

COMPILATION OF PPP TERMS AND CONDITIONS OF CONTRACT

PUBLIC SECTOR VERSION

CLAUSE 57: CONFIDENTIALITY

DBFOM CONTRACT

CONCESSION CONTRACT

OMF CONTRACT

INTRODUCTION

The parties' obligations in relation to confidentiality must be stated clearly.

References in this section need to relate to the Freedom of Information Acts 1997 and 2003.

The SPC /Operator should not release any project related information without the consent of the State Authority representative. Commercially sensitive information includes all information supplied as part of the tender process.

This compendium aims to supply, to the greatest extent possible, the non confidential terms and conditions of previous PPP contracts to state authorities.

SOPC3 GUIDANCE

25. INFORMATION AND CONFIDENTIALITY

25.1 INTRODUCTION

The Contract should determine whether information provided by the Authority to the Contractor and vice versa is to be treated as confidential. It should also specify the extent to which details in the Contract itself are confidential.

25.2 GOVERNMENT OPENNESS

25.2.1 *The "Code of Practice on Access to Government Information" (published by the Cabinet Office) provides that: "the approach to release of information should in all cases be based on the assumption that information should be released".*

25.2.2 *The requirements of Open Government suggest that PFI Contracts should be placed in the public domain as far as possible. Only "commercially sensitive" information, information the dissemination of which is contrary to the public interest or information which is personally private should be withheld. In the PFI context the key concern relates generally to "commercially sensitive" information and (for defence related projects particularly) issues of national security.*

25.3 RECOMMENDED APPROACH

25.3.1 *The recommended approach is that as much information in the Contract as possible should be placed in the public domain and only information which is specifically identified as commercially sensitive by the Contractor or identified and justified by the Authority as sensitive for public interest (including national security) reasons should be excluded. The parties should aim to*

achieve a pragmatic balance between the public sector's interest in transparency and the need for commercial confidentiality.

25.3.2 The Authority should make it clear at the start of a procurement that it is its intention to make the final Contract available to any relevant public sector body (e.g. the NHS Executive) in accordance with the Code of Practice on Access to Government Information (see Section 25.2 (Government Openness)). Access, however, to commercially sensitive information will be restricted in line with the particular confidentiality restrictions within the final Contract.

25.3.3 After short-listing, the Authority should negotiate with bidders as early as possible to define the scope of the information to be treated as commercially sensitive. If possible, the Authority should also agree with bidders when commercially sensitive matters will become non-sensitive to ensure maximum disclosure. Contracts should be structured if possible to facilitate easy removal of commercially sensitive elements.

25.3.4 The focus for whether information should be agreed to be "commercially sensitive" should be of disclosure causing real prejudice to the interests (legal and/or commercial) of the parties.

25.4 NATURE OF COMMERCIALLY SENSITIVE INFORMATION

25.4.1 The commercially sensitive aspects of Contracts differ greatly from sector to sector, depending on the maturity of the market. What may be commercially sensitive in one context may not be in another and sensitivity may also decline over time.

25.4.2 For example, for some types of contract, the only commercially sensitive information may be the financial provisions (e.g. the price and payment mechanism). Certain signed contracts have been lodged in the House of Commons library with only the money values blanked out and the Central IT Unit released copies of certain contracts on the same basis. In other contexts, however, the balance of risk transfer, some innovative construction or operational method and the payment mechanisms may be commercially sensitive (i.e. its disclosure may cause commercial harm), at least for a short period.

A suitable definition is as follows:

"Commercially Sensitive Information"

means any information which is agreed by the parties at the time of the Contract as being commercially sensitive.

25.4.3 Contractors are usually keen to ensure that proprietary information and details of pricing are kept confidential, so that their competitors cannot obtain any commercial advantage over them, for example, in any future competition. Financiers are likely to want to ensure details of the financing (such as the structure and pricing) are kept confidential from rivals and future borrowers and both of these interests are legitimate.

25.4.4 In some sectors, such as defence, the Authority may wish to keep certain contract details confidential to avoid prejudicing national security or other public interests. Other sectors may have their own particular sensitivities and certain information may need to be treated as confidential to avoid third party interference in the smooth running of the Contract.

25.5 RELATED MATTERS

25.5.1 Stock Exchanges have publicity requirements with which listed companies are required to comply. Companies raising finance through capital markets (e.g. through bond issues), in particular, must disclose details of Contracts and related documents. There are some exceptions to disclosure requirements, for example, where national security would be prejudiced. These type of disclosure requirements should be taken into account in negotiating the confidentiality obligations in the Contract, particularly if it is anticipated that a bond issue will

take place to refinance the Project after contract signature.

25.5.2 Authorities should recognise that attempts to keep contractual terms confidential amongst the private sector and financial community are to some extent cosmetic, as details of signed contracts will often become known over time. The advantage of greater openness on the public sector side is that Authorities planning projects should benefit similarly from gaining knowledge of positions agreed by Contractors and financiers on projects similar to those planned and to gain the benefits of competition, there is some advantage in making positions known. If there is a public offering or wide syndication, the prospectus or information memorandum will usually contain a great deal of detail on the contents of the Contract and other documents.

25.5.3 Contractors should note that the National Audit Office will require access to all relevant information from the Contracts which it requires for its audit purposes, irrespective of whether it is confidential or sensitive. The National Audit Office may also publish any information (including key contract terms, the contract price and results of bid evaluations) in its reports to Parliament. The Contract should ensure that the Comptroller and Auditor General is entitled to examine the Contractor's records.

CORE CONTRACT DRAFTING

57. CONFIDENTIALITY

57.1 Confidential Information

Each party agrees, for itself and its respective directors, officers, employees, servants, agents, professional advisers and sub-contractors, to keep confidential and not to disclose to any person (save as hereinafter provided) any of the terms of this Agreement which are of a confidential nature or any confidential or proprietary information provided to or arising or acquired by it pursuant to the terms or performance of this Agreement (including without limitation any such documents or information supplied in the course of proceedings under the Disputes Resolution Procedure) (together the “**Confidential Information**”).

57.2 Exceptions

Notwithstanding Clause 57.1 (Confidential Information), a party shall be entitled to disclose the whole or any part of the Confidential Information:

- (a) to its directors, officers, employees, servants, sub-contractors, agents, or professional advisers to the extent necessary to enable it to perform (or to cause to be performed) or to enforce any of its rights or obligations under this Agreement; or
- (b) when required to do so by Law or Legal Requirement or by or pursuant to the rules or any order having the force of law of any Court, association or agency of competent jurisdiction or any governmental agency; or
- (c) in the case of the PPP Co, to any bank, financial institution [or other potential investor in the Project (and their respective advisers) from whom it is seeking or obtaining finance in connection with the Project, including the Credit Providers and their advisers; or
- (d) to the extent that the Confidential Information has, except as a result of breach of confidentiality, become publicly available or generally known to the public at the time of such disclosure; or

- (e) to the extent that the Confidential Information is already lawfully in the possession of the recipient or lawfully known to it prior to such disclosure; or
- (f) to the extent that it has acquired the Confidential Information from a third party who is not in breach of any obligation as to confidentiality to the other party; or
- (g) to the extent required to enable a determination to be made under the Disputes Resolution Procedure; or
- (h) to the extent necessary to allow for the registration of any Necessary Consents; or
- (i) in the case of the Authority:
 - (i) to the extent required for the purpose of, the Design, the Construction or the conduct of the Operations in the event of termination of this Agreement or, any due diligence exercise undertaken by the Authority in connection with the Project; or
 - (ii) (without limitation to Clause 57.2(b)), in relation to the outcome of the procurement process for the Project as may be required to be published in the Official Journal of the European Union or elsewhere; or
 - (iii) to any other department, office or agency of the Government where required for parliamentary, governmental, administrative, statutory or judicial purposes; or
 - (iv) to include disclosing of any document to which the Authority is a party (including the Required Documents), which is related to this Agreement and, which the PPP Co (acting responsibly) agrees does not contain commercially sensitive information; or
 - (v) in the case of the confidential terms of this Agreement, after the expiry of [●] ([●]) years from the Expiry Date; or
 - (vi) for the purpose of publishing information (including payment structure) about the Project (other than financial and/or economic information relating to the PPP Co, which the PPP Co (acting reasonably) indicates is commercially sensitive information) as the Authority may deem appropriate from time to time; or
 - (vii) to provide copies and details of this Agreement and the Required Documents to any party having the purpose of compiling precedents,

and, in the cases of Clauses 57.2(a) and 57.2(c) above, upon obtaining from such person or entity to whom the disclosure is to be made an undertaking of strict confidentiality in relation to the Confidential Information in question.

57.3 Return of Confidential Information

At the end of the Contract Period each party shall return to the other such Confidential Information within its possession or control as may belong to the other party, save that this Clause 57.3 shall not apply, in the case of the Authority, to:

- (a) Confidential Information belonging to the PPP Co necessary for the Design, the Construction or the conduct of the Operations, which Confidential Information may be so used or applied by the Authority in relation to the Design, the Construction or

the conduct of the Operations; or

(b) User Data.

Comment: User Data is not currently defined in the Core Contract. In the NRA Model Contract, this is Traffic Data.

57.4 Continuation of Confidentiality Obligations

The obligations of the parties under this Clause 57 shall, subject to Clause 57.2 (Exceptions), be perpetual.

57.5 Publicity

Without prejudice to the generality of Clause 57.1 (Confidential Information), the PPP Co shall not (and shall procure that its Staff shall not), without Approval:

- (a) except where the PPP Co is expressly required to do so in order to comply with this Agreement, communicate directly or indirectly with the print or broadcast media or any agency or means of news or information dissemination whatsoever in relation to any matter concerning the Project; or
- (b) publish alone or in conjunction with any other person any articles or other material relating to any Dispute arising under this Agreement nor impart any information regarding any such Dispute except to its professional advisers and the Credit Providers and their advisers under obligations of confidentiality, except and to the extent that such publication shall arise out of any statutory or regulatory obligation applicable to the PPP Co.

57.6 Remedies

Without prejudice to any other rights and remedies that the other party would have, each of the parties agrees that damages may not be an adequate remedy for any breach of this Clause 57 and that the other party shall be entitled to the remedies of injunction, specific performance and/or other equitable relief for any threatened or actual breach of this Clause 57.

CROSS REFERENCES

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

- Clause 3 (Effectiveness of this Agreement)
- Clause 53 (Effect of Termination)
- Clause 56 (Dispute Resolution Procedure)

There are no references to this clause in the Risk Matrix.