

COMPILATION OF PPP TERMS AND CONDITIONS OF CONTRACT

PUBLIC SECTOR VERSION

CLAUSE 9: SERVICES COMMENCEMENT CERTIFICATE

DBFOM CONTRACT

DBOM CONTRACT

INTRODUCTION

All construction contracts will provide for a procedure for certifying that the Works are satisfactorily completed, and PPP contracts are no exception.

On some PPP contracts (such as the Northern Ireland Standard Schools Contract 2003) the Authority, the Lenders and the Contractors will appoint an independent “Technical Adviser” to certify completion. This does not occur in any of the model contracts considered for the purposes of this compilation.

SOPC3 GUIDANCE

3.6 ACCEPTANCE AND SERVICE COMMENCEMENT

3.6.1 *Before Service Commencement and at points in the Contract where the Service changes significantly (for example on the introduction of a new asset or new operational procedures), the Contractor should be under an obligation to demonstrate that the arrangements put in place will meet the output specification in the Contract. The method of demonstration by the Contractor will be dependent on each situation but may take the form of:*

- *a completion inspection of any asset built or developed with demonstration of principal facilities and services;*
- *completion of acceptance trials for new services; and*
- *other performance tests or inspections.*

3.6.2 *The Contract should set out in detail:*

- *the form of the tests, inspections or demonstrations (“Tests”) to be carried out by the Contractor;*
- *the timetable for the Tests – it may be appropriate to undertake partial Tests over a period rather than a single Test;*
- *the consequences of a failure to pass a Test;*
- *the notice of the Tests to be given by the Contractor to the Authority – this is particularly important if the Authority has to roster staff and resources to participate. If it is essential for the Authority to attend the Tests, the Contract should specify a time period for the Authority to respond to the notice and, to the extent that the Authority does not respond in time, a Compensation Event will have occurred (see Section 5.2 [of the SoPC3 Guidance] (Compensation Events)) although the Authority can still attend once it has responded;*
- *the responsibility for the cost and organisation of resources for the Tests.*

Again this is particularly important if the Authority's staff and resources are to be involved (also the responsibility for costs if Tests have to be repeated should be considered);

- the access for the Authority to witness the Tests (if the Authority does not control the site);
- the documentation required by the Authority as evidence of the results of the Tests;
- who is responsible for assessing satisfaction of the Tests – this should, in most cases, be done by joint assessment by the Authority and the Contractor or by an independent third party, although there will be cases where both parties accept that the Authority is the best judge (e.g. with defence equipment projects the best judge of whether the equipment behaves like it should are its users). The Authority should in no circumstances rely on any technical or other adviser appointed solely on behalf of the Senior Lenders, but may accept an adviser that has been jointly appointed and owes duties to all sets of interested parties; and
- the timing and procedure for acceptance of Service Commencement if the results of the Tests are satisfactory. Acceptance may be confirmed by the third party tester or by the Authority, in which case again the Compensation Event consequence of being late should be borne in mind if the Service cannot commence before any such confirmation is issued.

3.6.3 At the time of acceptance of the Service, there must be no “approval” of the means of delivery of the Service, as this may involve the Authority in taking back part of the Contractor's risk. Rather, acceptance should be based as far as possible on satisfaction by the Contractor of objective Service Commencement based tests.

Comment: The certification process in the Core Contract drafting could be construed as approval in this sense.

3.6.4 As stated in Section 3.2.5 [of the SoPC3 Guidance], the Authority should not generally accept stages of work (e.g. by signing off milestones) prior to the Service Commencement Date and delivery of the full Service as this dilutes risk transfer. In certain projects, however, it may be appropriate for the Authority to commence payment before a complete service is available. The principal examples of these are as follows:

- in roads projects, where the Highways Agency issues a permit allowing traffic to use the road once certain safety standards have been achieved, although construction may not be fully completed. Final acceptance of the road takes place once the Contractor has completed the outstanding construction works and the payment mechanism is structured to ensure that the Contractor is incentivised to do so;
- in accommodation projects, the Authority may accept Service Commencement where certain minor aspects of the construction works are incomplete but which are not integral to the Contractor's ability to provide the main Service – this may be done by specifying particular areas (e.g. landscaping works) or through more generic descriptions (e.g. “de minimis defects, shrinkages or faults”). Whether this is agreed prior to or after signature of the Contract, the Authority must ensure that the Contractor remains incentivised through the payment mechanism to complete the outstanding works. The Authority's technical adviser should advise on what aspects of the works can be completed after Service Commencement;
- in light rail projects where milestones trigger payments of grant, or where a portion of the repayments are derived from fare box revenues;
- in certain projects there may be aspects of the project for which the Authority retains a part of the risk deliberately, as it will ultimately retain responsibility for a part of the overall Service; and
- in projects in which Service Commencement is phased (i.e. different buildings or pieces of equipment are brought into service at different times), then an appropriate phasing in the introduction of payments (again with built-in incentives) may be appropriate.

3.6.5 In projects where Service Commencement is phased, there are two clear alternatives available to the Authority:

- to stipulate that full Service Commencement will only be accepted when all phases in the scheme reach the required output specification level, which would incentivise the Contractor

to bring them all up to the output specification standard as quickly as possible. This would mean, however, that the Authority would receive the full output specification level of service for some phases without paying for it; or

- to accept full Service Commencement as each phase reaches the output specification standard, so that payments reflect the service received. A slight variant to this that may be adopted in very large grouped schemes, where it would be administratively cumbersome to have phase by phase Service Commencement, would be to accept Service Commencement in batches as full service availability is confirmed. If this approach is adopted, some of the incentive effect of the first alternative above can still be achieved if payment is not increased pro rata as phases reach the output specification, so that there is in effect an amount retained or abated until the last phase reaches Service Commencement.

3.6.6 The overall time period until the planned completion and service commencement of the last phase is likely to have a significant impact on the relative value for money of these two alternatives – the longer the period, the more reluctant the Contractor is likely to be to accept the delayed payment involved in the first alternative above.

3.6.7 For example, an educational establishment may want to move to actually start using the new facilities outside full term times, and preferably in the long summer break. The Authority should make clear its requirements in this respect in the ITN.

CORE CONTRACT DRAFTING

9. SERVICES COMMENCEMENT CERTIFICATE

9.1

- (a) [●] ([●]) Working Days prior to the date upon which the PPP Co expects all of the [Project Facility] to reach Completion and to be Operationally Complete, the PPP Co shall issue to the Authority's Representative a notice to that effect together with a list of known Outstanding Item to be carried out in accordance with Clause 9.4 as relevant to the part of the Works to which the notice refers.
- (b) If the PPP Co expects the [Project Facility] to reach Completion and to be Operationally Complete prior to the Target Services Commencement Date then it shall notify the Authority's Representative not less than [●] ([●]) Working Days prior to the date on which it expects the [Project Facility] to reach Completion and to be Operationally Complete and then the Authority may, if it agrees that the [Project Facility] has reached Completion and is Operationally Complete, issue the Services Commencement Certificate prior to the Target Services Commencement Date and so require the Operations to be performed from the day after such Services Commencement Certificate is issued and the Authority will in this event pay the Unitary Charge from that day but nothing in this Clause 9 shall affect the Authority's ability to make Deductions in accordance with Schedule [●] (Payment Mechanism) [Parts 9, 10 and 11 at [Clause 11 – Schedule], [Clause 27 – Schedule] and [Clause 43A – Schedule]] other than in respect of the Outstanding Items, in which case the provisions of Clause 9.4 shall apply. The Authority is not obliged to issue the Services Commencement Certificate prior to the Target Services Commencement Date.

9.2 The Authority's Representative shall within [●] ([●]) Working Days of receipt of such notice either:

- (a) to the extent that
- (i) the [Project Facility] has reached Completion and is Operationally Complete; and

- (ii) the Authority's Representative and the PPP Co agree the list of known Outstanding Items,
issue a Services Commencement Certificate, to which shall be attached such agreed list of known Outstanding Items (together with a counterpart) to the PPP Co,
- (b) notify the PPP Co that, in his opinion (acting reasonably), the [Project Facility] has not reached Completion and / or is not Operationally Complete. In that event, the Authority's Representative shall state in such notice details of the works and/or preparations necessary to perform the Works and/or Operations which are required to be undertaken and completed in order that the relevant part of the [Project Facility] reach Completion and be Operationally Complete.
- 9.3 In the event of the service of a notice by the Authority's Representative under Clause 9.2(b) and following completion by the PPP Co of such further works or other measures necessary or appropriate to remedy or remove the cause of the refusal to issue a Services Commencement Certificate, the PPP Co may give notice to the Authority's Representative that such further works have been completed or measures taken. The provisions of Clause 9.2 and this Clause 9.3 shall then apply mutatis mutandis except that the time limit in Clause 9.2 shall be [●] ([●]) Working Days.
- 9.4 The Outstanding Items shall be completed by PPP Co within [●] ([●]) Working Days of the issue of the Services Commencement Certificate or such longer period as the Authority and the PPP Co may agree in writing. To the extent that the Outstanding Items are not completed within such [●] ([●]) Working Days or such longer period as the Authority and the PPP Co have agreed in writing, Performance Points and Deductions shall apply in respect of the performance or non-performance of the Outstanding Items from the expiry of such period.
- 9.5 The PPP Co shall return the Services Commencement Certificate referred to in Clause 9.2(a) within [●] ([●]) Working Days of receipt thereof, which Certificate shall be signed by the PPP Co's Representative in acknowledgement of its receipt by the PPP Co. PPP Co shall retain the counterpart referred to in Clause 9.2(b).
- 9.6 In the event of a Dispute in regard to a notice under Clause 9.1(a) and/or 9.2(b) begin referred to the Dispute Resolution Procedure, the date on which the Services Commencement Certificate should properly have been issued under Clause 9.2(a) shall be determined by reference to the Disputes Resolution Procedure, and if that determination is a date earlier than the actual date of such issue the failure to issue the Services Commencement Certificate on the determined date shall be deemed to be a Compensation Event pursuant to paragraph 1 of Part 1 of [Clause 36 - Schedule] (Compensation Events, Relief Events and Force Majeure) and Clause 36 (Delays to Completion and Compensation Events) shall apply thereto.
- 9.7 In the event of a failure by the Authority's Representative to issue a Services Commencement Certificate for the Project Facility on the date on which it should have been issued where no notice has been served under Clause 9.1(a), without prejudice to Clause 51 (Authority Default Termination) the failure to issue the Services Commencement Certificate on such date shall be deemed to be a Compensation Event pursuant to paragraph 1 of Part 1 of [Clause 36 - Schedule] (Compensation Events, Relief Events and Force Majeure) and Clause 36 (Delays to Completion and Compensation Events) shall apply thereto.
- 9.8 Subject to Clause 9.6, as and from the date of issue of the Services Commencement Certificate for the [Project Facility], the [Project Facility] shall be made available for full use of the [Project Facility] by the Users.

CROSS REFERENCES

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

- Clause 28 (Land)

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

- C24 (Commissioning)