

COMPILATION OF PPP TERMS AND CONDITIONS OF CONTRACT

PUBLIC SECTOR VERSION

CLAUSE 35: CHANGE IN LAW

DBFOM CONTRACT

CONCESSION CONTRACT

O&M CONTRACT

INTRODUCTION

In a PPP contract, change of law risk is usually shared. The PPP Co will be compensated for the cost of certain changes. Usually “discriminatory” changes of law are public sector risks. This means laws that discriminate against the project, or against PPP-type projects. In some projects, specific laws or other standards of particular relevance to the project are also covered.

Second, most PPP contracts provide for the Authority to take a share of *capital costs* incurred because of changes in law *after the construction is complete*. In some cases the PPP Co tenders the share of change of law risk it will take: this tendered percentage is used as a factor in assessing the most economically advantageous tender. If this approach is taken, it is important to ensure that the PPP contractor will have adequate resources – such as a standby facility – to meet this obligation.

The key commercial issues of allocation of change of law risk are usually reflected in the definitions. There is also a schedule dealing with the procedures. Below, we set out the drafting of the Core Contract definitions and the schedule, and some slightly different approaches reflected in the definitions in the Accommodation and Operating Contracts.

General changes in law absorbed by the PPP Co, in the most part, can be reimbursed when conducting benchmarking and market testing exercises.

SOPC3 GUIDANCE

SOPC3 provides the following commentary in relation to the issue of Change in Law:

13. CHANGE IN LAW

13.1 INTRODUCTION

13.1.1 *The Contractor must comply with all applicable legislation. A failure to comply could give rise to termination for Contractor Default (see Section 20.2 (Termination on Contractor Default [of SoPC Guidance])). The cost of complying with legislation which is current or foreseen at the time of the Contract should be built into the price the Contractor bids to provide the Service. Nevertheless, the Contractor may not, for example, be capable of including in the price specific costs arising from changes in law which are not foreseeable prior to contract signature. Accordingly, the issues concern who should be responsible for the costs arising from changes in law and how such costs should be*

funded.

13.1.2 *The treatment of changes in law relates very closely to the issues of indexation, benchmarking and market testing (see Section 14 (Price Variations) [of SoPC3 Guidance], particularly in relation to the risk of increases in operating costs. These provisions must be developed in conjunction with each other when negotiating the overall level of change in law risk to be transferred by the Authority. For example, the more often a Contract provides for benchmarking and market testing to occur (allowing upward revisions of price), then the more likely an apparently tougher change in law provision can be achieved by the Authority. It is recognised, however, that benchmarking, market testing and indexation provisions are not likely to have a significant bearing on the risk transfer position in relation to increases in capital costs due to a change in law.*

13.2 CONTRACTOR'S AND AUTHORITY'S CONCERNS

13.2.1 *Contractors have in the past expressed concern that change of law is a risk which it cannot control and which it regards as being within the control of the Authority or wider Government. In practice, however, many Authorities (particularly local authorities) have negligible influence over legislation whereas the private sector has traditionally proved adept at managing the effects of changes of law and minimising their impact on their business. Hence it is appropriate for the Contractor to bear or share in the risk.*

13.2.2 *Under more traditional commercial contracts, the Contractor is usually able to pass on the costs of changes in law to its customers through an increase in price or, in Contracts of relatively short duration, is able to take a view on the prospects of changes in law arising during the term of the contract. As the prices in PFI contracts are agreed on a long term basis and are not flexible in the same way, the Contractor will often not be in a position to price the full cost of changes in law effectively.*

13.2.3 *A sharing approach is the best way to ensure that the costs of implementing changes in law are minimised. The approach set out in this Section in respect of the sharing of risks relating to changes in law is intended to play to the strengths of both the public and private sectors and ensure that the Contractor is incentivised to manage its costs, even where the Authority agrees to meet the Contractor's costs resulting from complying with a change in law.*

13.3 DEFINITION OF CHANGE IN LAW

The Contract should specify that the Contractor is expected to comply with all relevant law and should contain a mechanism for handling the effects of a change in law.

13.4 ALLOCATION OF RISK OF CHANGE IN LAW

13.4.1 *In some projects, it is possible to treat changes in law of any type as the Contractor's risk. This has occurred in particular in projects in which such costs can be passed on to the users of the Project (e.g. toll bridges).*

13.4.2 *In other sectors, a risk sharing approach has developed where the main user of the Project is the Authority and it is not appropriate for the Contractor to bear all of the change in law risks as the risk cannot be quantified or passed on to third party users. There are a number of different possible approaches to risk sharing that build on the distinctions between discriminatory/specific legislation and general legislation. These all involve a sharing of the risk of changes in law.*

13.5 MITIGATION

13.5.1 *Whenever the Authority bears some of the risk of a change in law, the Contractor should be obliged to keep any cost increases to a minimum.*

13.5.2 *This duty to mitigate can be measured, in part, by reference to the extent to which price increases in comparable sectors are experienced. It will also require the Contractor to foresee and anticipate the effect of changes in law, particularly in relation to expenditure which it has planned to incur anyway in the ordinary course of the Contract. For example, a Contractor cannot on one day change a boiler under its normal maintenance programme and then argue that it immediately has to replace it due to a subsequent change in law which the Contractor should have anticipated at the time of replacement (and*

for which the Authority bears the cost in whole or in part). For that reason, any compensation should reflect any anticipated future saved maintenance costs.

13.6 DISCRIMINATORY, SPECIFIC AND GENERAL CHANGES IN LAW

13.6.1 [NOT USED]

13.6.2 [NOT USED]

13.6.3 Where a risk sharing approach is adopted in respect of Change in Law (as referred to in Section 13.4.2 [above]), any costs arising from Discriminatory Changes in Law and Specific Changes in Law should be at the Authority's risk.

13.7 GENERAL CHANGE IN LAW AT CONTRACTOR'S RISK

13.7.1 Costs arising from changes in non-discriminatory/non-specific legislation (i.e. General Changes in Law) can either be for the account of the Contractor or shared between the Contractor and the Authority.

13.7.2 General Changes in Law are generally only at the Contractor's sole risk in specific sectors where the length of the Contract is such that the Contractor is comfortable that the risk of General Changes in Law occurring is low, or where the relationship between the parties and the history of changes in the sector concerned is such that the Contractor is prepared to accept this risk. It is important, for example, in many MOD projects that this risk is passed to the Contractor.

13.7.3 Although the Contractor may appear to bear all the risk of General Changes in law, this approach will often involve some method of mitigating the effect on the Contractor. For example, market testing, benchmarking and/or indexation provisions will in fact lead to the sharing of some of this risk (see Section 14 (Price Variations) [of the SoPC3 Guidance]) in that additional operating costs may be reflected in increases to un Unitary Charge following a benchmarking or market testing and/or indexation, although the Contractor will bear such risk for the period up to benchmarking or market testing.

13.8 GENERAL CHANGE IN LAW AS A SHARED RISK

13.8.1 General Change in Law may affect the Project in a variety of ways. For example:

- the change may require alterations to the structure of a building or its fixtures (with an impact both on Capital Expenditure and, potentially, timetable); and
- the change may necessitate a change in the way a service is delivered (e.g. the number of people required to deliver it or the rights of employees may change).

13.8.2 Costs arising from General Changes in Law should generally be for the account of the Contractor, as the Contractor is protected through the combined effects of benchmarking, marketing testing and indexation.

13.8.2 This alternative approach recognises, however, that it may be more equitable for the Authority to share costs which are difficult for the Contractor to manage. An exception is therefore made of General Changes in Law which:

- require Capital Expenditure; and
- take effect during the Service Period (i.e. after construction is completed (but see Section 13.8.8)); and
- were not reasonably foreseeable at contract signature.

Under this approach the costs of a General Change in Law falling within this exception are shared between the Contractor and the Authority. If the change was reasonably foreseeable during the construction period although not yet in effect, the Contractor's obligation to mitigate (see Section 13.5 (Mitigation)) would require it to have taken all reasonable action to minimise the eventual cost of implementing such change (e.g. by altering construction works prior to completion). This approach promotes a shared incentive to keep the costs of a change in law to a minimum without exposing the

Contractor to excessive risk.

13.8.4 *An appropriate approach to sharing the risk of the type of change in law described in Section 13.8.3 is to share such risk on a progressive scale so that, for example, the Contractor takes 100% of the first £x of Capital Expenditure, 75% of the next £y, 50% of the next £z and so on (see the table set out in Section 13.8.9). Once a certain amount is reached, the Authority takes 100% of any amounts above that amount. The threshold figures agreed and the number of graduated steps will take into account the size of the Project and the impact of other factors such as the likelihood of environmental and health and safety legislation. The levels of Cumulative Capital Expenditure (see Section 13.8.9 [of the SoPC Guidance]) are not indexed (as the totals are cumulative, indexation can lead to unnecessary complication). The Contractor's total liability should generally be between 2% to 5% of the initial capital cost of the Project. A cap by reference to time is not recommended.*

13.8.5 *The advantage of sharing the risk in the way described (as opposed to the Contractor simply being liable for the first £x of Capital Expenditure) is that it both incentivises the Contractor to minimise the cost of implementing the change (as opposed to the Contractor simply invoicing the Authority for whatever it costs) and reduces any concern the Contractor has that the Authority can take advantage of the situation.*

13.8.6 *Although it is the responsibility of the Contractor to manage the way in which it will fund any increases in capital costs which occur as a result of a General Change in Law occurring during the Service Period, if it is clear to the Authority from the Preferred Bidder's Base Case that it has priced the risk at 100 percent, the Authority may wish to retain the risk on value for money grounds. For example, if the Base Case shows amounts being drawn from Senior Debt to fund a so called "Change in Law Reserve Account", the Authority is paying for this account to be placed in-funds as if it were an expected cost of the Contractor. Experience has shown however, that the competitive bidding process incentivises bidders to price the risk at less than 100 percent and Senior Lenders are typically comfortable that General Changes in Law can be managed either by: (i) standby finance; (ii) undrawn revolving working capital facilities; or (iii) building up sums over time from free cashflow without the need for a pre-funded Change in Law Reserve Account because:*

- *Changes in Law are usually consulted well in advance;*
- *there is normally a grace period for implementation; and*
- *such changes rarely apply retrospectively.*

The Authority should generally pay such Capital Expenditure in accordance with the principles set out in Section 12.4 (Means of Payment) [of the SoPC3 Guidance]. Any consequent operating cost increases are borne by the Contractor although these costs will be mitigated by the effects of market testing, benchmarking and/or indexation (see Section 14 (Price Variations) [of the SoPC3 Guidance]). The points made in Section 5.2.3 (Calculation of Compensation) [of the SoPC3 Guidance] are similarly relevant here.

13.8.8 *All other General Changes in Law requiring Capital Expenditure (e.g. those which take effect during a typical construction phase) should, with this approach, be at the risk of the Contractor in terms of time and money.*

13.8.9 *For projects which have unusually long construction periods, transferring the risk of General Changes in Law for the entire construction period (rather than adopting a sharing approach) may in fact be poor value for money and is likely to be difficult to achieve in practice.*

13.8.10 *Changes arising in operational costs as a result of a General Change in Law should also be borne by the Contractor (subject to Section 14 (Price Variations) [of the SoPC3 Guidance]). If a General Change of Law requires changes to the Service then either party should be entitled to require a variation to the project specifications to comply with a Change in Law and no breach of contract should arise while this is being done.*

13.9 CHANGES IN TAX LAW

13.9.1 *Discriminatory and specific changes in tax law should be dealt with in accordance with Section 13.6 (Discriminatory, Specific and General Changes in Law).*

13.9.2 *Whichever approach is adopted on General Changes in Law, all costs arising from changes in tax law that are general should be for the account of the Contractor, except as stated in Section 13.10 (Changes in VAT) in relation to changes in VAT legislation.*

13.10 CHANGES IN VAT

13.10.1 Changes in VAT Rate

13.10.1.1 *The Contract should be explicit regarding the consequences of a change in the rate of VAT affecting the Service. Where the Service is within the scope of VAT, a change in the rate will affect the Unitary Charge paid by the Authority. This risk is borne by the Authority.*

13.10.1.2 *A change in the rate of VAT may also affect the gross costs borne by the Contractor of input VAT is not reclaimable (i.e. the Service supplied by the Contractor to the Authority is specifically disallowed or relates to “exempt supplies” as at the date of the Contract). If the rate changes in relation to supplies received by the Contractor, then the Contractor will benefit or not in the same way as if its general corporation tax bill changes. This risk should, therefore, be borne by the Contractor.*

13.10.1.3 *Changes in the rate of VAT can lead to a cashflow cost or advantage. There is always a difference in timing of VAT payments and their recovery. A Contractor should not increase its Unitary Charge to deal with any such disadvantage, but instead should take such timing differentials into account in structuring its finance.*

13.10.2 Changes in VAT Scope

13.10.2.1 *During the course of the contract changes in the scope of VAT may affect the Contractor’s ability to recover its input VAT. The Contract should make it clear that the Contractor bears this risk unless it results from a change in the VAT status of the Service e.g. the Service becomes exempt from VAT. In this exceptional case, the Contract should provide for an adjustment to the Unitary Charge. Suitable drafting as follows:*

13.10.3 Payment of Irrecoverable VAT

*The Authority shall pay to the Contractor from time to time as the same is incurred by the Contractor sums equal to any Irrecoverable VAT but only to the extent that it arises as a result of a Change in Law. Any such payment shall be made within 20 days of the delivery by the Contractor to the Authority of written details of the amount involved accompanied by details as to the grounds for and computation of the amount claimed. For the purposes of this Clause 13.10 “**Irrecoverable VAT**” means input VAT incurred by the Contractor on any supply which is made to it which is used or to be used exclusively in performing the Works or the Services or any of the obligations or provisions under the Contract (together with input VAT incurred as part of its overhead in relation to such activities) to the extent that the Contractor is not entitled to repayment or credit from HM Customs & Excise in respect of such input VAT.*

CORE CONTRACT DRAFTING

35. CHANGE IN LAW

Schedule [●] (Change in Law) [Part 1 at [Clause 35 – Schedule]] shall have effect in respect of Change in Law during the Contract Period.

ADDITIONAL CORE CONTRACT DRAFTING

[CLAUSE 35 – SCHEDULE]

1. Change in Law

If a Qualifying Change in Law occurs or is shortly to occur, then either party may write to the other to express an opinion on its likely effects, giving details of its opinion of:

- 1.1 any necessary change to the Works and/or to the Operations;
- 1.2 whether any changes are required to the terms of this Agreement to deal with the Qualifying Change in Law;
- 1.3 whether relief from compliance with obligations is required, including the obligation of the PPP Co to achieve the Target Service Commencement Date and/or meet the O&M Requirements during the implementation of any Qualifying Change in Law;
- 1.4 any loss of revenue that will result from the Qualifying Change in Law;
- 1.5 any Estimated Change in Project Costs that directly result from the Qualifying Change in Law; and
- 1.6 any Capital Expenditure that is required or no longer required as a result of a Qualifying Change in Law taking effect during the Operational Period,

in each case giving in full detail the procedure for implementing the change in the Works and/or in the Operations. Responsibility for the costs of implementation (and any resulting variation to the Unitary Charge) shall be dealt with in accordance with paragraphs 2 (Parties to Discuss) to 5 (Unitary Charge Adjustment) below.

2. Parties to Discuss

As soon as practicable after receipt of any notice from either party under paragraph 1 (Change in Law) above, the parties shall discuss and agree the issues referred to in paragraph 1 (Change in Law) above and any ways in which the PPP Co can mitigate the effect of the Qualifying Change in Law, including:

- 2.1 providing evidence that the PPP Co has used reasonable endeavours (including (where practicable) the use of competitive quotes) to oblige the Contractor and the Operator to minimise any increase in costs and maximise any reduction in costs;
- 2.2 providing evidence that the PPP Co has used reasonable endeavours to minimise loss of revenue;
- 2.3 demonstrating how any Capital Expenditure incurred or avoided is being measured in a cost effective manner, including showing that when such expenditure is incurred or would have been incurred, foreseeable Changes in Law at that time have been taken into account by the PPP Co;
- 2.4 giving evidence as to how the Qualifying Change in Law has affected prices charged by any similar businesses to the Project, including similar businesses in which the shareholders or their Associated Companies carry on business;
- 2.5 demonstrating that any expenditure that has been avoided, which was anticipated to be incurred to replace or maintain assets that have been affected by the Qualifying Change in Law concerned, has been taken into account in the amount which in its opinion has resulted or is required under paragraph 1.5 and/or 1.6 above; and
- 2.6 demonstrating that any effect related to the residual value of the [Project Facility] (or part(s) thereof)

has been properly addressed.

3. Change Agreed

3.1 If the parties agree or it is determined under Clause 56 (Dispute Resolution) that the PPP Co is required to incur additional Capital Expenditure due to a Qualifying Change in Law (excluding the PPP Co's Share of any Capital Expenditure agreed or determined to be required as a result of a General Change in Law under this paragraph), then the PPP Co shall use its reasonable endeavours to obtain funding for such Capital Expenditure on terms reasonably satisfactory to it and the Senior Creditors.

3.2 The PPP Co's Share shall in every case be solely for the account of the PPP Co.

3.3 The Authority shall be entitled to any savings in Capital Expenditure and/or Operations Costs which result directly from a Qualifying Change in Law and there shall be a Unitary Charge adjustment to reflect such savings.

4. Financing

4.1 Subject to paragraph 3.1 if the PPP Co has used reasonable endeavours to obtain funding for capital expenditure referred to in paragraph 3, but has been unable to do so within [●] ([●]) days of the date that the agreement or determination in paragraph 3 occurred, then the Authority shall pay to the PPP Co an amount equal to that Capital Expenditure on the basis provided in paragraph 4.2 below.

4.2 Where funding is not available in accordance with paragraph 4.1:

4.2.1 the Authority and PPP Co shall agree:

4.2.1.1 a payment schedule in respect of the payment of such sum reflecting the amount and timing of the costs to be incurred by the PPP Co in implementing the Qualifying Change in Law to the extent borne by the Authority; and

4.2.1.2 where payment for part of the Qualifying Change in Law reflects the implementation of, or specific progress towards, an element within the Qualifying Change in Law, an objective means of providing evidence confirming that the part of the Qualifying Change in Law corresponding to each occasion when payment is due under the payment schedule appears to have been duly implemented,

(such payment schedule and evidence to be determined in accordance with [Clause 56 - Schedule] (Dispute Resolution Procedure) in the event of the Authority and PPP Co failing to agree as to its terms);

4.2.2 the Authority shall make a payment to PPP Co within 15 (fifteen) Working Days of receipt by the Authority of invoices presented to the Authority (in all material respects) in accordance with the agreed payment schedule (as the case may be, varied by agreement from time to time) accompanied by the relevant evidence (where applicable) that the relevant part of the Qualifying Change in Law has been implemented; and

4.2.3 if payment is not made in accordance with paragraph 4.2.2 above, the Authority shall pay interest to the PPP Co on the amount unpaid from the date ([●])[●] Working Days after receipt of the relevant invoice until paid at the Default Interest Rate in accordance with Clause 41.4 (Late Payments).

5. Unitary Charge Adjustment

5.1 Any compensation payable under this paragraph by means of an adjustment to or reduction in the Unitary Charge shall be in accordance with Part 10 (Unitary Charge Adjustment) of [Clause 27 –

Schedule] (Payment Mechanism).

- 5.2 The Authority shall only be obliged to pay amounts under this [Clause 35 - Schedule] in respect of a Change in VAT to the extent that:
- 5.2.1 The Change in VAT constitutes input VAT in respect of a supply made to the PPP Co, insofar as the supply is used by the PPP Co for the purposes of or in connection with the supplies made by the PPP Co under this Agreement or any Project Document; and
- 5.2.2 The Change in VAT does not arise or has not arisen or been increased by any act or omission (including the failure to make any appropriate option or election) of the PPP Co.

ANNEX 1

Determination of Proportion of Cost of capital expenditure to be borne by PPP Co.

Cumulative Capital Expenditure (expressed in euro)	PPP Co Share (expressed as a percentage)
0 to [a] million (inclusive)	[•]
[a + 1] million to [b] million (inclusive)	[•]
[b + 1] million to [c] million (inclusive)	[•]
[c + 1] million to [d] million (inclusive)	[•]
[d + 1] million to [e] million (inclusive)	[•]
[e + 1] million to [f] million (inclusive)	[•]
[f + 1] million and above	[•]

1. For the avoidance of doubt, a determination under the above table shall be calculated on an aggregated basis such that, where the Additional Work cost exceeds [a] million Euro, the amount of such cost to be borne by the PPP Co shall be: [•] ([•]%) of [a] million Euro, [•]percent ([•]%) of any amount above [a] million Euro but less than or equal to [b] million Euro, plus [•] percent ([•]%) of any amount above [b] million Euro but less than or equal to [c] million Euro, plus [•] percent of any amount above [c] million Euro but less than or equal to [d] million Euro, plus [•] percent of any amount above [d] million Euro but less than or equal to [e] million Euro, plus [•]percent of any amount above [e] million Euro but less than or equal to [f] million Euro.
2. The Cumulative Capital Expenditure as shown in the first column of the table set out above shall not be Indexed.

KEY DEFINITIONS - USED IN CLAUSE 35 ADDITIONAL CORE CONTRACT DRAFTING

“Law” means any law applicable in the State (without further enactment) and shall include without limitation, common law, statute, statutory instrument, proclamation, bye-law, directive, decision, regulation, rule, order, notice, code of practice, code of conduct, rule of court, instruments, or delegated or subordinate legislation.

“Legal Requirement” means the requirement of any European Community Law or of any Law, any Requirements of Relevant Authorities which have jurisdiction with regard to any part of the Project or whose systems may be affected by any part of the Project.

“Change in Law” means the coming into effect of:

- (a) any Law enacted after the Effective Date; or
- (b) any modification of any Law existing on the Effective Date (where such modification comes into effect

after the Effective Date); or

- (c) any applicable judgment of an Irish Court or of the European Court of Justice or the European Court of First Instance after the Effective Date which changes a binding precedent,

which is binding on the PPP Co or on any of the Principal Sub-Contractors to the extent that such Principal Sub-Contractor is discharging any of the duties of PPP Co under this Project Agreement (including any change in the Requirements of Relevant Authorities during the Operational Period as a result of a Change in Law as defined above but excluding, in any such case, any other Requirements of Relevant Authorities and any other change in the interpretation of any Law).

Comment: Relevant Authorities are public authorities with jurisdiction over the project, and utilities. The language in brackets about changes in requirements of Relevant Authorities gives the PPP Co some protection against their requirements changing after construction is completed – changes in their requirements during construction are not treated as changes in law. It will be noted that, under [Clause 35 – Schedule], the PPP Co is not compensated for every “Change in Law”, for compensation to arise it must be a “Qualifying Change in Law”.

“Qualifying Change in Law” means:

- (a) any Change in VAT in the State; or
- (b) any Change in Law the terms of which apply expressly to:
 - (i) the Project and not to other similar projects procured as a PPP; or
 - (ii) the holding of shares in companies whose main business is entering into contracts with public authorities for the design, construction, finance and operation of assets procured by a single contract on the same or similar basis to the Project; or
 - (iii) persons engaged in design, build, finance and operate concession projects and not to other persons; or
 - (iv) persons undertaking the functions referred to in sub-clauses (ii) and (iii) above (under a single contract with the Authority similar to this Agreement); or
 - (v) the PPP Co and not other persons; or
- (c) any Change in Law not falling within paragraphs (a) and (b) above, which comes into effect during the Operational Period and which involves Capital Expenditure,

which was not foreseeable at the Effective Date by an experienced contractor or service provider on the basis of but not limited to:

- (i) draft Bills or other proposals for legislation published in Government Green Papers or White Papers or other consultation papers of Government Departments or of statutory agencies;
- (ii) Bills, whether or not initiated in the Oireachtas before the Effective Date;
- (iii) draft statutory instruments;
- (iv) draft instruments or proposals in the Official Journal of the European Communities;
- (v) any Government guidance; or
- (vi) any applicable judgement of a relevant court of law which changes a binding precedent

in each case, published or otherwise publicly available before the Effective Date in substantially the same form as such change takes, provided that any Change in VAT in the State shall not be treated as a Qualifying Change in Law to the extent that the PPP Co is otherwise compensated under this Agreement for increases of costs which it suffers as a result of such change.

“Change in VAT” means the enactment or modification of any Law or Legal Requirement that provides that supplies to be made by the PPP Co as contemplated in this Agreement or to the PPP Co by its sub-contractors are exempt from VAT or subject to VAT at a different rate and that input tax incurred and attributable to such supplies ceases to be recoverable either in whole or in part by the PPP Co.

Comment: The purpose of including “Change in VAT” in the definition of “Qualifying Change in Law” is to protect the PPP Co against the risk of being brought outside the VAT net, which would mean that it would no longer be entitled to recover the VAT it pays.

“Additional Work” means any construction work requiring Capital Expenditure (as such term is interpreted in accordance with generally accepted accounting principles in the State from time to time) other than the Works, the Operations and the Renewal Works, to be carried out to the [Project Facility] during the Operational Period, including any change in or addition to the nature, quality, quantity, lines, levels or dimensions of any work shown and/or detailed in the Construction Requirements.

“Capital Expenditure” means any expenditure which falls to be treated as capital expenditure in accordance with generally accepted accounting principles in the State from time to time (and, for the avoidance of doubt, excluding any revenue expenditure).

“PPP Co Share” means:

- (i) in respect of a Qualifying Change in Law falling within limb (b) of that definition, all Capital Expenditure incurred up to €[•] inclusive; or
- (ii) in respect of a Qualifying Change in Law falling within limb (c) of that definition, the percentage figure corresponding to the amount of Cumulative Capital Expenditure at the relevant time, as shown in the first column of the table set out in Annex 1 to this [Clause 35 - Schedule].

Comment: In the Core Contract, the PPP Co is invited to bid the figure to be inserted in (i). As the risk here is uniquely within the public sector control, it is likely to be zero or a low figure (only for the purpose of eliminating the need to process very small claims).

“Cumulative Capital Expenditure” means the aggregate of:

- (a) all Capital Expenditure that has been incurred as a result of each General Change in Law that has come into effect during the Operational Period; and
- (b) the amount of Capital Expenditure that is agreed or determined to be required, as a result of a General Change in Law under [Clause 35 - Schedule] (Change in Law).

ACCOMMODATION CONTRACT DRAFTING

“Legislation” means any and all constitutions, acts, statutes, law, by law, rules, codes, regulations, orders, standards and/or conditions having effect in Ireland or any relevant part thereof including any final judgment or order of any court of competent jurisdiction and further including, any enforceable community right within the meaning of Section 2 of the European Communities Act 1972 and further including any Guidance;

“Guidance” means any guidelines, recommendations, policies or instructions of the [Minister any equivalent bodies with which the [Minister] or the Operator (as appropriate) are obliged to comply in relation to the Facility or the Services;

“Change in Law” means the coming into effect after the date hereof of:

- (a) any Legislation, other than any legislation which on the date hereof has been published:
 - (i) in a draft Bill which has been presented before the Dáil for approval;
 - (ii) in a Bill;
 - (ii) in a draft statutory instrument; or
 - (iv) as a proposal in the Official Journal of the European Communities;
- (b) any Guidance; or
- (c) any applicable judgement of a court of law in Ireland which changes a binding precedent;

“Qualifying Change in Law” means any one or more of the following:

- (i) a Discriminatory Change in Law;
- (ii) a Specific Change in Law; and
- (iii) a Capital Legislative Change

which could not reasonably have been foreseen at the date hereof by a contractor experienced in carrying out works or services similar to the Works or the Services and in the case of (i) and (ii) above, the impact of such Qualifying Change in Law (either singly or in aggregate with any other Qualifying Change in Law within the categories set out in (i) and (ii) above in any Contract Year) on the cost of performance of the Services exceeds [●] euros (€[●]) (Indexed). For the avoidance of doubt, any such amount of [●] euros (€[●]) (Indexed) shall be borne by the Operator.

For the avoidance of doubt, a Change in Law relating to the application for, the coming into effect, the terms, the implementation, repeal, revocation or otherwise of any planning permission shall not constitute a Qualifying Change in Law.

“Discriminatory Change in Law” means a Change in Law the terms of which apply expressly to or which has the effect specifically and directly in relation to:

- (i) the Project and not to similar projects;
- (ii) the Operator and not to other persons; or
- (iii) contractors engaged in carrying out works and/or services pursuant to concession type design, build, finance and operate projects in Ireland and not to other persons;

“Specific Change in Law” means any Change in Law which specifically refers to the provision of services the same as or similar to the Services (or any of them) and/or the construction of the Facility or to the holding of shares in companies whose main business is providing services the same as or similar to the Services (or any of them) or constructing education facilities.

“Capital Legislative Change” means any Change in Law (not being a Discriminatory Change in Law or a Specific Change in Law) coming into force after the relevant Certification Date resulting in an obligation on the Operator or its sub-contractors of any tier to incur Capital Expenditure in relation to the Facility to the extent that the aggregate and cumulative Capital Expenditure (Indexed) in relation to the Facility incurred or to be incurred in respect of such Change in Law exceeds [●]% of the original capital cost of the Facility (Indexed) during that part of the Term commencing on the Certification Date;

Comment: In the Accommodation Contract the regime for change in law also covers changes in

“Guidance”. The Core Contract tackles that differently, in terms of “Requirements of Relevant Authorities”. Also, the Accommodation Contract has a specific provision for changes in an international convention which applies to a particular sector.

OPERATING CONTRACT DRAFTING

“Change of Law” means the coming into effect after the Effective Date by means of any enactment, revocation, repeal, amendment, alteration or other coming into effect of:

- (a) Legal Requirements other than, in the case of Legal Requirements coming into effect prior to the Operating Commencement Date, Legal Requirements which on the Effective Date have been officially published in substantially the same form as the relevant Legal Requirements finally take when they have legal effect:
 - (i) in a draft bill as part of a published Government or Department paper; or
 - (ii) in a bill; or
 - (iii) in a draft statutory instrument; or
 - (iv) as a Common Position adopted by the European Parliament;
- (b) any applicable guidance or directions issued by or other requirements of:
 - (i) [the Minister]; or
 - (ii) any other Competent Authority;

with which in the case of (a) and (b) [the Authority] or the Operator is bound to comply or with which they must comply in order to obtain or retain any Necessary Consent or Consent to Operate and which in the case of (b):

 - (i) to the extent such guidance, directions or other requirements would have effect prior to the Operating Commencement Date, were not reasonably foreseeable (substantially in the form in which they finally have effect) at the Effective Date; and
 - (ii) amounts to a nationally applicable change in (or in the interpretation or application of) such applicable guidance, directions or other requirements;

but, to avoid doubt, shall not include any guidance or directions issued by [*Project specific - e.g. a relevant authority or specific commission*] during the Development Period to the extent that they do not constitute a change in Legal Requirements and shall not include any By-laws made by the Operator;
- (c) any judgement or ruling which changes a binding precedent.

Comment: This definition again includes changes in guidance, but not changes in project specific requirements (which are regarded as the Operator’s responsibility) unless they are otherwise changes in law.

CROSS REFERENCES

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

- Clause 24 (Records)
- Clause 53 (Effects of Termination)

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

- A5 (Variations)
- B3 (Variations)
- C16 (Variations)
- D10 (Variations)
- F7 (Discriminatory Change of Taxation)
- G1 (General Change of Law)
- G2 (Discriminatory Change of Law)