

COMPILATION OF PPP TERMS AND CONDITIONS OF CONTRACT

PUBLIC SECTOR VERSION

CLAUSE 55: HANDBACK

DBFOM CONTRACT

DBOM CONTRACT

OMF CONTRACT

O&M CONTRACT

INTRODUCTION

The Core Contract deals comprehensively with the handback obligations, and includes a mechanism to assess and cover the cost of ensuring that the asset is in the required condition at hand back. The NRA Model Contract has a procedure for assessing the residual life of pavement and structures earlier and over a longer time frame.

State Authorities, when identifying the time in the contract when the Retention Account is to be created, should recognise that the structure of some tenders allows the debt to be paid off early (many years before the contract end). Such a structure may require a different start date and/or retained amount. This may be difficult to ascertain in advance of receipt of the tenders and it may also be difficult for the tenderers to supply a fixed tender without knowledge of the financial requirements of this fund.

Where a performance guarantee is to be provided in place of the above mentioned Retention Account the State Authority (on advice of the NDFA) should ensure that such a guarantee (if supplied by the SPC) can be exercised even when the contract has concluded and the SPC has no other function. A guarantee/Bond from a financial institution (e.g. a demand bond) could be supplied by individual organisation/s that own/s the equity in the SPC, subject to the views of the NDFA.

SOPC3 GUIDANCE

19.4 HANDOVER PROVISIONS FOR ASSETS WHICH TRANSFER TO THE AUTHORITY

19.4.1 *Provisions dealing with the transfer of the Assets will need to be set out in the Contract. These will have to deal with:*

- *the condition of the Assets, any rectification works, their cost and how they are paid for (see Sections 8 (Maintenance) and 22 (Surveys on Termination) [of the SoPC3 Guidance]);*
- *any design life requirement after the Expiry Date;*
- *inspection prior to handover;*
- *checking any rectification works have been done;*
- *provision for any assignment of warranties, contracts and other rights relating to the Project;*
and

- any disputes in connection with the above.

19.4.2 Other relevant issues include how employees should be dealt with, as they will often transfer to any successor contractor or the Authority.

19.4.3 To the extent that employees are being transferred, then the Contract should contain restrictions on the ability of the Contractor to alter either the number of employees or their terms and conditions as the end of the Contract approaches (such as in the last 2 to 3 years of the Contract).

19.4.4 A general further assurance provision is usually included in relation to termination, such as the following:

The Contractor shall take all reasonable steps and co-operate fully with the Authority and any successor contractor so that any continuation in the Service is achieved with the minimum of disruption and so as to prevent or mitigate any inconvenience or risk to health or safety of the employees of the Authority and members of public.

CORE CONTRACT DRAFTING

55. HANDBACK

55.1 Handback Requirements

- Upon the Expiry Date, each element of the [Project Facility] shall comply with the Handback Requirements.
- The Renewal Works shall be carried out in accordance with the relevant parts of the User Requirements and the Review and Certification Procedure (as if references to Works contained therein were references to Renewal Works and the Handback Requirements).

55.2 Inspection

- Not less than [●] ([●]) months nor more than [●] ([●]) months prior to the Expiry Date, the PPP Co and the Authority's Representative shall conduct a joint inspection (the "Final Inspection") of the [Project Facility] including all Structures forming part of the [Project Facility]. If no date for the Final Inspection has been agreed between the PPP Co and the Authority's Representative, the Authority's Representative may initiate the Final Inspection during such period by giving at least [●] ([●]) days notice to that effect to the PPP Co and such inspection shall be conducted on the date specified in such notice. The cost of such Final Inspection shall be borne by the PPP Co.
- Such Final Inspection shall comply with the requirements set out in [Clause 55 – Schedule] (Handback Requirements).

55.3 Renewal Programme

- Within [●] ([●]) days after the completion of the Final Inspection, the PPP Co shall provide to the Authority's Representative a report on the condition of the [Project Facility] including the Structures and a notice setting out:
 - the PPP Co's proposals as to the Renewal Works;
 - the PPP Co's proposals as to the Renewal Programme; and

- (iii) the PPP Co's estimate of the Renewal Amount.
- (b) The proposals referred to in Clause 55.3(a) shall be made, inter alia:
 - (i) on the basis of an assessment of the Residual Life of the relevant element of the [Project Facility] in accordance with [Clause 55 - Schedule] (Handback Requirements); and
 - (ii) on the assumption that the [Project Facility] will be maintained in accordance with Clause 10.3 (Maintenance) and the User Requirements until the Expiry Date.
- (c) The Authority's Representative may, within [●] ([●]) days after receipt of the notice from the PPP Co in accordance with Clause 55.3(a), by notice to the PPP Co object to the proposals in respect of any or all of the Renewal Works, the Renewal Programme and the Renewal Amount as set out in the PPP Co's notice. The notice from the Authority's Representative shall give details of the grounds for such objection and shall give the Authority's Representative's proposals in respect of the Renewal Works and Renewal Programme and his estimate of the Renewal Amount.
- (d) If no agreement is reached between the PPP Co and the Authority's Representative as to any matter referred to in the notice given in accordance with Clause 55.3(c) within [●] ([●]) days of receipt by the PPP Co of such notice, then either the PPP Co or the Authority's Representative may refer the matter to the Disputes Resolution Procedure for determination:
 - (i) in the case of an objection in respect of the Renewal Works, as to whether or not the objection is justified and as to whether any alternative proposals by the Authority's Representative are more appropriate to ensure that the [Project Facility] and the relevant Structures will satisfy the Handback Requirements on the Expiry Date (on the basis referred to in Clause 55.3(b));
 - (ii) in the case of an objection in respect of the Renewal Programme, as to what programme would be reasonable for the implementation of the Renewal Works; and
 - (iii) in the case of an objection in respect of the Renewal Amount, as to what amount would represent the reasonable cost of carrying out the Renewal Works, on the assumption that such Renewal Works will be carried out in accordance with Good Industry Practice.
- (e) Upon agreement or determination in accordance with the Disputes Resolution Procedure of the Renewal Works and the Renewal Programme, the PPP Co shall procure that the Renewal Works are carried out in accordance with the Renewal Programme. For the avoidance of doubt, the PPP Co shall procure, at its own cost, that the Renewal Works are carried out notwithstanding that the actual cost of the Renewal Works may be higher than the Renewal Amount.
- (f) For the avoidance of doubt, neither the agreement of the Authority's Representative to any Renewal Works, Renewal Programme or Renewal Amount, nor the participation of the Authority's Representative in any inspection under this Clause 0 (Handback), nor the complete or partial carrying out of the Renewal Works shall relieve or absolve the PPP Co from:
 - (i) its obligations under Clause 55.1 (Handback Requirements); or
 - (ii) any obligation to conduct any other inspection or perform any other works in accordance with the User Requirements.

55.4 Handback Inspection

- (a) Not later than [●] ([●]) Working Days after the Expiry Date, the PPP Co and the Authority's Representative shall conduct a joint inspection of the [Project Facility] (the "Handback Inspection"). The cost of the Handback Inspection will be borne by the PPP Co. Such inspection shall comply with the requirements set out in [Clause 55 – Schedule] (Handback Requirements) as applicable to each element of the [Project Facility].
- (b) Within [●] ([●]) days after the completion of the Handback Inspection, the Authority's Representative shall either:
 - (i) issue to the PPP Co a Handback Certificate; or
 - (ii) notify the PPP Co in writing of his decision not to issue the Handback Certificate and state the reason for such decision.
- (c) The Authority's Representative may refuse to issue the Handback Certificate if:
 - (i) the PPP Co shall have failed to complete all of the Renewal Works; or
 - (ii) the [Project Facility] for any reason does not comply with the Handback Requirements in all respects.
- (d) Any notice given by the Authority's Representative in accordance with Clause 55.4(b)(ii) shall set out each respect in which the Renewal Works have not been completed or the [Project Facility] does not comply with the Handback Requirements and shall state the Authority's Representative's estimate of the cost of completing such Renewal Works and/or of procuring that the [Project Facility] comply in all respects with the Handback Requirements.
- (e) The PPP Co may, within [●] ([●]) Working Days after receipt of a notice given in accordance with Clause 55.4(b)(ii), by notice to the Authority's Representative object to any matter set out in the Authority's Representative's notice. The notice from the PPP Co shall give details of the grounds for such objection and shall give the PPP Co Proposals in respect of such matters.
- (f) If no agreement is reached between the PPP Co and the Authority's Representative as to any matter referred to in the notice given in accordance with Clause 55.4(e) within [●] ([●]) days of receipt by the Authority's Representative of such notice, then either the PPP Co or the Authority's Representative may refer the matter to the Disputes Resolution Procedure for determination, as the case may be:
 - (i) whether the Renewal Works have been completed;
 - (ii) whether the [Project Facility] complies in all respects with the Handback Requirements; and
 - (iii) of the estimated cost of procuring that such Renewal Works are completed and that the [Project Facility] complies in all respects with the Handback Requirements.
- (g) If it is agreed or determined in accordance with the Disputes Resolution Procedure that the PPP Co has not completed the Renewal Works or that the [Project Facility] does not comply in all respects with the Handback Requirements, then without prejudice to any other right or remedy of the Authority the PPP Co shall pay to the Authority an amount equal to the estimated cost of completing such Renewal Works or procuring that the [Project Facility] complies in all respects with the Handback Requirements, as agreed or determined in accordance with Clause 55.4(f) (the "Handback Amount"). Such payment shall be made not later than [●] ([●]) Working Days after such estimated

cost has been agreed or determined in accordance with this Clause 55.4.

55.5 Retention Account

The following provisions of this Clause 55.5 shall not apply if, not later than the date which is [●] ([●]) months prior to the Expiry Date, the PPP Co procures that a performance guarantee is provided to the Authority in respect of the PPP Co's obligations under this Clause 55 (Handback) (other than this Clause 55.5) by a bank or other party Approved by the Authority and in form and substance acceptable to it.

- (a) The Authority and the PPP Co shall procure that the Retention Account is established with a bank located in the State approved by the Authority not later than the date which is [●] ([●]) months prior to the Expiry Date. The Authority may (if it so chooses) by notice in writing to the PPP Co, designate the Retention Account as a "**Retention Account**" in which event the PPP Co shall grant a charge to the Authority over the Retention Account. Any interest accrued on any money standing to the credit of the Retention Account shall be credited to the Retention Account. All sums standing to the credit of the Retention Account from time to time, including without limitation any accrued interest, shall be dealt with only in accordance with the following provisions of this Clause 55 (Handback).
- (b) If the PPP Co has been notified under Clause 55.3(a) (Renewal Programme) that Renewal Works are required, not less than [●] ([●]) months prior to the Expiry Date the Authority shall deduct the Renewal Amount (as agreed or determined in accordance with the Disputes Resolution Procedure) from the Unitary Charge payable after such date and pay such amount into the Retention Account until the amount standing to the credit of the Retention Account (including any accrued interest but less any bank charges and less any deductions required by any Law or Legal Requirement to be made from such account) is equal to the Renewal Amount (the "**Retention Account Balance**").
- (c) When the Retention Account Balance is equal to the Renewal Amount, then subject to Clause 55.5(b) the Authority shall not be required to deduct any further sums in accordance with Clause 55.5(b).

To the extent:

- (i) part of the Renewal Works have been completed as required (the cost of which completed part exceeds [●] Euro (Indexed));
- (ii) the PPP Co has notified the Authority's Representative of such completion;
- (iii) the Authority's Representative does not within [●] ([●]) Working Days of receipt of such notice object to any of the details contained therein; and
- (iv) the amount standing to the account of the Retention Account exceeds the Renewal Amount,

the PPP Co shall be permitted to withdraw the lower of (A) the value of the Renewal Works completed or such lower figure as the Authority's Representative has determined, acting reasonably, as not being subject to objection and (B) the amount standing to the credit of the Retention Account which exceeds the Renewal Amount (as adjusted to reflect the completion of the relevant part of the Renewal Works in respect of which a withdrawal is to be made).

- (d) If, following the Final Inspection, it is agreed or determined in accordance with

Clause 55.3 (Renewal Programme) that no Renewal Works are required, then within [●] ([●]) Working Days of such agreement or determination the Authority and the PPP Co shall pay to the PPP Co the Retention Account Balance.

- (e) Within [●] ([●]) Working Days after the issue of a Handback Certificate in accordance with Clause 55.4(b)(i) (Handback Inspection), the Authority and the PPP Co shall pay the Balance to the PPP Co.
- (f) If the Authority's Representative gives a notice in accordance with Clause 55.4(b)(ii) (Handback Inspection), then pending the agreement or determination in accordance with the Disputes Resolution Procedure of all matters referred to in that notice, the Authority and the PPP Co shall retain in the Retention Account whichever is the lesser of:
 - (i) the Retention Account Balance; and
 - (ii) the amount stated by the Authority's Representative in the notice given in accordance with Clause 55.4(b)(ii) (Handback Inspection) as his estimate of the cost of completing the Renewal Works and/or of procuring that the [Project Facility] complies in all respects with the Handback Requirements,and the balance (if any) of any amount standing to the credit of the Retention Account (including any accrued interest but less any bank charges and less any deductions required by any Law or Legal Requirement to be made from such account) shall be paid to the PPP Co in accordance with Clause 55.5.
- (g) If any sum is retained in the Retention Account in accordance with Clause 55.5, then the Authority and the PPP Co shall continue to hold such sum in the Retention Account pending the agreement or determination under the Disputes Resolution Procedure of all matters raised in the notice given by the Authority's Representative in accordance with Clause 51.4(b)(ii) (Handback Inspection).
- (h) Within [●] ([●]) Working Days after the agreement or determination in accordance with the Disputes Resolution Procedure of the Handback Amount, the Authority and the PPP Co shall pay out of the Retention Account to the Authority an amount equal to the Handback Amount or, if the Retention Account Balance is insufficient to pay the Handback Amount in full, the Retention Account Balance. Any remaining sums standing to the credit of the Retention Account (after deducting the amount payable to the Authority and any bank charges and any deductions required by any Law or Legal Requirement to be made from such account) shall be paid by the Authority and the PPP Co out of the Retention Account to the PPP Co.
- (i) If the Retention Account Balance is less than the Handback Amount, then the payment of any sum to the Authority in accordance with Clause 55.5(h) in or towards satisfaction of the Handback Amount shall not in any way prejudice or affect any other rights or remedies of the Authority for the purpose of recovering the remainder of the Handback Amount.
- (j) Upon the occurrence of an Event of Default, which, if remediable, has not been remedied within the agreed remedy period pursuant to Clause 49, the Authority may, at its option and without prejudice to any of its other rights or remedies, require that any amount standing to the credit of the Retention Account be applied in payment of any amount due from the PPP Co to the Authority or becoming due as a consequence of such Event of Default or any termination of this Agreement (including, without limitation, any damages arising from such Event of Default). The PPP Co and the Authority shall pay to the Authority out of the Retention Account such sum or, if the amount standing to the credit of the Retention Account is

insufficient to pay such amount in full, the Retention Account Balance upon termination of this Agreement. Any remaining sums standing to the credit of the Retention Account (after deducting the amount payable to the Authority and any bank charges and any deductions required by any Law or Legal Requirement to be made from such account) shall be paid by the Authority and the PPP Co out of the Retention Account to the PPP Co.

KEY DEFINITIONS – USED IN CLAUSE 55 CORE CONTRACT DRAFTING

“Renewal Amount” means, at any time, the cost of carrying out the Renewal Works as agreed or determined in accordance with Clause 55 (Handback) and as adjusted, from time to time, to reflect the Renewal Works completed prior to such time.

“Renewal Programme” means the programme for the carrying out of the Renewal Works over the remainder of the Contract Period following the Initial Inspection, as agreed or determined in accordance with Clause 55 (Handback), as such programme may be revised or amended at any time in accordance with Clause 55 (Handback).

“Renewal Works” means the works of renewal, reconstruction, repair or reinstatement required, as agreed or determined at any time in accordance with Clause 55 (Handback), to be carried out in order to procure that [the Project Facility] will, on the Expiry Date, satisfy the Handback Requirements (other than the Operations).

ADDITIONAL CORE CONTRACT DRAFTING

[CLAUSE 55 – SCHEDULE]

HANDBACK PART 1

General Requirements and Inspections

REQUIREMENTS

Comment: This will be project specific in some respects. The Core Contract schedule is illustrative.

1. GENERAL

- 1.1 Upon the Expiry Date each element of the [Project Facility] shall comply in all material respects with the requirements of Clause 55 of the Agreement and of this [Clause 55 – Schedule]. In achieving this, the PPP Co shall transfer the [Project Facility] to the Authority in a safe and serviceable condition appropriate to its remaining design life, together with all of the associated equipment, plant and stock then in use in relation to the Operations and all associated records and documentation required by the other provisions of the Agreement.
- 1.2 Not less than [●] months before the Expiry Date the PPP Co shall consult and comply with the reasonable requirements of the Authority to produce a procedure for the return of the [Project Facility] and all associated documentation to the Authority. This procedure shall

ensure that the transfer proceeds smoothly and without unavoidable disruption to the level of service provided to Users.

- 1.3 All elements of the [Project Facility] shall at Handback be free from any Defect of a nature that, had it been identified during the Operational Period, would have required to have been rectified within a period of [●] year(s) to comply with the Construction Requirements in Schedule [●] of the Agreement and with the O&M Requirements in Schedule [●] of the Agreement.

2. **INSPECTIONS**

- 2.1 The Final Inspection and the Handback Inspection shall be conducted in accordance, inter alia, with the requirements set out in Clause 55 and this paragraph 2 of Part 1.

- 2.2 The inspection of all elements shall be carried out in a manner appropriate to the element as proposed by the PPP Co and subject to the agreement of the Authority's Representative.

- 2.3 Any weather dependent or seasonal survey or inspection forming part of any of the Final Inspection or Handback Inspection as referred to in paragraph 2.1 of this Part 1 shall be carried out at the earliest opportunity if the time for the particular inspection is unsuitable. In the case of the Handback Inspection, all weather dependent or seasonal survey or inspections shall be programmed for a suitable time prior to the end of the Contract Period.

- 2.4 Particular requirements for the Final Inspection and the Handback Inspection are as follows in sections 2.6 to 2.10 inclusive of this Part 1.

- 2.5 If no Residual Life is specified for an element as described in paragraphs 2.6 to 2.10 of this Part 1, in Table 1 or in Table 2 of Annex 1 to this Part 1, then that element shall have a Residual Life equal to the greater of one quarter of the Serviceable Life of that element or [●] years or, if the element has a Serviceable Life of less than [●] years, it shall have been renewed during the last [●] months of the Contract Period.

2.6 **Buildings**

- 2.6.1 A survey of the structural fabric of the [Project Facility] shall be carried out including the external envelope, including but not limited to [●].

- 2.6.2 Pursuant to the requirements of paragraph 1.2 the survey of [Project Facility] shall comply with the procedure agreed with the Authority's Representative and with Good Industry Practice in respect of structural, building and dilapidation surveys.

- 2.6.3 The Residual Life of the building elements of the [Project Facility] shall be assessed using the procedures agreed under paragraph 2.6.2. Where any element of the building is shown to have a Residual Life less than that indicated in Table 1 of this Part 1 or Table 2 of Annex 1 to this Part 1 then a full structural examination shall be carried out of such elements of the [Project Facility] in accordance with the procedures agreed under paragraph 2.5.2.

- 2.6.4 The Residual Life of any element shall not be less than the values specified in Table 1 below. Where the Final Inspection of an element identifies:

- (1) any maintenance works or replacement which should proceed as soon as possible;
- (2) any special investigation required to determine the nature of scope of works required; and or

- (3) any maintenance work or replacement that would normally be carried out concurrently with other works to avoid traffic disruption;
- 2.6.5 and if these works and any works arising from any special investigations are carried out as part of the Renewal Works, then the Residual Life of each element required by Table 1 will be deemed to be achieved provided also that the PPP Co carries out all necessary inspections, testing, repairs and maintenance in accordance with Schedule [●] of the Agreement until the Expiry Date.
- 2.7 The Final Inspection for Structures shall include without limitation the requirements set out in paragraphs 2.7.1 to 2.7.6 inclusive of this Part 1.
- 2.7.1 A suitably qualified and professional chartered engineer shall be responsible for the inspection of all structures.
- 2.7.2 All joints, flashings, openings for windows and doors and any other penetrations of the building's external envelope shall have a detailed examination for leakage and deterioration.
- 2.7.3 All structural connections, hinges and bearings shall have a detailed examination for wear and deterioration.
- 2.7.4 All Special Structures shall be the subject of a detailed inspection by a suitably qualified and independent chartered structural engineer who's appointment shall be agreed in advance with the Authority's Representative.
- 2.7.5 For important structural elements, as identified by PPP Co and agreed with the Authority's Representative under paragraph 1.2, chloride profiles shall be measured and plotted from surface of concrete to rebar level at key areas of reinforced concrete and prestressed concrete.
- 2.7.6 All lengths of weld shall be tested for cracking by non-destructive methods at key areas of structural steelwork to a plan agreed with the Authority's Representative under paragraph 1.2.
- 2.8 The Final and Handover Inspections for mechanical and electrical elements shall include without limitation the requirements set out in paragraphs 2.8.1 to 2.8.4 inclusive of this Part 1.
- 2.8.1 Mechanical and electrical elements, including but not limited to all cables, ducting, pipework, hot and cold water systems, security and communications systems, IT infrastructure, lighting and life safety systems shall be examined and tested in a manner appropriate to the element and/or as provided for in the Operation and Maintenance manual for the element.
- 2.8.2 All mechanical and electrical elements of the [Project Facility] (with the exception of lamps and other consumables) shall have a Residual Life as required by Table 1 of this Part 1 or, where not specified, of at least [●] years.
- 2.8.3 All lamps shall have been renewed within the last [●] months of the Contract Period.
- 2.8.4 If the Residual Life of an element cannot be determined by such examination and testing, then other methods may be used where agreed by the Authority's Representative in accordance with paragraph 1.2.
- 2.9 A detailed inspection shall be made at the Final Inspection and Handover Inspection of all internal finishes, fixtures and fittings by a suitably qualified and professional architect.

2.9.1 All [to be identified] shall have a detailed inspection for wear and tear and an assessment made of their Residual Life.

2.9.2 If the Residual Life of an element cannot be determined by such examination and testing, then other methods may be used where agreed by the Authority's Representative in accordance with paragraph 1.2.

2.10 Other Elements

2.10.1 Where, during the Final Inspection, visual or hydraulic checks of the drainage systems indicate that further surveys are required, the relevant section of the building and Site drainage shall be surveyed using closed circuit television.

2.10.2 The inspection of mature trees, areas of tree and shrub planting, grassed areas, fencing/walling, water features (ponds, lakes and fountains), shall take place between [●]. If the time at which the Final or Handback Inspection is otherwise required to be carried out under the provisions of Clause 55 does not include any period between [●], then the inspection of the elements referred to in this paragraph 2.9.2 shall take place during the period of [●] which is closest in time to the time required for such inspection under Clause 55.

2.10.3 All plant material on the [Project Facility] shall, at the Handback Inspection, be in good health and substantially free from pests, diseases and physical damage.

2.10.4 All [●] hard-landscaped areas shall be inspected and surveyed for structural integrity and for wear and tear at the Final Inspection and for wear and tear at the Handover Inspection.

2.11 General

2.11.1 Account shall be taken of maintenance and purchasing records in determining the Residual Life of proprietary products.

Principal Element	Life Expectancy (years)
[●]	[●]
[●]	[●]
[●]	[●]
[●]	[●]
[●]	[●]
[●]	[●]
[●]	[●]
[●]	[●]
[●]	[●]

[CLAUSE 55 - SCHEDULE]

HANDBACK REQUIREMENTS

ANNEX 1 TO PART 1

Residual Life of Other Elements

3. GENERAL

- 3.1 If no Residual Life is specified for an element as described in paragraphs 2.6 to 2.10 of Part 1 of this [Clause 55 - Schedule] or Table 2 of this Annex 1 to this Part 1, then that element shall have a Residual Life equal to the greater of one quarter of the Serviceable Life of that element or [●] years or, if the element has a Serviceable Life of less than [●] years, it shall have been renewed during the last [●] months of the Contract Period.

PPP Co to complete Table 2 below:-

**Table 2
Other Elements**

Residual Life of

Element	Residual Life (years)
[PPP Co to complete descriptions]	

NRA MODEL CONTRACT DRAFTING

[●] HANDBACK

[●].1 Handback Requirements

- (a) Upon the Expiry Date, each element of the Project Road shall comply with the Handback Requirements.
- (b) The Renewal Works shall be carried out in accordance with the relevant parts of the Construction Requirements and the Certification Procedure (as if references to Works contained therein were references to Renewal Works and the Handback Requirements).

[●].2 Initial Inspection

- (a) Not less than 57 (fifty-seven) months nor more than 63 (sixty three) months prior to the Expiry Date, the PPP Co and the Authority's Representative shall conduct a joint inspection (the "**Initial Inspection**") of the pavement of the Project Road and all Structures forming part of the Project Road. If no date for the Initial Inspection has been agreed between the PPP Co and the Authority's Representative, the Authority's Representative may initiate the Initial Inspection during such period by

giving at least 30 (thirty) days notice to that effect to the PPP Co and such inspection shall be conducted on the date specified in such notice. The cost of such Initial Inspection shall be borne by the PPP Co.

- (b) Such inspection shall comply with the requirements set out in Schedule [●] (Handback Requirements).

[●].3 Renewal Programme

- (a) Within 90 (ninety) days after the completion of the Initial Inspection, the PPP Co shall provide to the Authority's Representative a report on the condition of the pavement of the Project Road and the Structures and a notice setting out:
 - (i) the PPP Co's proposals as to the Renewal Works;
 - (ii) the PPP Co's proposals as to the Renewal Programme; and
 - (iii) the PPP Co's estimate of the Renewal Amount.
- (b) The proposals referred to in Clause [●].3(a)(i) shall be made, inter alia:
 - (i) on the basis of an assessment of the Residual Life of the relevant element of the Project Road in accordance with Schedule [●] (Handback Requirements); and
 - (ii) on the assumption that the Project Road will be maintained in accordance with the O&M Requirements until the Expiry Date.
- (c) The Authority's Representative may, within 90 (ninety) days after receipt of the notice from the PPP Co in accordance with Clause [●].3(a), by notice to the PPP Co object to the proposals in respect of any or all of the Renewal Works, the Renewal Programme and the Renewal Amount as set out in the PPP Co's notice. The notice from the Authority's Representative shall give details of the grounds for such objection and shall give the Authority's Representative's proposals in respect of the Renewal Works and Renewal Programme and his estimate of the Renewal Amount.
- (d) If no agreement is reached between the PPP Co and the Authority's Representative as to any matter referred to in the notice given in accordance with Clause [●].3(c) within 60 (sixty) days of receipt by the PPP Co of such notice, then either the PPP Co or the Authority's Representative may refer the matter to the Disputes Resolution Procedure for determination:
 - (i) in the case of an objection in respect of the Renewal Works, as to whether or not the objection is justified and as to whether any alternative proposals by the Authority's Representative are more appropriate to ensure that the pavement of the Project Road and the relevant Structures will satisfy the Handback Requirements on the Expiry Date (on the basis referred to in Clause [●].3(b));
 - (ii) in the case of an objection in respect of the Renewal Programme, as to what programme would be reasonable for the implementation of the Renewal Works; and
 - (iii) in the case of an objection in respect of the Renewal Amount, as to what amount would represent the reasonable cost of carrying out the Renewal Works, on the assumption that such Renewal Works will be carried out in accordance with Good Industry Practice.

- (e) Upon agreement or determination in accordance with the Disputes Resolution Procedure of the Renewal Works and the Renewal Programme, the PPP Co shall procure that the Renewal Works are carried out in accordance with the Renewal Programme. For the avoidance of doubt, the PPP Co shall procure, at its own cost, that the Renewal Works are carried out notwithstanding that the actual cost of the Renewal Works may be higher than the Renewal Amount.
- (f) For the avoidance of doubt, neither the agreement of the Authority's Representative to any Renewal Works, Renewal Programme or Renewal Amount, nor the participation of the Authority's Representative in any inspection under this Clause [●] (Handback), nor the complete or partial carrying out of the Renewal Works shall relieve or absolve the PPP Co from:
 - (i) fits obligations under Clause [●].1 (Handback Requirements); or
 - (ii) any obligation to conduct any other inspection or perform any other works in accordance with the O&M Requirements.

[●].4 Second Inspection

- (a) Not less than 15 (fifteen) months nor more than 18 (eighteen) months prior to the Expiry Date, the PPP Co and the Authority's Representative shall conduct a joint inspection, the cost of which inspection shall be borne by the PPP Co (the "**Second Inspection**") of all elements of the Project Road, including without limitation the pavement and the Structures referred to in Clause [●].2(a) (Initial Inspection) (whether or not the Renewal Works in respect of the pavement and such Structures have been carried out).
- (b) Such inspection shall comply with the requirements set out in Schedule [●] (Handback Requirements) as applicable to each element of the Project Road.

[●].5 Revised Renewal Programme

- (a) Within 60 (sixty) days after the completion of the Second Inspection, the PPP Co shall provide to the Authority's Representative a report on the condition of the Project Road and a notice setting out:
 - (i) the PPP Co's Proposals as to any revisions or additions to the Renewal Works (including without limitation those referred to in Clause [●].5(f)) required in order to procure that all elements of the Project Road will, on the Expiry Date, satisfy the Handback Requirements;
 - (ii) the PPP Co's Proposals as to any revisions to the Renewal Programme as a consequence of such revisions or additions to the Renewal Works; and
 - (iii) the PPP Co's estimate of any changes in the Renewal Amount as a consequence of such revisions or additions to the Renewal Works.
- (b) The proposals referred to in Clause [●].5(a)(i) shall be made, inter alia, on the basis set out in Clause [●].3(b) (Renewal Programme).
- (c) The Authority's Representative may, within 20 (twenty) Working Days after receipt of the notice from the PPP Co in accordance with Clause [●].5(a), by

notice to the PPP Co object to any proposed revisions or additions to any or all of the Renewal Works, the Renewal Programme and the Renewal Amount as set out in the PPP Co's notice. The notice from the Authority's Representative shall give details of the grounds for such objection and shall give the Authority's Representative's proposals in respect of such matters.

- (d) If no agreement is reached between the PPP Co and the Authority's Representative as to any matter referred to in the notice given in accordance with Clause [●].5(a)(iii) within 20 (twenty) Working Days of receipt by the PPP Co of such notice, then either the PPP Co or the Authority's Representative may refer the matter to the Disputes Resolution Procedure for determination:
- (i) in the case of an objection in respect of any revisions or additions to the Renewal Works, as to whether or not the objection is justified and as to whether any alternative proposals by the Authority's Representative are more appropriate to ensure that each element of the Project Road will satisfy the Handback Requirements on the Expiry Date (on the basis referred to in Clause [●].3(b) (Renewal Programme));
 - (ii) in the case of an objection in respect of any revisions to the Renewal Programme, as to what programme would be reasonable for the implementation of the Renewal Works (as revised or added to in accordance with the provisions of this Clause [●].5; and
 - (iii) in the case of an objection in respect of any change in the Renewal Amount, as to what amount would represent the reasonable cost of carrying out the Renewal Works (as revised or added to in accordance with the provisions of this Clause [●].5).
- (e) Upon agreement or determination in accordance with the Disputes Resolution Procedure of any revision or addition to the Renewal Works or the Renewal Programme, the PPP Co shall procure that the Renewal Works (as so revised or added to) are carried out in accordance with the Renewal Programme (as so revised). For the avoidance of doubt, the PPP Co shall procure, at its own cost, that the Renewal Works (as so revised or added to) are carried out notwithstanding that the actual cost of the Renewal Works may be higher than the Renewal Amount (as changed in accordance with this Clause [●].5).
- (f) The Renewal Works proposed pursuant to Clause [●].5(a)(i) shall include, inter alia, the following:
- (i) the renewal of all reflecting road studs on the Project Road within the last 6 (six) months of the Contract Period, provided that metal housings having a Residual Life of at least 5 (five) years at the Expiry Date need not be renewed; and
 - (ii) the renewal of all lamps on the Project Road within the last 6 (six) months of the Contract Period.

[●].6 Handback Inspection

- (a) Not later than 20 (twenty) Working Days after the Expiry Date, the PPP Co and the Authority's Representative shall conduct a joint inspection of the Project Road (the "**Handback Inspection**"). The cost of the Handback

Inspection will be borne by the PPP Co. Such inspection shall comply with the requirements set out in Schedule [●] (Handback Requirements) as applicable to each element of the Project Road.

- (b) Within 90 (ninety) days after the completion of the Handback Inspection, the Authority's Representative shall either:
 - (i) issue to the PPP Co a Handback Certificate; or
 - (ii) notify the PPP Co in writing of his decision not to issue the Handback Certificate and state the reason for such decision.
- (c) The Authority's Representative may refuse to issue the Handback Certificate if:
 - (i) the PPP Co shall have failed to complete all of the Renewal Works; or
 - (ii) the Project Road for any reason does not comply with the Handback Requirements in all respects.
- (d) Any notice given by the Authority's Representative in accordance with Clause [●].6(b)(ii) shall set out each respect in which the Renewal Works have not been completed or the Project Road does not comply with the Handback Requirements and shall state the Authority's Representative's estimate of the cost of completing such Renewal Works and/or of procuring that the Project Road comply in all respects with the Handback Requirements.
- (e) The PPP Co may, within 20 (twenty) Working Days after receipt of a notice given in accordance with Clause [●].6(b)(ii), by notice to the Authority's Representative object to any matter set out in the Authority's Representative's notice. The notice from the PPP Co shall give details of the grounds for such objection and shall give the PPP Co's Proposals in respect of such matters.
- (f) If no agreement is reached between the PPP Co and the Authority's Representative as to any matter referred to in the notice given in accordance with Clause [●].6(e) within 60 (sixty) days of receipt by the Authority's Representative of such notice, then either the PPP Co or the Authority's Representative may refer the matter to the Disputes Resolution Procedure for determination, as the case may be:
 - (i) whether the Renewal Works have been completed;
 - (ii) whether the Project Road complies in all respects with the Handback Requirements; and
 - (iii) of the estimated cost of procuring that such Renewal Works are completed and that the Project Road complies in all respects with the Handback Requirements.
- (g) If it is agreed or determined in accordance with the Disputes Resolution Procedure that the PPP Co has not completed the Renewal Works or that the Project Road does not comply in all respects with the Handback Requirements, then without prejudice to any other right or remedy of the Authority the PPP Co shall pay to the Authority an amount equal to the

estimated cost of completing such Renewal Works or procuring that the Project Road complies in all respects with the Handback Requirements, as agreed or determined in accordance with Clause [●].6(f) (the “**Handback Amount**”). Such payment shall be made not later than 10 (ten) Working Days after such estimated cost has been agreed or determined in accordance with this Clause [●].6.

[●].7 Retention Account

The following provisions of this Clause [●].7 shall not apply if, not later than the date which is 5 (five) years prior to the Expiry Date, the PPP Co procures that a performance guarantee is provided to the Authority in respect of the PPP Co's obligations under this Clause [●] (Handback) (other than this Clause [●].7) by a bank or other party Approved by the Authority and in form and substance acceptable to it.

- (a) The Authority and the PPP Co shall procure that the Retention Account is established with a bank located in the State approved by the Authority not later than the date which is 5 (five) years prior to the Expiry Date. The Authority may (if it so chooses) by notice in writing to the PPP Co, designate the Retention Account as a “**Retention Account**” in which event the PPP Co shall grant a charge to the Authority over the Retention Account. Any interest accrued on any money standing to the credit of the Retention Account shall be credited to the Retention Account. All sums standing to the credit of the Retention Account from time to time, including without limitation any accrued interest, shall be dealt with only in accordance with the following provisions of this Clause [●] (Handback).
- (b) Subject to Clause [●].7(c), from the date which is 5 (five) years prior to the Expiry Date, the PPP Co shall pay into the Retention Account a sum equal to 40% (forty) percent [of the toll revenue received by the PPP Co in the preceding Contract Year after the Revenue Share has been paid to the Authority]¹. The PPP Co shall deposit such sum into the Retention Account on that date and thereafter annually on the anniversary of such date or the first day thereafter.
- (c) When the amount standing to the credit of the Retention Account (including any accrued interest but less any bank charges and less any deductions required by any Law or Legal Requirement to be made from such account) is equal to the Renewal Amount, then subject to Clause [●].7(e)(i) the PPP Co shall not be required to deposit any further sums in accordance with Clause [●].7(b).

To the extent:

- (i) part of the Renewal Works have been completed as required (the cost of which completed part exceeds 100,000 (one hundred thousand) Euro (Indexed));
- (ii) the PPP Co has notified the Authority's Representative of such completion;
- (iii) the Authority's Representative does not within 20 (twenty) Working Days of receipt of such notice object to any of the details contained

¹

Clearly, a different benchmark will need to be used on the DBFOM contract as there is no revenue stream from third party users.

therein; and

- (iv) the amount standing to the account of the Retention Account exceeds the Renewal Amount,

the PPP Co shall be permitted to withdraw the lower of (A) the value of the Renewal Works completed or such lower figure as the Authority's Representative has determined, acting reasonably, as not being subject to objection and (B) the amount standing to the credit of the Retention Account which exceeds the Renewal Amount (as adjusted to reflect the completion of the relevant part of the Renewal Works in respect of which a withdrawal is to be made).

- (d) If, following the Initial Inspection, it is agreed or determined in accordance with Clause [●].3 (Renewal Programme) that no Renewal Works are required, then within 10 (ten) Working Days of such agreement or determination the Authority and the PPP Co shall pay to the PPP Co all sums standing to the credit of the Retention Account (including any accrued interest but less any bank charges and less any deductions required by any Law or Legal Requirement to be made from such account), but without prejudice to the provisions of Clause [●].7(e).
- (e) If, as a result of the Second Inspection:
 - (i) the Renewal Amount is increased, then the provisions of Clause [●].7(b) shall apply mutatis mutandis, or shall again apply, until the amount held in the Retention Account equals the increased Renewal Amount; or
 - (ii) there is a decrease in the Renewal Amount, such that the total amount held in the Retention Account (including accrued interest but less any bank charges and less any deductions required by any Law or Legal Requirement to be made from such account) exceeds the revised Renewal Amount, then the Authority and the PPP Co shall, within 10 (ten) Working Days of the agreement or determination of the revised Renewal Amount in accordance with the provisions of Clause [●].5 (Revised Renewal Programme), pay the amount of such excess out of the Retention Account to the PPP Co.
- (f) Within 10 (ten) Working Days after the issue of a Handback Certificate in accordance with Clause [●].6(b)(i) (Handback Inspection), the Authority and the PPP Co shall pay the monies standing to the credit of the Retention Account (including any accrued interest but less any bank charges and less any deductions required by any Law or Legal Requirement to be made from such account) to the PPP Co.
- (g) If the Authority's Representative gives a notice in accordance with Clause [●].6(b)(ii) (Handback Inspection), then pending the agreement or determination in accordance with the Disputes Resolution Procedure of all matters referred to in that notice, the Authority and the PPP Co shall retain in the Retention Account whichever is the lesser of:
 - (i) the amount standing to the credit of the Retention Account (including accrued interest); and
 - (ii) the amount stated by the Authority's Representative in the notice given in accordance with Clause [●].6(b)(ii) (Handback Inspection)

as his estimate of the cost of completing the Renewal Works and/or of procuring that the Project Road complies in all respects with the Handback Requirements,

and the balance (if any) of any amount standing to the credit of the Retention Account (including any accrued interest but less any bank charges and less any deductions required by any Law or Legal Requirement to be made from such account) shall be paid to the PPP Co In accordance with Clause [●].7(f).

- (h) If any sum is retained in the Retention Account in accordance with Clause [●].7(g), then the Authority and the PPP Co shall continue to hold such sum in the Retention Account pending the agreement or determination under the Disputes Resolution Procedure of all matters raised in the notice given by the Authority's Representative in accordance with Clause [●].6(b)(ii) (Handback Inspection).
- (i) Within 10 (ten) Working Days after the agreement or determination in accordance with the Disputes Resolution Procedure of the Handback Amount, the Authority and the PPP Co shall pay out of the Retention Account to the Authority an amount equal to the Handback Amount or, if the amount standing to the credit of the Retention Account is insufficient to pay the Handback Amount in full, the entire amount (including accrued interest but less any bank charges and less any deductions required by any Law or Legal Requirement to be made from such account) standing to the credit of the Retention Account. Any remaining sums standing to the credit of the Retention Account (after deducting the amount payable to the Authority and any bank charges and any deductions required by any Law or Legal Requirement to be made from such account) shall be paid by the Authority and the PPP Co out of the Retention Account to the PPP Co.
- (j) If the amount standing to the credit of the Retention Account is less than the Handback Amount, then the payment of any sum to the Authority in accordance with Clause [●].7(i) in or towards satisfaction of the Handback Amount shall not in any way prejudice or affect any other rights or remedies of the Authority for the purpose of recovering the remainder of the Handback Amount.
- (k) Upon the occurrence of an Event of Default, the Authority may, at its option and without prejudice to any of its other rights or remedies, require that any amount standing to the credit of the Retention Account be applied in payment of any amount due from the PPP Co to the Authority or becoming due as a consequence of such Event of Default or any termination of this Agreement (including, without limitation, any damages arising from such Event of Default). The PPP Co and the Authority shall pay to the Authority out of the Retention Account such sum or, if the amount standing to the credit of the Retention Account is insufficient to pay such amount in full, the entire amount (including accrued interest but less bank charges and less any deductions required by any Law or Legal Requirement to be made from such account) standing to the credit of the Retention Account upon termination of this Agreement. Any remaining sums standing to the credit of the Retention Account (after deducting the amount payable to the Authority and any bank charges and any deductions required by any Law or Legal Requirement to be made from such account) shall be paid by the Authority and the PPP Co out of the Retention Account to the PPP Co.

CROSS REFERENCES

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

- Clause 49 (PPP Co. Default Termination)

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

- D11 (Residual Equipment)
- D14 (Obsolescence incl. Technological)
- F9 (Residual Value)
- F12 (Adequacy of the Capital Replacement Fund)