



Guidance on PPP Contractual Provisions

2017 EDITION

2.3 SAMPLE DRAFTING 2

Definition of Material Adverse Government Action

- (1) For the purposes of this PPP Contract, “Material Adverse Government Action” means any act or omission by the Contracting Authority or any relevant public authority [*define if necessary*] or event set out in Clause (2) below, which occurs during the term of this PPP Contract and which (i) directly causes the Private Partner to be unable to comply with all or some of its obligations under the PPP Contract and/or (ii) has a [*Material*] Adverse Effect] on its [costs or revenues] [*insert defined terms*].
- (2) For the purposes of Clause (1) above any act or omission shall mean and be limited to the following circumstances:
 - (a) failure of any relevant public authority to grant to the Private Partner or renew any permit or approval that is required for the purposes of the Private Partner’s proper performance of its obligations and/or enforcement of its rights under this PPP Contract, in each case within the required timeframe under [Applicable Law], except where such failure results from the Private Partner’s non-compliance with [Applicable Law];
 - (b) any act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade, embargo or revolution, [occurring inside [*name of country*]];
 - (c) radioactive contamination or ionising radiation, [originating from a source in [*name of country*]];
 - (d) any riot, insurrection, civil commotion, act or campaign of terrorism, [occurring inside [*name of country*]];
 - (e) any strike, work-to-rule, or go-slow which is not primarily motivated by a desire to influence the actions of the Affected Party so as to preserve or improve conditions of employment by the Affected Party, [occurring inside [*name of country*]];
 - (f) expropriation, compulsory acquisition or nationalization by any relevant authority of any asset or right of the Private Partner, including any of the shares in the Private Partner;
 - (g) any act or omission of any relevant authority adversely affecting the legality, validity, binding nature or enforceability of this PPP Contract; and
 - (h) [*add any event specific to the PPP Project such as the construction of certain competing infrastructure (e.g. a free road adjacent to the PPP tolled road) or a pollution event*].

Where possible, undefined materiality qualifications should be avoided to minimize the risk of dispute.

If “material adverse effect” drafting is used it is advisable to define it by reference to a specified monetary impact.

Define Applicable Law with care if also used in other contexts such as Change in Law – see Section 3.3.

Drafting subject to the position adopted in this respect in the Force Majeure provisions. See Sections 1.4 and 1.5.

Consequences of Material Adverse Government Action

- (3) If a Material Adverse Government Action occurs, the Private Partner (i) shall be excused from the performance of its obligations under the PPP Contract to the extent that it is prevented, hindered or delayed in such performance by reason of the Material Adverse Government Action and (ii) shall be entitled to compensation under this PPP Contract, in each case subject to and in accordance with the provisions of this Clause [whole clause].
- (4) To obtain relief pursuant to Clause (5) below, the Private Partner must:
- (a) as soon as practicable [and in any event within [●] *business days*] after the Private Partner becomes aware that the Material Adverse Government Action has occurred, give to the Contracting Authority a notice of its claim for payment of compensation and/or relief from its obligations under the PPP Contract, following which the Parties shall consider in good faith any option to mitigate the impact of the Material Adverse Government Action;
 - (b) within [●] *business days* of receipt by the Contracting Authority of the notice referred in Clause (4)(a) above, give full details of (i) the Material Adverse Government Action and (ii) any Estimated Change in Project Costs and/or loss of revenue claimed and/or delay and/or any breach of the Private Partner's obligations under this PPP Contract,
 - (c) demonstrate to the Contracting Authority that:
 - (i) the Private Partner could not avoid such occurrence or consequences by actions which it might reasonably be expected to have taken without incurring [material] costs;
 - (ii) the Material Adverse Government Action was the direct cause of the Estimated Change in Project Costs and/or loss of revenue and/or delay and/or breach of the Private Partner's obligations under this PPP Contract;
 - (iii) time lost and/or relief from the obligations under the PPP Contract claimed, could not be mitigated or recovered by the Private Partner; and
 - (iv) the Private Partner is using reasonable endeavors to perform its affected obligations under the PPP Contract.
- (5) If the Private Partner has complied with its obligations under Clause (4) above, then the Contracting Authority shall:
- (a) compensate the Private Partner for the Estimated Change in Project Costs as adjusted to reflect the actual costs reasonably incurred [*and loss of revenue*];
 - (b) give the Private Partner such relief from its obligations under this PPP Contract as is reasonable for such Material Adverse Government Action; and

Insert reasonable time period, e.g. seven business days.

Insert reasonable time period given the level of detail required to be specified in full.

Drafting to reflect whether the Contracting Authority has continued paying the Private Partner through this process.

- (c) if the Material Adverse Government Action occurs during the *[insert defined term for Construction Period]* and causes a delay in achieving the *[insert defined term for scheduled services commencement date]*, such date shall be postponed by such time as is reasonable.
- (6) [In the event that information is provided after the dates referred to in Clause (4) above, then the Private Partner shall not be entitled to any extension of time, compensation or relief from its obligations under this PPP Contract in respect of the period for which the information is delayed].
- (7) If the Contracting Authority and the Private Partner cannot agree on the extent of any compensation, delay incurred, or relief from the Private Partner's obligations under this PPP Contract, as applicable, or the Contracting Authority disagrees that a Material Adverse Government Action has occurred, the Parties shall resolve the matter in accordance with Clause *[insert reference to dispute resolution clause]*.

Termination due to Prolonged Material Adverse Government Action

- (8) If a Material Adverse Government Action subsists for a continuous period of more than *[180-360 calendar]* days, a Party may in its discretion terminate this PPP Contract by issuing a written termination notice to the other Party which shall take effect *[thirty (30) calendar]* days after its receipt. [If, at the end of this *[thirty (30) calendar]*-day period, the Material Adverse Government Action continues,] the PPP Contract shall be terminated pursuant to Clause *[insert reference to clause governing termination]* and the Private Partner shall be entitled to the compensation set out under clause *[insert reference to Compensation on MAGA termination clause]*.

3.3 SAMPLE DRAFTING 3

OPTION 1: Protection Against All Changes in Law

Required Definitions

"Applicable Law"	means any [decree, resolution, law, statute, act, decision, ordinance, rule, directive (to the extent having the force of law), order, treaty, code or regulation or any interpretation of the foregoing by a relevant authority having jurisdiction over the matter in question, as enacted, issued or promulgated by any relevant authority, in each case applicable in [insert jurisdiction in which the PPP Project is located]; [Drafting to be adapted for the relevant jurisdiction – any reference to amendments, modifications, extensions, replacements or re-enactments must not cut across Change in Law definition].
"Change in Law"	means, after the [Setting Date,] any of the following events: (a) the enactment of any new Applicable Law; (b) the repeal, modification or re-enactment of any existing Applicable Law; and/or (c) a change in the interpretation or application of any Applicable Law, which (i) adversely affects (i) the ability of a Party to comply with its obligations under the PPP Contract or (ii) [the Base Case Equity IRR]; and (ii) was not [published as a draft law] in the [insert applicable publication source for legislation] or in effect at the Setting Date. [Adapt as appropriate for “in the public domain”].
"Estimated Change in Project Costs"	means the aggregate of any estimated increase in construction costs, operating costs and financing costs less the aggregate of any estimated reduction in construction costs, operating costs and financing costs.

This date could be a period of time before bid submissions but is usually no later than the bid date. See discussion under Section 3.2.2.3.

Definition and limbs (i) – (iii) and (b) will need to tie in with the definition of Applicable Law to avoid argument or circularity and will also need to reflect the law making process in the relevant jurisdiction.

Occurrence of a Change in Law

- (1) If a Change in Law occurs or is shortly to occur, then any Party may, within [thirty (30) business] days starting from the day it was aware (or should have been aware) of the Change in Law, notify the other Party to express an opinion on its likely effects, giving details of its opinion of:
 - (a) any necessary change to the terms of this PPP Contract including any necessary Contracting Authority variation;
 - (b) whether relief from compliance with obligations is required;
 - (c) whether any deadline under the PPP Contract should be postponed;
 - (d) any (positive or negative) estimated change of revenue that will directly result from the relevant Change in Law;
 - (e) any (positive or negative) estimated change in the costs of the PPP Project that will directly result from the Change in Law; or

The variations process will be dealt with under a different clause.

- (f) any capital expenditure that is required or no longer required as a result of a Change in Law.
- (2) As soon as practicable and in any event within *[thirty (30) business]* days after receipt of any notice from the affected Party, the Contracting Authority and the Private Partner shall discuss and agree the matters referred to in Clause (1) above and any ways in which either Party can, if applicable, mitigate the effect of the Change in Law, including, in relation to the Private Partner:
- (a) providing evidence that the Private Partner has used reasonable endeavors (including (where practicable) the use of competitive quotes) to oblige its sub-contractors to minimize any increase in costs and maximise any reduction in costs;
 - (b) demonstrating how any capital expenditure to be 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 Private Partner;
 - (c) giving evidence as to how the Change in Law has affected prices charged by any similar businesses to the PPP Project; and
 - (d) demonstrating that any expenditure that has been avoided on account of the Change in Law has been taken into account in the amount which in its opinion has resulted or is required under Clauses (1)(e) or (1)(f) above, provided that if the Parties cannot agree on the effects of the Change in Law, the matter shall be referred for determination in accordance with clause *[insert reference to the dispute resolution clause]*.

Consequences of a Change in Law

- (3) If the Parties have followed the procedure set out under Clauses (1) and (2) above, then:
- (a) the affected Party shall be excused from the performance of its obligations under the PPP Contract to the extent it is prevented, hindered or delayed in such performance by reason of the Change in Law;
 - (b) if the Change in Law has occurred before the services commencement date, the scheduled services commencement date shall be postponed to take into account the effect of such Change in Law; and
 - (c) the Parties shall agree on the amount and payment of any compensation to reflect the Estimated Change in Project Costs as adjusted to take into account the actual increase or reduction in costs reasonably incurred as a result of the Change in Law, *[provided that no compensation shall be made in relation to a Change in Law under this clause unless the claiming Party can demonstrate that the aggregate impact of all Changes in Law that have occurred during [insert relevant period in time, e.g. calendar year] exceeds [insert amount]]*.

Delete proviso if no materiality threshold is to be included.

- (4) If the notice and relevant information are not provided within the period referred to under Clause (1) above, the affected Party shall not be entitled to any compensation or relief from its obligations under the PPP Contract in respect of the period for which the information is delayed.

Termination due to a Change in Law

- (5) If a Change in Law:
- (a) results in the Private Partner not being able to achieve the *[insert defined term for services commencement date]* within [●] months after the *[insert defined term for scheduled services commencement date]*; or
 - (b) prevents a Party from performing its material obligations under this PPP Contract for a period of [●] consecutive days; or
 - (c) results in performance of the PPP Contract being illegal and such illegality cannot be remedied by a Contracting Authority variation,

either Party may in its discretion terminate this PPP Contract by issuing a written termination notice which shall take effect *[thirty (30) calendar]* days after receipt of such termination notice. If, at the end of this *[thirty (30)]* day period, the Change in Law continues, the PPP Contract shall be terminated pursuant to clause *[insert reference to the clause governing termination]* and the Private Partner shall be entitled to the compensation set out under clause *[insert reference to Change in Law termination payments clause]*.