EVIF Programme – SFT Template Concession Contract
Update Note 1 - Compensation on Early Termination – 08 April 2025

Background

SFT's draft template Concession Contract (Draft - Concession Contract - Front End - v3) sets out three events which could trigger early termination of the concession contract:

1. Authority Default
2. Concessionaire Material Default
3. Force Majeure

This update note provides guidance on approaches procuring authorities could adopt to determine an equitable level of compensation that should be paid by either the Authority to the Concessionaire or the Concessionaire to the Authority in the event of early termination.

This note deals solely with the matter of how to estimate an equitable level of compensation on early termination. In such circumstances, Authorities will also have to consider other consequences of termination, including requirements relating to the transfer of charge points and the implementation of the Exit Management Plan to ensure a smooth transition between operators.

The guidance is not intended to be legal drafting and is not a substitute for independent, specialist advice. Users of this guidance must take appropriate legal, financial and/or technical advice before using this note and SFT's draft template Concession Contract. Neither SFT nor its advisers accept any liability for losses arising from or in connection with the use of, or any reliance placed upon, this document and/or the template Concession Contract by other parties.

Unless otherwise stated, clause references and defined terms used in this note reflect those contained in the draft template concession contract.

The key principle in relation to the amount of compensation that should be payable in each termination scenario is that the defaulting party should be left no better off as a result of the termination and the non-defaulting party should be able to recover from the defaulting party its reasonably and properly incurred additional direct costs resulting from the early termination.

It is important to note that project specific factors will influence the approach. For example, the detailed drafting on compensation payable in each termination scenario should be proportionate to the overall value of the contract and the relative proportion of public and private capital used to finance the Installation Works.

To provide feedback on the Update Note please contact Alastair Young (alastair.young@scottishfuturestrust.org.uk). Following feedback, SFT will prepare an updated version of its draft template concession contract.

SFT is available to discuss this and alternative approaches with authorities and their advisers in the pre-procurement period.

1.0 Termination on Authority Default (clause 37.2)

The intention is that the Concessionaire should be left no better or worse off as a result of an early termination due to an Authority Default or an Authority voluntary termination[1].

In the event of early termination due to an Authority Default or an Authority voluntary termination, the termination sum due to the Concessionaire shall be an amount equal to the aggregate of (without double counting):

- an independent expert assessment of the present value of forecast pre-tax nominal net operating cashflows of the remaining term of the Concession Contract following the termination date based on reasonable income and expenditure projections as well an appropriate nominal discount rate reflecting the remaining risks associated with the project[2] (with this amount not being less than zero);
- the cost of materials or goods properly required for the Installation Works which have been ordered but not yet installed and for which the Concessionaire has paid for or is legally bound to pay, and on such payment in full by the Authority such materials or goods shall become the property of the Authority;
- redundancy payments for employees of the Concessionaire that have been or will be reasonably incurred as a direct result of the termination;
- any Sub-Contractor Breakage Costs;
- the reasonable and proper costs demonstrably incurred by the Concessionaire in:
    - supporting the migration of the charge points transferred to the Authority on termination to a new back-office; and
    - winding up sites or offices which were used solely to deliver the project.

[1] Following feedback to this Update Note, it is proposed to include provisions relating to Authority Voluntary Termination in a revised version of the template concession contract.
[2] These will be determined by the independent expert at the date of termination.

The Authority may set off from this termination sum any amounts that were properly due to the Authority prior to the date of termination but which have not yet been paid by the Concessionaire.

To assist in the assessment of the net operating cashflow of the remaining term of the Concession Contract, authorities should consider the scope of financial reporting required in Schedule Part 15 of the Concession Contract, such as a requirement for an annual profit and loss, cashflow and balance sheet statement for the project.

2.0 Termination on Concessionaire Default (clause 37.1)

The intention is that the Authority should be left no better or worse off as a result of an early termination due to the occurrence of an event of default by the Concessionaire (i.e., a Material Default[3]).

Careful consideration will be required as to what events trigger a Material Default in order to avoid 'hair trigger' events of default and/or disproportionate consequences which may unduly limit interest from CPOs considering bidding for projects. So far as possible and reasonable the Concessionaire should also have the right to remedy such events in advance of a termination notice being served by the Authority.

In the event of early termination due to Material Default, the termination sum due to the Concessionaire can be calculated on the following basis.

2.1 Retendering Approach

Where the parties agree or it is determined[4] that there are at least two entities capable of being a replacement concessionaire, the Authority can elect to retender the remaining term of the Concession Contract via a New Contract and pay the proceeds, net of the Authority's costs, to the Concessionaire.

The Authority would establish the highest compliant tender price from the retendering process. Where no compliant tenders are received the highest compliant tender price should be deemed to be zero.

The Authority can deduct from the highest compliant tender price its reasonable and proper costs incurred in relation to:

- rectifying or procuring the rectification of any of the Installation Works which do not comply with the terms of the Concession Contract;

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[3] Which includes Corrupt Gifts and Fraud

[4] Clause 35 of the template concession contract provides for a Dispute Resolution process which can potentially be used where the Authority and Concessionaire fail to agree.

- delivering or procuring the delivery of the Services prior to the commencement of a New Contract;
- undertaking the retendering process;
- transitioning the Concession Contract to a replacement concessionaire;
- migrating charge points to a new back-office; and
- any amounts that the Authority is entitled to set off or deduct under the Concession Contract.

Where the termination sum is a negative number, this will be an amount owed to the Authority from the Concessionaire.

2.2 No Retendering Approach

Where the Parties agree or it is determined that there is not likely to be at least two entities capable of being a replacement concessionaire, the Authority can appoint an independent expert to establish an Estimated Market Value of the remaining term of the Concession Contract.

The determination of Estimated Market Value of the remaining term of the Concession Contract should take into account the present value of the forecast pre-tax nominal net project cashflows over the remainder of the contact term based on reasonable income and expenditure projections and an appropriate nominal discount rate that reflects the risks associated with defaulted status of the project. These will be determined by the independent expert at the date of termination.

To the extent not already included in the determination of Estimated Market Value the Authority can deduct from the Estimated Market Value the aggregate of its reasonable and proper costs incurred in relation to:

- rectifying or procuring the rectification of any of the Installation Works which do not comply with the terms of the Concession Contract;
- delivering or procuring the delivery of the Services prior to an appointment of a replacement contractor;
- appointing an independent expert;
- transitioning the Concession Contract to a replacement service provider;
- migrating the Equipment to a new back-office; and
- net amounts properly due to the Authority prior to the termination of the Concession Contract.

Where the No Retendering approach is adopted, and a termination sum is due by the Authority to the Concessionaire, the Authority shall have the option to pay the termination sum as a lump sum or to pay in equal instalments over the remainder of the original contract term.

Where the termination sum is a negative number, this will be an amount owed to the Authority from the Concessionaire, payable as a lump sum.

3.0 Termination on Force Majeure (clause 36)

If both parties agree to terminate the Concession Contract based on an event of Force Majeure, the termination sum paid to the Concessionaire can be based on:

- the Fair Value of the completed Installation Works (including DNO connection costs)[5] and the Equipment after subtracting grant funding made by the Authority and any Equipment that does not revert to the Authority.

The following amounts should be added to the termination sum:

- redundancy payments for employees of the Concessionaire that have been or will be reasonably incurred by the Contractor as a direct result of the termination; and
- any Sub-Contractor Breakage Costs.

The following amounts should be deducted from the termination sum:

- amounts that the Authority is entitled to set off or deduct under the Concession Contract; and
- any insurance proceeds due to the Concessionaire.

[5] The Authority should be clear what falls under the scope of the Installation Works in Part 8 of the Schedule.

Glossary of terms

"Fair Value" means the depreciated value of the capital expenditure incurred by the Concessionaire to deliver the Installation Works and the Equipment (to the extent that such Equipment reverts to the Authority), where such capital expenditure is depreciated on a straight-line basis over a [10] year period from the date on which the Equipment was commissioned. For the avoidance of doubt the capital expenditure incurred shall subtract any grant funding received from the Authority.

"New Contract" means an agreement on the same terms and conditions as the Concession Contract at the Termination Date, but with the following amendments:

(a) any accrued KPI Points or Service Credits, for the purposes of termination only, and without prejudice to the rights of the Authority to make financial deductions, shall be cancelled;

(c) the term of such agreement shall be equal to the term from the Termination Date until the Expiry Date; and

(d) any other consequential amendments required to give effect to the New Contract which do not adversely affect the Concessionaire.

"**Sub-Contractor Breakage Costs**" means losses that have been or will be reasonably and properly incurred by the Concessionaire as a direct result of the early termination of the contract, but only to the extent that:

(a) the Losses are incurred in connection with the Project and in respect of the provision of Services or the completion of Works, including:

- (i) any materials or goods ordered or Sub-Contracts placed that cannot be cancelled without such losses being incurred;
- (ii) any expenditure incurred in anticipation of the provision of services or the completion of works in the future;
- (iii) the cost of demobilisation, including the cost of any relocation of equipment used in connection with the Project; and
- (iv) redundancy payments;

(b) the losses are incurred under arrangements and/or agreements that are consistent with terms that have been entered into in the ordinary course of business and on reasonable commercial terms; and

(c) the Concessionaire and the relevant Sub-Contractor has each used its reasonable endeavours to mitigate the losses.