Sample Telecommunications Agreements

Full Description

Australia

As Australia is a large country with a low population density, it is often uneconomical for telecommunications companies to construct and operate mobile base stations in remote or regional areas. The Australian Government introduced the Mobile Black Spot Program ("Program") to invest in telecommunications infrastructure to improve and extend coverage of mobile voice and wireless broadband services in regional Australia where insufficient mobile coverage had been reported. Under the Program, the Government contributed funding to network operators to build, own and operate new or updated mobile base stations in identified areas of need.

The Program is a good example of a PPP in a mature, market-oriented telecommunications industry with established private sector participation. The Government played a limited role in prescribing the requirements of the PPP, and was instead focused on assessing private participants' proposed outcomes. This market-led approach would need to be carefully considered in markets where likely private sector participants are relatively inexperienced.

Under the Program, network operators selected their desired locations from a list of locations identified by the Government as having inadequate mobile phone coverage, and submitted applications for funding for each selected location. The Government assessed each application against a number of pre-determined criteria, including:

- the size of new coverage;
- the benefit of the coverage (eg the number of premises or major transport routes would benefit from the coverage);
- the amount of contribution required from the Government; and
- the services proposed to be offered from the mobile base station,

and then ranked applications in order of merit. Funding was allocated from the highest ranked application downwards until the funding was exhausted.

This outline funding agreement sets out the draft terms on which the Australian Government granted funding under Round 1 of the Program. Under the funding agreement, the Government made contribution payments to the funding recipient on the achievement of certain milestones for each mobile base station, which were to be negotiated between the Government and the funding recipient during the application process. The funding only contributed to the capital costs of building the base station. All operating costs were borne by the funding recipient. If the actual capital cost was less than the estimated capital cost used to determine the amount of funding, the Government could, at its discretion, reduce its funding by an amount directly proportionate to the amount of the shortfall. Consistent with the intention of the Government to act only as a financial contributor, the funding agreement allocated all risk to the funding recipient. This included sole responsibility for procuring and obtaining access to each base station site and designing and constructing the base station.

Each funding recipient was also required to negotiate operational agreements with the Government, which were included as schedules to the funding agreement. These operational agreements set out the network operator's obligations in relation to the roll out, co-location and open access terms and service terms for each mobile base station.

Key features of the draft funding agreement include:

- **Site approval –** if the funding recipient is unable to obtain the necessary approvals to construct a mobile base station at the designated site, the funding recipient will have 15 business days to propose a replacement site that will provide an equivalent or similar level of coverage to the equivalent or similar area as the original site. If the funding recipient does not propose an alternative site or the Government is not satisfied that the proposed site will provide an equivalent or similar level of coverage as the original site, the Government may withdraw funding for that particular mobile base station.

- **Site risks –** the funding recipient accepts sole responsibility for, and assumes the risk of, all loss arising from the nature, characteristics or physical conditions of a site. This may include contamination around the site, any non-standard soil or subsurface conditions as well as environmental, heritage, native title and geotechnical risks associated with the site.

- **Variations –** if the funding recipient wishes to undertake any variation during the construction or operation of any mobile base station, it must obtain the Government's prior written consent, which must not be unreasonably withheld if the requested variation is consistent with the achievement of the key objectives.

- **Right of entry –** the Government may at any time enter a mobile base station site or other premises for the purpose of observing or inspecting the funding recipient's activities, monitoring compliance with the funding agreement or exercising any right or obligation which the Government has under the funding agreement.

- **Force majeure –** if the funding recipient alleges that a force majeure event has occurred, it must give the Government prompt notice of the force majeure, including the details of the force majeure and the obligations which have been affected. The parties must meet within 3 business days of the notice of force majeure to determine the estimated length of time for which the force majeure will continue. The funding recipient's obligations will be suspended to the extent and for so long as such obligations are affected by the force majeure; however, the Government may make alternative arrangements for the performance of any suspended obligations at its own cost.

- **Termination or reduction of scope for convenience –** the Government may, at any time by notice to the funding recipient, immediately terminate or reduce the scope of the funding agreement for convenience. The Government will only be liable for the payment of funds that are due and owing to the funding recipient at the date of the notice of termination as well as reimbursing any expenses the funding recipient has unavoidably incurred.

- **Subcontractors –** the funding recipient may engage subcontractors to undertake the construction and operation of the mobile base station. However, the funding recipient will be liable to the Government for any acts, defaults or neglects of any subcontractor or employee or agent of the subcontractor as if they were the funding recipient's own acts, defaults or neglects.

- **Publicity by funding recipient –** in all publications, promotional and advertising materials and public announcements, the funding recipient must acknowledge the financial and other support it has received from the Australian Government. The acknowledgement must be approved by the Government.

- **Publicity by the Government –** the Government reserves the right to publicize and report on the awarding of funding to the funding recipient and the achievement of key objectives.

- **Right of the Government to publicize failure –** the Government reserves the right to publicize and report on the funding recipient's failure to achieve any milestone or completion by the relevant date on the Government's website and in media releases and general announcements (unless the delay is caused by a force majeure event).

- **Dispute resolution –** if a dispute arises, the parties must first attempt to settle the dispute by direct negotiation. Failing negotiation, the parties must refer the dispute to an independent mediator, then an independent arbitrator, before being able to commence legal proceedings.

The Mobile Black Spot Program information page on the Department of Infrastructure, Transport, Regional Development and Communications website provides an overview of the Program and its key objectives.

Nepal

The Nepal Telecommunications Authority ("NTA") published this Request for Application ("RFA") in January 2020 to invite existing Internet Service Provider ("ISP") licensees to apply for the opportunity to install, activate and operate a broadband connectivity network using (mainly) optical fiber cable in five districts in Nepal.

This construction agreement reflects Nepal's position as a developing country in the earlier stages of market liberalization, with limited historical private sector participation in the telecommunications sector. The RFA is relatively prescriptive, setting out the districts and premises that must be serviced and specifying minimum quality, service and technical standards. However, within these constraints, responsibility for planning and designing the network lies with the private sector. This PPP is therefore an example of how a government may retain significant control over projects, while recognizing and leveraging private sector technology and expertise.

As part of the application process, applicants will nominate a subsidy amount to be provided by the NTA to establish the network. The contract will be awarded to the applicant with the lowest nominated subsidy ("Selected Licensed Operator", or "SLO"), provided that the applicant is qualified to perform the contract satisfactorily. The NTA estimated that the subsidy cost would be in the region of 928 million Nepalese rupees.

Applicants must include a technical proposal with a detailed description of its network, equipment and technology, approach to operating the network, land acquisition requirements, quality and maintenance arrangements, proposed tariff arrangements beyond the subsidy period, projected financials, and work schedule. Applicants must also provide bid security (in the form of a bank guarantee or cash deposit).

Key features of the project include:

- **Technology specifications –** the broadband network must be built using optical fiber. The 5 districts have different geography, so SLO is free to choose appropriate technology, based on the geography provided it uses optical for each district. Specified minimum quality standards must be met. The SLO's internet/data network must be technically compatible with another ISPs' network so as to provide seamless interconnection. All customers must be connected with 1 Mbps internet speed in each terminal.

- **Non-exclusive authorization –** the authorization will not change the SLO's existing rights and obligations except to add to them as provided in the RFA. NTA will ensure existing internet service providers do not abuse their dominant position / unfairly discriminate against the SLO.

- **Tariffs –** the tariff rates charged by the SLO to its customers for use of the Broadband Network will be subject to regulation by the NTA, as is the case with tariffs of other ISPs. SLO pays a royalty fee of 4% of adjusted gross revenues each year + contributes 2% of its adjusted gross revenues each year to the rural telco development fund

- **Publication of network information –** SLO must make public its network and the services it offers, including the conditions and process for people to access the network and services, and the guaranteed speeds.

- **Obligation to provide services –** SLO must provide services to all valid customers (it cannot refuse to provide services).

- **No sale without consent –** SLO cannot sell its license without NTA consent, and there cannot be a change of control of SLA in the first 5 years without NTA consent.

Key features of the proposed SLO contract include:

- **Roll-out timing –** installation of services must commence within 9 months of winning the contract and be completed within 12 months of the date of signing of the contract.

- **Liquidated damages –** the SLO is liable to pay liquidated damages to the NTA for each day the Completion Date is later than the Intended Completion Date. The applicable rate of liquidated damages is 0.05% of the subsidy amount granted to the SLO, with a cap of 10% of the subsidy amount.

- **Termination –** NTA can terminate for unremedied failure to perform, SLO insolvency, Force Majeure that subsists for 30 days, or SLO corruption/fraud. SLO can terminate if NTA does not pay subsidies.

- **Force majeure –** if an independent technical consultant appointed by the NTA provides written confirmation to NTA that one or more events of force majeure prevented the installation, activation or operation of the network, then the obligations will be modified accordingly.

- **Sub-contracting –** SLO must obtain NTA written consent to sub-contracting any activities or appointing new key personnel, or changing its program of activities.

- **Disputes –** disputes are resolved by arbitration.

United Kingdom

Framework Agreement (broadband network)

The Framework Agreement is part of Building Digital UK's ("BDUK") Broadband Delivery Framework ("Framework").

Under the Framework, the UK Government subsidizes private sector investment to provide broadband to areas where there is otherwise not a viable commercial market. It uses a gap-fund subsidy commercial model, where Government funding subsidizes capital costs, but the supplier bears the risk of implementing, owning and operating the network and therefore the risk of ensuring its commercial success. It is expected that customer revenue will cover operating and maintenance costs, as well as generate sufficient profit to provide a return on the investment. BDUK is responsible for the overall operation and governance of the Framework, and is the authority for design and costing and for ensuring compliance.

The liberalization of telecommunications markets globally means that the private sector entities involved in a PPP are often selected through a competitive bidding process. In many cases, each project will require a new standalone bidding process, with all private sector firms eligible to participate as long as they satisfy any minimum criteria. However, the UK Government has implemented a two-tiered structure whereby interested broadband suppliers must first apply for membership of a Government-approved panel before being eligible to bid for local broadband projects under the Framework. The Framework aims to:

- simplify and streamline the procurement process;

- capture and assure proposed technical solution components and financial information;

- simplify and reduce the contracting overhead on suppliers and local bodies; and

- retain flexibility to allow for local delivery issues and prioritization.

This panel bid structure provides an interesting example of another approach to the competitive bidding process, and underlines the flexibility in approach that may be taken by different jurisdictions, depending on the competitive dynamics of the market, volume of likely projects, and the key objectives and priorities of the government.

There are two main parts to the Framework:

1. the **Framework Agreement** between BDUK and selected broadband suppliers, which establishes a panel of broadband suppliers with the experience and capability to design, build and operate a wholesale broadband network; and

2. the **Call Off Contract** between the local body and a successful broadband supplier from the established panel (see Call Off Contract summary below).

Key features of the Framework, as reflected in the Framework Agreement, include:

- **Appointment of supplier –** the supplier is appointed to the panel as a potential supplier of certain network deployment and related services under Call Off Contracts.

- **Scope –** unless a local body has specifically contracted with the supplier under a Call Off Contract using the Call Off Procedure, neither BDUK nor any local body shall be under any obligation to conduct any Call Off Procedure or award any Call Off Contract to the supplier, or gives any commitment or undertaking as to the volume or value of any services.

- **Non-exclusivity –** the supplier agrees that its relationship with BDUK is non-exclusive and that BDUK is entitled to enter into contracts with other suppliers.

- **Call off procedure –** the supplier is under no obligation to respond to mini-competitions held by a local body, but if it does, it must use the Reference Supplier Solution and Financial Model set out in the Framework Agreement.

Key contractual clauses in the Framework Agreement include:

- **General Framework Obligations –** the supplier shall perform obligations in accordance with applicable industry codes, laws and industry best practice. The supplier will also be responsible for obtaining any relevant licenses, authorizations, consents or permits.

- **Change control –** any amendments to the Framework Agreement shall be made in accordance with the Change Control Procedure.

- **Dispute resolution –** all disputes shall be resolved in accordance with the Dispute Resolution Procedure, which requires reasonable endeavors to settle any dispute through commercial negotiation conducted in good faith and mediation.

- **Financial distress –** the supplier shall regularly monitor its credit ratings and notify BDUK as soon as practicable following the occurrence of a financial distress event.

- **Liability –** neither party limits its liability for death or personal injury caused by negligence, fraud or fraudulent misrepresentation or breach of any obligation as to title. Neither party shall be liable to the other for any indirect, special or consequential loss or damage or loss of profit.

- **Termination –**

- BDUK may terminate this Framework Agreement without penalty by written notice to the supplier if the supplier commits a material default, suffers an Insolvency Event or if BDUK objects to a change of control which has occurred.
- The supplier may terminate this Framework Agreement without penalty by written notice to BDUK where BDUK commits a material default of the Framework Agreement and the material default either has not been remedied within 30 days or is not capable of remedy.

- **Suspension from the Broadband Delivery Framework –** the Authority may suspend the supplier's appointment to the panel by notice if the supplier proposes a solution that materially varies from the Reference Supplier Solution, proposes a Call Off Bid Financial Model that materially varies from the Reference Financial Model, is unwilling to adjust pricing on reasonable request or where the supplier has failed to remedy a financial distress event.
- **Assignment and novation –**
  - the supplier shall not assign, novate or otherwise dispose of or create any trust in relation to any or all of its rights and obligations under the Framework Agreement without the prior written consent of BDUK.
  - BDUK may assign, novate or otherwise dispose of any or all of its rights and obligations and / or novate the Framework Agreement to any other body which substantially performs any of the functions that previously had been performed by BDUK in connection with the scope of the Framework Agreement.
- **Force majeure –** neither party shall be entitled to bring a claim for a breach of obligations to the extent that a force majeure event occurs and the affected party is prevented from carrying out obligations because of the force majeure event. Force majeure includes acts of God, riots, war or armed conflict, acts of terrorism, acts of government, local government or Regulatory Bodies, fire, flood, storm, earthquake or disaster. The definition of a force majeure event excludes any industrial dispute relating to the supplier or the supplier's personnel, or any other failure in the supplier or any subcontractor's supply chain.

Call Off Contract (broadband delivery)

Under BDUK's Broadband Delivery Framework ("Framework"), local authorities (e.g. councils) will use a Call Off Contract to engage suppliers on the Framework panel to undertake broadband projects. This process involves local bodies first conducting a public consultation for the proposed project, collecting relevant datasets to establish a data room and holding a bidder briefing. The local body will then hold a mini-competition by publishing an Invitation to Tender ("ITT") setting out the:

- specific requirements for the local broadband project;
- process and timetable for the competition;

- request for a form of response; and
- evaluation criteria, weightings and approach.

As part of the mini-competition, suppliers will be required to provide:

- a financial forecast for the implementation and operational periods;
- a compliance matrix;
- a description of their solution to the ITT, identifying any variances from the Reference Supplier Solution provided in the Framework Model; and
- all other requested documentation.

The local body will then evaluate submissions against the criteria published in the ITT and determine a preferred supplier. The preferred supplier will have an agreed period of time to conduct additional due diligence to reach a firm cost before the award of the contract. The local body will also be responsible for agreeing on the level of subsidy and providing such subsidy upon successful completion of specified milestones.

Once negotiations have been finalized, the supplier will enter into:

- a contract containing the terms and conditions for the specified broadband project (Call Off Contract) with the local body; and
- grant agreements with its other funding sources, including BDUK.

Each Call Off Contract will be a standalone contract and will include:

- variations from the requirements and commercial and financial terms set out in the template Call Off Contract;
- detailed final design and implementation plan; and
- detailed costing and subsidy calculation within a completed financial model.

Generally, Call Off Contracts last for seven years post-implementation. During the period of the Contract, suppliers must report to the local body on the performance of the network and of its operations. The solution provided is expected to be commercially sustainable, generating sufficient revenue to cover ongoing costs, provide a profit margin and generate funding for reinvestment. Any excess subsidy is “clawed back” from suppliers and reinvested in the roll-out of similar schemes within the same area.

Amongst other things, the template Call Off Contract sets out:

- **General performance standards –** the supplier shall ensure that the services are performed in an economic, efficient, effective and safe manner, in accordance with the applicable Codes, Standards and Consents, in such a manner as not to detract from or damage the image and reputation of the local body or the BDUK; and so as not to unreasonably impede the local body in carrying out its functions or increase the cost to the local body of carrying out its functions.

- **Consents –** the supplier shall apply for, obtain, maintain, renew and adhere to the applicable conditions of all consents. The local body shall do so when, as a matter of law, only the local body is eligible to obtain such consents.

- **Step-in rights –** if the network is to be designed such that it can be isolated from the supplier's wider infrastructure and business, then for continuity of service reasons, it may be appropriate for the local body to have a right to take over the performance of the services or appoint a third party to do so if a termination right, statutory requirement or duty, serious health and safety/environment risk or an emergency arises.

- **Delay –** if the supplier becomes aware that it will not, or is unlikely to, achieve any milestone by the milestone date, it shall as soon as is practicable notify the local body of the delay and summarize the reasons for it. When such delay is due to any default of the supplier, the supplier shall also submit a draft remedial plan identifying issues arising out of the delay and the steps that the supplier proposes to take to achieve the milestone in accordance with the terms of the Contract.

- **Financial matters –**

    - **Milestone payments and invoicing –** the local body shall pay Milestone Payments to the supplier subject to and in accordance with the Contract.

    - **State aid –** it is the local body's responsibility to comply with the State Aid Terms, which includes those stemming from the decision from the European Commission approving the aid scheme, the relevant articles of the Treaty on the Functioning of the European Union and the European Community rules, regulations and guidelines relating to State aid. The supplier shall provide such assistance, information and / or support as the local body may reasonably require in connection with the local body's responsibilities under the State Aid Terms.

    - **Additional funding –** an operative provision may need to be included to the extent that additional third-party funding is used.

    - **Financial distress –** the supplier must regularly monitor its own and each of its key subcontractors' credit ratings. In the event that the local body reasonably believes that a financial distress event could adversely impact the performance of the Contract and / or the security of the public subsidy, the supplier shall meet with the local body to review the effect of the financial distress event and provide a draft remedial plan (and any other relevant information) for the local body to approve.

    - **Guarantee and performance bond –** the local body may require the supplier to provide a guarantee and / or performance bond if it considers that either is required due to the financial circumstances of the supplier.

- **Subcontracting and supply chain rights –**

    - **Consent –** the supplier shall not subcontract any key service without the Authority's prior written consent, which shall not be unreasonably withheld or delayed. The local body may impose such conditions as it reasonably considers appropriate, including a requirement that certain terms and conditions from the Call Off Contract flow down to the subcontract.

    - **Obligations under the Contract –** the supplier shall not terminate or materially amend any key subcontract to the extent it could adversely affect the supplier's compliance with its obligations under the Contract.

    - **Small and Medium Sized Enterprises ("**SMEs**") –** the supplier shall implement appropriate processes and measures to ensure that SMEs are given fair, equal and proportionate access to any subcontracting opportunity.

- **Governance and key procedures –**

    - **Representatives –** the local body and the supplier shall each appoint a representative who shall have the authority to act on behalf of each party.

    - **Reports and records –** the supplier shall produce and provide to the local body the reports set out in the Contract, along with such reasonable additional ad hoc reports concerning the operation of the Contract as the local body may reasonably require from time to time.

    - **Change control –** the parties shall comply with their respective obligations in relation to contract changes as set out in the Change Control Procedure.

    - **Disputes –** all Disputes shall be resolved in accordance with the Dispute Resolution Procedure, which requires reasonable endeavors to settle any dispute through commercial negotiation conducted in good faith and mediation. Parties may also include a provision as to arbitration.

- **Personnel, premises and assets –**

    - **Access to premises –** the local body may refuse admission to its premises and / or direct the supplier to end the involvement of any personnel where the local body has reasonable grounds to do so (including if the local body reasonably believes the personnel represents a security risk and / or does not have the required levels of training and expertise). The local body shall provide an explanation for any such decision, subject to confidentiality, safety or other reasonable restraints on releasing such information.

  - **Key personnel –** the supplier shall obtain the prior written consent of the local body before any member of the key personnel is removed or replaced from their corresponding role during the term of the Contract. Additionally, the supplier shall ensure that the role of any key personnel is not vacant for any longer than 10 working days and that any replacement shall be as or more qualified and experienced as the previous incumbent.

  - **Supplier personnel security –** the supplier shall ensure that proper staff vetting procedures are in place in respect of all personnel employed or engaged in the performance of the services.

  - **Authority assets –** the local body may grant the supplier access to and use of any necessary assets during the term of the Contract. However, title to the assets will remain with the local body at all times.

- **Termination by the Authority –** the local body may terminate the Contract without penalty by written notice if:

  - the supplier commits a material default that either has not been remedied, or in the local body's opinion, is not capable of being remedied;

  - the supplier is in material default of its State aid obligations;

  - the supplier has failed to achieve a milestone by the relevant date; or

  - the supplier experiences an insolvency event.

- **Termination by the supplier –** the supplier may terminate the Contract only if the local body is in material breach of its obligation to pay undisputed milestone payments. The supplier must give the local body 60 days' written notice of the breach and can only terminate if the breach is not remedied by the expiry of the notice.

The Liability, Force Majeure and Assignment and Novation clauses in the Call Off Contract are largely similar to those in the Framework Agreement.

BDUK has published a summary of the Broadband Delivery Framework, which gives an overview of the Framework Agreement and Call Off Contract, as well as the risk allocation, implementation and operation of the initiative.

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