senior Lenders for stepping in if, subsequently, they choose to step-out (see Section 30 (Direct Agreement) [of the SoPC3 Guidance]);
- increases the incentives for Senior Lenders to work with the Authority and the Contractor to achieve a long term solution rather than terminate a project that hits difficulties;
- ensures that the Authority is no worse off as a result of the termination where Senior Lenders elect not to step-in;
- does not give the Authority a windfall gain on termination; and
- does not discriminate against different classes of finance or against bidders who are prepared to finance the Project through their own balance sheets.

20.2.6.2 *If the Authority issues a Termination Notice to the Contractor, the Senior Lenders will require an opportunity to put together a remedial plan and accordingly, the right to attempt to rectify breaches or transfer the Contract. The Senior Lenders are given this opportunity under the terms of the direct agreement. In such circumstances, the Senior Lenders are incentivised to take control of the Project because any failure to do so will lead to termination of the Contract and allow the Authority to elect to retender the Contract (see Section 20.2.7 (Retendering Election and Liquid Market below)). Senior Lenders accept that they should take the risk of the Contractor's performance and take responsibility for the Project if the Authority elects to terminate the Contract for poor performance. The Senior Lenders will not, however, agree to any requirement to take reasonable steps to transfer the Contract to a third party at the time of the issuance of the Termination Notice if there is no liquid market for similar types of PFI projects. The recommended approach is therefore that if at the time the Authority issues the Termination Notice the parties agree that there is no liquid market (or it is determined in accordance with the Dispute Resolution Procedure), the procedure set out in Clause 20.2.9 (No Retendering Procedure) [below] should be used to determine the compensation payable to the Contractor.*

20.2.7 Retendering Election and Liquid Market

20.2.7.1 *Clause 20.2.7 gives the Authority a choice in certain circumstances whether to retender the Contract or not following termination. It would not be appropriate for the Authority to choose between these two methods of compensation if:*

- *there is no liquid market for similar PFI projects; or*
- *the Senior Lenders have stepped in and are using their reasonable efforts to find a buyer for the Contract.*

The Authority should, however, in other circumstances have the right to elect whether to require retendering of the unexpired term of the Contract or to have the Contract valued on the basis of there being no retendering (i.e. which of Clause 20.2.8 (Retendering Procedure) and Clause 20.2.9 (No Retendering Procedure) applies) (e.g. if Senior Lenders decide not to step-in).

20.2.7.2 *If there is no liquid market for the Contract or similar contracts, and the Contract terminates then the procedure set out in Clause 20.2.9 (No Retendering Procedure) should be used.*

20.2.7.3 *There will be a liquid market for the Contract if there are a sufficient number of contractors in the prevailing PFI market (or markets for similar contracts to PFI contracts) to ensure that the price that a contractor will offer for the Contract is reasonably likely to represent a fair value.*

20.2.7.4 *The question is whether the market for contracts of this type in general is liquid (it is possible for there to be no bidders for a retendered Contract and there still to be a liquid market). If the Authority only receives one compliant tender then the amount that the compliant tenderer bids for the new contract should not automatically be rejected as not representing the fair value of the new contract. The relevant test is not what happens at the end of the Retendering Procedure, but the state of the PFI market for similar contracts at the time the liquid market test is run. If there is a liquid market for PFI and the Authority elects to retender the Contract, the market will determine the Fair Value of the Contract (i.e. if there are no bidders for the retendering of the Contract, the market has, by definition,*

determined that the market value of the Contract is less than or equal to zero). The Senior Lenders are therefore incentivised to exercise their rights under their Direct Agreement with the Authority to ensure greater control by means of retendering of the Contract.

20.2.7.5 *If the Contract is transferred to a new contractor via the Retendering Procedure, the price for which the Contract is to be sold will be determined through a competitive bidding process, controlled by the Authority. The Senior Lenders will generally prefer to control any transfer of the Contract, and the price achieved for the transfer, themselves. This they are permitted to do by stepping in under the Direct Agreement (see 30 (Direct Agreement)). Accordingly, the Senior Lenders are incentivised to exercise their rights of step-in and take control of the sale of the Contract to a new contractor.*

20.2.7.6 *Any dispute as to the existence of a liquid market for the Contract should be dealt with through the dispute resolution procedure (see Section 27 (Dispute Resolution) [of the SoPC3 Guidance]).*

20.2.8 Retendering Procedure

20.2.8.1 *The Authority will in the circumstances referred to in Clause 2.2.7 (Retendering Election) be entitled to elect to sell (i.e. retender) the unexpired term of the Contract on its original terms and pay the proceeds of the sale (net of the Authority's costs) to the former Contractor.*

20.2.8.2 *Bidders would be invited to tender to the Authority for the provision of the Service set out in the Contract at the same Unitary Charge as that set out in the Contract. Since both the Service and price remain unchanged, the Authority will be no better and no worse off than it would have been had the Contract not been terminated, save for the disruption caused. If the Authority wishes to retender the Contract on the basis of a different Service, then the Authority will need to agree with the Contractor (and its lenders) any changes which would adversely affect the Contractor, or alternatively pay the Adjusted Estimated Fair Value of the Contract.*

20.2.8.3 *The Unitary Charge should be sufficient, in most circumstances, to represent a positive valuation from prospective bidders (and so generate a cash sum) since, particularly if termination takes place during the Service Period, bidders will not typically incur capital costs on the scale envisaged when the price was originally agreed. The private sector is, of course, familiar with the cashflow valuation techniques which would be used to assess the value of the Contract. These involve their valuing a number of factors, including the revenue stream of the Project, the capital and service costs they expect to incur (taking into account the conditions of the Assets), the perceived risks associated with the Project, financing costs and market appetite.*

20.2.8.4 *One of the concerns that the outgoing Contractor will have is that, in the period between the Termination Date and the date of the New Contract, there will be no income, finance costs will increase, the condition of the Assets may deteriorate (thereby detrimentally affecting their value) and the Authority will potentially be obtaining some value even though there is no service (in that, even with the Authority itself performing the Service, a significant benefit exists). For that reason, the Authority should periodically pay a Post Termination Service Amount to the outgoing Contractor which should approximate to the value received in this interim period. The recommended approach is to take the Unitary Charge that was paid at the Termination Date and deduct from that both the costs of alternative provision of the Service and any rectification costs (allowing the Contractor the benefit of any rectified availability as a result of rectification costs being incurred).*

20.2.8.5 *To the extent that the term of the New Contract is the same as the unexpired term for the terminated Contract (i.e. the expiry date in the New Contract is later than that in the Contract by the amount of time the Retendering Procedure has taken) then any Post Termination Service Amounts should be deducted from the ultimate payment made. That is, once the estimated value of the post termination period to the Authority has been accurately assessed, this deduction is appropriate.*

20.2.8.6 *It may be, however, for operational reasons that a service requirement can, in fact, only be delivered for a period that expires on the original Expiry Date. In such circumstances, it would not be possible for the term of the retendered contract to be for a period equal to the unexpired term of the Contract. If it is not possible to relet for a period equal to the unexpired term (e.g. the Expiry Date of the original Contract is the date on which the Service ceases to be required) then the Post Termination Service*

Amounts should not be deducted from the Market Value of the Contract¹. If this is the case then the parties will have to fix a date for the new Contract coming into effect, so that tenderers can bid for a fixed term.

20.2.8.7 As in the original procurement, the Authority will select the bid which represents best value (which should not simply be the highest price). Given the need for the outgoing Contractor to be protected and to give the Authority flexibility, the highest priced compliant tender is the amount paid by the Authority to the outgoing Contractor in compensation, even if the Authority decides to contract with a separate compliant tenderer offering better value for money and which has agreed to pay a lower price. In such a situation the Authority will have to have satisfied itself as to the value for money benefits of choosing such a tenderer. All things being equal, and provided bidders are able to show that they are capable of meeting the service requirements, the best priced compliant bid should win. The bid price, net of the Authority's own costs of retendering and any costs incurred in relation to running the Service prior to replacement of the Contractor (having taken into account non-payment of the Unitary Charge), will be paid to the former Contractor as compensation (this is defined as the Adjusted Highest Complaint Tender price in the drafting).

20.2.8.8 It is important that neither party is incentivised to delay the process by which market value is determined. These provisions help prevent such a delay occurring.

20.2.8.9 If the Authority elects to retender the Contract, the Authority will be responsible for and will control the retendering process. Consequently, if the Senior Lenders decide not to step in, or have subsequently stepped out without satisfying the requirements of Clause 20.2.7(c), they will cease to have any control over the transfer of the Contract to the new contractor. However, the Senior Lenders will be concerned to ensure that the Authority correctly follows the Tender Process so as to help ensure that a fair market value for the Contract is received. The Senior Lenders (through the Contractor) should therefore have the right to appoint a third party (the "Tender Process Monitor") to monitor the retendering process and report on its progress to the Contractor and Senior Lenders. Although the Tender Process Monitor should have the right to attend meetings, review tender process documentation and bids, the Authority should not be required to have regard to any representations made by the Tender Process Monitor in respect of the Tender Process.

20.2.9 No Retendering

20.2.9.1 Alternatively, either the Authority may elect (for example, for operational reasons) not to retender the Project or it may be that there is no Liquid Market, in which case the Authority will instead pay to the Contractor (from its own resources) an assessed value of the amount it would have received through an appropriate retender process (again net of costs) (see Clause 20.2.8 (Retendering Procedure)) that is, if a Liquid Market had existed (the "**Estimated Fair Value of the Contract**").

20.2.9.2 Estimated Fair Value computations are conducted by forecasting the full unitary charge from the date of termination to the expiry of the Contract (ignoring any deductions for performance or availability), from which the estimated costs of delivering the service to the required standard in the output specification (this includes the running costs, lifecycle costs and any rectification costs) are deducted to arrive at the estimated operating cash-flow stream which, had a liquid market existed and the project been re-tendered, a hypothetical bidder would have valued to determine the amount to bid for the project.

20.2.9.3 The first point to consider in making this computation is whether this computation should be conducted in nominal terms (i.e. using current prices) or in real terms (i.e. using constant prices). For contracts with 100% indexation to RPI, it should not normally matter since both methods would return the identical result. However, it is easier and safer to conduct the analysis in nominal terms because:

- (a) many elements of a project (including tax and cost of funds) are always quoted in nominal terms, and it is easy to make errors by ignoring this when conducting 'real' computations, and

¹ If this is the case then the parties will have to fix a date for the new Contract coming into effect, so that tenderers can bid for a fixed term.

(b) *the majority of PFI contracts let in the PFI market are partially indexed. For such contracts, the “real” value of the Unitary Payment effectively declines with time. The effect of indexation must therefore be recognised by explicitly including the indexation effects and conducting the analysis in nominal terms.*

20.2.9.4 *The calculation must also take care to ensure that if the forecast cash flows are expressed in nominal terms (i.e. taking indexation into account), the discount rate used must also be expressed in nominal terms. The discount rate is usually made up of a ‘real’ rate of return, on top of which an allowance for inflation is added. A methodology for making this adjustment is set out in the suggested drafting below.*

20.2.9.5 *The Authority and the Contractor will need to agree a forecast rate of inflation to be applied to the RPI index to make the nominal computations. It is recommended that the agreed assumed rate of inflation should be an easily observable and transparent figure such as the Bank of England’s target long term inflation rate as published in the Bank of England Quarterly Bulletins.*

20.2.9.6 *The next question is whether the Estimated Fair Value analysis should be conducted in pre- or post-tax terms. It is considerably easier and more transparent to conduct the analysis in pre-tax terms because this avoids protracted scrutiny of the assumptions underlying the tax forecasts. Since neither the public sector nor the private sector is actually going to be paying taxes going forwards, it is not necessary to assess taxation in the calculation. Moreover, the risk of changing tax regimes between financial close and termination date lies squarely with the private sector, and this should not be made an occasion to revisit that risk transfer. The analysis should therefore be conducted in pre-tax terms.*

20.2.9.7 *The forecast cash-flows should be discounted at a discount rate which reflects the risk of the underlying cash-flow. The most transparent measure of the risk of the cashflows is the real pre-tax project IRR reflected in the Base Case. However, since underlying rates in the market such as the real yields on Government Gilts or the London Interbank Offered Rate (LIBOR) can and do vary over time, the Authority must consider carefully whether, in setting a discount rate for the Estimated Fair Value calculation, it should acknowledge the effect of changes to these underlying variables.*

20.2.9.8 *The main argument in favour of giving effect in the discount rate to changes in underlying risk-free rates is that if a liquid market existed and the Contract were successfully re-tendered, a hypothetical bidder would take into account current market yields on risk-free investments in choosing what discount rate to apply to the project. If these benchmark rates had moved upwards, for instance, in the time between Financial Close and Date of Termination, an incoming bidder would bid a lower sum for the project and vice versa. Not recognising this difference could create a discrepancy between the compensation sums arising out of the Retendering procedure and the No Retendering procedure. It is therefore recommended that an adjustment should be made as suggested in the drafting below to reflect the impact on the Estimated Fair Value Discount Rate of changes to underlying market rates.*

20.2.9.9 *An adjustment as proposed below provides the Contractor with a natural hedge against movements in underlying market rates that may cause losses or profits on broken interest rate hedges on Termination. If interest rates move down between Financial Close and Termination Date, the Contractor would find itself having to pay positive breakage costs on the interest rate swap (if one was put in place at Financial Close). Adjusting the Estimate Fair Value discount rate downwards in line with market rate movement would have the effect of generating a larger compensation sum, thereby partially or fully protecting the Contractor against the adverse position on its interest rate swap. Upwards movements in interest rates would likewise have the opposite effect, generating profits on the broken hedge but a smaller compensation sum from the Authority.*

20.2.9.10 *From the point of view of Authorities, it is also beneficial to consider adjustments as suggested below to the discount rate because, just as the adjustment provides the Contractor with a natural hedge against breakage costs, it provides Authorities with a natural hedge against the cost of funding compensation payments. To illustrate, an upward movement in interest rates would make it more expensive for Authorities to finance a given compensation payment, but the proposed mechanism would adjust the discount rate upward in line with market movement and reduce the amount of compensation to be paid, thereby partly protecting the Authority’s position. A downward movement in market rates would have the opposite effect.*

20.2.9.11 *Any dispute as to the assessed value of the terminated Contract should be dealt with through the*

CORE CONTRACT DRAFTING

54.2 Termination for PPP Co Default

- (a) Subject to Clause 54.2(b), where an Event of Default gives rise to termination under Clause 49 (PPP Co Default Termination) (save where this Agreement is terminated pursuant to Clause 54.4(b) (where Clauses 54.4(b)(i) and (ii) are satisfied), in which case the provisions of Clause 54.1 (Termination of Force Majeure, Uninsurable Risk and Change in law) apply) the Authority shall be entitled, at its absolute discretion, to elect to:
- (i) retender the provision of the Operations, in accordance with Paragraph 1 of Part 4 of [Clause 54 – Schedule] (Retendering Procedure); or
 - (ii) require an expert determination in accordance with Paragraph 2 of Part 4 of [Clause 54 – Schedule] (No Retendering Procedure); or
- (b) The Authority shall be entitled to elect to retender the provision of the Operations in accordance with paragraph 1 of Part 4 (Retendering Procedure) if:
- (i) the Authority notifies the PPP Co on or before the date falling [•][•] Working Days after the Termination Date; and
 - (ii) there is a Liquid Market; and either:
 - (A) the Senior Lenders have not exercised their rights to step-in under clause [•] of the Direct Agreement; or
 - (B) Co or Senior Lenders have not procured the transfer of the Company's rights and liabilities under this Agreement to a Suitable Substitute Contractor and have failed to use all reasonable efforts to do so;
- but otherwise the Authority shall not be entitled to Re-tender the provision of the Operations and Paragraph 2 of Part 4 of [Clause 54 – Schedule] shall apply.
- (c) If the Authority exercises its rights under clause 50.2(a)(i) or 50.2(a)(ii), then the Authority shall pay compensation to the PPP Co, in accordance with Part 4 of [Clause 54 - Schedule] (Compensation on Termination).

[CLAUSE 54 – SCHEDULE]

Compensation On Termination

PART 4

Termination for PPP Co Default

1. Retendering Procedure

If the Authority elects to retender the provision of the Operations under Clause 54.2 (Termination for PPP Co Default), then the following provisions shall apply:

- 1.1 The objective of the retendering procedure shall be to establish and pay to the PPP Co the Highest Compliant Tender Price, as a result of the Tender Process.

- 1.2 The Authority shall (subject to any legal requirements preventing it from doing so) use its reasonable endeavours to complete the Tender Process as soon as practicable.
- 1.3 The Authority shall notify the PPP Co of the qualification criteria and the other requirements and terms of the Tender Process, including the timing of the Tender Process but shall act reasonably in setting such requirements and terms.
- 1.4 The PPP Co authorises the release of any information by the Authority under the Tender Process which would otherwise be prevented under Clause 57 (Confidentiality) that is reasonably required as part of the Tender Process.
- 1.5 The PPP Co may, at its own cost, appoint a person (the "Tender Process Monitor") to monitor the Tender Process for the purpose of monitoring and reporting to the PPP Co and the Senior Credit Providers on the Authority's compliance with the Tender Process and making representations to the Authority. The Tender Process Monitor will not disclose any confidential information to the PPP Co or any other person (and shall provide an undertaking to the Authority to such effect as a condition of its appointment) but shall be entitled to advise the PPP Co as to whether it considers that the Authority has acted in accordance with the Tender Process, and correctly determined the Adjusted Highest Compliant Tender Price.
- 1.6 The Tender Process Monitor shall enter into a confidentially agreement with the Authority in a form acceptable to the Authority and shall be entitled to attend all meetings relating to the Tender Process, inspect copies of the tender documentation and bids and shall be required to make written representations to the Authority regarding compliance with the Tender Process. All representations shall be made by the Tender Process Monitor in a timely manner as the Tender Process proceeds. The Authority shall not be bound to consider or act upon such representations but acknowledges that such representations may be referred to by the PPP Co in the event that the PPP Co refers a dispute relating to the Adjusted Highest Compliant Tender Price to dispute resolution in accordance with Clause 56 (Dispute Resolution).
- 1.7 For all or any part of a month, falling within the period from the Termination Date to the Compensation Date, the Authority shall pay to the PPP Co:
 - (a) the Post Termination Service Amount for that month, on or before the date falling [●][●] Working Days after the end of that month; and
 - (b) the Post Termination Service Amount for the period ending on the Compensation Date, on or before the date falling [[●][●]] Working Days after the Compensation Date.
- 1.8 If any Post Termination Service Amount is less than zero then it shall be carried forward and shall be set off against any future positive Post Termination Service Amounts. If any such Post Termination Service Amount has not been set off on or before the Compensation Date then it shall be taken into account in the calculation of the Adjusted Highest Compliant Tender Price.
- 1.9 The Authority shall require bidders to bid on the basis that they will receive the benefit of any outstanding claims under material damage insurance policies and amounts (if any) standing to the credit of the Joint Insurance Account on the date that the New Contract is entered into.
- 1.10 As soon as practicable after tenders have been received, the Authority shall (acting reasonably) determine the Compliant Tenders and shall notify the PPP Co of the Adjusted Highest Compliant Tender Price.
- 1.11 If the PPP Co refers a dispute relating to the Adjusted Highest Compliant Tender Price to dispute resolution in accordance with Clause 57 (Disputes Resolution Procedure), the Authority shall be entitled to enter into a New Contract. The Authority shall pay to the PPP Co the Adjusted Highest Compliant Tender Price on or before the date falling [[●][●]] Working

Days after it has been determined in accordance with Clause 56 (Disputes Resolution Procedure) and the Authority shall pay interest to the PPP Co at the Senior Debt Rate on any amount of Adjusted Highest Compliant Tender Price which had been withheld, from the date specified in paragraph 1.12 below until the date specified in this paragraph 1.11.

- 1.12 Subject to paragraphs 1.11 and 1.15, the Authority shall pay to the PPP Co an amount equal to the Adjusted Highest Compliant Tender Price no later than the date falling [[•][•]] Working Days after the date of the New Contract.
- 1.13 The discharge by the Authority of its payment obligation in paragraph 1.11 and/or 1.12 above shall be in full and final settlement of all the PPP Co's claims and rights against the Authority for breaches and/or termination of this Agreement and the Project Documents whether under contract, tort, restitution or otherwise, save for any liability of the Authority which arose prior to the Termination Date that has not already been taken into account in the Adjusted Highest Compliant Tender Price.
- 1.14 Subject to paragraphs 1.15 and 1.18 below, if the Authority has not paid an amount equal to the Adjusted Highest Compliant Tender Price to the PPP Co on or before the date falling [•][•] after the Termination Date then the following provisions of this paragraph 1 of Part 4 of [Clause 54 – Schedule] shall not apply to that termination and the provisions of paragraph 2 of Part 4 of [Clause 54 – Schedule] (No Retendering Procedure) shall apply instead.
- 1.15 If the Adjusted Highest Compliant Tender Price is zero or a negative number then the Authority shall have no obligation to make any payment to the PPP Co and with effect from the time that the Authority gives notice of that event to the PPP Co, the Authority shall be released from all liability to the PPP Co for breaches and/or termination of this Agreement and any other Project Document whether under contract, tort, restitution or otherwise save for any antecedent liability of the Authority which arose prior to the Termination Date (but not from the termination itself) that has not already been taken into account in determining the Adjusted Highest Compliant Tender Price.
- 1.16 If the Adjusted Highest Compliant Tender Price is less than zero then an amount equal to the Adjusted Highest Compliant Tender Price shall be due and payable by the PPP Co to the Authority on the date of the New Contract.
- 1.17 The Authority may elect at any time prior to the receipt of a Compliant Tender to follow the no retendering procedure under paragraph 2 of Part 4 of [Clause 54 – Schedule] (No Retendering Procedure) by notifying the PPP Co that this election has been made.
- 1.18 If the Authority has received all bids from bidders under the Tender Process and has received a Compliant Tender but decides not to complete the Tender Process, it shall notify the PPP Co of this decision and pay to the PPP Co an amount equal to the Adjusted Highest Compliant Tender Price within [[•][•]] Working Days of such notification.

2. No Retendering Procedure

If either the Authority is not entitled to retender the provision of the Operations under paragraph 1 of Part 4 of Schedule 21 (Retendering Election) or the Authority elects to require an expert determination in accordance with this paragraph 2 of Part 4 of [Clause 54 – Schedule] (No Retendering Procedure) then the following procedure shall apply.

- 2.1 Subject to paragraph 2.2 below, the PPP Co shall not be entitled to receive any Post Termination Service Amount.
- 2.2 If the Authority elects to require an expert determination in accordance with this paragraph 2 (No Retendering Procedure) after it has elected to follow the procedure under paragraph 1 above (Retendering Procedure), then the Authority shall continue to pay to the PPP Co each Post Termination Service Amount until the Compensation Date, in accordance with this

paragraph 2 (No Retendering Procedure).

2.3 In agreeing or determining the Estimated Fair Value of the Contract the parties shall be obliged to follow the principles set out below:

- (a) all forecast amounts should be calculated in nominal terms at current prices, recognising the adjustment for indexation in respect of forecast inflation between the date of calculation and the forecast payment date(s) as set out in the Agreement;
- (b) the total of all future payments of the full Unitary Charge (without deductions) forecast to be made shall be calculated and discounted to the Termination Date at the Base Case Equity IRR;
- (c) the total of all costs forecast to be incurred by the Authority as a result of termination shall be calculated and discounted at the Base Case Equity IRR and deducted from the payment calculated pursuant to sub-paragraph 2.3(b) above, such costs to include (without double counting):
 - (i) a reasonable risk assessment of any cost overruns that will arise, whether or not forecast in the relevant base case;
 - (ii) the costs of the service forecast to be incurred by the Authority to the standard required; and
 - (iii) any rectification costs required to deliver the Operations to the standard required (including any costs forecast to be incurred by the Authority to complete construction or development work and additional operating costs required to restore operating services standards),

in each case such costs to be forecast at a level that will deliver the full Unitary Charge referred to in sub-paragraph 2.3(b).

2.4 If the parties cannot agree on the Adjusted Estimated Fair Value of the Contract on or before the date falling [[•][•]] days after the date on which the Authority elected to require an expert determination in accordance with this paragraph 2 (No Retendering Procedure), then the Estimated Fair Value of the Contract shall be determined in accordance with Clause 56 (Disputes Resolution Procedure).

2.5 The Authority shall pay to the PPP Co an amount equal to the Adjusted Estimated Fair Value of the Contract on the date falling [•][•]days after the date on which the Adjusted Estimated Fair Value of the Contract has been agreed or determined in accordance with this paragraph 2.5 (No Retendering Procedure).

2.6 The discharge by the Authority of its obligation in paragraph 2.5 is in full and final settlement of all the PPP Co's claims and rights against the Authority for breaches and/or termination of this Agreement or other Project Document whether in contract, tort, restitution or otherwise save for any liability that arose prior to the Termination Date (but not from the termination itself) that has been taken into account in determining the Adjusted Estimated Fair Value of the Contract.

2.7 To the extent that the Adjusted Estimated Fair Value of the Contract is less than zero, then an amount equal to the Adjusted Estimated Fair Value of the Contract shall be due and payable by the PPP Co to the Authority on the Compensation Date.

3. Limit of Liability

In the event the Adjusted Highest Compliant Tender Price or the Adjusted Estimated Fair Value of the Contract exceeds the Base Senior Debt Termination Amount, the Authority shall only be obliged to

pay to the PPP Co the Base Senior Debt Termination Amount in full and final settlement of all the PPP Co's claims and rights against the Authority for breaches and/or termination of this Agreement and the Project Documents whether under contract, tort, restitution or otherwise.

KEY DEFINITIONS – USED IN CLAUSE 54.2 AND [CLAUSE 54 – SCHEDULE] PART 4 CORE CONTRACT DRAFTING

“Liquid Market” ” means that there are sufficient willing parties (being at least two parties, each of whom is capable of being a Suitable Substitute Contractor) in the market for PPP contracts or similar contracts for the provision of services (in each case the same as or similar to the Agreement) for the price that is likely to be achieved through a tender to be a reliable indicator of Fair Value;

“Fair Value” means the amount at which an asset or liability could be exchanged in an arms length transaction between informed and willing parties, other than in a forced or liquidation sale;

“Highest Compliant Tender Price” means the price offered by the Compliant Tenderer (if any) with the highest tender price and, if no Compliant Tenders are received, zero;

“Compliant Tender” means any tender submitted by a Compliant Tenderer that meets the qualification criteria notified under paragraph 1.4 of Part 4;

“Adjusted Highest Compliant Tender Price” means the Highest Compliant Tender Price less the aggregate of:

- (a) any Post Termination Service Amounts paid to the PPP Co to date;
- (b) the Tender Costs; and
- (c) amounts that the Authority is entitled to set off or deduct under Clause 42 (Set-off),

plus an amount equal to the aggregate of:

- (i) all credit balances on any bank accounts held by or on behalf of the PPP Co on the date that the highest priced Compliant Tender is received;
- (ii) any insurance proceeds and other amounts owing to the PPP Co, to the extent not included in (i); and
- (iii) the Post Termination Service Amounts (if a negative number),

to the extent that:

- (a) (i), (ii) and (iii) have not been directly taken into account in that Compliant Tender; and
- (b) the Authority has received such amounts in accordance with the Agreement;

“Post Termination Service Amount” means for the purposes of paragraph 1 of Part 4 (Retendering Procedure), for the whole or any part of a month for the period from the Termination Date to the Compensation Date, an amount equal to the Maximum Unitary Charge which would have been payable in that month under the Agreement had the Agreement not been terminated, less an amount equal to the aggregate of:

- (a) the Market Value Availability Deduction Amount for that month;
- (b) the Rectification Costs incurred by the Authority in that month; and
- (c) (where relevant), the amount by which the Post Termination Service Amount for the previous month was less than zero;

“Tender Costs” means the reasonable and proper costs of the Authority incurred in carrying out the Tender Process and/or in connection with any calculation of the Estimated Fair Value of the Contract;

“Tender Process” means the process by which the Authority requests tenders from any parties interested in entering into a New Contract, evaluates the responses from those interested parties and enters into a New Contract with a new service provider, in accordance with paragraph 1 of Part 4 (Retendering Procedure);

“New Contract” means an agreement on the same terms and conditions as this Agreement at the Termination Date, but with the following amendments:

- (a) if this Agreement is terminated prior to the Service Commencement Date, then the Service Commencement Date shall be extended by a period to allow a New Contractor to achieve Service Commencement;
- (b) any accrued Performance Points and/or Warning Notices shall be cancelled;
- (c) the term of such agreement shall be equal to the term from the Termination Date until the Expiry Date; and
- (d) any other amendments which do not adversely affect the PPP Co;

“New Contractor” means the person who has entered or who will enter into the New Contract with the Authority;

“Market Value Availability Deduction Amount” means for any month or part of a month, an amount equal to the availability deduction that was made to the Unitary Charge under Part 5 of [Clause 39 – Schedule] (Payment Mechanism) in the month immediately preceding the Termination Date, less an amount equal to any Unavailability Deduction that was made for an Area which was unavailable at the Termination Date but which has subsequently become Available whether as a result of the Authority incurring Rectification Costs or otherwise;

“Rectification Costs” means, for the purposes of any Termination Date that occurs during the Service Period, an amount equal to the reasonable and proper costs incurred by the Authority in a particular month or part of a month in ensuring that the Service is available;

“Estimated Fair Value of the Contract” means the amount determined in accordance with paragraph 2.3 of Part 4 (No Retendering Procedure) that a third party would pay to the Authority as the market value of the Deemed New Contract;

“Adjusted Estimated Fair Value of the Contract” means the Estimated Fair Value of the Contract, less an amount equal to the aggregate of:

- (a) [the Post Termination Service Amounts (if a positive number);]
- (b) the Tender Costs; and
- (c) amounts that the Authority is entitled to set off or deduct under Clause 58 (Set-Off).

NRA MODEL CONTRACT DRAFTING

[•] DEFAULT

[•].5 No Compensation

Upon the termination of this Agreement pursuant to this Clause [•] (Default) the PPP Co shall not be entitled to compensation.

INTRODUCTION TO TERMINATION ON AUTHORITY DEFAULT OR AUTHORITY ELECTION TO TERMINATE

If the contract is terminated because of an Authority default, or because the Authority has elected to terminate it, the PPP Co’s compensation should be a “full payout” – so that the lenders and investors are no worse off than if

the contract had not been terminated.

SOPC3 GUIDANCE

SoPC3 GUIDANCE ON COMPENSATION ON TERMINATION FOR AUTHORITY DEFAULT AND VOLUNTARY TERMINATION

20.1.3 Compensation on Termination for Authority Default

20.1.3.1 *The objective should be to ensure that the Contractor and its financiers are fully compensated² i.e. no worse off because of Authority Default than if the Contract had proceeded as expected.*

20.1.3.2 *The Contractor should be required to specify its preferred method of calculation of equity return at the time of its bid. It should choose between the level set out in the original base case, the market value at the time of termination and the original base case return from the Termination Date (see Section 20.1.3.6).*

20.1.3.3 *In most PFI projects, equity is invested as a blend of share capital and Junior Debt. In calculating Authority Default compensation, many projects have distinguished between Junior Debt and equity. Typically, Junior Debt has been repaid in full (together with interest) while compensation for equity has been based either on its market value or on a base case return. Mezzanine debt has not been specifically identified. If the project concerned does have an element of mezzanine debt then the Authority will have to consider the extent to which, for the purposes of Authority Default, it is more akin to Senior Debt or equity and decide upon an appropriate approach for termination compensation.*

20.1.3.4 *Since in most PFI projects, the substantial majority of “equity” is invested as Junior Debt, the approach taken in the early PFI projects was to give the Contractor the opportunity of equity upside (through the market value compensation) but insulate it from downside (since Junior Debt is repaid in full). This is not appropriate. It is important that the same method of calculation (whether “market value” or “base case return”) is used for both equity and Junior Debt.*

20.1.3.5 *For similar reasons, calculations based on “the higher of base case return and market value” (giving the Contractor all upside but no downside) or “the lower of base case return and market value” (giving the Contractor all downside but no upside) are inappropriate.*

20.1.3.6 *Bidders should be invited to bid which of the following levels of equity/Junior Debt compensation they prefer:*

- *Compensation to reflect the base case IRR for equity and Junior Debt for the entire duration of the Contract. The purpose is to provide equity investors with the returns they expected from the Project at the outset, regardless of actual project performance (whether better or worse than expected). The compensation payment is the amount which, when taken together with all amounts already paid to equity (in dividends/redemption payments etc) and Junior Debt (in interest and principal repayments) taking account of the actual timing of all such payments, provides equity and Junior Debt with their base case project-life IRR as agreed on signature of the Contract up to the Termination Date. Where equity or Junior Debt have already hit their project life base case IRR, no payment should be made.*
- *Compensation to reflect the market value of both equity and Junior Debt for the entire duration of the Contract. The purpose is to allow the equity investors to take the full benefit of good Contractor performance but bear the risks associated with poor performance. The Authority pays an amount for both equity and Junior Debt based on their market value on a going concern basis immediately prior to the termination i.e. the amount for which the equity and Junior Debt could have been sold to a willing buyer at the relevant date (the calculation being based on the assumption that there had been no Authority Default and that both equity and Junior Debt were freely transferable). The*

² *The compensation payable should reflect a realistic calculation of an anticipated claim for damages and therefore should be an exclusive remedy of the Contractor leaving no residual claim for damages (See Section 21.6 (Exclusivity of Remedy) [of the SoPC3 Guidance]).*

market valuation will reflect the value of anticipated future cashflows (both revenue and costs); risk allocation under the Contract; and market appetite for Contracts of a similar nature. It will also take into account the value of the Assets (including any cash balances) held by the Contractor at the Termination Date.

- Compensation to reflect the base case return for equity and Junior Debt for the remainder of the duration of the Contract. This is an amalgamation of the first two approaches. The compensation payment is the amount of future return that the equity and Junior Debt providers originally provided for in the base case bid. Care should be taken that if a refinancing has occurred (see Section 35 (Refinancing) [of the SoPC3 Guidance]) and the original equity and Junior Debt reduced, there is no double counting.

20.1.3.7 The Contractor is likely to incur redundancy costs as a result of the termination of the Contract and, to the extent that these will occur, these should be included in the compensation payable by the Authority. Similarly, the Sub-Contractors may incur losses as a direct result of the early termination of the Contract (e.g. in respect of cancellation of orders for materials and goods). The Contract should specify those heads of loss which the Authority will pay to the Contractor, on account of the Sub-Contractors' losses. If the Authority proposes to offer compensation to cover the Sub-Contractors' future loss of profits, it should limit the period of time for which it will pay for such future loss (e.g. for a one year period from termination) and satisfy itself (through conducting due diligence over sub-contracts or otherwise) that the quantum of the loss of profit and other consequential losses and breakage costs are reasonable and appropriate.

20.1.3.8 The Authority should also decide what happens to the Assets following a compensation payment. As the Authority has fully compensated the Contractor, they should usually revert to the Authority. Where the assets may have a significant residual value and the Contractor retains the assets then different considerations will apply (see for example Section 21.6 (Retention of Assets by Contractor on Termination) [of the SoPC3 Guidance]).

20.1.3.9 In certain termination scenarios, the amount payable will be adjusted for any Additional Permitted Borrowing advanced by Senior Lenders (on a rescue refinancing) – see Section 21.3 and definitions in Section 1.1.

20.5.3 Compensation for Voluntary Termination

20.5.3.1 The Contractor should receive a termination payment which leaves it in the position it would have been in had the Contract run its full course.

20.5.3.2 Regardless of whether or not the asset has any alternative use, the level of compensation on a voluntary termination should be the same as the level proposed on a termination for Authority default (see Section 20.1.2 (Compensation on Termination for Authority Default) and 20.1.3.9 [of the SoPC3 Guidance]).

20.5.3.3 Again, the Contract should clarify what happens to the asset following such full payout. It would usually be expected to revert to the Authority.

CORE CONTRACT DRAFTING

54.3 Termination for Authority Default

If this Agreement is terminated pursuant to Clause 51.1 (Authority Default), then the Authority shall pay compensation to the PPP Co in accordance with Part 1 of [Clause 54 – Schedule] (Compensation on Termination).

54.4 Voluntary Termination

If this Agreement is terminated pursuant to Clause 52.4 (Voluntary Termination) or it is agreed by the

parties or finally determined that the Authority wrongfully terminated this Agreement, then the Authority shall pay compensation to the PPP Co in accordance with Part 1 of [Clause 54 – Schedule] (Compensation on Termination).

[CLAUSE 54 – SCHEDULE]

COMPENSATION ON TERMINATION

PART 1

Termination for Authority Default and Voluntary Termination

1. Compensation on Authority Default

1.1 On termination of the Agreement under Clause 51 (Termination for Authority Default) the Authority shall pay the PPP Co the “Authority Default Termination Sum” in accordance with Clause 54 (Compensation on Termination).

1.2 Subject to paragraphs 1.4 to 1.6 below the Authority Default Termination Sum shall be an amount equal to the aggregate of:

- (a) the Base Senior Debt Termination Amount;
- (b) redundancy payments for employees of the PPP Co that have been or will be reasonably incurred by the PPP Co as a direct result of termination of this Agreement and any Sub-contractor Breakage Costs; and
- (c) the aggregate amount for which the share capital of the PPP Co and the amounts outstanding under the Junior Debt Documents could have been sold on an open market basis based on the Relevant Assumptions³.

Opt.1:

- (i) an amount which when taken together with
- (ii) dividends (or other distributions) paid by the PPP Co on its share capital on or before the Termination Date;
- (iii) interest paid and principal repaid by the PPP Co under the Junior Debt Documents on or before the Termination Date,

taking account of the actual timing of all such payments, gives a real internal rate of return on the share capital subscribed and amounts advanced under the Junior Debt Documents equal to the Base Case Equity IRR;

or Opt.2:

all amounts shown in the Base Case as payable by the PPP Co from the Termination Date, either in dividends or other distributions on the share capital of the PPP Co or as payments of interest or repayments of principal made by the PPP Co under the Junior Debt Documents, each amount discounted back at the Base Case Equity IRR from the date on which it is shown to be payable in the Base Case to the Termination Date.

Comment: This gives tenderers 3 options, which must be picked in the tender and fixed at contract close. The PPP Co can have:

- the market value of its shares or**
- its originally modelled return for the whole contract period less actual return before termination or**
- its originally modelled return for the period after termination.**

³

Tenderers may bid either of the following two options in lieu of the provision in paragraph 1.2(c).

- 1.3 On payment of the amount referred to in paragraph 1.1 above, the Authority shall have the option to require the PPP Co to transfer its right, title and interest in and to the Assets to the Authority or as directed by the Authority and the terms of [Clause 53 – Schedule] (Transfer of Assets) shall apply.
- 1.4 If the aggregate of the amounts referred to in paragraphs 1.2(a) and 1.2(c) is less than the Revised Senior Debt Termination Amount, then the Authority Default Termination Sum shall be increased so that it is equal to the aggregate of the Revised Senior Debt Termination Amount and the amount referred to in paragraph 1.2(b) provided always that:
- (a) the amount referred to in paragraph 1.2(b) shall only be paid to the extent that the PPP Co has demonstrated to the reasonable satisfaction of the Authority that the amount will not be paid in payment (in whole or in part) of any Distribution; and
 - (b) if at the time of termination, there are any Additional Permitted Borrowings outstanding, no Sub-Contractor Breakage Costs shall be paid in respect of any Principal Sub-Contract in circumstances where there is an event of default under such Principal Sub-Contract which would entitle the PPP Co to terminate such Principal Sub-Contract.
- 1.5 If a Distribution is made whilst any Additional Permitted Borrowing is outstanding and the PPP Co has wilfully, or through gross negligence, failed to comply with the obligations under Clause [•] of the Credit Providers' Direct Agreement then in addition to the deduction of the Distribution referred to in paragraph (v) of the definition of Revised Senior Debt Termination Amount, the Authority shall be entitled to set off the value of that Distribution a second time against the Authority Default Termination Sum, provided that the amount of the Authority Default Termination Sum will never be less than the Revised Senior Debt Termination Amount.
- 1.6 If the PPP Co has wilfully or through gross negligence failed to comply with its obligations under Clause [•] of the Direct Agreement and there has been an overstatement of the cash balances by the PPP Co as at that date which has caused the Authority to reasonably believe that it would be required to pay a lesser sum at the Termination Date than it actually is required to pay under the terms of this paragraph 1.6, then the Authority Default Termination Sum, shall be reduced by the amount of such overstatement (to the extent that such overstatement is still applicable at the Termination Date), provided that the amount of the Authority Default Termination Sum will never be less than the Revised Senior Debt Termination Amount.

2 Compensation on Voluntary Termination

On termination under Clause 52 (Voluntary Termination), the Authority shall pay the PPP Co an amount equal to the amount payable under paragraph 1 (Compensation on Authority Default) in accordance with Clause 54 (Compensation on Termination).

KEY DEFINITIONS – USED IN [CLAUSE 54 – SCHEDULE] PART 1 CORE CONTRACT DRAFTING

“Relevant Assumptions” means the assumptions that the sale of the PPP Co is on the basis that there is no default by the Authority, that the sale is on a going concern basis, that no restrictions exist on the transfer of share capital, that no Additional Permitted Borrowing has taken place and therefore that the effect of the Additional Permitted Borrowing on the calculation of such amount is disregarded but that otherwise the actual state of affairs of the PPP Co and the Project is taken into account;

NRA MODEL CONTRACT DRAFTING

Comment: Again, also in relation to Termination on Authority Default or Authority election to terminate, there is a longer list of deductions, and some additional provisions in the NRA Model Contract drafting. See [Clause 54 – Schedule A].

INTRODUCTION TO COMPENSATION IN RESPECT OF CORRUPT GIFTS, FRAUD AND BREACH OF REFINANCING PROVISIONS

In most PPP Contracts, if there is a termination because a corrupt gift was made, the Authority pays the senior debt, and nothing else. The same usually applies when the contract is terminated for a breach of the restrictions on refinancing.

SOPC3 GUIDANCE

SOPC3 provides the following guidance on this issue:

20.4.3 Compensation on Termination for Corrupt Gifts and Fraud

20.4.3.1 Regardless of whether or not the Assets have any alternative use, only the Revised Senior Debt Termination Amount should be paid out on a termination for Corrupt Gifts or Fraud. If the Authority wishes to have the right to terminate, it should accept such level of compensation.

20.4.3.2 Equity holders should acknowledge that their relationship to the Contractor renders them responsible for the Contractor's acts – the level of return they expect reflects the greater risks equity holders must accept. Where the Contractor itself is not the perpetrator of the relevant act, the recommended approach gives them ample opportunity to ensure termination does not occur.

20.4.3.3 Where the Project is fully financed by equity providers with no Senior Debt, it will be necessary to examine their relationship to the person who commits the breach in order to ascertain whether any payment is appropriate. Authorities are unlikely to agree in effect to paying out the breaching party (by paying out to its shareholder or parent).

20.4.3.4 The Contract should also provide the Authority with the option to retain or walk away from the asset. Whatever the Authority decides, only the payment outlined above should be made.

20.6.2 Compensation on Termination for Breach of the Refinancing Provisions

20.6.2.1 Equity investors should acknowledge that their relationship with the Contractor renders them responsible for the Contractor's acts – the level of return they expect reflects the greater risks that equity holders accept.

20.6.2.2 Regardless of whether or not the Assets have any alternative use, the level of compensation payable on termination for breach of the refinancing provisions should be the same as the level proposed on a termination for corrupt gifts or fraud (see Section 20.4.4 [above] (Compensation on Termination for Corrupt Gifts and Fraud)).

CORE CONTRACT DRAFTING

54.5 Termination for breach of Refinancing Provisions

If this Agreement is terminated pursuant to Clause 43.2 (Termination for breach of Refinancing Provisions), then the Authority shall pay compensation to the PPP Co in accordance with Part 5 of [Clause 54 – Schedule] (Compensation on Termination).

54.6 Termination for Corrupt Gifts and Fraud

If this Agreement is terminated pursuant to Clause 50 (Corrupt Gifts and Fraud), then the Authority shall pay compensation to the PPP Co in accordance with Part 3 of Schedule 21 (Compensation on Termination).

[CLAUSE 54 – SCHEDULE]

PART 5 Refinancing

1 Compensation on Termination for Breach of the Refinancing Provisions

On termination under Clause 43.2 (Breach of Refinancing Provisions) the Authority shall pay the PPP Co an amount equal to the amount payable under Part 3 of [Clause 54 – Schedule] (Termination on Corrupt Gifts and Fraud) in accordance with Clause 54 (Compensation on Termination).

[CLAUSE 54 – SCHEDULE]

PART 3 Termination for Corrupt Gifts and Fraud

1 Compensation on Termination for Corrupt Gifts and Fraud

1.1 On termination of the Agreement in accordance with Clause [•] (Consequences of Prohibited Acts), then the Authority shall pay the PPP Co an amount equal to the Revised Senior Debt Termination Amount.

1.2 Such amount shall be determined and paid in accordance with Clause 54 (Compensation on Termination).

1.3 If termination occurs then the Authority may require the PPP Co to transfer its rights, title and interest in and to the Assets to the Authority or as directed by the Authority and the provisions of [Clause 53 – Schedule] (Transfer of Assets) shall apply.

NRA MODEL CONTRACT DRAFTING

Comment: Here again, the NRA drafting has a more extensive list of deductions. Also, this type of compensation applies only when the contract is terminated because of a corrupt gift, not when it is terminated for breaking the refinancing rules.

[CLAUSE 54 – SCHEDULE A]

PART 3

Corrupt Gifts

Consequences of Termination for Corrupt Gifts

1. If the Authority terminates this Agreement pursuant to Clause [•] (Corrupt Gifts) the Authority shall, subject to Clause [•] (Tax Equalisation) and [•] (Rights of Set-Off), pay to the PPP Co the Corrupt Gifts Termination Sum as such amount is determined pursuant to paragraph 2 of this Part 3 of [Clause 54 – Schedule B] (the “Corrupt Gifts Termination Sum”).
2. The Corrupt Gifts Termination Sum shall, subject to paragraph 3, be:
 - 2.1 an amount equal to the Senior Debt Amount at the Termination Date (together with interest which accrues at the Funding Interest Rate under the Senior Credit Providers Agreement on the Senior Debt Amount from the Termination Date to the date on which payment of the Corrupt Gifts Termination Sum is made by the Authority to the PPP Co);
 - 2.2 less to the extent it is a positive amount the aggregate of:
 - 2.2.1 an amount equal to:
 - 2.2.1.1 all credit balances on any bank accounts held by or on behalf of the PPP Co on the Termination Date (other than the Retention Account);
 - 2.2.1.2 the insurance proceeds received by the PPP Co or any Credit Provider at any time during the period between the Termination Date and the date on which a Compensation Payment is made by the Authority to the PPP Co pursuant to this Part 3 of [Clause 54 - Schedule] (save to the extent such insurance proceeds are (i) held in the Insurance Account and are to be applied in reinstatement; or (ii) to be or have been applied in payment of third party liabilities incurred for the purposes of the Project (unless such third party is a Sponsor or a Contracting Associate) and provided such third party liabilities do not fall within any of the items in paragraph 2.1; and
 - 2.2.1.3 any sums due and payable from third parties (but only when received from such third parties) at any time during the period between the Termination Date and the date on which a Compensation Payment is made by the Authority to the PPP Co pursuant to this Part 3 of [Clause 54 – Schedule B];
 - 2.2.2 to the extent it is a positive amount the amount realised during the period between the Termination Date and the date on which any Compensation Payment is made by the Authority to the PPP Co in respect of any other assets and rights of the PPP Co (other than those transferred to the Authority pursuant to this Agreement) less the liabilities of the PPP Co properly incurred in carrying out its obligations under this Agreement as at the Termination Date or such later date as such assets are being realised but in any event calculated prior to the date on which any Compensation Payment is made by the Authority to the PPP Co provided that no account shall be taken of any such liabilities of the PPP Co arising out of:
 - 2.2.2.1 agreements or arrangements entered into by the PPP Co to the extent that such agreements or arrangements were not entered into in connection with the PPP Co's obligations in relation to the Project; and/or
 - 2.2.2.2 agreements or arrangements entered into by the PPP Co to the extent that such agreements or arrangements were not entered into in the ordinary course of business and on commercial arm's length terms,

provided that (a) the PPP Co shall be obliged to use all reasonable endeavours to realise such assets and (b) to the extent realisation of an asset is not effected on an arms-length basis and to the extent the market value is greater than the amount

realised for such asset, the market value of the asset being realised shall be substituted for the amount realised in this calculation;

provided that any deduction referred to in this paragraph 2.2 may only be made if the amount which is to be deducted has not been applied in reduction of any amount referred to in paragraph 2.1 or the Corrupt Gifts Termination Sum prior to the calculation thereof or pursuant to another sub-paragraph of this paragraph 2.2

3. There shall be excluded from the amount calculated pursuant to paragraph 2 (but only to the extent they would otherwise be included in such calculation) the following amounts:
 - 3.1 the amount of any additional obligation or liability incurred or arising under any of the Funding Agreements (other than (but without prejudice to paragraph 3.3) in respect of any element of interest payable as a result of a default by the PPP Co under any of the Funding Agreements) which arises as a result of:
 - 3.1.1 any breach of any undertaking, warranty or representation under the terms of any of the Funding Agreements;
 - 3.1.2 the occurrence of any event of default (however described) under any of the Funding Agreements;
 - 3.1.3 any failure to satisfy any condition under the terms of any of the Funding Agreements; or
 - 3.1.4 the cancellation, suspension or revocation by the PPP Co of a request by it for the advance to it of funds or for the issue of any guarantee, letter of credit, or the Performance Guarantee,

(except to the extent that any of the events referred to in paragraphs 3.1.1 to 3.1.4 (inclusive) arises as a result of termination of this Agreement or arises as a result of any breach by the Authority of its obligations under this Agreement) provided that nothing in this paragraph 3.1 shall be deemed to exclude any principal sums outstanding under the Funding Agreements and any interest thereon (excluding default interest);
 - 3.2 any amount payable under any of the Funding Agreements in respect of any demand under the Performance Guarantee;
 - 3.3 any liability of the PPP Co in respect of any interest payable as a result of a default by the PPP Co under the agreement in respect of which the interest is payable save to the extent such interest arises as a result of a breach by the Authority of any of its obligations under this Agreement;
 - 3.4 any amounts which would not have been payable under the Funding Agreements but are otherwise payable by reason of replacements of or amendments to such Funding Agreements which have not been submitted to the Authority's Representative pursuant to the Commercial Review, or are otherwise payable by reason of replacements of or amendments to such Funding Agreements to which the Authority's Representative has objected pursuant to the Commercial Review and such objections have not been addressed to the satisfaction of the Authority's Representative;
 - 3.5 any liability of the PPP Co, under or in respect of any Funding Agreement, to pay any amount by way of reimbursement of, or indemnification in respect of, costs and expenses incurred by any other party to any such contract if and to the extent that:
 - 3.5.1 such costs and expenses were not properly incurred; or
 - 3.5.2 such costs and expenses were properly incurred but exceed a reasonable amount;
 - 3.6 any liability of the PPP Co in respect of Irish taxation; and
 - 3.7 any amount payable by way of, or determined by reference to (directly or indirectly):

- 3.7.1 (but without limitation to paragraph 3.1) any deduction or withholding of tax other than Irish tax; and/or
- 3.7.2 any stamp or documentary duties or taxes levied otherwise than in the Republic of Ireland on any agreement, document or other instrument.
4. The Corrupt Gifts Termination Sum is in full and final settlement of all the PPP Co's Claims and rights against the Authority for breaches prior to the Termination Date and/or termination of this Agreement and any other Project Document whether under contract, tort, restitution or otherwise but it is without prejudice to any antecedent liability of the PPP Co to the Authority or any breach by either party of their obligations under this Agreement which continue after the Termination Date:
- (a) any antecedent liability of the PPP Co to the Authority or any breach by either party of their obligations under this Agreement which continue after the Termination Date; or
- (b) Clause [•] (Rights of Set-Off) of this Agreement.
5. The Corrupt Gifts Termination Sum shall be paid by the Authority to the PPP Co within 40 (forty) days after the date (the "Payment Request Date") that is the later of:
- 5.1 the date that the Authority receives a payment request from the PPP Co for such Corrupt Gifts Termination Sum; and
- 5.2 the date that the Authority receives sufficient supporting evidence reasonably satisfactory to the Authority justifying the amount of the Corrupt Gifts Termination including a breakdown of the individual elements of such Corrupt Gifts Termination Sum.
6. In addition to the Corrupt Gifts Termination Sum, the Authority will pay to the PPP Co interest on the Corrupt Gifts Termination Sum (or any part that remains outstanding) at the Funding Interest Rate from (but excluding) the Payment Request Date until (but including) the date which is 40 (forty) days after the Payment Request Date or if earlier the date of payment of the Corrupt Gifts Termination Sum (or part thereof) by the Authority and thereafter if the PPP Co has still not received the Corrupt Gifts Termination Sum (or any part thereof) interest on the Corrupt Gifts Termination Sum (or such outstanding part) at the Default Interest Rate provided that nothing in this paragraph 6 shall require the Authority to pay interest on any amount payable in respect of:
- 6.1 any Senior Debt Amount in respect of which interest continues to accrue under the Funding Agreements from the Termination Date as contemplated in paragraph 2.1; or
- 6.2 interest which accrues under the Funding Agreements referred to in paragraph 6.1.
7. The PPP Co will give to the Authority the payment request and supporting information referred to in paragraphs 5.1 and 5.2 (respectively) above as soon as practicable and in any event within 15 (fifteen) Working Days of the Termination Date.

INTRODUCTION TO GENERAL PROVISIONS

The contract will contain general provisions relating to the pursuant of the compensation, regarding matters relating to taxation of the payment and set off from the payment.

SOPC3 GUIDANCE

SOPC3 provides the following commentary on this issue:

21.2 GROSS UP OF TERMINATION PAYMENTS

21.2.1 Compensation on early termination should be calculated on the basis that there is grossing-up of payments (for tax deductions), save in the case of Contractor Default where a market value payment makes grossing-up inappropriate as the Contractor is basically receiving the sale value of the outstanding Contract rather than receiving amounts designed to compensate specific elements of its financing⁴.

A grossing-up provision would typically be as follows:

If any amount of compensation payable by the Authority under Clauses 20.1.3 (Compensation on Authority Default), 20.3.2 (Compensation on Termination for Force Majeure), Section 20.4.4 (Compensation for Termination for Corrupt Gifts and Fraud), 20.5.2 (Voluntary Termination) and 20.6.2 (Compensation on Termination for Breach of the Refinancing Provisions) is subject to Tax payable to a Relevant Authority in the United Kingdom⁵, then the Authority shall pay to the Contractor such additional amount as will put the Contractor in the same after Tax position as it would have been had the payment not been subject to Tax, taking account of any relief, allowances deduction, setting off or credit in respect of Tax (whether available by choice or not) which may be available to the Contractor to reduce the Tax to which the payment is subject.

21.2.2 With the approaches taken in Section 20 (Early Termination) [of the SoPC3 Guidance] to termination compensation, there is no need to deal in the drafting with the extent to which payments to replace the Unitary Charge should reflect tax deductions that would otherwise have occurred.

21.3 CERTAINTY OF COMPENSATION PAYMENT AMOUNTS

21.3.1 Compensation payments where there has been a voluntary termination (see Section 20.5.2 (Compensation on Voluntary Termination) [of SoPC3 Guidance]), a termination for Authority Default (see Section 20.1.3 (Compensation on Termination for Authority Default)), force majeure (see Section 20.3.2 (Compensation on Termination for Force Majeure)), corrupt gifts and fraud (see Section 20.4.3 (Compensation on Termination for Corrupt Gifts and Fraud)) or wilful breach of the refinancing provisions (see Section 20.6.2 (Compensation on Termination for Breach of the Refinancing Provisions) [of the SoPC3 Guidance]) are all calculated in whole or in part by reference to the level of the Contractor's Senior Debt outstanding at the time of the termination payment.

21.3.2 Authorities should be concerned to ensure that the level of Senior Debt outstanding at any time is not inflated in a way that will significantly and unexpectedly increase the Authority's liability on termination⁶. The Contract should always ensure that the amount of Senior Debt and Junior Debt cannot be artificially inflated.

21.3.3 The Contractor may, during the course of the Contract, refinance or reschedule its debt obligations. This may be either to lower its financing costs and increase its return (see Section 35 (Refinancing)) or to attempt to save the Project if it is in difficulties due to construction delays, cost overruns or temporary

⁴ The Authority will need to review carefully the tax implications of any market value upon termination for Contractor Default. A provision dealing with grossing up will be necessary for payment, derived from the retendering process which are taxed as a result of the market value payment passing through the Authority's control.

⁵ The Authority should ensure that UK tax only is relevant, so that no liability to foreign tax authorities is caught, as cash occur if, for example, the Contractor's Affiliates are registered or located abroad. The Authority should also ensure that it retains the right to pay the amount of gross-up directly to the Inland Revenue or the Relevant Authority and to context the Contractor's tax liability.

⁶ Consequently the Authority should also be concerned to capture increases in the Senior Debt profile covered by rescheduling of the Senior Debt (which may not include the provision of additional Senior Debt).

poor performance. In the latter case, it is in the interests of all parties to ensure that a rescheduling of debt can take place as quickly as possible, without the need for the Contractor and/or Senior Lenders to obtain consents from the Authority. To reflect this principle, Section 35 (Refinancing) states that any Refinancing that does not increase the Equity IRR above that projected in the Base Case shall not require the prior consent of the Authority. If the Project is in difficulty and in need of rescue, the Senior Lenders will also be reluctant to rescue the Project unless they know that any rescheduled or new Senior Debt required to rescue the Project will be compensated if the Authority chooses to terminate voluntarily, or termination occurs as a result of Authority Default, Force Majeure or Corrupt Gifts.

21.3.4 *The Senior Lenders will only agree to reschedule or commit new Senior Debt to the Project as a last resort. In recognition of this and to protect the Authority from Senior Debt levels being artificially inflated, the amount of compensation payable by the Authority in respect of Senior Debt on early termination should only include additional Senior Debt if it was incurred either under a “standby” facility committed at financial close or alternatively if this constitutes Additional Permitted Borrowing. This provision does not preclude Senior Lenders otherwise relying upon compensation payable to equity investors upon early termination for recovery of rescheduled or increased levels of Senior Debt.*

21.3.5 *In certain termination scenarios, the amount payable will be adjusted for any Additional Permitted Borrowing advanced by Senior Lenders (on a rescue refinancing) – see Section [•] and definitions in Section 1.1 and Annex 4, “Permitted Borrowing”.*

21.3.6 *Following the making of any Additional Permitted Borrowing if the project terminates early on the grounds of Authority Voluntary Termination or Authority Default or Force Majeure, the Authority will pay to the Contractor:*

- *the Senior Debt, plus the Additional Permitted Borrowings less any Distribution made while the Additional Permitted Borrowing is outstanding (the “New Senior Debt Amount”). The Senior Lenders are protected even if the New Senior Debt Amount exceeds the aggregate amount which would have been payable (to both debt and equity) had no Additional Permitted Borrowing been made (the “Original Aggregate Compensation Amount”);*
- *if the New Senior Debt Amount is greater than the Original Aggregate Compensation Amount, the Shareholders and Subordinated Lenders will receive no termination payment;*
- *(if the Original Aggregate Compensation Amount is greater than the New Senior Debt Amount, the Shareholders and Subordinated Lenders will, broadly, be paid the excess.*

21.3.7 *Distributions made while such Additional Permitted Borrowing is outstanding will reduce the amount payable to the Senior Lenders in various circumstances (and it may be that the Senior Lenders would therefore cash collateralise any such amount which would otherwise have been distributed until the Additional Permitted Borrowing is fully covered). The amount of the Additional Permitted Borrowing which may be lent in this way is 10% of the initial principal commitment, reducing to 5% at such time as the initial principal senior debt is 50% paid down. There is also a requirement in the Direct Agreement for the Authority to be notified of any such Additional Permitted Borrowing, and the reasons for it, and to be notified, on an ongoing basis, of Distributions then made.*

21.3.8 *Senior Lenders, of course, remain able to advance new monies to the Contractor with the express consent of the Authority, but this Additional Permitted Borrowing provision will offer the Senior Lenders flexibility to rescue projects in difficulty without having to obtain the prior consent of the Authority and without having to step-in to the project. Authorities should not give their consent to other increases to their liabilities on termination (see Section 21.3) until such time as the Contractor/Senior Lenders have exhausted their rights to put more money into the project by way of Permitted Borrowing. See further Sections 21.1.3.8 to 20.1.3.11. The Authority should also consider the relationship between these provisions and Section [•] (refinancing) if a request is received to increase the Authority’s termination liabilities beyond the extent permitted for Permitted Borrowings.*

21.4 SET-OFF ON TERMINATION

21.4.1 *The Authority should be fully entitled to set off any outstanding liabilities of the Contractor against the amounts it pays in compensation on a Contractor Default, but for the reasons set out in Section 21.4.2 this will in all likelihood not affect the termination payment concerned. There should be no ring-fencing*

of Senior Debt under these circumstances. In circumstances other than Contractor Default, however, it is acceptable for a limit on set-off to be introduced. To minimise the possible effects of not having the right to set off in other circumstances, the Authority should ensure that minimum amounts are outstanding from the Contractor.

21.4.2 Claims against the Contractor by the Authority should be fully reflected in the “market value” based termination payment to the Contractor since bidders will discount the value of any claims (depending on the likelihood of their success) from the amount they are prepared to pay for a project retendered on the same terms (that is, subject to any outstanding claims which the Authority would set off against the future Unitary Charge if the outgoing Contractor did not meet them). This is the case, therefore, with the second valuation options for Authority Default and Voluntary Termination and also for termination for Contractor Default. There should be no double counting in these circumstances, so the Authority must make it clear to potential replacement contractors what claims they should take into account in their bids.

21.4.3 Where termination has occurred for reasons other than Contractor Default, the Authority should be entitled to set off outstanding liabilities of the Contractor against all amounts it pays in compensation, except amounts paid to compensate Senior Debt (see above).

21.5 METHOD OF PAYMENT

21.5.1 Where an incoming Contractor pays market value on Contractor Default termination, or the Contract is terminated for Authority Default, the Authority should pay the Contractor by way of a lump sum.

21.5.2 On other types of termination, the Contract should deal with how compensation is paid. Value for money issues should be taken into consideration which in most cases will mean that compensation payments by lump sum will be the appropriate position. Value for money is unlikely to be achieved if the Authority repays such amounts over time (i.e. in instalments), as interest will continue to accrue on the compensation amount to reflect the equity/Junior Debt providers’ and Senior Lenders’ loss of opportunity. Moreover, the Authority’s choice between lump sum and instalments should not be influenced by arbitrage possibilities (i.e. it would be bad practice to choose the long term option just because it can earn higher interest on amounts on short term deposit than it pays the Contractor).

21.5.3 While the above is the general position, local authorities may wish to reserve the option to pay over time due to affordability constraints, particularly as their ability to raise debt is restricted by statutory regulation. Therefore, where a local authority (or any other public body which has a valid value for money reason in accordance with 21.5.2) seeks the right to pay compensation by instalments it should follow the guidance set out below.

21.5.3.1 The Contractor will require the Authority to pay interest on any outstanding balance at the Senior Debt rate. If equity/Junior Debt compensation is payable on termination, the recommended approach for all Authorities is to restrict the Authority’s right to pay by instalments to the Senior Debt related compensation.

21.5.3.2 If the Contract is terminated for Contractor Default and the Adjusted Estimated Fair Value of the Contract is payable to the Contractor as compensation, the appropriate interest rate payable on the outstanding balance is again the Senior Debt rate.

21.5.3.2 If the Authority elects to pay compensation in instalments, the protections in the Contract in respect of payment default and unauthorised transfer of the Contract by the Authority should continue to operate¹⁰ but the Contractor should only have the ability to declare all outstanding instalments immediately due and payable on the occurrence of these events. If the Authority elects to pay compensation in instalments the Senior Lenders should not require the Authority to enter into new funding arrangements with them as they will have fixed security over the instalments to be paid by the Authority which will be paid in accordance with the Senior Lenders’ instructions.

21.5.4 To the extent that any compensation amounts are paid to Senior Lenders, a provision such as the following should be included:

The Authority shall be entitled to rely on the certificate of the Agent as conclusive as to the amount of

the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount outstanding at any relevant time. The receipt of the Agent shall discharge the Authority's obligation to pay any element of compensation due to the Contractor that is equal to the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount (as relevant).

21.6 RETENTION OF ASSETS BY CONTRACTOR ON TERMINATION

To the extent the Contractor retains Assets on a termination, then their value should be deducted from any compensation payments made. The value of the Assets will be close to zero in the case of Assets with no alternative use¹⁵ and so there may be no need to deal with this issue in the Contract. Where residual value exists the Authority should, however, carefully consider likely residual value out-turns, as the commercial incentives can be different if the residual value were to be significant. In certain scenarios (e.g. if residual value could exceed the original return) residual value could distort the effect of any compensation payment (e.g. for Contractor Default) and reduce the incentives to perform that would otherwise exist.

21.7 EXCLUSIVITY OF REMEDY

21.7.1 *The Contractor should typically agree that termination compensation payments are its sole remedy, subject to certain exceptions. The Authority's agreement to a similar provision in this regard should depend on the issues set out in Section 23.6 (Damages Claims) (of the SoPC3 Guidance).*

CORE CONTRACT DRAFTING

54.7 Tax Equalisation

- (a) Where a payment is to be made to the PPP Co pursuant to Clause 36.6 (Compensation) to the extent that such compensation is payable following a Compensation Event referred to in paragraph 1.1 or paragraph 1.2 of Part 1 of [Clause 36 – Schedule] (Compensation Events, Relief Events and Force Majeure) [*this is breach of contract by the Authority*], Clause 54.1 (Force Majeure, Uninsurable Risk and Change in Law), Clause 54.2 (Termination for Authority Default), Clause 54.4 (Voluntary Termination) (a "Compensation Payment") and the PPP Co has a Relevant Tax Liability in respect of such payment, then the amount of the Compensation Payment to be made by the Authority to the PPP Co shall be increased so as to ensure that the PPP Co is in the same position (after account is taken of the Relevant Tax Liability) as it would have been in had it not been for such Relevant Tax Liability. Notwithstanding the preceding sentence, if part or all of the Relevant Tax Liability is capable of being offset as a Relief or tax or is capable of giving rise to a credit against, or right to repayment of tax in each case which the PPP Co is entitled to claim, then the amount of the Relevant Tax Liability shall be reduced accordingly. Furthermore, any tax liability shall be accounted for once only (and in a case where withholding tax and related underlying tax arise on the same payment, one only of the two shall be accounted for) in the calculation of the increase in any Compensation Payment.

Comment: The NRA Model Contract form also provides for tax gross-up when a payment is made under the Authority indemnities. In the current Core Contract, there are no Authority indemnities.

- (b) In determining whether the PPP Co has a Relevant Tax Liability by reason of a Compensation Payment, it shall be assumed that any Reliefs derived from the Project which are available to the PPP Co (or would have been so available but for a surrender by the PPP Co of such Reliefs by way of group or consortium relief) for offset against the Compensation Payment, or against tax in relation to the same, have been so offset to the maximum extent possible.

54.8 Objections in relation to Relevant Tax Liability

The PPP Co shall keep the Authority fully informed of all negotiations with the Revenue Commissioners in relation to any Relevant Tax Liability in respect of a Compensation Payment. The PPP Co shall not agree, accept or compromise any Claim, issue or dispute relating to such Relevant Tax Liability without the prior consent of the Authority. The Authority may, if it considers in good faith that such action is justified having regard to the likely costs and benefits, direct the PPP Co to resist, appeal, defend or otherwise dispute the Relevant Tax Liability in respect of the Compensation Payment, provided that the cost of any such resistance, appeal defence or other dispute (including any interest or penalties incurred) shall be at the Authority's expense. However, if the PPP Co obtains professional advice from an independent person with relevant expertise that any resistance, appeal, defence or other mode of dispute is not likely to result in any more beneficial position in relation to the Relevant Tax Liability, the PPP Co shall be entitled not to continue with such resistance, appeal, defence or other mode of dispute. Where any resistance, appeal, defence or other mode of dispute results in a more beneficial position in relation to the Relevant Tax Liability, an adjustment will be made to the amount payable under Clause 54.7 (Tax Equalisation) to reflect such outcome.

54.9 Date of Payment

Any increase in the amount of a Compensation Payment which is payable under Clause 54.7 (Tax Equalisation) shall be paid on the later of [•] [•] Working Days after a demand therefore (together with evidence in sufficient detail for the Authority to satisfy itself of the Relevant Tax Liability and its calculation) is made by the PPP Co and:

- (a) in the case of an Actual Liability, [•][•] Working Days before the date on which the relevant tax must be paid to the tax authority in order to avoid incurring interest and penalties; and
- (b) in the case of a Deemed Liability, [•][•] Working Days before the date on which tax which would have been payable but for the utilisation of the relevant Relief in order to avoid incurring interest or penalties (whether by the PPP Co or otherwise) and, for the purposes of determining when the Relief would otherwise have been utilised, Reliefs shall be regarded as utilised in the order in which they arise.

54.10 Right of Authority

The Authority shall have the right to pay the amount payable under Clause 50.7 (Tax Equalisation) direct to the Revenue Commissioners in satisfaction of the relevant tax due by the PPP Co.

54.11 Rights of Set-Off

To avoid doubt, the Authority's obligations to make any payment of compensation to the PPP Co pursuant to this Clause 54 are subject to the Authority's rights under Clause 42 (Set-Off), save that the Authority agrees not to set-off any amount agreed or determined as due and payable by the PPP Co to the Authority against any payment of termination compensation under Clauses 54.1 (Force Majeure and Uninsurable Risk and Change in Law), 54.3 (Termination for Authority Default), 54.4 (Voluntary Termination), 54.5 (Termination for breach of Refinancing Provisions), 54.6 (Corrupt Gifts and Fraud) and 54.7 (Tax Equalisation), save to the extent that after such an amount has been set off, the termination payment made would be in an amount greater than or equal to the Base Senior Debt Termination Amount, or the Revised Senior Debt Termination Amount as the case may be at that time.

54.12 Full and Final Settlement

- (a) Any compensation paid pursuant to this Clause shall be in full and final settlement of any Claim of the PPP Co in relation to any termination of this Agreement (and the circumstances leading to such termination) and the PPP Co shall be excluded from all other rights and remedies in respect of any such termination. The compensation payable (if any) pursuant to any of Clauses 54.1 to 54.6 above shall be the sole remedy of the PPP Co and the PPP Co

shall not have any other right or remedy in respect of such termination.

- (b) If the calculation of amounts payable under any provision of this Clause 54 (Compensation on Termination) gives a negative amount, such amount shall be aggregated with any amount payable under other provisions of this Clause 54 (Compensation on Termination), which shall be reduced accordingly, but in no circumstances shall the calculation of compensation under this Clause 54 (Compensation on Termination) give rise to an obligation on the PPP Co to make payment to the Authority (but without prejudice to any obligation of the PPP Co to make any payment to the Authority pursuant to any other provision of this Agreement).

54.13 Method of Payment

- (a) The Authority shall pay to the PPP Co the Termination Sum and any amounts due under clause 47 (Authority Default), together with interest (such interest to be payable from the Notice Date until the Authority makes the payment pursuant to this Clause 50.13(a)) on any Senior Debt Termination Sum or Revised Senior Debt Termination Sum element of the Termination Sum at the Senior Debt Rate on or before the date falling 60 (sixty) days after the Notice Date provided that it may elect to pay the Adjusted Estimated Fair Value of the Contract or the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount (as relevant) element of the Termination Sum in accordance with clause 50.13(b) below.
- (b) The Authority may, other than on an Authority Default, elect to pay the Adjusted Estimated Fair Value of the Contract or the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount (as relevant) element of the Termination Sum:
 - (i) in instalments as follows:
 - (A) in respect of that element of the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount or the Adjusted Estimated Fair Value of the Agreement (as relevant) representing the Outstanding Principal (where the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount or the Adjusted Estimated Fair Value of the Agreement (as relevant) is greater than or equal to the Outstanding Principal) on the dates (the "**Instalment Dates**") and in the amounts that PPP Co would have been required to pay as principal to the Senior Lenders under the terms of the Senior Financing Agreement had the Termination Date not occurred and the sum remaining after deducting the Outstanding Principal from the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount or the Adjusted Estimated Fair Value of the Agreement (as relevant) shall be paid in equal instalments on the Instalment Dates;
 - (B) where the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount or the Adjusted Estimated Fair Value of the Agreement (as relevant) is less than the Outstanding Principal, on the Instalment Dates pro rata to the amounts that PPP Co would have been required to pay as principal to the Senior Lenders under the terms of the Senior Financing Agreement had the Termination Date not occurred; or
 - (ii) as the parties may otherwise agree.
- (c) From the Notice Date until the date of payment, interest shall accrue on any unpaid element of the Termination Sum at the Senior Debt Rate and be payable on the next occurring Instalment Date.
- (d) If the Authority has elected to pay in accordance with Clause 50.13(b) above, it may (on 28 (twenty-eight) days prior written notice to the PPP Co) elect to pay any outstanding element of the Adjusted Estimated Fair Value of the Contract or the Base Senior Debt Termination

Amount or Revised Senior Debt Termination Amount (as relevant) element of the Termination Sum in full on any Instalment Date.

(e) If the Authority:

(i) fails to make a payment to the PPP Co. in accordance with Clauses 50.13(a) and / or 50.13(b) above; or

(ii) breaches clause 17.3 (Authority Successors),

the PPP Co may issue a notice to the Authority declaring any unpaid and outstanding element of (as applicable) the Adjusted Estimated Fair Value of the Contract, the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount (as relevant) element of the Termination Sum to be immediately due and payable.

The Authority shall be entitled to rely on the certificate of the Senior Credit Providers' Agent as conclusive as to the amount of the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount (together with accrued interest and breakage costs where appropriate outstanding at any relevant time). The receipt of the Senior Credit Providers' Agent shall discharge the Authority's obligation to pay any element of compensation due to the PPP Co that is equal to the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount (as relevant).

KEY DEFINITIONS – USED IN CLAUSES 5.7- 5.13 CORE CONTRACT DRAFTING

“Relevant Tax Liability” means the Actual Liability or Deemed Liability in respect of a Compensation Payment.
“Actual Liability” means the PPP Co's liability for Tax within the State, as a consequence of or in respect of a Compensation Payment.

“Deemed Liability” means the circumstances in which the PPP Co would have had an Actual Liability but for the utilisation of a Relief, other than a Relief derived from the Project.

“Relief” means any relief, allowance or deduction in computing profits or tax or a credit against, or right to repayment of, tax, granted by or pursuant to any legislation for tax purposes.

ADDITIONAL CORE CONTRACT DRAFTING

[CLAUSE 54 – SCHEDULE]

COMPENSATION ON TERMINATION

PART 6

General

1. Costs

1.1 The costs and/or expenses to be taken into account in the calculation of all termination sums due pursuant to this Schedule shall only be such costs and/or expenses to the extent that they are reasonable and proper in quantum and shall have been or will be reasonably and properly incurred.

- 1.2 PPP Co shall take all reasonable steps to mitigate such costs and/or expenses.
- 1.3 No cost and/or expense shall be taken into account to the extent that the same cost and/or expense has otherwise been provided for.
2. Ascertainment of Compensation
 - 2.1 The amount of any compensation paid pursuant to this Schedule including the identification and calculation of each element comprised in or to be deducted from it, the ascertainment of any amount or matter requiring to be estimated or anticipated and (where so required by the provisions of this Schedule) the reasonableness of any amount or matter shall be as agreed between the parties or, if they are unable to agree within a period which is reasonable in the light of the amounts and matters requiring to be so identified, ascertained or calculated, as referred to and determined in accordance with the Disputes Resolution Procedure and so that an interim or partial amount of compensation may be declared payable pending final determination where, because of difficulty in resolving particular elements comprised in it, undue delay would otherwise be caused in payment or commencement of payment of compensation.
3. Undisputed Amounts
 - 3.1 If the payment of any amount is disputed then any undisputed element of that amount shall be paid and the disputed element shall be dealt with in accordance with [Clause 56 – Schedule] (Disputes Resolution Procedure).
4. Outstanding Senior Debt Amount
 - 4.1 The Authority shall be entitled to rely on the certificate of the Senior Credit Providers' Agent as conclusive as to the amount of the Senior Debt Amount (together with accrued interest and breakage costs where appropriate outstanding at any relevant time).
 - 4.2 Following payment of the amount under paragraph 4.1 above the Senior Credit Providers' Agent shall provide a written receipt to the Authority which shall discharge the Authority's obligation to pay any element of compensation due to the PPP Co that is equal to Senior Debt Amount (and where appropriate any interest or breakage costs).

ACCOMMODATION CONTRACT DRAFTING

Comment: The Accommodation Contract direct agreement has provision for the Authority to step in to the interest rate hedging contract on termination of the PPP contract, as an alternative to incurring the cost of terminating the hedging contract.

DIRECT AGREEMENT

[•].B TRANSFER OF HEDGING AGREEMENT

In the circumstances in which any of paragraphs [•],[•] or [•] of Schedule [•] (Compensation upon Termination) of the Project Agreement applies [this covers all forms of termination] the following provisions shall apply in relation to the Hedging Agreement:

- [•]B.1 The Minister shall not less than [•][•] Working Days prior to the anticipated Termination Date be entitled to serve a notice on the Operator (with a copy to the Security Trustee) requiring the Security Trustee to provide or procure provision of information in sufficient detail to allow the Minister and his/her advisers to properly assess the quantum of liability which the Minister will incur in respect of termination of the Hedging Agreement;

[•]B.2 Upon receipt of such notice, the Operator shall not and the Hedge Counterparty shall not terminate the Hedging Agreement pending a decision of the Minister in accordance with the following provisions; and

[•]B.3 Within [•][•]Working Days from receipt of the information as required by Clause [•]B.1, the Minister may, by notice in writing to the Operator and the Security Trustee, require the Operator to assign to the Minister or the Swap Nominee (as defined in Clause [•]A.4.1) the Hedging Agreement and, in this regard, the provisions of Clause [•]A.4 shall apply (mutatis mutandis). To the extent that no such notice is served by the Minister by the expiry of such [•][•]Working Day Period the Hedging Counterparty and/or the Operator may terminate the Hedging Agreement.

Comment: As discussed in clause 23, effect of termination, the Accommodation Contract has provision for the Authority to step into equipment leases. The compensation on termination schedule provides that the liabilities assumed on such step-in are deducted from compensation on termination (except where that compensation is ring fenced from set-off).

[CLAUSE 54 – SCHEDULE C]

[•] Leased Equipment

There shall be taken into account, and subject to paragraph [•].3 deducted from any amount otherwise payable under this Schedule [•] (unless already taken into account in the calculation thereof) the costs and other liabilities arising under leases assumed by the Minister under Clause [•] (Consequential Arrangements on Termination) and costs and liabilities arising under future leasing agreements entered into by the Minister upon expiry of any such existing lease which expires before the Expiry Date in respect of equipment of the type which is the subject of the expired lease for the remainder of the Unexpired Term.

CORE CONTRACT DEFINITIONS

Comment: Some of these definitions are repeated in the parts above, but we include here for reference the full set of definitions in [Clause 54 – Schedule] of the Core Contract.

[CLAUSE 54 – SCHEDULE]

COMPENSATION ON TERMINATION Definitions

1.1 Definitions

“Adjusted Estimated Fair Value of the Contract” means the Estimated Fair Value of the Contract, less an amount equal to the aggregate of:

- (a) [the Post Termination Service Amounts (if a positive number);]
- (b) the Tender Costs; and
- (c) amounts that the Authority is entitled to set off or deduct under Clause 42 (Set-Off),

plus an amount equal to the aggregate of:

- (i) all credit balances on any bank accounts held by or on behalf of the PPP Co on the date that the Estimated Fair Value of the Contract is calculated;
- (ii) any insurance proceeds and other amounts owing to the PPP Co (and which the PPP Co is entitled to

- (iii) retain), to the extent not included in (i); and the Post Termination Service Amounts (if a negative number),

to the extent that:

- (1) (i), (ii) and (iii) have not been directly taken into account in calculating the Estimated Fair Value; and
- (2) the Authority has received such amounts in accordance with the Agreement;

“Adjusted Highest Compliant Tender Price” means the Highest Compliant Tender Price less the aggregate of:

- (a) any Post Termination Service Amounts paid to the PPP Co to date;
- (b) the Tender Costs; and
- (c) amounts that the Authority is entitled to set off or deduct under Clause 42 (Set-off),

plus an amount equal to the aggregate of:

- (i) all credit balances on any bank accounts held by or on behalf of the PPP Co on the date that the highest priced Compliant Tender is received;
- (ii) any insurance proceeds and other amounts owing to the PPP Co, to the extent not included in (i); and
- (iii) the Post Termination Service Amounts (if a negative number),

to the extent that:

- (a) (i), (ii) and (iii) have not been directly taken into account in that Compliant Tender; and
- (b) the Authority has received such amounts in accordance with the Agreement;

“APB Distribution” means for the period during which the Additional Permitted Borrowing subsists, an amount equal to the aggregate of all Distributions made during that period up to an amount equal to the principal of the Additional Permitted Borrowing on the first day of that period.

“Base Case Equity IRR” means [\bullet]⁷%

“Base Senior Debt Termination Account” means:

- (a) all amounts outstanding at the Termination Date, including interest and Default Interest accrued as at that date, from the PPP Co to the Senior Credit Providers under the Senior Credit Providers’ Agreements and in respect of Permitted Borrowings; and
- (b) all amounts including costs of early termination of interest rate hedging arrangements and other breakage costs, payable by the PPP Co to the Senior Credit Providers as a result of a prepayment under the Senior Credit Providers’ Agreements and in respect of Permitted Borrowings subject to the PPP Co and the Senior Credit Providers mitigating all such costs to the extent reasonably possible; less, to the extent it is a positive amount, the aggregate of (without doubt counting in relation to the calculation of the Base Senior Debt Termination Amount or the amounts below):
 - (i) all credit balances on any bank accounts (but excluding the Joint Insurance Account) held by or on behalf of the PPP Co on the Termination Date;
 - (ii) any amounts claimable on or after the Termination Date in respect of Contingent Funding Liabilities;
 - (iii) all amounts, including costs of early termination of interest rate hedging arrangements and other breakage costs, payable by the Senior Credit Providers to the PPP Co as a result of prepayment of amounts outstanding under the Senior Credit Providers’ Agreements and in respect of Permitted Borrowings;
 - (iv) any Additional Permitted Borrowings and any interest and Default Interest on such Additional Permitted Borrowings; and
 - (v) all other amounts received by the Senior Credit Providers on or after the Termination Date and before the date on which any compensation is payable by the Authority to the PPP Co. as a result of enforcing any other rights they may have;

⁷

This is the nominal pre-tax (i.e. pre-tax with respect to Shareholders in the PPP Co, post-tax with respect to the PPP Co) blended rates of return for equity or amounts advanced under the Subordinated Financing Agreements (as appropriate) shown in the Base Case.

“Compensation Date” means either:

- (a) if paragraph 1 of Part 4 (Retendering Procedure) applies, the earlier of:
 - (i) the date that the New Contract is entered into; and
 - (ii) the date on which the Authority pays the Adjusted Highest Compliant Tender Price to the PPP Co, or
- (b) if paragraph 2 of Part 4 (No Retendering Procedure) applies, the date that the Adjusted Estimated Fair Value of the Contract has been agreed or determined;

“Compliant Tender” means any tender submitted by a Compliant Tenderer that meets the qualification criteria notified under paragraph 1.4 of Part 4;

“Compliant Tenderer” means a tenderer who is a Suitable Substitute Contractor;

“Contingent Funding Liabilities” means

Comment: This is additional credit support given by sponsors to funders, if any.

“Deemed New Contract” means an agreement on the same terms and conditions as this Agreement, as at the Termination Date, but with the following amendments:

- (a) if this Agreement is terminated prior to the Service Commencement Date, then the Service Commencement Date shall be extended by a period to allow a New Contractor to achieve Service Commencement;
- (b) any accrued Performance Points shall be cancelled; and
- (c) the term of such agreement shall be for a period equal to the term from the Termination Date to the Expiry Date;

“Estimated Fair Value of the Contract” means the amount determined in accordance with paragraph 2.3 of Part 4 (No Retendering Procedure) that a third party would pay to the Authority as the market value of the Deemed New Contract;

“Fair Value” means the amount at which an asset or liability could be exchanged in an arms length transaction between informed and willing parties, other than in a forced or liquidation sale;

“Highest Compliant Tender Price” means the price offered by the Compliant Tenderer (if any) with the highest tender price and, if no Compliant Tenders are received, zero;

“Liquid Market” means that there are sufficient willing parties (being at least two parties, each of whom is capable of being a Suitable Substitute Contractor) in the market for PPP contracts or similar contracts for the provision of services (in each case the same as or similar to the Agreement) for the price that is likely to be achieved through a tender to be a reliable indicator of Fair Value;

“Losses” means all damages, losses, liabilities, costs, expenses (including legal and other professional charges and expenses), and charges whether arising under statute, contract or at common law or in connection with judgments, proceedings, internal costs or demands but excluding loss of profit for work not executed, loss of income or indirect or consequential loss;

“Market Value Availability Deduction Amount” means for any month or part of a month, an amount equal to the availability deduction that was made to the Unitary Charge under Part [4] of [Clause 39 – Schedule] (Payment Mechanism) in the month immediately preceding the Termination Date, less an amount equal to any Unavailability Deduction that was made for an Area which was unavailable at the Termination Date but which has subsequently become Available whether as a result of the Authority incurring Rectification Costs or otherwise;

“Maximum Unitary Charge” means, in respect of a month, the Unitary Charge payable during that month before any deductions under parts [4] and/or [5] of [Clause 39 – Schedule] (Payment Mechanism) but allowing for indexation under the indexation provisions in Clause 2.1(r) (Interpretation) and Part [3] of [Clause 39 – Schedule] (Payment Mechanism);

“New Contract” means an agreement on the same terms and conditions as this Agreement at the Termination Date, but with the following amendments:

- (a) if this Agreement is terminated prior to the Service Commencement Date, then the Service Commencement Date shall be extended by a period to allow a New Contractor to achieve Service Commencement;
- (b) any accrued Performance Points and/or Warning Notices shall be cancelled;
- (c) the term of such agreement shall be equal to the term from the Termination Date until the Expiry Date; and
- (d) any other amendments which do not adversely affect the PPP Co;

“New Contractor” means the person who has entered or who will enter into the New Contract with the Authority;

“Notice Date” means the later of the Termination Date and (if applicable) the date that the Adjusted Estimated Fair Vale of the Contract is agreed between the parties pursuant to Clause paragraph 2.4 of Part 4 (No Retendering);

“Post Termination Service Amount” means for the purposes of paragraph 1 of Part 4 (Retendering Procedure), for the whole or any part of a month for the period from the Termination Date to the Compensation Date, an amount equal to the Maximum Unitary Charge which would have been payable in that month under the Agreement had the Agreement not been terminated, less an amount equal to the aggregate of:

- (a) the Market Value Availability Deduction Amount for that month;
- (b) the Rectification Costs incurred by the Authority in that month; and
- (c) (where relevant), the amount by which the Post Termination Service Amount for the previous month was less than zero;

“Rectification Costs” means, for the purposes of any Termination Date that occurs during the Service Period, an amount equal to the reasonable and proper costs incurred by the Authority in a particular month or part of a month in ensuring that the Service is available;

“Relevant Assumptions” means the assumptions that the sale of the PPP Co is on the basis that there is no default by the Authority, that the sale is on a going concern basis, that no restrictions exist on the transfer of share capital, that no Additional Permitted Borrowing has taken place and therefore that the effect of the Additional Permitted Borrowing on the calculation of such amount is disregarded but that otherwise the actual state of affairs of the PPP Co and the Project is taken into account;

“Revised Senior Debt Termination Amount” means, subject to Clause 43A (Amendments to the Funding Agreements):

- (a) all amounts outstanding at the Termination Date, including interest and Default Interest accrued as at that date, from the PPP Co to the Senior Credit Providers under the Senior Credit Providers’ Agreements including in respect of Permitted Borrowings other than any such amounts that are in respect of Additional Permitted Borrowings;
- (b) all amounts of Additional Permitted Borrowings including interest but excluding Default Interest outstanding at the Termination Date, including such Additional Permitted Borrowings accrued at that date; and
- (c) all amounts including costs of early termination of interest rate hedging arrangements and other breakage costs, payable by the PPP Co to the Senior Credit Providers as a result of a prepayment under the Senior Credit Providers’ Agreements including in respect of Permitted Borrowings, subject to the PPP Co and the Senior Credit Providers mitigating all such costs to the extent reasonably possible, less, to the extent it is a positive amount, the aggregate of (without double counting in relation to the calculation of the Revised Senior Debt Termination Amount or the amounts below):
 - (vi) all credit balances on any bank accounts (but excluding the Joint Insurance Account held by or on behalf of the PPP Co) on the Termination Date;
 - (vii) any amounts claimable on or after the Termination Date in respect of Contingent Funding Liabilities;
 - (viii) all amounts, including costs of early termination of interest rate hedging arrangements and

- other breakage costs, payable by the Senior Credit Providers to the PPP Co as a result of prepayment of amounts outstanding under the Senior Credit Providers' Agreements including in respect of Permitted Borrowings;
- (ix) all other amounts received by the Senior Credit Providers on or after the Termination Date and before the date on which any compensation is payable by the Authority to the PPP Co as a result of enforcing any other rights they may have; and
- (x) all APB Distributions.

“Senior Debt Rate” means [*incorporate the non-default interest rate definition in the Senior Funders Agreement*] or such other lower rate as the parties may agree;

“Sub-Contractor Breakage Costs” means Losses that have been or will be reasonably and properly incurred by the PPP Co under the terms of the Construction Contract and the O&M Contract as a direct result of the termination of this Agreement, but only to the extent that:

- (i) the Losses are incurred solely in connection with the Project and in respect of the provision of the Operations or the completion of Works, including:
- i. any materials or goods ordered or sub-contracts placed that cannot be cancelled without such Losses being incurred;
 - ii. any expenditure incurred in anticipation of the provision of services or the completion of works in the future;
 - iii. the cost of demobilisation including the cost of any relocation of equipments used in connection with the Project; and
 - iv. redundancy payments; and
- (ii) the Losses are incurred under arrangements and/or agreements entered into by PPP Co in connection with its obligations in relation to the Project on terms that are consistent with terms that have been entered into in the ordinary course of business and on reasonable commercial terms at arms' length; and
- (iii) the PPP Co and the Contractor and/or the Operator has each used its reasonable endeavours to mitigate the Losses; and
- (iv) the Losses have not arisen as a result of the breach of this Agreement or any sub-contract by PPP Co relating to the Project;

“Tender Costs” means the reasonable and proper costs of the Authority incurred in carrying out the Tender Process and/or in connection with any calculation of the Estimated Fair Value of the Contract;

“Tender Process” means the process by which the Authority requests tenders from any parties interested in entering into a New Contract, evaluates the responses from those interested parties and enters into a New Contract with a new service provider, in accordance with paragraph 1 of Part 4 (Retendering Procedure);

“Tender Process Monitor” means a third party appointed by the PPP Co under paragraph 1.5 of Part 4;

“Termination Date” means any date of early termination of this Agreement in accordance with Part [•] (Termination and Handback); and

“Termination Sum” means any compensation payable by the Authority to the PPP Co on an early termination of the Agreement under paragraph 2 of Part 4 (No Retendering) (excluding the Adjusted Highest Compliant Tender Price and any compensation payable as a result of a termination of the Agreement under Clause 51 (Terminate for Authority Default)).

CROSS REFERENCES

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

- Clause 42 (Set Off)
- Clause 43 (Refinancing)
- Clause 48 (Insurance)
- Clause 49 (PPP Co. Default)

- Clause 50 (Corrupt Gifts and Fraud)
- Clause 51 (Authority Default)
- Clause 52 (Non-Default)
- Clause 53 (Effect of Termination)

This clause is relevant in 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)