

# COMPILATION OF PPP TERMS AND CONDITIONS OF CONTRACT

## PUBLIC SECTOR VERSION

### CLAUSE 4: DURATION

#### DBFOM CONTRACT

#### CONCESSION CONTRACT

#### DBFM CONTRACT

#### DBOM CONTRACT

#### DBM CONTRACT

## INTRODUCTION

All PPP contracts exist for a defined term. The term will start on the day when the contract is signed, or sometimes later when certain conditions are satisfied, for example when planning permission is obtained. When the PPP Co is responsible for obtaining planning permission or other consents, the time gap between the time the contract is signed and the time the conditions are satisfied can be significant.

The Contract Period, including services, can commence on the date the contract comes into effect (either by signature or satisfaction of conditions), or on the date when the construction is scheduled to be completed. The first approach works when the PPP Co is allowed to finish early, and keep the benefit of the extra revenue generated as a result. Early completion may not always be appropriate; for example, in accommodation projects the public authority may not be ready to occupy the facility early. In accommodation projects early occupation may also require additional payments to the PPP Co.

If construction is delayed, delay eats into the term. Even if the PPP Co is allowed an extension of the time to complete the construction, there is usually no matching extension to the term. So, if the end of the term is defined by reference to when completion is scheduled, the drafting must be careful to ensure that an extension of the scheduled date for completion does not extend the term.

The State Authority may wish to agree a service commencement date. Failure by the PPP Co. to deliver the service by a Long Stop Date would allow the Authority to instigate a default of the contract. This approach ensures that the project has priority over other projects competing for the resources of the contractors.

The State Authority may wish to segment some aspects of the service delivery into a shorter duration to reflect the life of those assets, for example, the provision of information technology.

## SoPC3 GUIDANCE

*SoPC3 provides the following commentary in relation to the duration of the Contract:*

### **2.2 FACTORS TO CONSIDER**

*2.2.1 The Authority will wish to specify a duration which is expected to result in the best value for money solution for the Project. Factors to be taken into account when deciding on the duration of the Contract will include:*

- the service requirements of the Authority (see Section 7 [of the SoPC3 Guidance] (Service Requirements and Unavailability));*
- the possibility of alternative uses of assets for the Authority which might result in a significant residual value (see Sections 2.2.2 and 19 [of the SoPC3 Guidance] (Termination on Expiry of Service Period));*
- the affordability of the Service for the Authority, taking into account the expected useful economic life of the underlying assets (a longer duration may be preferable, from an affordability perspective, if assets involved in delivering the Project have a longer economic life);*
- the need for and timing of major refurbishment or asset refreshment programmes during the Contract (see Section 8 [of the SoPC3 Guidance] (Maintenance));*
- the likely term of the Senior Debt and the possibility of refinancing the Project (see Section 35 [of the SoPC3 Guidance] (Refinancing)) a longer debt service period could allow a longer duration; and*
- the possibility of an option to extend the term of the Contract by entering into a further contract period with the initial Contractor (this can equally be structured as a no cost early termination option – see Sections 19.2.5 and 19.6.3 [of the SoPC3 Guidance]) even if there is no alternative use.*

*2.2.2 Some assets (e.g. vehicles or property) may have an alternative use which means that they can generate revenue for the Contractor after the Contract expires (see Section 19 [of the SoPC3 Guidance] (Termination on Expiry of Service Period)). If this is the case, the Contractor may not expect to recover the full cost of financing its investment (i.e. debt and equity return) over the life of the Contract, as it will be able to recover the balance by putting the assets to such alternative use after the Contract expires (e.g. selling them). The price the Contractor charges to the Authority can therefore be lower and the Contract duration shorter than would be the case if the Contractor needed to recover all its costs over the life of the Contract (see Section 19.2 [of the SoPC3 Guidance] (Assets with No Alternative Use)).*

*2.2.3 Given the rapid pace both of technological change and Authority functions (particularly in projects such as hospitals), the Authority should ensure that the Contract is sufficiently flexible to allow changes to the Service over time (see Section 12 [of the SoPC3 Guidance] (Change in Service)). If, however, the Authority is concerned that changes will be so radical that the Service in its present form may become redundant it may wish to retain some flexibility by having shorter Contract periods, consistent with an affordable financing plan.*

*2.2.4 The impact of certain events on the duration of a Contract is dealt with in the Sections on Compensation Events (see Section 5.2 [of the SoPC3 Guidance] (Compensation Events)), Relief Events (see Section 5.3 [of the SoPC3 Guidance] (Relief Events)) and Force Majeure (see Section 20.3 [of the SoPC3 Guidance] (Termination on Force Majeure)). A delay in the Service Commencement Date should not lead to an extension of the Contract (see Section 5 [of the SoPC3 Guidance] (Delays)).*

## CORE CONTRACT DRAFTING

### 4. DURATION

Subject to Clause 3 (Effectiveness of this Agreement) this Agreement shall remain in effect for the Contract Period.

### KEY DEFINITIONS – USED IN CLAUSE 4 CORE CONTRACT DRAFTING

“Contract Period” means the period commencing on the Effective Date and expiring on the earlier of:

- (a) the Expiry Date; or
- (b) the Termination Date.

“Expiry Date” means the day falling [•] years after the earlier of the Target Services Commencement Date and the Services Commencement Date.

“Termination Date” means the date upon which this Agreement is terminated.

### CROSS REFERENCES

There are no cross references to this clause elsewhere in the Compendium.

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