

COMPILATION OF PPP TERMS AND CONDITIONS OF CONTRACT

PUBLIC SECTOR VERSION

CLAUSE 8: STATUTORY UNDERTAKERS

DBFOM CONTRACT

DBOM CONTRACT

INTRODUCTION

Many infrastructure projects involve interfaces with utilities, both during construction and in some cases, afterwards. Building works may also involve the relocation of utility apparatus. For road and rail projects the issues are more complicated: first, it is much more likely that there are interfaces during construction, for example the need to relocate apparatus: second, utilities will need to have access to work on their apparatus throughout the life of the project. The Core Contract drafting below deals with the more basic issues of diversionary works. The NRA Model Contract drafting deals with the complex interfaces which arise in relation to utilities in public roads, and provides for a sharing of costs and revenue levies arising from utility works. The Operating Contract provides for the development of an operating protocol for lineside working.

This issue is separate from the connection and supply of utilities to the Project.

CORE CONTRACT DRAFTING

8 STATUTORY UNDERTAKERS

8.1 Primary Duty of Co-ordination

The PPP Co covenants with the Authority to use its best endeavours to co-ordinate the execution of works of all kinds affecting the [Project Facility]:

- (i) in the interests of safety;
- (ii) so as to minimise the inconvenience to persons using the [Project Facility];
- (iii) so as to protect the structure of the [Project Facility], and
- (iv) in accordance with all relevant Law and Legal Requirements.

NRA MODEL CONTRACT DRAFTING

[●]. STATUTORY UNDERTAKERS

[●].1 Primary Duty of Co-ordination

- (a) The PPP Co covenants with the Authority to use its best endeavours to co-ordinate the execution of works of all kinds affecting the Project Road and, insofar as it is able, the Connecting Roads:
- (i) in the interests of safety;
 - (ii) so as to minimise the inconvenience to persons using the Project Road;
 - (iii) so as to protect the structure of the Project Road, and in accordance with all relevant Road Regulations.
- (b) The PPP Co shall comply with such directions as to the co-ordination of works of all kinds, including to the extent affecting the Project Road the co-ordination of works on the Connecting Roads, as the Authority may give from time to time consistent with Good Industry Practice provided that the Authority, subject to Law, shall consult with the PPP Co in respect of the co-ordination of such works with works being carried out by the PPP Co prior to issuing such directions.

[●].2 The Roads Act

- (a) In constructing and operating the Project Road and otherwise carrying out the Project, the PPP Co shall comply with the requirements of the Roads Act, any Road Regulations and any requirements of any relevant Road Authority to the extent that they relate to the Project and shall, subject to Clause [●].4 [below] (The Authority's Responsibility), carry out or permit the carrying out of the Statutory Undertaker Works.
- (b) The PPP Co shall notify the Authority of all proposed Diversionary Works necessary in connection with the Project and shall (to the extent possible) contract, commit or compromise in respect of such works with the relevant owners of such Apparatus and carry out any such works in accordance with the Roads Act and the Road Regulations, the relevant requirements of the relevant owners of such Apparatus and the provisions of this Clause [●].
- (c) Without prejudice to the right of the PPP Co to deal directly with the relevant owners of such Apparatus, the PPP Co shall be responsible for all costs of, and shall make all payments due to, the relevant owners of such Apparatus in connection with any Diversionary Works.
- (d) Subject to deduction from such sum by the Authority of any costs, fees and expenses incurred by the Authority in connection with such Diversionary Works by the relevant owners of such Apparatus, the Authority will pay to the PPP Co within 20 (twenty) Working Days of receipt any monies actually received by the Authority from the relevant owners of such Apparatus by way of compensation for such works in respect of the Project Road.
- (e) At the request of the PPP Co, and subject to an indemnity for all costs including administrative costs, general staff costs and overheads, the Authority will use its reasonable endeavours to recover all damages, losses, charges, fees, contributions and costs due to the Authority in its capacity as the Road Authority in respect of the Project Road pursuant to the Roads Act and the Road Regulations provided that, to the extent the Authority recovers amounts in respect of physical damage to the Project Road and/or Tolling Facilities which the PPP Co has rectified and/or in respect of Losses suffered or incurred by the PPP Co the Authority shall pay to the

PPP Co an amount equal to such recoveries (after deduction of any unreimbursed costs, fees and expenses).

- (f) The PPP Co shall notify the Authority of any breach of the Roads Act or offence committed or likely to be committed in respect of the Project Road of which the PPP Co is or should reasonably be aware and shall provide such information relating to such breach or offence as may be specified by the Authority.
- (g) The PPP Co shall, at all times, assist and facilitate the Authority in carrying out, and shall, to the extent within its power and control, take all steps reasonably necessary to ensure that the Authority is able to comply with, its duties under the Roads Act, and any Road Regulations insofar as such duties relate to the Project.

[●].3 Management of Operations Affecting Apparatus

- (a) The PPP Co shall not contract with, enter into binding commitments with, compromise with, give a notice of intention to proceed to, or impose obligations upon or seek to recover costs from Statutory Undertakers or carry out works affecting Statutory Undertakers without the prior Approval of the Authority (such Approval not to be unreasonably withheld) in the event that any such action could result in any costs (whether incurred directly or indirectly) in respect of which the Authority is responsible pursuant to Clause [●].4(b) (The Authority's Responsibility) below.
- (b) For the purposes of Clause [●].3(a) [above], the Approval of the Authority may be given from time to time either in terms relating to a particular contract, commitment, compromise or works or upon terms relating to particular classes of contracts, commitments, compromises or works.
- (c) Actions taken by the PPP Co pursuant to this Clause [●].3 shall not in any way limit or fetter the absolute discretion of the Authority in the discharge or exercise of its duties or powers under the Roads Act. The decision of the Authority on the merits of any recommendation made by the PPP Co pursuant to this Clause [●].3 shall not be subject to review under the Disputes Resolution Procedure.

[●].4 The Authority's Responsibility

- (a) Without prejudice to the PPP Co's obligations pursuant to Clause [●].1 [above] (Primary Duty of Co-ordination) the Authority shall from time to time, at the reasonable request of the PPP Co, notify Statutory Undertakers that, subject to the terms and conditions set out in this Clause [●] the PPP Co will be exercising the functions or will be performing the services set out in this Clause [●] (as the case may be) which would otherwise be exercised or performed by the Authority and notify the PPP Co promptly of any Statutory Undertaker's requirements or notices for roads other than the Project Road (but which affect the Project Road) which it receives pursuant to the Roads Act and any Road Regulations.
- (b) Where Statutory Undertaker Works are carried out on any section of the Project Road which is designated as a motorway pursuant to the Scheme Orders by or at the request of a Statutory Undertaker during the Operational Period and such Statutory Undertaker Works directly result in :-
 - (i) the PPP Co incurring a cost or expense in excess of 5,000 (five thousand) Euro (Indexed) which the Statutory Undertaker has not reimbursed or agreed to reimburse where the PPP Co has used its best endeavours to procure that such costs or expenses are reimbursed (an "unreimbursed expense"); or
 - (ii) the closure of a lane or part of a lane (excluding, for these purposes, the

hard shoulder) or a Toll Lane for more than 2 (two) days days and the PPP Co being able to demonstrate to the satisfaction of the Authority's Representative (acting reasonably) that any reduction in traffic has resulted directly in a loss of revenue to it in excess of (A) 10,000 (ten thousand) Euro (Indexed) over the duration of any one closure; or (B) 50,000 (fifty thousand) Euro (Indexed) in aggregate over the course of any Contract Year (the excess of any such loss being, the "**revenue loss**"),

the Authority shall be responsible for compensating the PPP Co for such unreimbursed expense and/or revenue loss to the extent that the PPP Co does not recover such amount from the Statutory Undertaker. For the avoidance of doubt, Performance Points shall not be allocated in relation to any lane closures resulting solely and directly from Statutory Undertaker Works.

Provided however that this Clause [●].4(b) shall be without prejudice to the PPP Co's obligation to operate and maintain the Project Road.

OPERATING CONTRACT DRAFTING

[●] Statutory Undertakings

The Operator shall comply with the Operating Protocol for [●] Working and shall participate in such meeting of the Operating Protocol Working Group as may be necessary. The Operator shall use reasonable endeavours to ensure that utilities, companies and their agents and contractors comply with the requirements of the Operating Protocol for [●] Workings.

KEY DEFINITIONS – USED IN CLAUSE 8 OPERATING CONTRACT DRAFTING

"Operating Protocol for [●] Working" means the protocol to be applied by the Operator and third parties in respect of working on or near [●].

"Operating Protocol Working Group" means the working group established for definition and implementation of the Operating Protocol for [●] Working.

CROSS REFERENCES

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

- Clause 20 (Project Undertakings – General)

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

- C5 (Utility Diversions)
- C 17 (Interruptions)