

COMPILATION OF PPP TERMS AND CONDITIONS OF CONTRACT

PUBLIC SECTOR VERSION

CLAUSE 42: SET-OFF

DBFOM CONTRACT

CONCESSION CONTRACT

DBFM CONTRACT

DBF CONTRACT

OMF CONTRACT

INTRODUCTION

In brief, the Authority has a right to set off, so that when the Authority owes a sum to the Contractor, the Authority will be entitled to reduce that outstanding sum by any amount that is owed to it by the Contractor. Where the sum that is owed to the Contractor is compensation for termination of the contract, there are specific rules relating to this right to set off.

The Contractor does not have a right to set off, so that if the Contractor owes the Authority a sum of money he cannot reduce that outstanding sum by any amount that is owed to him by the Authority.

SOPC 3 GUIDANCE

11. PAYMENTS AND SET-OFF

11.1 INTRODUCTION

11.1.1 *The Authority should ensure that the Contract contains an express right for the Authority to deduct liquidated amounts owed to it by the Contractor under the Contract from any payments it is obliged to make to the Contractor (whether during the Service Period or on termination). This applies to liquidated damages and all other debts or liabilities owed to the Authority (including amounts owed in respect of failure by the Contractor to comply with its maintenance obligations at the end of the Contract (see Section 22 (Surveys on Expiry and Termination) [of the SoPC3 Guidance]). Senior Debt service should not be insulated from set-off or deductions.*

11.1.2 *Set-off on termination is dealt with specifically in Section 21.4 (Set-off on Termination) [of the SoPC3 Guidance].*

11.1.3 *The right to set off being described here does not apply to deductions for non-availability or substandard performance of the Service (see Section 10 (Price and Payment Mechanism) [of the SoPC3 Guidance]) as these are contractual deductions which apply automatically if the relevant circumstances arise (e.g. if the availability or performance criteria are not met). Disputes relating to these are dealt with under Section 27 (Dispute Resolution) [of the SoPC3 Guidance].*

11.2 SCOPE OF AUTHORITY'S RIGHT TO SET OFF

- 11.2.1** *Standard practice in all fields of civil procurement has been for the Authority to have the right to set off amounts owed to it by the Contractor against amounts due to the Contractor under any contract between the Contractor and the Crown. In practice, there are not likely to be any other contracts between the Contractor and the Crown, as the Contractor will usually be a single purpose vehicle whose only business is the project in question.*
- 11.2.2** *If the Contractor does have other contracts with the Crown, its third party financiers would be highly unlikely to allow it to agree to a wide set-off clause which enabled amounts relating to other contracts (whether PFI or non-PFI contracts) to be set off against amounts due under the Contract. Generally, the financiers will only agree to the Authority having the right to set off any ascertained amount owed to it by the Contractor under the Contract and Project Documents (subject to any agreed restrictions) against amounts the Authority owes to the Contractor under such documents. The Authority should not usually seek to extend such right as many of the value for money benefits of PFI projects come from isolating the rights and obligations of the Project from more general rights and obligations.*
- 11.2.3** *Over payments, liquidated damages and amounts claimed under indemnities are the only liquidated claims that are likely to give rise to a set-off. Provided that any relevant criteria are fulfilled, as specified in the Contract (e.g. the Planned Service Commencement Date is missed due to the Contractor's fault or the Authority suffers a loss due to a breach covered by an indemnity), then the applicable amounts should be calculated by the Authority and set off against the next payment. The determination of any dispute as to whether such criteria were fulfilled or about the level of any indemnity amount set off will also determine whether or not any amounts should be repaid. Interest should be paid on any amounts which it is determined should be repaid with effect from the due date see also Section 10.2.5 [of the SoPC3 Guidance] above).*
- 11.2.4** *To the extent an amount owed is disputed, the Authority should pay the undisputed amount, but be entitled to retain the disputed amount until the dispute is resolved (see Clause 27 (Dispute Resolution) [of the SoPC3 Guidance]).*

11.3 TIMING OF SET-OFF

- 11.3.1** *During the Service Period, any amount to be set off should generally be applied against the next payment of the Unitary Charge (or other payments) due after the amount owed by the Contractor has fallen due and payable (unless the Contractor has already paid the Authority the relevant amount).*

Comment: *The Core Contract drafting goes beyond SOPC, in allowing the Authority set-off disputes claims.*

CORE CONTRACT DRAFTING

42 SET-OFF

- 42.1** PPP Co shall not be entitled to retain or set off any amount due to the Authority by it, but subject to Clause 54.11 the Authority may retain or set off any amount owed to it by PPP Co under this Agreement and the Project Documents which is due to the Authority against any amount due to PPP Co under this Agreement.

If the payment or deduction of any amount referred to in paragraph 42.1 above is disputed then any undisputed element of that amount shall be paid and the disputed element shall be

dealt with in accordance with Clause 56 (Disputes Resolution Procedure).

ADDITIONAL CORE CONTRACT DRAFTING

[•].11 Rights of Set-Off

Comment: This sub-clause is dealt with in Clause 54 (Compensation on Termination).

To avoid doubt, the Authority's obligations to make any payment of compensation to the PPP Co pursuant to this Clause 54 are subject to the Authority's rights under Clause 42 (Set-Off), save that the Authority agrees not to set-off any amount agreed or determined as due and payable by the PPP Co to the Authority against any payment of termination compensation under Clauses 54.1 (Force Majeure and Uninsurable Risk and Change in Law), 54.3 (Termination for Authority Default), 54.4 (Voluntary Termination), 54.5 (Termination for breach of Refinancing Provisions), 54.6 (Corrupt Gifts and Fraud) and 54.7 (Tax Equalisation), save to the extent that after such an amount has been set off, the termination payment made would be in an amount greater than or equal to the Base Senior Debt Termination Amount, and/or Revised Senior Debt Termination Amount as the case may be.

CROSS REFERENCES

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

- Clause 3 (Effectiveness of this Agreement)
- Clause 41 (Payments)
- Clause 54 (Compensation on Termination)

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