Photo Credit
Person using computer

Sample Term Sheet

Download Chatbot

Module 5 of the Annex in Asset Recycling.

This term sheet provides certain baseline requirements for a proposed concession-type Asset Recycling Agreement which may be initiated by Relevant Authority and sets out a framework for the terms and conditions to be set out in the agreement. These terms and conditions will be subject to further direction or discretion of the Relevant Authority initiating the relevant asset recycling transaction, in accordance with applicable regulations and guidelines in effect.

This term sheet is only an indicative term sheet and should not be used without being reviewed and revised by the transaction advisory team working on the relevant asset recycling transaction. This term sheet will have to be customized to include project-specific and sector-specific provisions during the transaction stage. *Find more below, or visit the Guidelines for Implementing Asset Recycling Transactions section and Content Outline, or Download the Full Report.*

Key Provision:

- Introduction
- Project
- Upfront Concession Fee
- Effective date
- Term
- Closing date
- Responsibilities of Project Company
- Responsibilities of the Initiator
- Facilities, Equipment and Plant
- [Remuneration and Payment]
- Payment Default
- Performance Security
- Insurance
- Indemnity and Liability
- Environmental Liabilities
- Project Company Remediable Event
- Project Company Non-Remediable Event
- Initiator Remediable Event
- Initiator Non-Remediable Event
- Event of Force Majeure
- Relief from Force Majeure Events
- Material Adverse Government Action
- Consequences of a Material Adverse Government Action
- Qualifying Change in Law
- Consequences of Qualifying Change in Law
- Termination
- Consequences of Termination
- Initiator Step-in
- Initiator Take Back Option

- Financing and Lender Direct Agreement
- Dispute Resolution
- Subcontracting
- Governing Law
- Language
- Waiver of Immunity
- Miscellaneous

This document has been prepared as part of the annex of the section on Guidelines in Implementing Asset Recycling in the PPP Legal Resource Center (PPPLRC) for contracts, laws and regulations. It is for general guidance purposes only and should not be used as a substitute for specific legal advice for a project.

Introduction

The [Asset Recycling] Agreement (the **Agreement**) is entered into as of [?] by and between:

a. [?], the Relevant Authority established and organised under the laws of the [?], with its principal address at [?] (**Initiator**); and
b. [?], a limited liability company duly organised and existing under the laws of the [?], with its principal address at [?] (**Project Company**).

Note: The parties will be the Relevant Authority initiating the asset recycling concession transaction and a special purpose project company established by the winning bidder of the asset recycling transaction tender.

Project

The Project comprises:

a. [the operation, management and maintenance of [?]];
b. [if refurbishments / expansions / operational efficiencies are contemplated during the Term, relevant modifications and enhancements required to the project/asset];
c. [the transfer or hand-back, as applicable, of [?] in accordance with the terms of the Agreement];
d. [the sale of [?] by the Project Company to the Initiator / the provision by the Project Company of the following services [?]]; and
e. [the financing of the foregoing activities].

The Project shall be used for [?] and for no other purposes except as may be provided in the Agreement.

Note: The foregoing description should be adjusted to align with the project description in the Business Case.

Upfront concession fee

The amount of [?], payable by the Project Company, or on its behalf, to the Initiator, as a condition precedent to the Effective Date of the Agreement.

Note: In a traditional auction process, the winning bidder will be the bidder with the highest unconditional up-front payment. Other auction structures may, however, be selected. The transaction advisory team may recommend alterations to this structure if either (1) the project structure contemplates a series of payments being made by the Project Company to the Initiator, and/or (2) the project structure includes the purchase of goods and/or services from the Project Company by the Initiator.

Effective date

The date on which the Project Company and the Initiator sign a certificate stipulating that all of the following conditions precedent have been fulfilled:

a. [the Project Company has transferred the Up-front Concession Payment to the Initiator];
b. [the Project Company has provided any required performance bonds or guarantees in favour of the Initiator];
c. [the Project Company has established any escrow or reserve accounts which have been specified in the Agreement and have funded such accounts to at least the requisite level];
d. [the Project Company has provided evidence that it is has been duly established and is validly existing under [?] law];
e. [the execution and delivery of all Project Documents specified in the Agreement by the parties thereto]; and
f. [other].

Note: The Effective Date is the first major milestone after the winning bidder has been appointed and should take place as soon as possible after the signing date.

Term

From the [Effective Date] [Closing Date] until the [?] anniversary of the [Effective Date] [Closing Date], subject to any extension made pursuant to the Agreement or the termination of this Agreement.

Note: The transaction advisory team should recommend a duration for the concession term and whether the term should start at the effective date, closing date or some other date (such as a commissioning date). The term of the concession agreement should comply with sector specific regulations.

Closing date

[The date on which the Project Company and the Initiator sign a certificate stipulating that all of the following events have occurred:

a. [copies of any contracts, subcontracts, service agreements and supply agreements to which the Initiator is a party and which have been identified in the Agreement, together with duly executed and delivered novation and assignment agreements effective as of the Closing Date, thereby novating or assigning such rights and obligations from the Initiator to the Project Company];
b. [copies of all subcontracts, service agreements and supply agreements of the Project Company not referred to above (with any Proprietary Information removed) have been provided to and received by the Initiator];

c. [copies of all funding and financing agreements of the Project Company (with any Proprietary Information removed) have been provided to and received by the Initiator];
d. [copies of all consents, permits, licenses and approvals required by the Project Company to carry out the Project have been provided to and received by the Initiator];
e. [the Project Company has provided the Initiator with a legal opinion of the Project Company's counsel which provides that the Project Company is duly established and validly existing, holds all consents, permits, licenses and approvals required by the Project Company to carry out the Project, has validly executed and delivered the Agreement and all other agreements to which the Initiator and its subsidiaries and affiliates are party, that such agreements are enforceable against the Project Company in accordance with their respective terms and such other matters which may specified in the Agreement];
f. [shares in the Project Company have been duly issued in favour of the Initiator in the amount and with the characteristics and terms described in the Agreement]; and
g. [any other documents specified in the Agreement].

Note: Issuance of shares in the Project Company to the Initiator is only appropriate if the joint venture structure is recommended in the Business Case. This term sheet contemplates that the private sector will establish the Project Company and issue shares to the Initiator. Where this approach is taken, the transaction advisory team should specify the requisite percentage and characteristics of the shares. The Agreement can also provide detailed terms and conditions of the shares which must be fulfilled for this condition to be fulfilled.

Responsibilities of Project Company

The Project Company's responsibilities under the Agreement shall include:

a. [accepting delivery and taking possession of the Project including certain inventory, equipment, consumables and other movable assets specified in the Agreement from the Initiator];
b. [assuming full responsibility for the site of the Project and the buildings and the immovable assets specified in the Agreement from the Initiator and minimising inconvenience, disruption and damage to the occupants of, and visitors to, the site of the Project and adjacent sites];
c. [assuming full responsibility for the operation and maintenance in relation to the Project];
d. [arranging for any modifications or enhancements of the Project to be delivered in accordance with the Agreement and the requirements of the other Project Documents];
e. [from time to time, supplying all further equipment, materials, consumables and any other items whatsoever, whether of a temporary or permanent nature, which it may require for the proper performance of its obligations in accordance with the Agreement];
f. [paying the Upfront Concession Fee [and any Recurrent Concession Fee] provided for under the Agreement];
g. [accepting employment of all employees of the Initiator who were associated with or connected to the Project and whose names are specified in the Agreement, and to supervise, control and manage all such employees in accordance with the terms of the Agreement];
h. [ensuring that all of Project Company's employees are properly trained and qualified, competent and experienced to carry out their respective responsibilities];
i. [the preparation and entering into of all subcontracts, service agreements and supply agreements of the Project Company required for the operation and delivery of the Project (other than such agreements which have been novated and/or assigned from the Initiator to the Project Company)];
j. [due and proper application for, and diligent effort to obtain, all consents, permits, licences and approvals required by the Project Company to carry out the Project, and all extensions, renewals and amendments thereof (other than the consents, permits, licences and approvals required to be

provided/transferred by the Initiator)];

k. [due and proper application for, and diligent effort to obtain, all work permits, employment passes, dependents' passes, visas and other permits required for all personnel of the Project Company to carry out the Project, and all extensions, renewals and amendments thereof];
l. [control and management of site of the Project and provision of all reasonable and customary measures within its control required to ensure the protection and security of the site of the Project];
m. [provision of any non-exclusive easements and/or rights of way in respect of the site of Project in favour of the Initiator];
n. [providing on or prior to the Effective Date any required performance bonds or guarantees in favour of the Initiator];
o. [establishing any escrow or reserve accounts which have been specified in the Agreement and funding such accounts to at least the requisite level];
p. [exercising all reasonable measures within its control to develop and maintain good relations with the people in the community within the vicinity of the Project that could reasonably be expected to be adversely affected or impacted by the implementation of the Project];
q. [the strict compliance, observation and implementation by the Project Company with GIIP and all Applicable Laws and E&S standards];
r. [delivering regular reports to the Initiator regarding the Project in accordance with the Agreement];
s. [payment of all taxes, duties and fees payable in respect of the Project and all related movable and immovable assets, land and buildings, as well as all other equipment, materials, chemicals, consumables and any other items in accordance with Applicable Law unless otherwise so provided in the Agreement];
t. [Charging and collection of relevant tariffs or fees (as permitted by the Agreement or relevant regulations] and
u. [other].

Note: This section provides a starting point only and must be customised to the project's specific requirements, as set out in the Business Case.

Responsibilities of the Initiator

The Initiator's responsibilities under the Agreement shall include:

a. [furnishing the Project Company with, and placing the Project Company in possession of, the [relevant Project asset] including certain inventory, equipment, consumables and other movable assets specified in the Agreement];
b. [allowing the Project Company full and free access to, and undisturbed use, occupation, possession and enjoyment of, the site of the Project and the buildings and the immovable assets specified in the Agreement];
c. [transferring to the Project Company all employees of the Initiator who are associated with or connected to the Project and whose names are specified in the Agreement];
d. [cooperating with the Project Company in connection with the Project Company's applications for all consents, permits, licences and approvals required by the Project Company to carry out the Project, and all extensions, renewals and amendments thereof, so as to expedite the consideration thereof by the appropriate government instrumentality of the [?], provided that such applications are in compliance with all applicable legal and regulatory requirements and the terms of the Agreement / [where necessary, providing/transferring certain licences required for the operations of the Project which are held by the Initiator or its affiliates]];
e. [cooperating with the Project Company in connection with the Project Company's applications for all work permits, employment passes, dependents' passes, visas and other permits required for all

personnel of the Project Company to carry out the Project, and all extensions, renewals and amendments thereof, so as to expedite the consideration thereof by the appropriate government instrumentality of the [?], provided that as such applications are in compliance with all applicable legal and regulatory requirements and the terms of the Agreement];

f. [the due and proper application for, and diligent effort to obtain, all consents, permits, licenses and approvals required by the Initiator to carry out its obligations under the Agreement, and all extensions, renewals and amendments thereof];
g. [as reasonably requested by the Project Company, discussing the Project with, and providing publicly available information about the Initiator to, any other party providing financing for the Project; provided, in any event, that the Initiator shall not be required to make any representations or undertakings in connection with any such discussions or in connection with any financing arrangement, except as may be expressly provided for in the Agreement];
h. [making such easements and rights of way available to the Project Company as may be required to carry out the Project, as detailed in the Agreement];
i. [if the Project involves an expansion or upgrades, providing support to the Project Company in applying for necessary permits and licences as well as any land procurement necessary for such expansion / upgrade; in a way consistent with national law and E&S standards] and
j. [other].

Note: This section provides a starting point only and must be customised to the Project's specific requirements, as set out in the Business Case.

Facilities, Equipment and Plant

a. [The Project Company shall not acquire any title to or ownership interests in or to any of the assets or the works unless expressly provided in the Agreement, and the Project Company shall acknowledge that the works and all such existing assets as at the Effective Date (including all equipment, accessories, supplies, spare parts and materials forming part thereof) are and shall remain the property of the Initiator. The Project Company shall have no right to grant, and shall not permit the creation of, any encumbrances on such existing assets.]
b. [Unless otherwise specified in the Agreement, assets acquired or constructed after the [Effective Date] [Closing Date] (including all equipment, accessories, supplies, spare parts and materials forming part thereof) may be owned by, and considered the Property of, the Project Company.]
c. [Subject to the payment of any consideration required therefor, upon termination or expiry of the term of the Agreement, all of the Project Company's ownership and/or rights in respect of the Project (and all related movable and immovable assets, land and buildings, as well as all other equipment, materials, chemicals, consumables and any other items whatsoever), and all related rights and warranties, shall be directly or indirectly transferred to the Initiator, free of all encumbrances or other party claims, with full indemnity from the Project Company to the Initiator, in accordance with the Agreement.]
d. [The Project Company will ensure that the Project meets the Initiator's return conditions at the end of the term of the Agreement. Such transfer shall occur in accordance with a hand-back procedure to be detailed and set out in the Agreement.]

Note: Hand back procedure to be determined by SOE and its transaction advisory team.

[Remuneration and Payment]

Payment by the Project Company:

In consideration for the concession rights afforded by the Initiator to the Project Company for the Term:

a. The Project Company shall pay the Upfront Concession Fee to the Initiator as a condition precedent to the effectiveness of the Agreement; and
b. The Project Company shall pay in a timely manner any Recurrent Concession Fee which may be provided under the Agreement. Payment by the Initiator/Users of the Project:
c. [In consideration for the Project Company fulfilling its obligations under the Agreement, [the Initiator shall pay the Project Company the amounts specified in the Agreement][the Project Company shall be entitled to collect and retain all revenue, tariffs and other amounts in respect of the Project from its users and/or the general public, as applicable.]
d. [Failure by the Project Company to [deliver [] / provide []] to the standards set out in the Agreement shall result in [a reduction in the fees payable][performance deductions/penalty points], as applicable.]
e. [For any amounts that may become due from the Initiator to the Project Company, the Project Company shall render to the Initiator an itemised invoice for any billing period in accordance with the Agreement.]
f. [In the event that the Initiator disputes any portion of an invoice, the Initiator may refer such dispute for resolution in accordance with the Agreement. In this case, the Initiator shall pay any undisputed amounts and continue to make payments, and any disputed amounts shall be paid to a separate joint interest-bearing account, pending resolution of such dispute.]

Note: This section provides a starting point only and must be customised to the Project's specific requirements, as set out in the Business Case.

Payment Default

If either party is in default in making any payment based on the Agreement, the defaulting party shall pay to the other party, interest on the unpaid amount at the late payment interest rate from the day when such amount becomes due and payable until the day such amount is paid.

Performance Security

[?], in a form and from a bank acceptable to the Initiator, which shall be forfeited by the Project Company to the Initiator in the event that the Effective Date does not occur within the time period provided or as otherwise may be provided in the Agreement.

Note: Amount and form of security / guarantee / bond to be described here. The transaction advisory team should advise on an appropriate amount and form of performance security.

Insurance

The Project Company, at its sole cost and expense, shall obtain and maintain the policies of insurance described in the Agreement, in the amounts, on the terms and during the period mentioned therein.

Note: Insurance advice regarding minimum insurance should be sought for inclusion in the Agreement.

Indemnity and Liability

Project Company:

a. The Project Company will bear the responsibility for any claim against the Initiator in respect of loss of or damage to property, death or injury to any person and all expenses relating thereto or the ownership, operation or maintenance of the Project and resulting from any wilful misconduct or negligent act or omission of the Project Company, its employees or subcontractors, without recourse to the Initiator.
b. The Project Company will fully indemnify and hold the Initiator (together with the Initiator's employees, directors and commissioners) fully indemnified in respect thereof.
c. The indemnity from the Project Company shall not extend to and the Initiator hereby waives any claims against the Project Company for and indemnifies the Project Company against (a) any such loss, damage, death or injury suffered by the Initiator or its employees, directors or commissioners, or (b) any such claim, to the extent that it was caused by any act or omission of the Initiator or its employees, directors or commissioners, or the failure of the Initiator or any such party to take reasonable steps in mitigation thereof.

Initiator:

a. The Initiator will bear the responsibility for any claim against the Project Company in respect of loss of or damage to property, death or injury to person and all expenses relating thereto or the ownership, operation or maintenance of the Project and resulting from the any wilful misconduct or negligent act or omission of the Initiator its employees or subcontractors, without recourse to the Project Company.
b. The Initiator will fully indemnify and hold the Project Company (together with the Project Company's employees, directors and commissioners) fully indemnified in respect thereof.

The indemnity from the Initiator shall not extend to and the Project Company hereby waives any claims against the Initiator for and indemnifies the Initiator against (a) any such loss, damage, death or injury suffered by the Initiator or its employees, directors or commissioners, or (b) any such claim to the extent that it was caused by any act or omission of the Project Company or its employees, directors or commissioners, or the failure of the Project Company or any such party to take reasonable steps in mitigation thereof.

Environmental Liabilities

[The Project Company will use GIIP in relation to the Project and will be responsible for all environmental liabilities arising out of the performance of the Project and the component under its responsibility including noise. The Agreement and dedicated annex to the Agreement will detail environmental and social requirements. Any pre-existing impact is responsibility of the Initiator (e.g. exiting contamination)]

Project Company Remediable Event

Occurrence of a material breach or default in respect of the Project Company's obligations under the Agreement (other than a Project Company Non-Remediable Event) after the relevant grace period has expired, as may be more specifically detailed in the Agreement.

Project Company Non-Remediable Event

Occurrence of any of the following events:

a. The Project Company abandons the Project;
b. the passing of a resolution for the bankruptcy, insolvency, winding up, liquidation of, or other similar proceeding relating to the Project Company;
c. the appointment of a trustee, liquidator, custodian, provisional manager or similar person in a proceeding referred to in point (a), which appointment has not been set aside or stayed within sixty (60) days of such appointment;
d. the making by a court having jurisdiction of an order winding up or otherwise confirming the bankruptcy or insolvency of the Project Company, which order has not been set aside or stayed within sixty (60) days; or

after a Project Company Remediable Event shall have occurred and a remedial notice has been given by the Initiator to the Project Company and the Project Company Remediable Event has not been remedied by the Project Company, or waived by the Initiator, within the time period specified in the Agreement.

Initiator Remediable Event

Occurrence of a material breach or default in respect of the Initiator's obligations under the Agreement (other than an Initiator Non-Remediable Event) after the relevant grace period has expired, as may be more specifically detailed in the Agreement.

Initiator Non-Remediable Event

Occurrence of any of the following events:

a. The dissolution, merger, consolidation, amalgamation, reorganisation, reconstruction or privatisation of the Initiator, except to the extent that it does not affect the ability of the resulting entity to perform its obligations under the Agreement; or

after an Initiator Remediable Event shall have occurred and a remedial notice has been given by the Initiator to the Project Company and the Project Company Remediable Event has not been remedied by the Project Company, or waived by the Initiator, within the time period specified in the Agreement.

Event of Force Majeure

Events of Force Majeure means any event or circumstance or combination of events or circumstances:

a. beyond the reasonable control of the party affected by such event, circumstance or combination of events or circumstances (the **Affected Party**);
b. which was not foreseeable or, if foreseeable, could not have been prevented or avoided or overcome by the Affected Party having taken all reasonable precautions and due care;
c. which directly causes the Affected Party to be unable to comply with all or a material part of its obligations under the Agreement; and
d. which is not the direct result of a breach by the Affected Party of its obligations under the Agreement or, in respect of the Project Company, under any other Project Agreement.

Force Majeure Events include but are not limited to the following circumstances, provided that they meet the criteria set forth above:

a. plague, epidemic and natural disaster, such as but not limited to, storm, cyclone, typhoon, hurricane, tornado, blizzard, earthquake, volcanic activity, landslide, tsunami, flood, lightning, drought;

[Note: Plague and epidemics are becoming increasingly difficult to insure and some bidders may request that these be treated as Material Adverse Government Action]

a. fire, explosion, or chemical contamination (other than a fire, explosion, or chemical contamination caused by the negligence of the Project Company, its contractors, or any subcontractor, supplier or vendor);
b. war (whether declared or not), armed conflict (including but not limited to hostile attack, blockade, military embargo), riots, invasion, act of a foreign enemy, act of terrorism, sabotage or piracy;
c. radioactive contamination or ionizing radiation, occurring outside the [?]; or

general labour disturbances such as boycotts, strikes and lock-out, go-slow, occupation of factories and premises, excluding similar events which are unique to the Agreement and specific to the Project Company or to its subcontractors.

Relief from Force Majeure Events

If a Force Majeure Event has occurred, the Affected Party shall be entitled to relief from its obligations under the Agreement if it meets the requirements below.

To obtain relief above, the Affected Party must:

a. as soon as practicable, and in any event within [seven (7) business] days after it became aware that the Force Majeure Event has caused or is likely to cause breach of an obligation under the Agreement, give to the other party a notice of its claim for relief from its obligations under the Agreement, including (i) satisfactory evidence of the existence of the Force Majeure Event, (ii) full details of the nature of the Force Majeure Event, (iii) the date of occurrence; (iv) its likely duration; and (v) details of the measures taken to mitigate against the Force Majeure Event.
b. within [seven (7) business] days of receipt of the notice referred to in clause (a) above, give to the other party full details of the relief claimed, as well as information on all actions being taken by the Affected Party to mitigate the consequences of the Force Majeure Event; and
c. demonstrate to the other party that:
    - the Affected Party, and its contractors, could not have avoided such occurrence or consequences by steps which they might reasonably be expected to have taken, without incurring material cost;
    - the Force Majeure Event directly caused the need for the relief claimed;
    - the relief claimed could not reasonably be expected to be mitigated by the Affected Party without incurring material cost; and
    - the Affected Party is using all reasonable endeavours to prevent and mitigate the consequences of the Force Majeure Event of its obligations under the Agreement.

If the Affected Party has complied with its obligations above, then it shall be excused from the performance of its obligations under the Agreement to the extent it is prevented, hindered or delayed in such performance by reason of the Force Majeure Event. If information required under the clauses above is provided after the dates referred to in that clause, then the Affected Party shall not be entitled to any relief during the period for which the provision of information is delayed.

The Affected Party shall notify the other party as soon as practicable after the Force Majeure Event ceases or no longer causes the Affected Party to be unable to comply with its obligations under the Agreement. Following such notification, the Agreement shall continue to be performed on the terms existing immediately prior to the occurrence of the Force Majeure Event.

Material Adverse Government Action

For the purposes of the Agreement, a Material Adverse Government Action means any act or omission by the Initiator or any relevant public authority, which occurs during the term of the Agreement and which (i) renders the Project Company unable to comply with all or a material part of its obligations under the Agreement; and/or (ii) has a material adverse effect on the cost or the profits arising from such compliance/performance. Material Adverse Government Action shall mean and be limited to the following circumstances, to the extent that they meet the requirements set forth above:

a. failure of any relevant public authority to grant to the Project Company, or renew, any permit or approval that is required for the purposes of the Project Company's proper performance of its obligations and enforcement of its rights under the Agreement, in each case within the required timeframe under Applicable Law, except where such failure results from the Project Company's non-compliance with Applicable Law;
b. expropriation, compulsory acquisition or nationalization by any relevant authority of any material asset or right of the Project Company, including any of the shares in the Project Company;
c. any act or omission of any relevant authority of the [?] adversely affecting the legality, validity, binding nature or enforceability of the Agreement
d. any act or omission of any relevant authority of the [?] which adversely impacts on the financial performance of the Project Company; or

any action or failure to act without justifiable cause by any relevant public authority

Consequences of a Material Adverse Government Action

If a Material Adverse Government Action occurs, the Project Company shall be excused from the performance of its obligations under the Agreement to the extent that it is prevented, hindered or delayed in the performance of such obligations by reason of the Material Adverse Government Action, and in some circumstances may be entitled to compensation under the Agreement, in each case subject to and in accordance with the provisions of the Agreement.

To obtain relief and/or claim compensation, the Project Company must:

a. as soon as practicable, and in any event within [seven (7) business] days after the Project Company becomes aware that the Material Adverse Government Action has occurred, give to the Initiator a notice of its claim for payment of compensation and/or relief from its obligations under the Agreement, following which the parties shall meet and discuss in good faith to consider any option to mitigate the impact of the Material Adverse Government Action;
b. within [seven (7) business] days of receipt by the Initiator of the notice referred in clause (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 Project Company's obligations under the Agreement; and

c. demonstrate to the Initiator that: (i) the Project Company 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 Project Company's obligations under the Agreement; (iii) the Estimated Change in Project Costs, and/or loss of revenue and/or relief from the obligations under the Agreement claimed, could not be mitigated or recovered by the Project Company; and (iv) the Project Company is using all reasonable endeavours to perform its obligations under the Agreement.

If the Project Company has complied with its obligations above, then the Initiator shall:

a. compensate the Project Company for the actual Estimated Change in Project Costs and/or loss of revenue as adjusted to reflect the actual costs reasonably incurred; and
b. give the Project Company such relief from its obligations under the Agreement as is reasonable for such Material Adverse Government Action.

In the event that information is provided after the dates referred to above, then the Project Company shall not be entitled to any compensation or relief from its obligations under the Agreement in respect of the period for which the provision of information is delayed.

If the Initiator and the Project Company cannot agree on the extent of any compensation or relief from the Project Company's obligations under the Agreement, or the Initiator disagrees that a Material Adverse Government Action has occurred, the parties shall resolve the matter in accordance with the Agreement.

Qualifying Change in Law

Qualifying Change in Law includes the following:

a. a Discriminatory Change in Law;
b. [a Specific Change in Law;] or
c. [a General Change in Law which comes into effect during the Term and which involves additional expenditure at or above any amount required the Agreement.]

Note: SOE may not want to provide relief for Specific and General Changes in Law and this might be an appropriate position depending on specific circumstances of the transaction. A decision on this risk allocation would need to be done on a case by case basis including with regards to the general economics of the transaction.

Applicable Law mean all laws, statutes, orders, decrees, resolution, injunctions, licenses, permits, approvals, ordinance, rule, order, treaty, code or regulation as enacted, issued or promulgated by any Governmental Instrumentality including amendments, modifications, exclusions or re-enactments thereof.

Change in Law means, after the date on which the successful bidder submitted its bid, 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;
c. a change in the interpretation or application of any Applicable Law;
d. the imposition by any government entity of any material condition in connection with the issuance, renewal or modification, or the revocation or non-renewal (other than in accordance with the existing Applicable Law) of any approval consents, permits, licenses and approvals; or

e. the imposition or levying of any taxes on the Project Company or the increase or decrease in the rate or classification of any taxes.

Discriminatory Change in Law means a Change in Law, the terms of which apply expressly to:

a. the Project and not to similar projects; and/or
b. the Project Company and not to other persons.

General Change in Law means a Change in Law which is not a Discriminatory Change in Law or a Specific Change in Law.

Governmental Instrumentality shall mean the Government of the [?] and any ministry, department, political subdivision, instrumentality, or agency of the [?], in each case whether central, provincial or regional government level but only within the [?] and any successor to or assignee of any of the foregoing.

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 provided in the course of the Project.

Consequences of Qualifying Change in Law

If a Qualifying Change in Law occurs or is shortly to occur, then any party may, within [thirty (30) business] days starting from the day it became aware (or should have been aware) of the Qualifying 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 required to the obligations of the Project Company;
b. whether any changes are required to the terms of the Agreement to deal with the Qualifying Change in Law;
c. whether relief from compliance with obligations is required, including the obligation of the Project Company to achieve any contractual deadline and/or meet any contractual performance requirement during the implementation of any relevant Qualifying Change in Law;
d. any (positive or negative) change of revenue that will result from the relevant Qualifying Change in Law;
e. any (positive or negative) estimated change in the costs of the Project that will directly result from the Qualifying Change in Law; and
f. any capital expenditure that is required or will no longer be required as a result of a Qualifying Change in Law.

As soon as practicable and in any event within [thirty (30) business] days after receipt of any notice from the affected party, the Initiator and the Project Company shall discuss and agree the issues referred to above and any ways in which either party can, if applicable, mitigate the effect of the Qualifying Change in Law, including, in relation to the Project Company:

a. providing evidence that the Project Company has used reasonable endeavours (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 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, Changes in Law at that time have been taken into account by the Project Company;
c. giving evidence as to how the Qualifying Change in Law has affected prices charged by any similar businesses to the Project; and

d. demonstrating that any expenditure that has been avoided, which was anticipated to be incurred to replace or maintain the contractual obligations of the Project Company 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 clauses (e) or (f) above, provided that if the parties cannot agree on the effects of the Qualifying Change in Law, the matter shall be referred for determination in accordance the Agreement.

If the parties have followed the procedure set out above, then:

a. the affected party shall be excused from the performance of its obligations under the Agreement to the extent it is prevented, hindered or delayed in such performance by reason of the Qualifying Change in Law;
b. if the Qualifying Change in Law has occurred before the [Closing Date], the scheduled [Closing Date] shall be postponed taking into account the effect of such Qualifying Change in Law; and
c. the parties shall agree on the amount and payment of any compensation to reflect the actual Estimated Change in Project Costs as adjusted to take into account the actual costs or gains reasonably incurred or obtained further to the Qualifying Change in Law, provided that no compensation shall be made in relation to a Qualifying Change in Law under this clause unless the Project Company can demonstrate that the aggregate impact of all Qualifying Change in Laws that have occurred [during the year during which the Qualifying Change in Law in respect of which compensation is claimed occurs / in aggregate] exceed [?].

In the event that the notice and relevant information are not provided within the periods referred to above, the affected party shall not be entitled to any compensation or relief from its obligations under the Agreement in respect of the period for which the provision of information is delayed.

Termination

Termination due to failure to achieve Effective Date [or Closing Date]

In the event that the Effective Date does not occur within the time period specified in the Agreement and such period has not been extended, the Initiator may terminate the Agreement in its sole and absolute discretion on notice to the Project Company and retain any performance security provided under the Agreement.

Termination due to Project Company Non-Remediable Event or Initiator Non-Remediable Event

Upon the determination that a Project Company Non-Remediable Event or an Initiator Non-Remediable Event has occurred, the following procedure shall apply:

a. The party which is not the subject of such event may give a notice (Termination Notice) to the other party, specifying in reasonable detail the Project Company Non-Remediable Event or Initiator Non-Remediable Event, as the case may be, giving rise to such Termination Notice, and the date on which the party giving such Termination Notice proposes to terminate the Agreement, which date shall not be less than [thirty (30)] days after the date of such notice;
b. During the period of [thirty (30)] days (or such longer period set forth in the Termination Notice or as the parties may agree) following the giving of such Termination Notice, the parties shall consult as to what steps shall be taken with a view to mitigating or remedying the consequences of the relevant event having regard to all the circumstances;
c. If the party receiving the Termination Notice intends to raise a Dispute regarding the right to give effect to the Termination Notice and/or to refer such Dispute to an expert or to arbitration in

accordance with the Agreement, such party shall within [fifteen (15)] days of receipt of the Termination Notice so inform the party giving the Termination Notice and shall immediately refer to an expert the question of whether the party receiving the Termination Notice has a reasonable basis to dispute the other party's right to give effect to the Termination Notice, which reference shall instruct the expert to render such determination not later than [thirty (30)] days after the appointment of such expert; and

d. at the expiry of the period referred to above the Agreement shall be terminated and the Project Company shall be entitled to the compensation set out in the Agreement.

Termination due to Prolonged Force Majeure

If a Force Majeure Event subsists for a continuous period of more than [180-360 calendar] days, which prevents the Project Company from complying with its obligations under the Agreement, either party may in its discretion terminate the Agreement by issuing a written termination notice to the other party which shall take effect [thirty (30) calendar] days after the receipt of the termination notice by the other party.

If, at the end of this [thirty (30)]-day period, the Force Majeure Event continues, the Agreement shall be terminated, and the Project Company shall be entitled to the compensation set out in the Agreement.

Termination due to Prolonged Material Adverse Governmental Action

If a Material Adverse Government Action subsists for a continuous period of more than [180-360 calendar] days, which prevents the Project Company from complying with its obligations under the Agreement, either party may in its discretion terminate the Agreement by issuing a written termination notice to the other party which shall take effect [thirty (30) calendar] days after the receipt of the termination notice by the other party.

If, at the end of this [thirty (30)]-day period, the Material Adverse Government Action continues, the Agreement shall be terminated, and the Project Company shall be entitled to the compensation set out under the Agreement.

Termination due to a Qualifying Change in Law

If a Qualifying Change in Law:

a. results in the Project Company not being able to achieve the [Closing Date] within [?] months after the scheduled [Closing Date]; or
b. prevents a party from performing its material obligations under the Agreement for a period of [?] consecutive days,

either party may in its discretion terminate the Agreement by issuing a written termination notice to the other party which shall take effect [thirty (30) calendar] days after the receipt of the termination notice by the other party.

If, at the end of this [thirty (30)]-day period, the Qualifying Change in Law continues, the Agreement shall be terminated, and the Project Company shall be entitled to the compensation set out under the Agreement.

Consequences of Termination

In the event of termination of the Agreement due to failure to achieve the [Effective Date] [or the Closing Date], the Initiator shall be entitled to payment under the terms of any performance bonds or guarantees in favour of the Initiator.

In the event of termination of the Agreement due to either of an Initiator Non-Remediable Event, a Project Company Non-Remediable Event, a Force Majeure Event, a Material Adverse Government Action or a Qualifying Change in Law:

a. the Initiator shall purchase the Project or the shares in the Project Company at the purchase price determined in the Agreement for those respective circumstances;
b. the Project Company shall hand over and transfer to the Initiator the Project, or the shares in the Project Company, for no other consideration, or assumption by the Initiator of any liability in respect thereof, except as expressly provided for in the Agreement; and

the effect on any required performance bonds or guarantees in favour of the Initiator shall be provided in the Agreement.

Note: In principle, the purchase price in the event of a termination due to an Initiator Non-Remediable Event, a Force Majeure Event affecting Initiator, a Material Adverse Government Action or a Qualifying Change in Law should ideally consider the concession fee less financial benefits accrued to the private section till termination.

Initiator Step-in

The Initiator shall have the right to step-in to the Agreement and assume some or all of the obligations of the Project Company in certain circumstances (and for so long as these circumstances are occurring), including:

a. an emergency;
b. a serious risk to the environment, the public or users of the Project; or

a serious risk of material damage to public or private property.

Initiator Take Back Option

At any time during the term of the Agreement, the Initiator has the option to take back the Project upon giving notice to the Project Company. The purchase price under the option will be the same as the purchase price paid due to an Initiator Non-Remediable Event.

Financing and Lender Direct Agreement

The Initiator shall provide all documents and other assistance as Project Company and its financiers may reasonably request in connection with any financing relating to the Project. If, following such financiers' review, the financiers require amendments to be made to this Agreement, then the Initiator shall negotiate with Project Company in good faith with regard to such required amendments to this Agreement. The Initiator shall (i) furnish consents to assignment, certifications, representations, estoppel certificates and opinions of counsel and other closing documents and (ii) enter into a direct agreement, in each case as may be reasonably requested by Project Company and its financiers from time to time, and in a form reasonably acceptable to Project Company and its financiers in connection with such financing.

For the purpose of financing relating to the Project, Project Company may assign or create a security interest over its rights, title and interest under or pursuant to this Agreement, the Project, the moveable property and

intellectual property, or the revenues or any of the rights or assets of Project Company within the scope of this Agreement.

Dispute Resolution

Mutual Discussions:

If any dispute or disagreement of any kind whatsoever (a **Dispute**) shall arise between the parties in connection with, or arising out of, the Agreement, or the breach, termination or validity hereof, the parties shall attempt for a period of 30 days after the receipt by one party of a written notice from the other party of the existence of the Dispute, to settle such Dispute in the first instance by mutual discussions between the parties.

Referral to an independent expert:

If the dispute is of a technical (e.g. operational) or financial (e.g. accounting) nature, and the parties fail to reach an agreement on such a dispute by mutual discussions within the required 30-day period, then the parties shall appoint an approved independent expert to resolve the dispute between the parties. If the expert does not render a decision within a period of 90 days from completion of the hearing, either party may terminate the appointment of the expert upon given written notice to the party and a new expert shall be appointed in accordance with the process stated above. If the Dispute is not resolved by one or more experts so appointed within a 12-month period from the occurrence of the Dispute, either party may refer the Dispute to arbitration.

Arbitration:

If the Dispute cannot be settled within the 30 day period provided for mutual discussions, and in the case of technical or financial matters referred to an independent expert, the Dispute is not resolved within a 12 month period, the Dispute shall finally be settled by an arbitral tribunal under the rules of the [- *international arbitration institution to be named; ICC or SIAC and a neutral arbitration seat would be appropriate*].

Subcontracting

[The Project Company may subcontract to contractors named in the Agreement. A contractor not named in the Agreement may only be appointed by the Project Company with the written approval of the Initiator.]

Governing Law

The Agreement will be governed by and construed in accordance with the laws of the [?].

Language

The Agreement will be prepared in [?]and English. In the event of any conflict or inconsistency between the English language version and the [?] language version of the Agreement, the English language version shall

prevail save to the extent that the [?] language version is required to prevail in accordance with Applicable Law from time to time in effect.

Waiver of Immunity

Each party will unconditionally and irrevocably:

a. agree that the execution, delivery and performance by it of the Agreement constitutes private and commercial acts, rather than public or governmental acts;
b. agree that should any legal proceedings be brought against it or its assets in relation to the Agreement, no immunity (sovereign or otherwise) from such legal proceedings shall be claimed by or on behalf of itself or with respect to its assets;
c. waive any right of immunity (sovereign or otherwise) which it, or any of its assets now has, or may acquire in the future; and

consent generally in respect of the enforcement of any judgment (or arbitral award) against it in any such proceedings to the giving of any relief or the issue of any process in connection with such proceedings including the making, enforcement or execution against it or in respect of property whatsoever (irrespective of its use or intended use) of any order or judgment which may be made or given in such proceedings.

Miscellaneous

The Agreement shall contain market standard boiler plate clauses including the following provisions:

a. confidentiality undertakings;
b. notices;
c. no agency;
d. waivers;
e. entire agreement;
f. severability;
g. survival provisions;
h. amendments;
i. costs; and
j. counterparts.

Related Content

- **Guidelines for Implementing Asset Recycling Transactions (Download PDF version)**

Additional Resources

- Sector Specific Standardized PPP Agreements and Contract Clauses
- Standardized PPP Contracts and Contract Clause
- Contracts & Agreements

This section has not been prepared with any specific transaction in mind and are meant to serve only as general guidance. It is therefore critical that the content will be reviewed and adapted for specific transactions.

This is a new section of the website and is currently in draft form. For feedback on the content of this section or to suggest additional links or materials, please contact the PPP Resource Center using the feedback form.

Image not found or type unknown

