

Waste Infrastructure Delivery Programme Contract Management Training



Norfolk County Council

Termination

30 January 2013 – NAME REDACTED

Objectives



- Understand the different forms of termination
- Compensation on termination
- Ensure that correct processes and procedures are in place
- Consider termination for planning failure



Agenda



- Principles and categories of termination - 30 mins
- Exercise - 30 mins
- Feedback - 15 mins
- WIDP's comments and conclusions - 15 mins



Introduction To Termination



- What do we mean by "Termination"?
- What are the different forms?
- When and under what circumstances would you think about it?



Definitions



Termination Date

- means any date of early termination of this Contract in accordance with Part Twelve (Termination and Consequences of Termination)

Termination Date Discount Rate

- means a discount rate expressed as $(1 + \text{real base case project IRR} + \text{Gilt B} - \text{Gilt A})^* (1+i) - 1$ where "real base case project IRR" is the real pre-tax Project IRR as set out in the Base Case

Definitions (Cont'd)



Termination Notice

- means a notice of termination issued in accordance with this Contract;

Termination Sum

- means any compensation payable by the Authority to the Contractor on an early termination of the Contract under Part Twelve (Termination and Consequences of Termination) (excluding the Adjusted Highest Compliant Tender Price);



Definitions (Cont'd)



Retendering Procedure

- "Liquid Market"
- Tender Process should establish what is payable to the Contractor as the Adjusted Highest Compliant Tender Price;



No Retendering Procedure

- Expert Determination
- Estimated Fair Value of the Contract



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Processes Leading to Termination



Authority Default (cl 65)

- If Contractor wishes to terminate, he must serve a termination notice on the Authority.
- Notice must specify type of Authority Default
- Contract will terminate 30 Business Days after notice received (unless rectified)



FAILURE
WHEN YOUR BEST JUST ISN'T GOOD ENOUGH



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Processes Leading to Termination



Contractor Default (cl 67)

- Authority can serve termination notice, specifying nature of Contractor Default and identifying if acceptable rectification programme / rectification is required within 40 Business Days of receipt, or in certain cases, noting that the Contract will terminate in 20 Business Days.

**A
BIG
FAT
FAILURE**

Processes Leading to Termination



Contractor Default (cont'd)

- If the rectification plan is unacceptable or not implemented in accordance with its terms, or for the other limbs not involving such a plan there is a failure to rectify within the period specified by the Authority, the Authority can (subject to Direct Agreement) serve a termination notice on the Contractor, terminating the Contract 10 Business Days after notification.

Processes Leading to Termination



Voluntary Termination (cl 73)

If the Authority wishes to terminate:

- Notice must be sent to Contractor stating intent, and that Contract will terminate as soon as reasonably practicable and within 3 months of notice.
- Stating whether the Authority has chosen to exercise its option to require Contractor to transfer its rights, etc in the Assets to the Authority or as directed by it.

Processes Leading to Termination



Persistent Breach (cl 67.3)

- This ground for termination is only relevant during the Services Period.
- Scope to terminate for PB excludes items subject to paymech/performance framework deductions / adjustments
- First trigger: a breach has continued for more than 30 days or occurred more than 3 times in any 6-month period.



Processes Leading to Termination



Persistent Breach – Warning Notice

- Specify that it is a formal **warning notice**, give reasonable details of breach, and say if it recurs frequently or continues, it may result in termination.
- If the breach continues beyond 14 Business Days, or recurs 3 or more times within a 6-month period after the date of the formal warning, the Authority may serve a Final Warning Notice.

Processes Leading to Termination



Persistent Breach – Final Warning Notice

- Notes the breach was subject of a warning notice.
- States Contract may be terminated if the breach continues beyond 30 Business Days, or recurs 3 or more times within a 6-month period after the date of the Final Warning.
- This will be a termination for Contractor Default

Processes Leading to Termination



Corrupt Gifts and Fraud (cl 71.1)

- If the Contractor, any Sub-Contractor or their employees, agents or shareholders commits a Prohibited Act, the Authority can enact the termination clause.
- Mechanics for termination vary according to the identity of the party (Contractor / Sub-Contractor / their employees / other persons) and whether acting independently



Processes Leading to Termination



Corrupt Gifts and Fraud (cont'd)

Notice of termination must specify:-

- the nature of the Prohibited Act
- the identity of the party responsible for the Prohibited Act
- the date of termination



Processes Leading to Termination



Force Majeure (cl 69.1)

- Force Majeure Event definition



Processes Leading to Termination



Breach of Refinancing Provisions (cl 75)

- If the Contractor wilfully breaches the refinancing provisions (in Schedule 16, para 2), the Authority may terminate at any time on or before Contract Expiry.

Breach of Refinancing Provisions (cont'd)

- Authority must give notice to Contractor that Contract will terminate 20 Business Days following receipt of notice.
- The notice should state whether the Authority is exercising its option to require the transfer to it of the rights, title and interest in the Assets.

Compensation on Termination

Compensation: Authority Voluntary Termination / Authority Default



- Contractor is fully compensated
- Compensation for equity invested
- Recognition of loss of profit over project's life
- Sub-Contractor Breakage Costs – usually capped, and limited to direct contractual flow-downs
- Repayment of directly attributable redundancy costs

Compensation: Contractor Default



- Offers protection to the Authority whilst not over-penalising the Contractor
- Market Value approach is usually recommended – the idea is that the Contractor receives back what the project is worth in the market (for remaining part of project's expected cash-flows)

Compensation: Contractor Default



- Value of the project is subject to an assessment of market worth via a retendering process
- However, if retendering is not practical, an “Estimated Fair Value” approach can be used

Compensation: Force Majeure or Uninsurability Termination



- This is where termination is due to no fault of either party.
- Examples in waste sector include planning or permitting failure.
- Full compensation not paid.
- Senior and Junior Debt repaid.

Compensation: Force Majeure Termination



- Equity repaid at par
- Redundancy costs repaid
- Subcontractor breakage costs repaid (usually capped)

Compensation: Corrupt Gifts and Fraud



- No compensation payable

Exercise



- Exercise – Assume that the Revised Project Plan process is heading for failure, what should the Authority plan to do? (30 mins)
- Feedback (15 mins)

WIDP's comments on termination for planning failure



- Schedule 26 (Planning)
- RPP process

WIDP's comments on termination for planning failure



- Governance structure
- ARE
- Compensation
- Appeal Contingency

Summary



- Clarity on making an informed decision
- Carrying out the decision

