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Platform for  
Sustainable  
Cities



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# SAMPLE PUBLIC-PRIVATE PARTNERSHIP AGREEMENT

# Municipal Public-Private Partnership Framework

# 11

**The Municipal Public-Private Partnership Framework can be found at [www.thegpsc.org](http://www.thegpsc.org) and [www.worldbank.org/ppplrc](http://www.worldbank.org/ppplrc)**

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**Important Note:**

This PPP Agreement is provided only as a sample document. It must be adapted to fit the unique circumstances and needs of each particular Municipality and project for which its use is intended. National and local laws, regulations, policies and practices may prescribe a different approach to procuring project-level consulting services. It is based on the World Bank Guidance on PPP Contractual Provisions (2017 Edition).

This agreement has been kept as simple as possible.

It should be modified to take into account the specific aspects of the transaction in question, including:

- Payment structure of the project (e.g. availability payment);
- Liquidity support (e.g. escrow account, performance bond);
- Greenfield/brownfield (this template assumes that there will be at least some assets constructed and financed).
- External financing (the template assumes that the asset will be financed by way of limited recourse debt financing).
- Whether or not there will be employees transferred to the project;
- Whether the Service Provider will deliver services directly to Users and/or collect payment from them. Whether tariffs will be regulated by an independent authority.
- The application of local legislation, in particular PPP laws.
- Time allotted for notices and decisions and other actions: the periods of time indicated are based on usual practice, and may need to be adapted.
- A Government guarantee template is included, but if used will need to be adapted to applicable law and State practice.

**ADDITIONAL GUIDANCE MATERIAL**

World Bank Group's Public-Private Partnership Legal Resource Center,  
<https://ppp.worldbank.org/public-private-partnership/>

Sample Document, Adapt as Appropriate

**DATED [·]**

**MUNICIPAL PPP AGREEMENT**

**Between**

**[CONTRACTING AUTHORITY]**

**and**

**[SERVICE PROVIDER]**

Sample Document, Adapt as Appropriate

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This agreement (the "**Agreement**") is made on [•]

## **BETWEEN**

- (1) **[Contracting Authority]**, a **[local public entity]** established under the laws of the **[relevant country]**, whose address is [•] (the "**Contracting Authority**"); and
- (2) **[Service Provider]**, a **[form of the company]** incorporated in **[relevant country<sup>1</sup>]** under certificate of incorporation number [•], whose address is [•] (**Service Provider**).

The Contracting Authority and the Service Provider shall hereinafter be referred to individually as a "**Party**" and collectively as the "**Parties**".

## **WHEREAS<sup>2</sup>**

- (A) The Contracting Authority wishes to engage the Service Provider to deliver the Services and to develop the Facilities, all as described in Schedule 2 and Schedule 3.
- (B) [The Contracting Authority]<sup>3</sup> has procured the Services and the development of the Facilities by competitive tender in accordance with Applicable Laws, and the Service Provider has been selected by the Contracting Authority following its offer dated [•] (the "**Bid Submission Date**")<sup>4</sup>.
- (C) The Contracting Authority wishes to contract with the Service Provider to **[design, finance, build, maintain, operate]** the Facilities and carry out the Services and then hand over the Facilities to the Contracting Authority at the end of the Term.

## **NOW THE PARTIES AGREE AS FOLLOWS:**

### **1. DEFINITIONS AND INTERPRETATION**

#### **1.1 Definitions**

In this Agreement (including the recitals and schedules), the following words and expressions have the following meanings:

**Acceptable Bank** means a bank or financial institution having international ratings for its long-term unsecured unsubordinated debt obligations from at least two of Standard & Poor's Ratings Services, Fitch Ratings Limited and Moody's Investors Service, Inc., such ratings being no less than "A-" (Standard & Poor's Ratings Services or Fitch Ratings Limited) or "A3" (Moody's Investors Service, Inc.) or as otherwise agreed by the Parties from time to time.

**Affected Party** means the Party affected by a Force Majeure Event.

**Affiliate** means, with respect to any Person, any other Person that, directly or indirectly, through one or more intermediaries, Controls or is controlled by or is under common Control with such Person.

**Annual Financial Report** has the meaning given in Schedule 6.

**Antiquities** means all fossils, antiquities and all other forms of Cultural Heritage as identified in Performance Standard 8 including structures, and other remains, objects or things, having archaeological, historical, artistic, geological and/or monetary value or interest, discovered on the Site.

**Applicable Law<sup>5</sup>** means laws and any other legal instruments having the force of law in the Country and includes any applicable statute, ordinance, decree, regulation or by-law or any rule, circular, directive or any license, consent, permit, authorization, concession or other approval issued by any Governmental authority which has appropriate jurisdiction, or any binding interpretation thereof.

<sup>1</sup> Drafting note: the country of incorporation of the Service Provider may depend on applicable PPP laws. Most PPP laws require the Service Provider to be locally incorporated within the country where the PPP takes place.

<sup>2</sup> Drafting note: Project and rationale for entry into Agreement to be briefly described here.

<sup>3</sup> Drafting note: the Contracting Authority may not be the one in charge of the tendering of the delivery of the Services and development of the Facilities.

<sup>4</sup> Drafting note: this agreement assumes that the Services have been procured under a competitive bidding process. The key steps of the competitive bidding process should be briefly described. If this is not the case, additional wording to be added.

<sup>5</sup> Drafting note: to be adjusted depending on jurisdiction.

**Approval** means any approval, consent, license, permit or other authorization of any kind that is required from any Government entity under the Applicable Law in order for the Service Provider to carry out the Works and perform the Services and otherwise to perform its obligations under this Agreement.

**Base Case Equity IRR** means the Equity IRR set out in the Original Base Case.

**[Bid Submission Date]** means the date in Recital (B).<sup>6</sup>

**Bulk Payments** means the payments, if any, to be paid to the Service Provider by the Contracting Authority for the Services pursuant to Clause 4.2 (*Service Provider's Rights*) and Schedule 5.

**Certificate of Insurance Policy** means any certificate to be provided by the Service Provider to the Contracting Authority as a condition precedent to the Commencement Date.

**Change Confirmation** means the confirmation to be given under Clause 13 (*Change Notice*).

**Change in Law** means, after the **[Bid Submission Date/Effective Date]** any of the following events occurring in the Country:

- (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;

which:

- (a) materially and adversely affects the ability of a Party to enforce its rights or comply with its obligations under the Agreement; and
- (b) was not published as a draft law in the [specify the relevant source of publication] at the date on which the [successful bidder submitted its bid/the Service Provider signed this Agreement]<sup>8</sup>.

**Change Notice** means the notification of a contemplated change to be given under Clause 13 (*Change Notice*).

**Commencement Date** has the meaning given under Clause 3.2.3.

**Conditions Precedent** has the meaning given to it under Clause 3.2 (*Conditions Precedent*).

**Construction Period** has the meaning given to it in Schedule 1.

**Construction Program** has the meaning given in Schedule 2.

**Contracting Authority Event of Default** has the meaning given to it under Clause 18.2 (*Contracting Authority Event of Default*).

**Contractor** means any entity appointed by the Service Provider to perform functions in relation to the Services, but shall not include staff of the Service Provider.

**Control** means (i) the power to elect a majority of the board of directors (or other similar constituent body) or otherwise direct the management and policies of a Person, directly or indirectly, whether through the ownership of voting securities, by contract or otherwise; or (ii) the holding of the majority of the rights to dividends with respect to a Person.

**Country** mean the **[specify the country where the PPP Project takes place]**.

**Default Interest** means the interest to be paid according to the Default Interest Rate.

**Default Interest Rate** has the meaning set out in Part 1 of Schedule 1.

<sup>6</sup> Drafting note: only applicable when the Services were procured under a competitive bidding process.

<sup>7</sup> Drafting note: to be adapted depending on the fact that the Services were procured under a competitive bidding process.

<sup>8</sup> Drafting note: to be adapted depending on the fact that the Services were procured under a competitive bidding process.



**Defects Notification Period** means the period of twelve (12) months from the date of the Performance Certificate.

**Design and Construction Plan** has the meaning given in Schedule 2.

**Dispute** has the meaning given under Clause 26.

**Dispute Resolution Procedure** has the meaning set out under Clause 26 (*Dispute Resolution*).

**Distribution** means:

- (a) the payment of a distribution by the Service Provider (whether directly or indirectly) to its Shareholders;
- (b) any dividend, charge, fee or other distribution (or interest on any unpaid dividend, charge, fee or other distribution) (whether in cash or in kind) declared, paid or made on or in respect of share capital (or any class of share capital) in the Service Provider;
- (c) the redemption, repurchase, defeasance, retirement or repayment of any share capital of the Service Provider, including in connection with any merger or consolidation, or any resolution to do so.

**Early Termination** has the meaning given under 18.1 (*Early Termination Event*).

**Effective Date** means the date on which this Agreement is executed by both Parties.

**Equity** means the capital of the Service Provider attributed to its Shareholders in respect of their investment in the Service Provider (including indebtedness for money borrowed by the Service Provider from a Shareholder or any Affiliate of a Shareholder which by its terms is subordinated to any indebtedness for borrowed money incurred by the Service Provider under any Lenders Documents).

**Equity IRR** means the projected blended internal rate of return to the Shareholders and any of their Affiliates over the entire Agreement period, having regard to Distributions made and projected to be made.

**Escrow Account** means, where applicable, the **[offshore/onshore] [specify currency]** bank account with the Escrow Agent.

**Escrow Agent** means, where applicable, **[specify the bank elected by the Parties]**.

**Escrow Letter** means, where applicable, any letter agreement to be entered into between the **[Contracting Authority]**<sup>9</sup>, the Service Provider and the Escrow Agent dated on or before the Effective Date substantially in the form set out in Schedule 12, as may be adjusted to reflect the legal requirements of the jurisdiction of the Escrow Agent<sup>10</sup>.

**Estimated Change in Project Costs** means the aggregate of any estimated increase in construction costs, operating costs and Financing Costs less the aggregate of any estimated reduction in construction costs, operating costs and Financing Costs.

**Exempt Refinancing**<sup>11</sup> means:

- (a) any Refinancing fully contemplated in the Original Base Case;
- (b) a change in taxation or in accounting treatment;
- (c) the exercise of rights, waivers, consents and similar actions which relate to day to day administrative and supervisory matters
- (d) any sale of shares in the Service Provider by the Shareholders.

**[Existing Facilities** means the structures and other facilities, whether immovable or movable, equipment, supplies and other property, owned or used by or on behalf of the Contracting Authority on the Effective Date which are to be transferred in connection with the Project as detailed in Schedule 9.]<sup>12</sup>

<sup>9</sup> Drafting note: to be adapted depending on who will deposit funds on the Escrow Account, i.e. the Contracting Authority or the Government.

<sup>10</sup> Drafting note: depending on the security mechanism, reference to Escrow Account, Escrow Agent and Escrow Letter should be deleted.

<sup>11</sup> Drafting note: this definition may be extended/reduced on a case-by-case basis, to reflect the particular circumstances of the PPP Project.

<sup>12</sup> Drafting note: only applicable in the event of a brownfield project.

**Expiry Date** means the last day of the Term as specified Schedule 1.

**Environmental and Social Impact Assessment** means the environmental assessment prepared by [•].

**Facilities** means [Existing Facilities and New Facilities]<sup>13</sup>.

**Financial Closing** means the date on which the conditions precedent to drawdown under the Lender Documents covering;

- (a) one hundred percent (100%) of the total capital cost of the PPP Project; less
- (b) the percentage to be funded by Equity as specified in the Service Provider's offer, have been met or otherwise waived in accordance with the terms of the Lenders Documents.

**Financial Year** means the period from 1 January to 31 December of any year.

**Financing Costs** means those costs to be determined and agreed between the Parties following the securing of finance in accordance with Schedule 1.

**Financial Model** means the financial model [provided by the Service Provider as part of its bid/ agreed between the Parties prior to the date of the Agreement]<sup>14</sup> and as amended from time to time.

**First Demand Guarantee** means any irrevocable, unconditional, first demand guarantee in a form acceptable to the Service Provider, acting reasonably, issued in favor of the Service Provider by an Acceptable Bank and valid for a term of no less than 12 (twelve) months, in the form of Schedule 13.

**Force Majeure Event** has the meaning given under Clause 19.1 (*Definition of Force Majeure Event*).

**Government** means the government of [*specify the relevant country*]

[**Government Guarantee** means a guarantee issued by the Government of the Country to secure the Contracting Authority's obligations under the Agreement substantially in the form of Schedule 11.]<sup>15</sup>

**Insurance Policies** means those insurances required to be effected and maintained by the Service Provider pursuant to Clause 3.2 and Schedule 7.

[**Lease** means the lease agreement to be entered into between the Contracting Authority and the Service Provider in relation to the Site and request for the Service Provider to [*construct/ modernize*] and operate the Facilities.]<sup>16</sup>

**Lenders** means any Person providing debt financing or refinancing under the Lenders Documents to the Service Provider for the PPP Project and their permitted successors and assigns and transferees, including any agent or trustee for such Persons but not including a Shareholder or Affiliate of a Shareholder or any other Person providing Equity.

**Lenders' Direct Agreement** means a direct agreement executed between the Contracting Authority, any of the Lenders and the Service Provider based on the principles set out in Schedule [•].

**Lenders Documents** means any and all loan agreements, notes, bonds, indentures, security agreements, registration or disclosure statements, subordination agreements, mortgages, deeds of trust, credit agreements, note or bond purchase agreements, participation agreements, hedging agreements, and other documents entered into by the Service Provider relating to the financing or refinancing of the PPP Project provided by any Lender, including any modifications, supplements, extensions, renewals and replacements of any such financing or refinancing.

**Liquidated Damages for Delay** has the meaning given in Schedule 1.

<sup>13</sup> Drafting note: this definition should be amended based on the nature of the project.

<sup>14</sup> Drafting note: to be adapted depending on whether the Financial Model is agreed between the Parties or is part of the bid of the Service Provider.

<sup>15</sup> Drafting note: applies if a Government Guarantee is required to obtain financing at acceptable rates.

<sup>16</sup> Drafting note: depending on the Applicable Laws, a lease agreement might be necessary to govern the right of the Service Provider on the Site.

**Liquidity Support Balance** means, at any time, the sum of:

- (a) The balance standing to the credit of the Escrow Account; and
- (b) the uncalled and available for draw face value of any valid and enforceable First Demand Guarantee.

**Material Adverse Government Action** has the meaning given in Clause 20.1.1.

**Mediation Notice** has the meaning given in Clause 26.2 (*Mediation*).

**Monthly Construction Report** has the meaning given in Schedule 6.

**Monthly Service Report** has the meaning given in Schedule 6.

**Net Present Value** means the aggregate of the discounted values, calculated as of the estimated date of the Refinancing, of each of the relevant projected Distributions, in each case discounted using the Base Case Equity IRR.

**[New Facilities]** means facilities, whether immovable or movable, including vehicles, equipment, supplies and other property, constructed or purchased by the Service Provider during the Term for the provision, by the Service Provider, of the Services including those facilities set out in Schedule 2.]<sup>17</sup>

**Operating Staff** means the staff engaged by the Service Provider or its Contractors to deliver the Services pursuant to this Agreement.

**Operating and Maintenance Plan or O&M Plan** has the meaning given under Clause 10 (*Operation And Maintenance Plan*).

**Original Base Case** means the Financial Model for the purpose of amongst other things calculating **[insert the various defined terms used to calculate the Parties payment scheme]**, as updated from time to time in accordance with the terms of this Agreement.

**Performance Certificate** means a certificate issued under Clause 5.3.4.

**Performance Indicators** has the meaning given in Schedule 1.

**Performance Security** means an unconditional and irrevocable on-demand bank guarantee issued by a bank reasonably acceptable to the Contracting Authority and with offices in the Country, having a credit rating of at least [BBB under Standards and Poor's rating or with Baa2 under Moody's rating]<sup>18</sup>, in an amount of [•] and substantially in the form set out in Schedule 14 (*Form of Performance Security*) (or in any other form acceptable to the Contracting Authority).

**Performance Tests** means the tests, specified in the Specifications and designated as such, to be carried out before the Performance Certificate is issued by the Contracting Authority.

**Person** means any Country national or foreign natural or legal person, partnership, enterprise, Governmental agency or any other entity or instrumentality, whether public or private.

**PPP Project** means the project described in this Agreement, including [the development of the New Facilities, the operation, repair and maintenance of Facilities and the provision of Services by the Service Provider.]<sup>19</sup>

**Pre-Refinancing Equity IRR** means the Equity IRR calculated immediately prior to any Refinancing, but without taking into account the effect of such Refinancing and using the Financial Model as updated (including as to the performance of the PPP Project).

**[Project Fee]** means the initial or periodic payment to be made by the Service Provider to the Contracting Authority as set out in Schedule 1, and calculated in accordance with Schedule 5.]<sup>20</sup>

<sup>17</sup> Drafting note: only applicable in the event of a greenfield project.

<sup>18</sup> Drafting note: to be adapted depending on the PPP Project.

<sup>19</sup> Drafting note: to be adapted depending on the PPP Project.

<sup>20</sup> Drafting note: this definition shall be amended or deleted depending on the Service Provider's remuneration structure.

**Project Officer** means the person designated as such by the Contracting Authority and performing the functions stated under Clause 9.1.1.

**Prudent Industry Practice** means the standards, practices, methods and procedures expected from a person seeking in good faith to perform its contractual obligations and in so doing and in the general conduct of its undertaking exercising that degree of skill, diligence, prudence and foresight which would reasonably and ordinarily be expected from a skilled and experienced operator engaged in the same type of undertaking under the same or similar circumstances and conditions as contemplated by this Agreement.

**Qualifying Refinancing** means any Refinancing that will give rise to a Refinancing Gain greater than zero and that is not an Exempt Refinancing.

**Recitals** means recitals of this Agreement.

**Reference Shareholder** means [to be inserted from the Bid].

**Refinancing** means:

- (a) any amendment, variation, novation, supplement or replacement of any Lenders Documents;
- (b) the grant of any waiver or consent, or the exercise of any similar right under any Lenders Documents;
- (c) the creation of or granting of any form of benefit or interest in the Lenders Documents, or the creation or granting of any rights or interest in any contracts, revenues or assets of the Service Provider's whether by way of security or otherwise; and
- (d) any other arrangement having been put in place by any Person which has an effect similar to any of (a) to (c) above or which has the effect of limiting the Service Provider's ability to carry out any of (a) to (c) above.

**Refinancing Gains** means a positive amount equal to A-B, where:

**A** = the Net Present Value of Distributions, as projected immediately prior to the Refinancing (taking into account the effect of the Refinancing and using the Financial Model as updated so as to be current immediately prior to the Refinancing) to be made to each Shareholder or affiliate over the remaining term of the Agreement following the Refinancing; and

**B** = the Net Present Value of Distributions, as projected immediately prior to the Refinancing (but without taking into account the effect of the Refinancing and using the Financial Model as updated so as to be current immediately prior to the Refinancing) to be made to each Shareholder or affiliate over the remaining term of this Agreement following the Refinancing.

**Regulatory Agency** means the regulatory body stated in Schedule 1.

[**Regulatory Fee** means an amount payable to the Regulatory Agency during the Term]<sup>21</sup>.

**Required Liquidity Support Amount** means the amount specified in Schedule 1.

**Rules** has the meaning given under Clause 26.4.3.

**Scheduled CP Satisfaction Date** has the meaning given under Clause 3.2.2.

**Service Commencement Date** means the date following the date on which the Contracting Authority issues the Performance Certificate under Clause 5.3 (*Performance Tests*), whichever is the earlier.

**Service Period** means the period commencing on Service Commencement Date and ending on the Expiry Date or earlier termination of this Agreement in accordance with its terms.

**Service Provider** means [*name of the company*] incorporated in [*place of incorporation*] in charge of the Works to be provided under this Agreement as specified in Schedule 2.

<sup>21</sup> To be adjusted/deleted

**Service Provider Event of Default** has the meaning given under Clause 18.3 (*Service Provider Event of Default*).

**Service Standards** means those standards listed in the Schedule 3.

**Services** means the services provided by the Service Provider in connection with the PPP Project during the Term under this Agreement.

**Shareholder** means any shareholder in the share capital of the Service Provider from time to time.

**Site** means the area described in Schedule 5.

**Specifications** mean the specifications for the Facilities set out in Schedule 2.

**Taxation** means all taxes (direct and indirect) and including:

- (a) customs and excise duties, corporate tax, income tax (including pay-as-you-earn withholdings), national insurance contributions, VAT and stamp duty;
- (b) all other levies, imposts, duties, charges or withholdings in the nature of taxes imposed by any Government entity having functions (including the right to levy Tax) in relation to Taxation in the Country; and
- (c) all interest, penalties, fines and other charges relating to any of the above or to a failure to make any return or supply any information in connection with any of the above, and "**Tax**" and "**Taxes**" shall be construed accordingly.

**Term** means the period stated in Clause 3.1 (*Effective Date and Term*).

**Termination Date** means the date that any termination of this Agreement takes effect.

**Termination Payments** mean the net amounts payable under Schedule 8.

**Testing and Commissioning Plan** has the meaning given in Schedule 2.

**Time for Completion** means the date by which the Facilities are to have passed the Performance Tests as set out in Schedule 2, calculated from the Effective Date.

**Users** means any person or class of persons or legal entity entitled to benefit from the Services.

[**User Payment** means a payment by a User in accordance with the provisions of Clause 6.2, subject to User Payment Adjustments under Schedule 5.]<sup>22</sup>

[**User Payment Adjustments** means the level of User Payments payable by Users in accordance with this Agreement.]<sup>23</sup>

**Working Hours** means those hours during which the Facilities are generally open, as designated in Schedule 1 and Schedule 3.

**Works** means those works to be undertaken by the Service Provider in accordance with Schedule 2.

## 2. INTERPRETATION

2.1 The Recitals and the Schedules to this Agreement shall form an integral part thereof. This Agreement shall be read as a whole. In the event of discrepancy and/or contradiction between the main body of the Agreement and its Schedules, the Agreement shall prevail.

2.2 References to Schedules shall be references to Schedules to this Agreement unless otherwise agreed by the Parties.

<sup>22</sup> Drafting note: this definition shall be amended or deleted depending on the Service Provider's remuneration structure.

<sup>23</sup> Drafting note: this definition shall be amended or deleted depending on the Service Provider's remuneration structure.

- 2.3 The headings of Clauses of this Agreement and the Table of Contents are inserted for convenience and reference purposes only and shall not in any way limit, alter or affect the interpretation of this Agreement.
- 2.4 In this Agreement, words denoting the singular include the plural and vice-versa, words denoting persons include companies, corporations, partnerships or other legal persons and references to any Party or person include references to its respective successors and permitted assigns.
- 2.5 References to gender include any other gender as well as neuter.
- 2.6 Neither the giving of any approval, consent, examination, acknowledgement, knowledge of the terms of any agreement or document nor the review of any document or course of action by or on behalf of the Contracting Authority, nor the failure of the same, shall unless expressly stated in this Agreement, relieve the Service Provider of any of its obligations under this Agreement or of any duty which it may have hereunder to ensure the correctness, accuracy or suitability of the matter or thing which is the subject of the approval, consent, examination, acknowledgement or knowledge.
- 2.7 The words "include", "includes", and "including" shall at all times be construed as if followed by the words "without limitation" or "but not limited to".
- 2.8 A reference to any law shall include any amendment brought to such law from time to time or any law which may replace or consolidate the same.

### 3. COMMENCEMENT, DURATION, RENEWAL

#### 3.1 Effective Date and Term

This Agreement shall enter into full force and effect on the date of its execution by all Parties (the "**Effective Date**") and shall remain in full force and effect for a period of [•] ([•]) years starting from the Commencement Date (the "**Term**"), unless terminated earlier or extended in accordance with the provisions of this Agreement.

#### 3.2 Conditions Precedent

- 3.2.1 Subject to Article 3.2.6, the rights and obligations of the Parties under this Agreement shall be conditional upon the occurrence of the Commencement Date.
- 3.2.2 The Service Provider and the Contracting Authority shall use their best efforts to respectively procure the satisfaction of the conditions precedent listed in Schedule 1 as being their responsibility (the "**Conditions Precedent**") as soon as is practicable and in any event no later than [one hundred and twenty/one hundred and eighty] ([120/180]<sup>24</sup>) days from the Effective Date (the "**Scheduled CP Satisfaction Date**").
- 3.2.3 Within five (5) days from the date on which the Service Provider and the Contracting Authority have provided to the other written notice that they have met or are in a position to meet or waive (as applicable) the Conditions Precedent, the Contracting Authority and the Service Provider shall meet to evidence the fulfillment of the Conditions Precedent and if they are satisfied that all the Conditions Precedent have been satisfied or waived pursuant to this Agreement they shall both sign a joint statement to that effect. The date of signature of this joint statement shall be the "**Commencement Date**".
- 3.2.4 If any of the Conditions Precedent are not satisfied or waived on the last day before the Scheduled CP Satisfaction Date, the Parties shall promptly meet to discuss how to satisfy the outstanding Conditions Precedent. If the Parties cannot agree on a timetable for the completion of the outstanding Conditions Precedent within thirty (30) days after the Scheduled CP Satisfaction Date then:
- (a) If the only conditions that have not been satisfied or waived at that time are Conditions Precedent under the Service Provider's responsibility as specified in Schedule 1:
- (1) the Contracting Authority may choose to terminate this Agreement by giving a thirty (30) days' notice to the Service Provider; and

<sup>24</sup> To be adjusted depending on whether financial close is a CP

- (2) upon the expiry of such period, this Agreement shall automatically terminate without the need for further notice, unless, during such period, the Service Provider has provided notice that all the outstanding Conditions Precedent have been satisfied and the Contracting Authority is satisfied of the same, in which case this Agreement shall not terminate.
  - (b) If the only conditions that have not been satisfied or waived at that time are the Conditions Precedent under the Contracting Authority's responsibility as specified in Schedule 1 Part 1:
    - (1) the Service Provider may choose to terminate this Agreement by giving give a thirty (30) days' notice to the Contracting Authority; and
    - (2) upon the expiry of such period, this Agreement shall automatically terminate without the need for further notice, unless, during such period, the Contracting Authority has provided notice that all the outstanding Conditions Precedent have been satisfied and the Service Provider is satisfied of the same, in which case this Agreement shall not terminate.
  - (c) If the only conditions that have not been satisfied or waived at that time are the Conditions Precedent under both Parties' responsibility as specified in Schedule 1:
    - (1) any of the Parties may choose to terminate this Agreement by giving a thirty (30) days' notice to the other Party; and
    - (2) upon the expiry of such period, this Agreement shall automatically terminate without the need for further notice, unless, during such period, the Parties agree that all the outstanding Conditions Precedent have been satisfied, in which case this Agreement shall not terminate.
- 3.2.5 In the event of termination of the Agreement under Clause 3.2.4:
  - (a) if the conditions that have not been satisfied at that time are conditions precedent under the Service Provider's responsibility, the Service Provider shall compensate the Contracting Authority for all dully evidenced reasonable costs and expenses suffered or incurred by the Contracting Authority in connection with this Agreement, up to [•]
  - (b) if the conditions that have not been satisfied at that time are conditions precedent under the Contracting Authority's responsibility, the Contracting Authority shall compensate the Service Provider for all dully evidenced reasonable losses (excluding loss of profits), costs and expenses suffered or incurred by the Service Provider in connection with this Agreement, up to [•]; and
  - (c) if the conditions that have not been satisfied at that time are conditions precedent under both Parties' responsibility, no Party shall have any liability to the other Party under or in connection with this the termination of this Agreement.
- 3.2.6 The rights and obligations of the Parties under the following Clauses shall not be conditional upon the fulfillment of the Conditions Precedent and are effective from the Effective Date: Clause 3 (*Commencement, Duration, Renewal*), Clause 19 (*Force Majeure*), Clause 20 (*Material Government Action*), Clause 21 (*Change In Law*), Clause 22 (*Representations And Warranties Of The Service Provider*), Clause 23 (*Representations And Warranties Of Contracting Authority*), Clause 24 (*Refinancing*), Clause 27 (*Confidentiality*), and Clause 28 (*Miscellaneous*).

### 3.3 Commencement of Services

The Service Provider shall take over the Site<sup>25</sup> and thereafter commence the provision of the Services in accordance with the programme set out in Schedule 2 as soon as the Commencement Date is reached.

### 3.4 Term

Unless terminated earlier pursuant to Clause 18 (*Early Termination*), this Agreement shall remain in full force for the Term.

<sup>25</sup> Drafting note: subject to the structuring of the Project, the Service Provider may need to have access to the Site before the Commencement Date, including if any land survey has to be performed.



## 4. RIGHTS AND OBLIGATIONS

### 4.1 Service Provider Obligations

4.1.1 The Service Provider shall, at its own costs and expenses:

- (a) design, build and [modernize] the Facilities in accordance with the Specifications, the Construction Schedule and Prudent Industry Practice;
- (b) provide all financing for the Facilities;
- (c) operate the Facilities and deliver the Services under this Agreement in accordance with Prudent Industry Practice, Service Standards, and all Applicable Laws;
- (d) obtain all necessary licenses, permits and warranties necessary to carry out its obligations under this Agreement, other than the permits if any listed in Schedule 1 to be obtained by the Contracting Authority;
- (e) [unless otherwise stated in Schedule 2, arrange for the utility supplies for the Facilities to be installed in accordance with Schedule 2 and supply such utilities as required for the performance of its obligations under this Agreement ]<sup>26</sup>;
- (f) repair and maintain the Facilities in good working order and not dispose of any of the Facilities without the authorization of the Contracting Authority, other than to charge or otherwise pledge its interest in the Facilities to the Lenders, subject to Applicable Law and the Lenders' Direct Agreement;
- (g) employ Operating Staff who have the relevant qualifications / experience for the performance of its obligations under this Agreement;
- (h) provide as a minimum to staff [statutory benefits and terms and conditions of employment]<sup>27</sup>;
- (i) obtain appropriate insurance coverage for the Term in accordance with Clause 28.3 (*Insurance*);
- (j) prepare operating manuals within six (6) months of the [Commencement Date / the Service Commencement Date], including the information set out in Schedule 2 keep a copy thereof on site and keep such operating manuals up to date;
- (k) cooperate with the Contracting Authority, the Project Officer and [the Regulatory Agency]<sup>28</sup> to allow effective monitoring, including for the purposes of Clause 4.4 (*Contracting Authority Supervision*);
- (l) [pay the Project Fee];
- (m) update any Environmental and Social Impact Assessment where its design impacts on the assessment prepared by the Contracting Authority so as to meet the requirements of not only the Applicable Laws but also the IFC Performance Standards on Environment and Social Sustainability; and
- (n) act in a non-discriminatory manner toward Users.

### 4.2 Service Provider's Rights

4.2.1 The Service Provider shall be entitled to:

- (a) access, use and occupy the Site, and more generally benefit from peaceful and unencumbered possession of the Site for the purpose of the Project [in accordance with the Lease]<sup>29</sup> including any necessary easements, rights of way and rights to [lay pipes or other conduits to the Site]<sup>30</sup>;
- (b) [payment of the Bulk Payments in accordance with Schedule 5]<sup>31</sup>;
- (c) payment of the Termination Payments in accordance with Schedule 8; and
- (d) [levy User Payment Adjustments on Users in accordance with Schedule 5]<sup>32</sup>.

### 4.3 Contracting Authority Obligations

4.3.1 The Contracting Authority, from the Commencement Date shall:

- (a) [grant the Lease to the Service Provider]<sup>33</sup>;
- (b) assist the Service Provider to gain access to assets or to other land on which it is required to exercise its duties;
- (c) cooperate with the Service Provider to facilitate the securing by the Service Provider of the funding of the Project;

<sup>26</sup> Drafting note: to be deleted if no utility supplies are to be provided under the Agreement.

<sup>27</sup> Drafting note: this depends on local law applicable to the Agreement.

<sup>28</sup> Drafting note: this depends on local law applicable to the Agreement.

<sup>29</sup> Drafting note: to be adapted if a lease agreement is not necessary.

<sup>30</sup> Drafting note: to be adapted depending on the type of Services to be provided.

<sup>31</sup> Drafting note: to be adapted depending on the remuneration method of the Service Provider

<sup>32</sup> Drafting note: to be adapted depending on the remuneration method of the Service Provider.

<sup>33</sup> Drafting note: this provision shall be deleted if a lease agreement is not necessary.



- (d) except where expressly entitled pursuant to the terms of this Agreement, not interfere and cause its employees, sub-contractors or agents not to interfere or obstruct the Service Provider in carrying out its obligations under this Agreement and providing the Services;
- (e) give the Service Provider full access to all available necessary information, plans, policies, papers, reports and data in order to enable the Service Provider to carry out the Services; and
- (f) assist the Service Provider in obtaining, from the Government, other local Government or statutory bodies, all necessary consents, permits and authorizations as required by Applicable Law, other than permits listed in Schedule 4 to be obtained by the Contracting Authority.

#### **4.4 Contracting Authority Supervision**

The Contracting Authority (including the Project Officer and all other duly authorized officers, employees and representatives as well as the financial and technical auditors) may access during Working Hours the Facilities and premises, works and sites of the Service Provider and its Contractors and access the Service Provider's employees and the books, records and other material kept by or on behalf of the Service Provider in connection with the Facilities, for the purposes of monitoring, inspection, supervision and, as applicable, retendering, and shall use all reasonable efforts not to disturb the Service Provider's performance of its obligations under this Agreement.

### **5. CONSTRUCTION, TESTING AND COMMISSIONING**

#### **5.1 Works**

- 5.1.1 The Service Provider shall carry out and complete the design, procurement, construction, installation and commissioning of the Works.
- 5.1.2 The Service Provider shall procure the issue of Performance Certificate in accordance with Clause 5.3.4 below by the Time for Completion.
- 5.1.3 The Service Provider will provide monthly status reports to the Contracting Authority during the Construction Period setting out progress of the Works and whether there are any delays or issues that have arisen. The first report shall be provided following the end of the first calendar month after the Commencement Date. Each monthly report shall be provided within ten (10) days from the end of the related calendar month.

#### **5.2 Delay in Construction**

If the Service Provider fails to comply with Clause 5.1.2 for reasons other than a Force Majeure Event, a Material Adverse Government Action or a Change in Law, the Service Provider shall pay to the Contracting Authority Liquidated Damages for Delay as set out in Schedule 1, up to the cap set out therein.

#### **5.3 Performance Tests**

- 5.3.1 The Service Provider shall carry out the Performance Tests in accordance with this Clause 5.3 (*Performance Tests*) and the Specifications set out in Schedule 2. The Service Provider shall give to the Contracting Authority a seven (7) days' notice of the date on which the Service Provider will carry out the Performance Tests and invite the Contracting Authority to observe the performance of such Performance Tests. The Performance Tests shall be carried out as scheduled by the Service Provider irrespective of whether the Contracting Authority is attending the Performance Tests or not.
- 5.3.2 As soon as the Facilities have passed the Performance Tests, the Service Provider shall provide the Contracting Authority with a report of the results of all such Performance Tests, and in any case no later than five (5) days from the execution of the Performance Tests.
- 5.3.3 If the Facilities fail to pass the Performance Tests, the Service Provider shall promptly and in any event within three (3) days from the failure to pass the Performance Tests, inform the Contracting Authority of the action the Service Provider proposes to take to ensure that the Facilities pass the Performance Tests when performed again. The Performance Tests shall be performed again no later than seven (7) days (or any time that is reasonable in light of the actions to be taken) from the previous failed Performance Tests.

- 5.3.4 The Service Provider may apply by notice to the Contracting Authority for a Performance Certificate not earlier than three (3) days after it has provided the certified report evidencing that the Performance Tests have been passed to the Contracting Authority. The Contracting Authority shall, within three (3) days after the receipt of the Service Provider's application for a Performance Certificate:
- (a) issue the Performance Certificate to the Service Provider, stating the date on which the Facilities have passed the Performance Tests; or
  - (b) reject the application, stating the Contracting Authority's reasons for considering that the Facilities have not passed the Performance Tests. The Service Provider shall then proceed in accordance with Clause 5.3.3, or submit the dispute to the Dispute Resolution Procedure under Clause 21 (*Change In Law*).
- 5.3.5 If the Contracting Authority fails either to issue the Performance Certificate or to reject the Service Provider's application within three (3) days, the Performance Certificate shall be deemed to have been issued on the following day of that period and the date of issue of the Performance Certificate shall be deemed to be the date of receipt of the application.

#### **5.4 Performance Security**

- 5.4.1 In order to secure the obligations of the Service Provider under the Agreement, the Service Provider shall maintain the Performance Security in full force and effect until the date on which the Defects Notification Period expires. The Contracting Authority shall return the Performance Security to the Service Provider by the date which is 30 days after the date on which the Defects Notification Period expires.
- 5.4.2 If the Performance Security is scheduled to expire prior to the aforementioned date, then at least thirty (30) days prior to the scheduled expiry of the Performance Security, the Service Provider shall arrange for the extension or replacement of the Performance Security, failing which the Contracting Authority may draw on the Performance Security for its full amount. In such an event, the Contracting Authority shall return the proceeds of any drawing to the Service Provider upon the delivery by the Service Provider to the Contracting Authority of an extension or replacement of the Performance Security.
- 5.4.3 The Contracting Authority shall have the right to claim under the Performance Security any amounts which are or may become due under the Agreement as a result of the Service Provider's failure to comply with any of its obligations, responsibilities or commitments until the end of the Defects Notification Period (including any Liquidated Damages for Delays that the Service Provider is liable to pay under this Agreement).
- 5.4.4 If the Agreement is terminated before the Service Commencement Date for any reason, the Performance Security shall be returned to the Service Provider on the date which is 90 days after the date on which the Agreement terminates.

### **6. PAYMENTS**

- 6.1 [Bulk Payments shall be calculated and paid in accordance with Schedule 5, subject to adjustment by reference to actual performance in accordance with Schedule 5.
- 6.2 The Service Provider shall be entitled to collect, receive and retain User Payments, calculated in accordance with Schedule 5, subject to User Payment Adjustments in accordance with Schedule 5.]<sup>34</sup>
- 6.3 As between the Parties:
- (a) the Contracting Authority shall deliver a statement of account compliant with all relevant tax laws for any monies which become payable by the Service Provider to the Contracting Authority under this Agreement; and
  - (b) the Service Provider shall deliver statements of account compliant with all relevant tax laws in accordance with the provisions of Schedule 5.

<sup>34</sup> Drafting note: to be adapted depending on the remuneration mode of the Service Provider.

6.4 All payments shall be made within the Time for Payment set out in Schedule 5. In the case where a Party disputes the amount to be paid to the other, the claiming Party shall pay to the other Party the undisputed amount within the Time for Payment, and shall pay the balance agreed or determined to be due under the Disputes Resolution Procedure set under Clause 21 (*Change In Law*) together with the Default Interest on that balance calculated from the time that balance ought to have been paid had there been no dispute. All other delayed payments shall bear Default Interest from the day of expiry of the Time for Payment to the date of actual payment.

## 7. COMMUNITY ENGAGEMENT

### 7.1 User Relations

7.1.1 The Service Provider shall ensure that Users have easy access to information from the Service Provider and are able to lodge complaints with it.

7.1.2 The Service Provider shall record all complaints from Users and shall report to the Contracting Authority on a quarterly basis on the complaints received showing numbers, nature and trends as well as the steps being taken to remedy the issues raised in legitimate complaints. The Service Provider shall promptly respond to requests for information and complaints according to the Minimum Service Level Guidelines published in accordance with Schedule 3. The Service Provider will use every reasonable effort to resolve complaints from Users in connection with the Services.

7.1.3 The Service Provider shall ensure that all of its employees who have contact with Users can be easily identified.

### 7.2 Employment

7.2.1 The Service Provider undertakes that the Services and/or Works shall be subcontracted with equal opportunity to Country nationals and businesses Controlled by Country nationals Persons, provided those Services or Works can be carried out with competitive conditions in terms of price, quality, warranties and delivery periods equivalent to those available on the international market<sup>35</sup>.

7.2.2 [•]<sup>36</sup>.

## 8. ANTIQUITIES

8.1 If any Antiquities are discovered at the Site after the Site Handover Date, the Service Provider shall:

- (a) take all steps required by the Applicable Law and IFC Performance Standard 8: Cultural Heritage in relation to the Antiquities;
- (b) promptly notify the Contracting Authority of such discovery;
- (c) take such steps as any appropriate Government entity may legally require, which may include ceasing and not carrying out any operations which may hinder the excavation of the Antiquities or in any way interfere with the Antiquity; and
- (d) take all necessary steps to preserve the Antiquity in the same position and condition in which it was found.

8.2 All Antiquities will be the property of the Government.

8.3 The Contracting Authority, any appropriate Government entity and any person acting on behalf of either of them shall be entitled to have access to the Site for the purposes of investigating any Antiquity, drawing up a plan to deal with the Antiquity and/or any related excavation work and the Service Provider shall provide reasonable assistance to the Contracting Authority, any appropriate Government entity and/or any person acting on behalf of either of them, including making available its labor and equipment.

8.4 Actions taken by the Contracting Authority or any Government entity in relation to Antiquities in accordance with this Clause 8 shall constitute a Material Adverse Government Action<sup>37</sup>, subject to and in accordance with Clause 20 (*Material Government Action*).

<sup>35</sup> Drafting note: this provision is subject to applicable laws.

<sup>36</sup> Specific community engagement undertaking to be considered.

<sup>37</sup> Drafting Note: Please note that based on the specificities of the project, in some projects contracting authorities may condition the application of this clause subject to a financial threshold.

## 9. REPORTING, PLANNING AND MANAGEMENT

### 9.1 Reporting and Management

- 9.1.1 The Project Officer shall be in charge of the following:
- (a) monitoring the performance of the Service Provider and ensure that the Agreement is properly implemented;
  - (b) day to day supervision of the PPP Project;
  - (c) acting as the liaison officer between the Service Provider and the Contracting Authority;
  - (d) preparing quarterly and annual reports on the development of the PPP Project;
  - (e) maintaining records on PPP Project implementation from the Commencement Date to Term; and
  - (f) measuring the implementation, performance and outputs of the PPP Project under the Agreement.
- 9.1.2 The Service Provider shall proactively support the Project Officer in supplying information and material in order to enable the Project Officer to carry out its responsibilities under this Agreement.

## 10. OPERATION AND MAINTENANCE PLAN

- 10.1 The Service Provider shall prepare and submit within one hundred and twenty (120) days of the [Commencement Date / Services Commencement Date]<sup>38</sup> an annual operation and maintenance plan for the Facilities which shall comply with the Service Standards and Prudent Industry Practice (the "**Operation and Maintenance Plan**" or "**O&M Plan**") with sufficient detail of all critical and routine operating tasks with the objective of achieving and maintaining the technical specifications set out in Schedule 2 and the Performance Indicators.
- 10.2 The O&M Plan shall comprise the operating and maintenance strategy for improving the operating efficiency, methodology, organization structure, human resource plan, equipment deployment plan, environmental management measures, responsibilities for unit operations, monitoring and emergency response, related processes, systems, protocols, procedures including detailed costs for each activity of operations and maintenance etc.
- 10.3 Within thirty (30) days of receipt of the Operation and Maintenance Plan, the Contracting Authority shall send to the Service Provider its comments on the Operation and Maintenance Plan. If the Contracting Authority fails to provide their comments as aforesaid, the Operation and Maintenance Plan shall be deemed to be approved.
- 10.4 If the Contracting Authority raises any objections in respect of the Operation and Maintenance Plan, the Service Provider shall issue a revised version incorporating such amendments and/or comments, or notify the Contracting Authority within ten (10) days of receipt of the Contracting Authority's comments that it disagrees with such amendments and/or comments, together with a reasonably detailed explanation for such disagreement.
- 10.5 The approval (or deemed approval) by the Contracting Authority of the Operation and Maintenance Manual shall not relieve the Service Provider of any duty, obligation or liability under this Agreement, and the Contracting Authority shall not be liable to the Service Provider as a result of such approval. In the event of a failure by the Parties to agree on the appropriate amendments to the Operation and Maintenance Plan, any Party may refer the Dispute for determination by the Technical Expert in accordance with Clause 26.2 (*Mediation*).

## 11. RETENDERING OF THE FACILITIES

### 11.1 Retendering of the Facilities

The Service Provider acknowledges that the Contracting Authority may wish, to invite persons (who may, except in case of early termination of this Agreement for Service Provider Event of Default, include the Service Provider) to tender for the right to provide all or some of the services related to the PPP Project after expiry or termination of this Agreement.

<sup>38</sup> Drafting note: please note that this plan should be approved as part of a condition precedent to the Commencement Date in the event of a brownfield project.

## 11.2 Cooperation

11.2.1 From the date which is (i) one year prior to the expiry of the Term or (ii) one month prior to early termination (as applicable), the Service Provider shall co-operate with the Contracting Authority during the preparation for, and running of, any tender organized under Clause 11.1 for a replacement service provider and, unless otherwise stated in Schedule 1 and provided the Service Provider is not in breach of its obligations under this Agreement, the Service Provider shall have the right to participate to the bidding process.

## 11.3 Maintenance as Going Concern

11.3.1 The Service Provider shall maintain, operate and manage the Facilities so that:

- (a) the Contracting Authority or a successor operator will be able to take over the operation and management of the Facilities at any time; and
- (b) the Facilities may be transferred, in the manner contemplated under this Agreement, at any time.

11.4 The Service Provider shall upon reasonable notice allow the Contracting Authority or such successor service provider to have access to all the Facilities and related employees for those purposes.

## 11.5 Preparation for Retendering

The Service Provider shall make available during the last twelve (12) months of the Agreement to the Contracting Authority and its authorized representatives such information as the Contracting Authority shall reasonably require in connection with such preparation for tendering.

## 12. HANDOVER

12.1 Each Party shall comply with the provisions of Schedule 10.

12.2 Upon termination or expiration of this Agreement, the Parties shall have no further rights or obligations hereunder except for rights and obligations which arose prior to such termination or expiration and those which expressly survive termination or expiration pursuant to this Agreement.

12.3 All Facilities initially transferred from the Contracting Authority to the Service Provider pursuant to Schedule 9 (Assets Transfer Plan) (as modernized, modified or replaced in accordance with this Agreement), as well as all Facilities built, installed or delivered by the Service Providers, will be transferred to the Contracting Authority at the end of the Term (or Expiry Date) of this Agreement or in the event of an early termination of this Agreement in accordance with the provisions of Schedule 10.

12.4 All tangible assets purchased by the Service Provider for the purpose of the PPP Project will be owned by the Service Provider and transferred to the Contracting Authority subject to and in accordance with the provisions of Schedule 10<sup>39</sup>.

12.5 Except in the case of early termination pursuant to Clauses 18 (*Early Termination*) or 21.3 (*Termination due to Change in Law*), the Service Provider and the Contracting Authority shall cooperate as reasonably necessary during the twelve (12) month before expiration of this Agreement in order to ensure the smooth continuation and provision of Services, including the selection of a new service provider, if relevant.

## 13. CHANGE NOTICE

13.1 The Contracting Authority may request in writing from the Service Provider a change in the Specification for the Facilities, the Service Standards and/or a variation in the Services (a "**Change Notice**").

13.2 Within seven (7) days from the reception of the Change Notice, the Service Provider shall provide the Contracting Authority with a written answer showing the impact of the Change Notice on the

<sup>39</sup> Drafting Note: There may be certain assets that the Service Provider will want to retain.

PPP Project both in terms of time, cost and effect on the delivery of the Services. The Contracting Authority may then:

- (a) accept the response of the Service Provider and issue a Change Confirmation;
- (b) refuse the response from the Service Provider and refer the issue to the Service provider under the Dispute Resolution Procedure set out under Clause 26 (*Dispute Resolution*) to assess what should be the proper cost and/or effect on the delivery of the Services, and then either issue a Change Confirmation or withdraw the Change Notice; or
- (c) withdraw the Change Notice.

13.3 If the Contracting Authority does not act pursuant to Clause 13.2 within five (5) days from the reception of the answer from the Service Provider, the Change Notice shall be considered as withdrawn.

## **14. FACILITIES' DATA AND PERSONNEL AND SAFETY**

### **14.1 Data**

14.1.1 All plans, drawings, specifications, programs, quality assurance programs designs, reports, and other documents and software prepared by the Service Provider in the course of performing its obligations under this Agreement shall remain property of the Service Provider.

14.1.2 The Service Provider hereby grants to the Contracting Authority a non-exclusive, perpetual, irrevocable, royalty free license to use for all purposes in connection with the Facilities all such plans, drawings, specifications, programs, quality assurance programs, designs, reports, and other documents and software prepared by the Service Provider together with a right to use all intellectual property rights pertaining to the same.

14.1.3 Where such plans, drawings, specifications, programs, quality assurance programs designs, reports, other documents and software prepared by the Service Provider, as well as the asset condition register, are retained on electronic storage, the Service Provider shall provide access for the Contracting Authority to such electronic storage. In any case, the Contracting Authority shall not amend any of those data as long as the Service Provider is in charge of providing the Services and operate the Facilities under this Agreement.

14.1.4 On the Expiry Date or earlier termination of this Agreement, the Service Provider shall deliver a copy of all the documents and software identified in Clauses 14.1.2 and 14.1.3 above (or an electronic version thereof) to the Contracting Authority as it may reasonably require, together with a detailed inventory thereof.

14.1.5 The Service Provider may retain in safe custody copies of such documents and software identified in Clauses 14.1.2 and 14.1.3 above.

### **14.2 Personnel**

14.2.1 Subject to the provisions of Clause 19 (*Force Majeure*), the Service Provider shall not be relieved or excused of any responsibility, liability or obligation under this Agreement by the appointment of any Contractor. The Service Provider shall, as between itself and the Contracting Authority, be responsible for the selection, pricing, performance, acts, defaults, omissions, breaches and negligence of all Contractors. All references in this Agreement to any act, default, omission, breach or negligence of the Service Provider shall be construed accordingly to include any such act, default, omission, breach or negligence of a Contractor.

14.2.2 The Service Provider shall only enter into a contract with a Contractor who has either been included in the list of Contractors appearing in Schedule 2 or who has been approved in writing by the Contracting Authority;

14.2.3 If the Contracting Authority has reasonable cause to be dissatisfied with the qualification and/or performance of any Operating Staff or Contractors, the Service Provider shall, at the Contracting Authority's written request specifying the grounds thereof, provide as a replacement an Operating Staff or Contractor with qualifications and experience acceptable to the Contracting Authority.

14.2.4 The Service Provider shall have no claim for additional costs arising out of or incidental to the removal and/or replacement of Operating Staff or Contractors under Clause 14.2.3.

14.2.5 On the Expiry Date or earlier termination of this Agreement, the Operating Staff will not be transferred to the Contracting Authority unless and subject to prior agreement of the Service Provider and the Contracting Authority.

### **14.3 Safety**

14.3.1 The Service Provider shall throughout the progress of the PPP Project have full regard for the safety of all persons using or carrying out operations on the Facilities (whether lawfully or not) and shall keep the Facilities in an orderly state, appropriate in accordance with Prudent Industry Practice, to avoid danger to such persons.

14.3.2 The Service Provider shall take such measures, including the retention of security staff where appropriate, as are reasonable in accordance with Prudent Industry Practice to prevent access to the Facilities of any persons or creatures not entitled to such access. The Contracting Authority shall use its best endeavour to provide the Service Provider with the support of the relevant security forces in order to ensure the safety of the Facilities as well as the enforcement of any Applicable Laws.

## **15. LIABILITY**

### **15.1 Service Standards**

15.1.1 The Service Provider shall meet the Service Standards as defined under Schedule 3 and shall be subject to the application of the Performance Incentives as defined under Schedule 1.

15.1.2 The Service Provider shall not be liable for failure to meet Service Standards to the extent such failure is caused by:

- (a) failure by the Contracting Authority to perform its obligations under this Agreement; or
- (b) Force Majeure or Material Adverse Government Action.

### **15.2 Duty to mitigate**

15.2.1 The Parties shall be under a duty to mitigate any loss or delay it may suffer in connection with this Agreement, including any loss or delay due to a Force Majeure event, provided that the suffering Party can do so without unreasonable inconvenience or cost.

### **15.3 Consequential loss**

No Party shall be liable to the other Parties for special, consequential, or punitive damages or indirect losses, costs or expenses or loss of actual or anticipated profits, lost opportunities (including opportunities to enter into or complete arrangements with third parties), loss or inability to use equipment, a failure to realize anticipated savings or loss of reputation, howsoever caused (including by negligence) except to the extent expressly provided herein.

### **15.4 Indemnity**

A Party shall indemnify, defend and hold harmless the other Party and/or its contractors, subcontractors or their officers, agents or employees against any and all claims for loss, damage and expense of whatever kind and nature (including all related costs and expenses) in respect of personal injury to or death of third parties and in respect of loss of or damage to any third party property which arises out of or in consequence of the performance or non-performance by this Party of its obligations under this Agreement except and to the extent that the same arises out of any negligence, default or breach of statutory duty on the part of the Party seeking the indemnity, its subcontractors or their officers, agents or employees.

## **16. CONTRACTING AUTHORITY STEP-IN RIGHT**

16.1 If the Contracting Authority reasonably believes that it needs to take action in connection with the supply of Services:



- (a) because a serious risk exists to the health or safety of persons or property or to the environment; and/or
- (b) to discharge a statutory duty; and/or
- (c) because the Service Provider ceases to operate the Facilities for a period of [•] ([•]) consecutive hours other than due to a (i) Force Majeure Event, (ii) Material Adverse Government Action, (iii) Change in Law, or (iv) breaches of this Agreement by the Authority;

then the Contracting Authority shall have the right to enter the Facilities and take over operation of the Facilities upon not less than twenty-four (24) hours advance notice to the Service provider (such right, the "**Contracting Authority Step-In Right**"). The Contracting Authority may continue to exercise the Contracting Authority Step-In Right until the circumstances giving rise to the Contracting Authority Step-In Right have been cured or otherwise cease to exist.

- 16.2 In the exercise of the Contracting Authority Step-In Right, the Contracting Authority shall (i) cause the Facilities to be operated by an adequate number of sufficiently qualified personnel, (ii) use commercially reasonable efforts to continue to perform all of the Service Provider's obligations under this Agreement and the PPP Project related agreements; (iii) and not do anything which would cause the Service Provider to breach this Agreement or any of the PPP Project related agreements or any of the Service Provider's insurance policies.
- 16.3 In the exercise of the Contracting Authority Step-In Right, the Service Provider shall (i) cooperate in all respects with the Contracting Authority and (ii) to the extent reasonably requested by the Contracting Authority, assign its rights under all permits, contracts and relevant documents to the Contracting Authority during the period that the Contracting Authority is exercising the Contracting Authority Step-In Right.
- 16.4 The exercise by the Contracting Authority of the Contracting Authority Step-In Right shall not affect any other right or remedy the Contracting Authority may have, nor shall the existence of the Contracting Authority Step-In Right or its exercise thereof relieve the Service Provider of any duty, obligation or liability under this Agreement.
- 16.5 The Contracting Authority shall, once the circumstances giving rise to the Contracting Authority Step-In Rights have ended, except where the Service Provider has agreed to a shorter period, give not less than twenty (21) days notice and hand over the Facilities to the Service Provider and vacate the Facilities in accordance with Prudent Industry Practice.
- 16.6 The costs, expenses, losses and liabilities reasonably incurred or suffered by the Service Provider in connection with the exercise of the Contracting Authority Step-In Right shall be borne:
- (a) by the Contracting Authority with respect to events referred to in Clause 16.1(a) (only to the extent not caused by the Service Provider's breach of its obligations under this Agreement) and (b); and
  - (b) by the Service Provider in any other cases.

## **17. LIQUIDITY SUPPORT MECHANISM (OPTIONAL)**

### **17.1 Liquidity Support Balance**

- 17.1.1 The Contracting Authority shall ensure that at all times until the termination or expiry of this Agreement, the Liquidity Support Balance is no less than the Required Liquidity Support Amount. The Service Provider shall promptly notify the Contracting Authority and the Government of any withdrawal from any Escrow Account or claim under any First Demand Guarantee pursuant to Clause 17.3.
- 17.1.2 If at any time before the termination or expiry of this Agreement, the Liquidity Support Balance is less than the Required Liquidity Support Amount, the Contracting Authority shall take such steps as are necessary (whether by making further deposits into any Escrow Account or procuring that the undrawn portion of the First Demand Guarantee is increased or that the First Demand Guarantee is replaced) to increase the Liquidity Support Balance to the Required Liquidity Support Amount as soon as reasonably practicable and in any event within fifteen (15) days following receipt by the Contracting Authority of any notice under Clause 17.1.



## 17.2 First Demand Guarantee

17.2.1 Where the Contracting Authority has procured a First Demand Guarantee in favour of the Service Provider and that such First Demand Guarantee is due to expire before the term of this Agreement, the Contracting Authority shall, by no later than 14 days prior to the expiry of a Letter of Credit:

- (a) replace the existing First Demand Guarantee with a new First Demand Guarantee; and/or
- (b) increase the balance in the Escrow Account,

in each case, in an aggregate amount necessary to ensure that, upon the expiry of the existing First Demand Guarantee, the Contracting authority will be in compliance with its obligations under Clause 17.1.1, failing which the Seller may immediately call on the existing First Demand Guarantee and require that all proceeds are deposited into the Escrow Account. If the Purchaser subsequently procures a replacement First Demand Guarantee and subject (i) to the Service Provider's right to have recourse to amounts in the Escrow Account in accordance with this Agreement, and (ii) to the requirement that the Liquidity Support Balance is no less than the Required Liquidity Support Amount, the proceeds deposited in the Escrow Account shall be repaid to the Contracting Authority immediately upon the Purchaser procuring the replacement of the Letter of Credit.

## 17.3 Use of funds

If at any time the Contracting Authority fails to pay the Service Provider any undisputed amount due and payable under this Agreement within three (3) days from its due date under this Agreement; then the Service Provider shall be entitled to:

- (a) withdraw an amount equal to such payment and any default interest accruing thereon in accordance with this Agreement from any Escrow Account; and/or
- (b) make a claim under the First Demand Guarantee in an amount equal to such payment and any default interest accruing thereon in accordance with this Agreement, to the extent not withdrawn under paragraph (a) above.

## 18. EARLY TERMINATION

### 18.1 Early Termination Event

This Agreement shall terminate:

- (a) due to a prolonged Force Majeure Event in accordance with Clause 19.3 (*Termination due to Prolonged Force Majeure*); or
- (b) due to a prolonged Material Adverse Government Action in accordance with Clause 20.3 (*Termination due to Prolonged Material Adverse Government Action*); or
- (c) due to a Change in Law in accordance with Clause 21.3.1; or
- (d) due to a Contracting Authority Event of Default in accordance with Clause 18.2 (*Contracting Authority Event of Default*); or
- (e) due to a Service Provider Event of Default in accordance with Clause 18.3 (*Service Provider Event of Default*); or
- (f) due to the non-occurrence of the Commencement Date in accordance with Clause 3.3 (*Commencement of Services*).

### 18.2 Contracting Authority Event of Default

18.2.1 The following events, provided that they are not caused by a Service Provider Event of Default or a Force Majeure Event and are not cured within five (5) days following the issuance of a notice from the other Party, shall constitute a Contracting Authority Event of Default and the Service provider shall be entitled to terminate this Agreement:

- (a) the Contracting Authority fails to pay the Service Provider any undisputed amount due and payable in excess of [•] under this Agreement within three (3) days from its due date under this Agreement; or
- (b) any representation or warranty made by the Contracting Authority in this Agreement is incorrect when made and the Service Provider's ability to perform its obligations in accordance with this Agreement is materially adversely affected; or
- (c) the Contracting Authority is in material breach of its obligations under this Agreement; or

- (d) [the Government Guarantee terminates, is revoked or otherwise ceases to be in full force and effect<sup>40</sup>]; or
- (e) a breach by the Contracting Authority of its obligation to maintain the Liquidity Support Balance at the Required Liquidity Support Amount which has not been remedied within thirty (30) days of the Service Provider notifying that it requires such breach to be remedied.

### 18.3 Service Provider Event of Default

The following events, provided that they are not caused by a Contracting Authority Event of Default or a Force Majeure Event and are not cured within five (5) days following the issuance of a notice from the other Party, shall constitute a Service Provider Event of Default and the Contracting Authority shall, subject to the Lenders' Direct Agreement, be entitled to terminate this Agreement:

- (a) any representation or warranty made by the Service Provider in this Agreement is incorrect when made or repeated in accordance with Clause 22;
- (b) liquidation or insolvency of the Service Provider;
- (c) the Service Provider ceases to be Controlled by the Reference Shareholder (unless previously approved by the Contracting Authority);
- (d) transferring the Services in violation of this Agreement;
- (e) the amount identified in Schedule 2 and Schedule 3 for Liquidated Damages For Delay has been reached;
- (f) failure of the Service Provider to deliver and/or maintain the Performance Security as and when required under Clause 5.4;
- (g) the Service Provider has been convicted of any fraudulent conduct, including, but not limited to, any bribes, kick-backs, unlawful payments or promises of payment or other unlawful gifts or similar actions by any of the parties thereto or their employees, representatives, agents or similar Persons;
- (h) the Service Provider is in material breach of its obligations under this Agreement; and
- (i) [The Service Provider has, directly or indirectly, or through an agent, engaged in corrupt practices, fraudulent practices, coercive practices, or restrictive practices during the bidding process for this PPP Project]<sup>41</sup>.

### 18.4 Termination Procedure

#### 18.4.1 Termination of this Agreement by the Contracting Authority

The Contracting Authority may terminate this Agreement by giving a Termination Notice to the Service Provider if, without prejudice to the Lenders' rights under the Lender's Direct Agreement, a Service Provider Event of Default has occurred and is continuing for more than thirty (30) days after the Contracting Authority has delivered notice to the Service Provider of such Service Provider Event of Default. Such a Termination Notice shall be effective from its reception by the Service Provider.

#### 18.4.2 Termination of this Agreement by the Service Provider

The Service Provider may terminate this Agreement by giving a Termination Notice to the Contracting Authority if a Contracting Authority Event of Default has occurred and is continuing for more than thirty (30) days after the Contracting Authority has received a notice from the Service Provider mentioning the Contracting Authority Event of Default and requesting the Contracting Authority to remedy such Event of Default. Such a Termination Notice shall be effective from its reception by the Contracting Authority.

### 18.5 Termination Payments

In the event of Early Termination of this Agreement in accordance with Clauses 18.4.1 (*Termination of this Agreement by the Contracting Authority*) and 18.4.2 (*Termination of this Agreement by the Service Provider*) above, or Clause 20.3 (*Termination due to Prolonged Material Adverse Government Action*) and Clause 21.3 (*Termination due to Change in Law*) below, the Parties shall comply with their obligations under Clause 12 (*Handover*), and shall proceed to Termination Payments as set forth in Schedule 8

<sup>40</sup> If government guarantees are provided and subject to the terms of that regime.

<sup>41</sup> Drafting note: to be inserted only if the PPP Project has been awarded following a bidding process. Please also note that under the tender documentation these corrupt practices, fraudulent practices, coercive practices, or restrictive practices will be defined.

## 19. FORCE MAJEURE

### 19.1 Definition of Force Majeure Event

- 19.1.1 In this Agreement, a "**Force Majeure Event**" 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 this Agreement; and
  - (d) which is not the direct result of a breach by the Affected Party of its obligations under this Agreement or, in respect of the Service Provider, under any other PPP Project agreement
- 19.1.2 Force Majeure Events include but are not limited to the following circumstances, provided that they meet the criteria set forth in Clause 19.1 (*Definition of Force Majeure Event*) 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, and drought;
  - (b) fire, explosion, or nuclear, biological or chemical contamination (other than caused by the negligence of the Service Provider, its contractors, or any subcontractor, supplier or vendor);
  - (c) war (whether declared or not), armed conflict (including but not limited to hostile attack, blockade, military embargo), hostilities, invasion, act of a foreign enemy, act of terrorism, sabotage or piracy, in each case occurring outside the Country;
  - (d) civil war, riot rebellion and revolution, military or usurped power, insurrection, civil commotion or disorder, mob violence, act of civil disobedience, in each case occurring outside the Country; and
  - (e) general labor disturbance such as boycotts, strikes and lock-out, go-slow, occupation of factories and premises, excluding similar events which are unique to the PPP Project and specific to the Service Provider or to its sub-contractors, and occurring outside the Country.

### 19.2 Consequences of Force Majeure Event

- 19.2.1 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 of Clause 19.2.2 below.
- 19.2.2 To obtain relief under Clause 19.2.1 above, the Affected Party must:
- (a) as soon as practicable, and in any event within fifteen (15) days after it became aware that the Force Majeure Event has caused or is likely to cause breach of an obligation under this 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 the effect of the Force Majeure Event.
  - (b) within seven (7) 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;
  - (c) demonstrate to the other Party that:
    - (1) 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;
    - (2) the Force Majeure Event directly caused the need for the relief claimed;
    - (3) the relief claimed could not reasonably be expected to be mitigated by the Affected Party, including recourse to alternate sources of services, equipment and materials and construction equipment, without incurring material cost; and
    - (4) the Affected Party is using all reasonable endeavors to perform its affected obligations under this Agreement.
  - (d) If the Affected Party has complied with its obligations under Clause 19.2.2 above, then it

shall be subsists for a continuous period of more than one hundred and eighty (180) days under this Agreement to the extent it is prevented, hindered or delayed in such performance by reason of the Force Majeure Event.

- (e) [If information required under Clause 19.2.2 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 information is delayed.]<sup>42</sup>
- (f) 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 the applicable obligations under Agreement. Following such notification this Agreement shall continue to be performed on the terms existing immediately prior to the occurrence of the Force Majeure Event.
- (g) If the Parties cannot agree the extent of the relief required, or a Party disagrees that a Force Majeure Event has occurred, the Parties shall resolve the matter in accordance with Clause 26 (*Dispute Resolution*).

### 19.3 Termination due to Prolonged Force Majeure

If a Force Majeure Event subsists for a continuous period of more than one hundred and eighty (180) days, either Party may in its discretion terminate this Agreement by issuing a written termination notice to the other Party which shall take effect five (5) days after its receipt. If, at the end of this five (5) day period, the Force Majeure Event continues, the Agreement shall be terminated pursuant to Clause 18 (*Early Termination*).

## 20. MATERIAL GOVERNMENT ACTION

### 20.1 Material Adverse Governmental Action - Meaning

20.1.1 For purposes of this Agreement, a Material Adverse Government Action means:

- (a) any act or omission by the Contracting Authority, or any relevant public authority, which occurs during the term of this Agreement and which:
  - (1) renders the Service Provider unable to comply with all or a material part of its obligations under this Agreement and/or
  - (2) has a material adverse effect on the cost or the profits arising from such performance.
- (b) For the purpose of Clause 20.1 (*Material Adverse Governmental Action - Meaning*) above, any act or omission shall mean and be limited to the following circumstances<sup>43</sup>:
  - (1) failure of any relevant public authority to grant to the Service Provider or renew any permit or approval that is required for the purposes of the Service Provider's proper performance of its obligations and enforcement of its rights under this Agreement, in each case within the required timeframe under Applicable Law, except where such failure results from the Service Provider's non-compliance with Applicable Law;
  - (2) any act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade, embargo or revolution, occurring inside the Country;
  - (3) radioactive contamination or ionizing radiation, originating from a source in the Country;
  - (4) any riot, insurrection, civil commotion, act or campaign of terrorism, occurring inside the Country; expropriation, compulsory acquisition or nationalization by any relevant authority within the Country of any material asset or right of the Service Provider, including any of the shares in the Service Provider;
  - (5) any instructions of any Government entity further to the discovery of Antiquities under Clause 8 (*Antiquities*);
  - (6) [ground conditions on the Site, which are adverse and were not by the Bid Submission Date drawn to the Service Provider's attention, or within its knowledge (as is evidenced by written records), or foreseeable from the data supplied to the Service Provider by the Contracting Authority, or reasonably available to the Service Provider]<sup>44</sup>;
  - (7) any act or omission of any relevant authority within the Country adversely affecting the legality, validity, binding nature or enforceability of this Agreement; and
  - (8) [add any other event specific to the Project]

### 20.2 Consequences of Material Adverse Governmental Action

20.2.1 If a Material Adverse Government Action occurs, the Service Provider:

- (a) shall be excused from the performance of its obligations under this Agreement to the extent

<sup>42</sup> Drafting note: to be included within the Agreement depending on the Project. This part of Clause 18.2.2 reduces flexibility for any Affected Party to invoke a Force Majeure Event and obtain relief pursuant to such event.

<sup>43</sup> Drafting note: inclusion of Contracting Authority's default as a MAGA might be subject to discussions with bidders.

<sup>44</sup> Drafting note: risk allocation on Site to be allocated depending on the Project (including, as the case may be, reference to landmines).

that it is prevented, hindered or delayed in the performance of such obligations by reason of the Material Adverse Government Action; and

- (b) shall be entitled to compensation under this Agreement, in each case subject to and in accordance with the provisions of this Clause 20.2 (*Consequences of Material Adverse Governmental Action*).

20.2.2 To obtain relief pursuant to Clause 20.2.3 below, the Service Provider must:

- (a) as soon as practicable, and in any event within thirty (30) days after the Service Provider became aware that the Material Adverse Government Action has occurred, give to the Contracting Authority a notice of its claim for payment of compensation and/or relief from its obligations under this Agreement, following which the Parties shall meet and discuss in good faith to consider any option to mitigate the impact of Material Adverse Government Action;
- (b) within fourteen (14) days of receipt by the Contracting Authority of the notice referred in paragraph (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 Service Provider's obligations under this Agreement;
- (c) demonstrate to the Contracting Authority that:
  - (1) the Service Provider could not avoid such occurrence or consequences by actions which it might reasonably be expected to have taken without incurring material costs;
  - (2) 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 Service Provider's obligations under this Agreement;
  - (3) time lost and/or relief from the obligations under the Agreement claimed, could not be mitigated or recovered by the Service Provider; and
  - (4) the Service Provider is using all reasonable endeavours to perform its obligations under this Agreement.

20.2.3 If the Service Provider has complied with its obligations under Clause 20.2.2, then the Contracting Authority shall:

- (a) compensate the Service Provider for the Estimated Change In Project Costs as adjusted to reflect the actual costs reasonably incurred, and without double counting, for revenue actually lost to the extent it could not reasonably have been mitigated;
- (b) give the Service Provider such relief from its obligations under this Agreement as is reasonable for such Material Adverse Government Action; and
- (c) [if the Material Adverse Governmental Action occurs during the Construction Period and causes a delay in achieving the Time for Completion, such date shall be postponed by such time as is reasonable.]<sup>45</sup>

20.2.4 In the event that information is provided after the dates referred to in 20.2.2 above, then the Service Provider shall not be entitled to any extension of time, compensation or relief from its obligations under this Agreement in respect of the period for which the information is delayed.

20.2.5 If the Contracting Authority and the Service Provider cannot agree on the extent of any compensation, delay incurred, or relief from the Service Provider's obligations under this Agreement, as applicable, or the Contracting Authority disagrees that a Material Adverse Government Action has occurred, the Parties shall resolve the matter in accordance with Clause 26 (*Dispute Resolution*).

### **20.3 Termination due to Prolonged Material Adverse Government Action**

20.3.1 If a Material Adverse Government Action subsists for a continuous period of more than one hundred and eighty (180) days, a Party may in its discretion terminate this Agreement by issuing a written termination notice to the other Party which shall take effect thirty (30) days after its receipt. [If, at the end of this thirty (30) day period, the Material Adverse Government Action continues,] the Agreement shall be terminated pursuant to Clause 18 (*Early Termination*) and the Service Provider shall be entitled to the compensation set out under Clause 18.5 (Termination Payments).

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<sup>45</sup> Drafting Note: to be deleted when there is no Construction Period for the PPP Project.

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## 21. CHANGE IN LAW

### 21.1 Occurrence of a Change in Law

- 21.1.1 If a Change in Law occurs or is shortly to occur, then any Party may, within five (5) days starting from the day it was aware (or should have been aware) of the Change in Law, notify the other Party to express an opinion on its likely effects, giving details of its opinion of:
- (a) any necessary change to the terms of this Agreement including any necessary Contracting Authority variation;
  - (b) whether relief from compliance with obligations is required;
  - (c) whether any deadline under the Agreement should be postponed;
  - (d) any (positive or negative) estimated change of revenue that will directly result from the relevant Change in Law;
  - (e) any (positive or negative) estimated change in the costs of the PPP Project that will directly result from the Change in Law; or
  - (f) any capital expenditure that is required or no longer required as a result of a Change in Law.
- 21.1.2 As soon as practicable and in any event within thirty (30) days after receipt of any notice from the affected Party, the Contracting Authority and the Service provider shall discuss and agree the matters referred to in Clause 21.1.1 above and any ways in which either Party can, if applicable, mitigate the effect of the Change in Law, including, in relation to the Service Provider:
- (a) providing evidence that the Service Provider has used reasonable endeavors (including (where practicable) the use of competitive quotes) to oblige its subcontractors to minimize any increase in costs and maximize any reduction in costs;
  - (b) demonstrating how any capital expenditure to be incurred or avoided is being measured in a cost effective manner, including showing that when such expenditure is incurred or would have been incurred, foreseeable Changes in Law at that time have been taken into account by the Service Provider;
  - (c) giving evidence as to how the Change in Law has affected prices charged by any similar businesses to the PPP Project; and
  - (d) demonstrating that any expenditure that has been avoided on account of the Change in Law has been taken into account in the amount which in its opinion has resulted or is required under Clauses 21.1.1 (e) or 21.1.1 (f) above, provided that if the Parties cannot agree on the effects of the Change in Law, the matter shall be referred for determination in accordance with Clause 22 (*Representations And Warranties Of The Service Provider*).

### 21.2 Consequences of a Change in Law

- 21.2.1 If the Parties have followed the procedure set out under Clauses 21.1.1 and 21.1.2 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 Change in Law;
  - (b) if the Change in Law has occurred before the Commencement Date, the scheduled Commencement Date shall be postponed to take into account the effect of such Change in Law; and
  - (c) the Parties shall agree on the amount and payment of any compensation to reflect the Estimated Change in Project Costs as adjusted to take into account the actual increase or reduction in costs reasonably incurred as a result of the Change in Law, provided that no compensation shall be made in relation to a Change in Law under this clause unless the claiming Party can demonstrate that the aggregate impact of all Changes in Law that have occurred during **[specify the relevant period in time]** exceeds **[insert amount]**.
- 21.2.2 If the notice and relevant information are not provided within the period referred to under Clause 21.1.1 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 information is delayed.



### **21.3 Termination due to Change in Law**

21.3.1 If a Change in Law:

- (a) prevents a Party from performing its material obligations under this Agreement for a period of fifteen (15) consecutive days; or
- (b) results in performance of the Agreement being illegal and such illegality cannot be remedied by a Contracting Authority variation,

either Party may in its discretion terminate this Agreement by issuing a written termination notice which shall take effect five (5) days after receipt of such termination notice and the Service Provider shall be entitled to the compensation set out under Clause 18.5 (*Termination Payments*).

## **22. REPRESENTATIONS AND WARRANTIES OF THE SERVICE PROVIDER**

The Service Provider hereby represents and warrants to the Contracting Authority as of the Effective Date as follows:

### **22.1 Power, Authority, No Contravention**

22.1.1 The Service Provider is duly organized, validly existing and in good standing under the Applicable Laws of the Country and has the right, power and authority to enter into this Agreement and to perform in all material respects its obligations hereunder.

22.1.2 The execution of, delivery of and performance by the Service Provider of its obligations arising under this Agreement have been duly authorized by all necessary corporate action of the Service Provider, and this Agreement constitutes the valid, binding and enforceable obligation of the Service Provider.

22.1.3 Every approval of any Government entity or third party required with respect to the Service Provider in connection with its execution and delivery of, and performance of its obligations under, this Agreement has been obtained other than those which are not required at the time this representation is made or deemed to be repeated.

### **22.2 Litigation**

22.2.1 There is no pending or, to the best of the Service Provider's knowledge, threatened, action, suit, investigation, arbitration or other proceeding that would impair the ability of the Service Provider to perform its obligations under this Agreement.

22.2.2 Neither the Service Provider nor any of its Affiliates has received any notice of any violation or potential violation of any Applicable Law pertaining or that would reasonably be likely to affect the Service Provider's use or occupancy of the Site, or the Service Provider's right to [design, finance, build, maintain, operate] the Facilities, or the Services Provider's provision of the Services, are in violation of any Applicable Law pertaining to and affecting the Site which violation or potential violation could have a material adverse effect on the ability of the Service Provider to perform its obligations under this Agreement or the ability of the Service Provider to use and enjoy the Site for the purposes contemplated by this Agreement.

22.2.3 The execution and delivery of this Agreement by the Service Provider and the performance by the Service Provider of its obligations under this Agreement do not violate, conflict with or result in a breach of any decree, memorandum or articles of incorporation, charter, bylaw, Applicable Law, contract or obligation to which the Service Provider is a party.

### **22.3 Skills and Expertise**

The Service Provider, the Contractors, its employees, agents and independent contractors at all times are duly licensed to the extent required by Applicable Law, suitably qualified and experienced.

### **22.4 Continuing Warranties**

The representations and warranties in this Clause 22 (*Representations And Warranties Of The Service Provider*) shall be deemed to be repeated by the Service Provider on the Commencement

Date and thereafter as of December 31 of each year during the Term, as if made as of the Effective Date with reference to the facts and circumstances on such dates.

## 22.5 Information

The Service Provider shall notify the Contracting Authority in writing if any of the warranties given by it in Clauses 22.1 (*Power, Authority, No Contravention*) to 22.3 (*Skills and Expertise*) ceases to be true in any material respect as soon as practicable and in any event within five (5) days of becoming aware of the same.

## 23. REPRESENTATIONS AND WARRANTIES OF CONTRACTING AUTHORITY

The Contracting Authority hereby represents and warrants to the Service Provider as of the Effective Date as follows:

23.1 The Contracting Authority has full power and authority to enter into and perform in all material respects its obligations under this Agreement.

23.2 The Contracting Authority has taken all necessary action for the authorization of its entering into this Agreement and the performance of its obligations thereunder.

## 24. REFINANCING

24.1 The Service Provider shall promptly provide the Contracting Authority with full details in relation to any contemplated Refinancing, which shall include the proposed changes to the Financial Model, a justification of the assumptions on which it is based, the proposed contractual documentation and any other information that the Contracting Authority may reasonably request in relation to that Refinancing.

24.2 The Contracting Authority shall, at all time, have unrestricted rights to audit the Financial Model used (or proposed to be used) in relation to a Refinancing.

24.3 The Service Provider shall obtain the Contracting Authority's prior written consent in relation to any Qualifying Refinancing.

24.4 The Contracting Authority shall be entitled to receive a [fifty per cent (50%)]<sup>46</sup> share of any Refinancing Gain in a Qualifying Refinancing<sup>47</sup>.

24.5 The Service Provider shall pay, on behalf of the Contracting Authority, all reasonable costs of external advisors appointed by the Contracting Authority in relation to a Refinancing or potential refinancing and the calculation of a Refinancing Gain.

## 25. GOVERNING LAW

This Agreement, and any non-contractual obligation connected with it, shall be governed by and construed in accordance with the laws of the Country.

## 26. DISPUTE RESOLUTION

If any dispute arises out of or in connection with this Agreement including any dispute concerning any non-contractual obligations arising out of or in connection with it (a "**Dispute**") it shall be resolved in accordance with this Clause 26 (*Dispute Resolution*).

Either Party may by notice in writing to the other Party, at the address for sending of notices under this Agreement and in a manner provided by Clause 28.11 (*Notices*), give notice that a Dispute has arisen ("**Notice**"). The Notice shall set out brief details of the nature of the Dispute.

### 26.1 Amicable Settlement

26.1.1 From the receipt of one of the Party's Notice; the Parties shall meet together promptly, in an effort to resolve the related Dispute amicably.

26.1.2 The representatives of both Parties shall meet to resolve such Dispute. To this end, each Party shall designate in writing to the other Parties from time to time a representative who shall be

<sup>46</sup> Drafting note: to be adjusted to fit the Parties negotiation on the payment structure.

<sup>47</sup> Drafting note: to be adapted depending on the agreed sharing mechanism.



authorized to resolve between them any Dispute and, unless otherwise expressly provided herein, to exercise the authority of such Party to reach such resolution. The representatives shall meet if and when necessary from time to time and attempt in good faith and use their best endeavors at all times to resolve the Dispute and produce written terms of settlement. The meetings of the representatives shall be conducted in **[specify language of the meetings]**.

- 26.1.3 If the Dispute is not amicably resolved, as evidenced by a written agreement, within [fifteen] (15) days of raising such Dispute, any Party may decide to submit the Dispute to Mediation, a Technical Expert or to Arbitration (as the case may be) in accordance with either Clauses 26.2 (*Mediation*), 26.3 (*Technical Expert*) and 26.4 (*Arbitration*).

## 26.2 Mediation<sup>48</sup>

- 26.2.1 If the Parties are unable to negotiate the settlement of a Dispute referred to in a Notice within [fifteen] (15) days of the date of the Notice (or such further period as is agreed in writing between the Parties before the expiry of that [fifteen] (15) days period), either Party may refer the Dispute to mediation by notice in writing to the other Party at the address given for the sending of notices under this Agreement at Clause 28.11 (*Notices*), and in a manner provided for in that Clause (a "**Mediation Notice**"). If a Party refers a Dispute to mediation in accordance with this Clause both Parties to the Dispute shall be obliged to follow the procedure below.
- 26.2.2 The mediation shall be conducted by a single mediator who shall be appointed by agreement in writing between the Parties. If the Parties are unable to agree on the identity of a mediator within [five (5)] days of the date of the Mediation Notice, or if the mediator agreed by the Parties is or becomes unable or unwilling to act, the mediator shall be appointed by [the ICC] on the application of either Party.
- 26.2.3 The mediation shall be conducted in **[specify the place of mediation]** and in the **[specify language of mediation]** under the [ICC Mediation Rules]. Each Party shall be represented at the mediation by an individual with authority to settle the Dispute.
- 26.2.4 Save for the purposes of implementing and/or enforcing a written legally binding settlement agreement or as otherwise required by law, the mediation shall be conducted without prejudice to the rights of the Parties in any future proceedings.
- 26.2.5 The costs of the mediation, including the fees and expenses of the mediator (but excluding each Party's own costs, which shall be borne by the Party incurring those costs) shall be borne equally by the Parties, unless otherwise agreed in writing.

## 26.3 Technical Expert

- 26.3.1 Where the Parties are unable to reach an agreement on any Dispute that relates to any matters of fact of a financial, technical, engineering, operational or environmental aspect of this Agreement, including factual determination of a matter of fact of technical, engineering, operational or environmental nature relating to the existence, nature and consequences of a Force Majeure Event, of an Event of Default (but excluding any legal aspects of the same) or the remedy of defaults and termination procedures (a "**Technical Dispute**") within thirty (30) days of raising such Technical Dispute, any Party may ask for the matter to be referred to a Technical Expert.
- 26.3.2 The Parties shall agree on the appointment of the expert and shall agree with the expert the terms of his/her appointment. If the Parties are unable to agree on the identity of the expert, or if the person proposed is unable or unwilling to act, then, within [•] days of either Party serving details of a suggested expert on the other or the proposed expert declining to act, either Party shall then be entitled to request that an expert be appointed by [the ICC]<sup>49</sup> on the application of a Party. All costs of and associated with the request for the appointment of an expert by the [ICC] shall be borne equally between the Parties.
- 26.3.3 The expert appointed may be an individual, partnership, association or body corporate and shall be generally recognized as an expert in **[specify the field of the PPP Project]** and shall have [•] years of experience in that field.

<sup>48</sup>Drafting Note: as a general comment, we recommend aligning mediation rules with arbitration rules, in order for the Parties to benefit from similar and compatible processes.

<sup>49</sup>Drafting note: Drafting note: Parties may elect another rules for Technical Expert appointment.

- 26.3.4 The decisions of the Technical Expert shall be binding upon the Parties.
- 26.3.5 The costs of the Technical Expert and associated expenses shall be borne equally by the Parties.
- 26.3.6 If the Technical Dispute is not resolved by the Technical Expert within thirty (30) days of service of a notice raising a such Technical Dispute, or if a Party fails to implement fully the Technical Expert's decision, any Party may decide to submit the Dispute to Arbitration in accordance with Clause 26.4 (*Arbitration*).

#### **26.4 Arbitration**

- 26.4.1 If any Dispute has not been resolved between the Parties through an amicable settlement, or if any Party is unsatisfied with the decision of the Technical Expert in respect of the Technical Dispute in accordance with Article 26.2 above, such Dispute may then be referred to and finally resolved by arbitration as provided below.
- 26.4.2 The Agreement, and the rights and obligations of the Parties hereunder shall remain in full force and effect pending the award in such arbitration proceeding, which award, if appropriate, shall determine whether and when any termination shall become effective.
- 26.4.3 All arbitration proceedings with respect to the foregoing shall be held and finally settled in **[specify place of arbitration]**, **[specify country of the seat of arbitration]**, and shall be conducted pursuant to the **[specify arbitration rules]** (the "Rules") then in force by three (3) arbitrators appointed in accordance with the said Rules. Where the Rules are silent, **[specify applicable law]** law shall apply to the arbitration proceedings.
- 26.4.4 The arbitration shall be conducted in **[specify arbitration language]** and all documents submitted in connection with such proceedings shall be in **[specify arbitration language]** or accompanied by a certified **[specify arbitration language]** translation.
- 26.4.5 The decisions of arbitrators shall be final and binding upon the Parties.

#### **26.5 Continuing Obligations**

Performance of this Agreement shall continue during arbitration proceedings or any Dispute resolution mechanism pursuant to this Clause 21 (*Change In Law*).

#### **26.6 Waiver of Immunities**

- 26.6.1 To the fullest extent permitted by law the Contracting Authority irrevocably and unconditionally:
- (a) submits to the courts of any jurisdiction in relation to the recognition of any judgment or order of the courts of [jurisdiction of arbitration seat] in support of any arbitration in relation to any Dispute and in relation to the recognition of any arbitral award and waives and agrees not to claim any sovereign or other immunity from the jurisdiction of any court in relation to the recognition of any such judgment or court order or arbitral award and agrees to ensure that no such claim is made on its behalf.
  - (b) consents to the enforcement of any order or judgment in support of arbitration or any award made or given in connection with any Dispute and the giving of any relief in the courts of any other jurisdiction whether before or after final arbitral award including, without limitation: (i) relief by way of interim or final injunction or order for specific performance or recovery of any property; (ii) attachment of its assets; and (iii) enforcement or execution against any property revenues or other assets whatsoever (irrespective of their use or intended use) and waives and agrees not to claim any sovereign or other immunity from the courts of any other jurisdiction in relation to such enforcement and the giving of such relief (including to the extent that such immunity may be attributed to it), and agrees to ensure that no such claim is made on its behalf.

#### **27. CONFIDENTIALITY**

- 27.1 Each Party shall hold, and shall use its best efforts to cause its shareholders and Affiliates (as applicable) to hold, in strict confidence from any other person (other than any such Affiliates

or Lenders) all documents and information concerning the other Parties or any of its Affiliates furnished to it or its advisors, consultants, contractors or agents by any other Party in connection with this Agreement or the transaction contemplated hereby ("**Confidential Information**"), unless:

- (a) required to disclose any such information by any relevant stock exchange, judicial or administrative process (including in connection with obtaining from relevant authorities the necessary approvals of this Agreement and the transactions contemplated hereby) or by other requirements of Applicable Law;
- (b) disclosed in or pursuant to the offering statement provided to potential investors in the Service Provider, as the case may be, it being provided that in such event the Service Provider shall make these investors sign a non-disclosure agreement which content shall reflect the Service Provider's confidentiality undertakings as set out in this Agreement;
- (c) disclosed in an action or proceeding brought by any Party for the purpose of pursuing its rights or in the exercise of its remedies hereunder; or
- (d) disclosed by the Contracting Authority to any Person, its advisers and its lenders involved in the retendering process for the right to provide all or some of the Services, should the Contracting Authority decide to proceed with such retendering at the expiry of this Agreement or in the event of any early termination of this Agreement.

27.2 This Clause 27 (*Confidentiality*) shall not apply to such documents or information that were:

- (a) previously known by the Party receiving such documents or information;
- (b) in the public domain (either prior to or after the furnishing of such documents or information hereunder) through no fault of such receiving Party;
- (c) later acquired by such receiving Party from another source if such receiving Party is not aware that such source is under an obligation to any other Party to keep such documents and information confidential;
- (d) disclosed by the Contracting Authority to any relevant authority;
- (e) required to be disclosed to a Lender for the purpose of negotiating and/or entering into the Lender's Documents; or
- (f) required to be disclosed to insurance providers for the purposes of obtaining and/or maintaining insurance cover.

## **28. MISCELLANEOUS**

### **28.1 Survival**

28.1.1 The covenants and agreements of the Parties contained in Clauses 14.1 (*Data*) 22 (*Representations And Warranties Of The Service Provider*), 15 (*Liability*), 18 (*Early Termination*), 21 (*Change In Law*), 27 (*Confidentiality*), and 28 (*Miscellaneous*), shall survive any termination of this Agreement, for a period of two (2) years after such termination or expiration of this Agreement, provided, however, that with respect to the confidentiality provisions of Clause 27 (*Confidentiality*):

- (a) each Party shall be entitled to use such information as may be reasonably required in connection with the ownership and operation of the PPP Project by such Party or such Party's assignee or transferee; and
- (b) each Party shall continue to be bound by such confidentiality provisions to the extent only that disclosure of any Confidential Information might have a material adverse effect on the other Parties' interests in the PPP Project.

### **28.2 Authorized Representative**

28.2.1 Any action required or permitted to be taken, and any document required or permitted to be executed under this Agreement by the Contracting Authority or the Service Provider may be taken or executed by the officials specified in, or designated in accordance with, Part 1 of Schedule 1.

### **28.3 Insurance**

28.3.1 The Service Provider shall procure and maintain, and shall cause any Contractor or sub-contractors to procure and maintain, throughout the term of this Agreement, an insurance coverage as stipulated in Schedule 7. Such insurance shall be purchased by the Service provider at its own cost at such levels as are consistent with Prudent Industry Practice. Such insurance shall be effective as of the Commencement Date and cover the persons identified in Schedule 7.

28.3.2 The Service Provider shall provide the Contracting Authority with certificates of insurance or other satisfactory evidence that the required insurance policies have been issued and are in force and shall promptly pay all insurance premiums, fees or other costs due in relation with the required insurance policies. The said insurance policies may not be cancelled or modified except with the prior written consent of the Contracting Authority obtained not less than [•] ([•]) days before the intended date of cancellation or modification.

28.3.3 To the extent that a loss or damage suffered by any of the insured under the relevant insurance policies falls within the terms of the insurance cover required under this Clause 28.3 (*Insurance*), the Service Provider shall forthwith make the appropriate claims thereunder and in the case of property insurance shall replace or repair such loss or damage.

#### **28.4 Assignment**

28.4.1 Except where required under any law passed by the **[insert the relevant Government]**, the Contracting Authority shall not assign or transfer all or any part of its rights or obligations under this Agreement without the prior written consent of the Service Provider, such consent not to be unreasonably withheld or delayed.

28.4.2 The Service Provider shall not without the prior written consent of the Contracting Authority, such consent not to be unreasonably withheld or delayed, transfer all or any part of its rights or obligations under this Agreement other than by way of security assignment to the Lenders for the purpose of the financing of the PPP Project.

#### **28.5 Relations between the Parties**

28.5.1 The Service Provider shall be an independent contractor in its performance of this Agreement. This Agreement does not create any agency, partnership, joint venture or other joint relationship between the Service Provider and the Contracting Authority.

28.5.2 All Operating Staff, Contractors and sub-contractors shall be under the complete control of the Service Provider and nothing contained in this Agreement or any related contract or sub-contract awarded by the Service Provider or under any Lenders Documents shall be construed to create any contractual relationship between the Service Provider's Contractors, subcontractors or Lenders and the Contracting Authority except and to the extent that such relationship shall be governed by a collateral agreement entered into between such Contractor and the Contracting Authority or by a direct agreement between the Lenders (or their agent) and the Contracting Authority as referred to in Schedule 1.

#### **28.6 Variations in Writing**

All additions, amendments and variations to this Agreement shall be binding only if in writing, and signed by duly authorized representatives of each of the Parties.

#### **28.7 Entire Agreement**

This Agreement, together with the Lease, including the Recitals and the Schedules attached hereto, represents the entire agreement between the Parties in relation to the subject matter thereof and supersedes any or all previous agreements, communications or arrangements, whether oral or written, between the Parties.

#### **28.8 Severability**

If any term or partial term of the agreement is prohibited or rendered invalid or unenforceable, such prohibition, invalidity or unenforceability shall not affect the validity or enforceability of the agreement or any other term or partial term of the agreement.

#### **28.9 Non-Waiver**

None of the provisions of this Agreement shall be deemed waived by either Party except when such waiver is given in writing. The failure by either Party to insist upon strict performance of any of the provisions of this Agreement or to take advantage of any of its rights under this Agreement shall not be construed as a waiver of any such provisions or the relinquishment of any such rights for the future.

**28.10 Further Assurances**

Each Party agrees to execute all deeds, instruments, transfers or other documents as may be necessary or desirable to give full effect to the provisions of this Agreement.

**28.11 Notices**

Unless otherwise agreed between the Parties, notices to be given under this Agreement shall be in **[specify language of the notice]**, in writing and shall be given by hand delivery, recognized international courier or mail and delivered to the Parties at their respective addresses set forth below:

The Contracting Authority: [•]  
Attention: [•] (Authorized Representative)  
Address: [•]  
The Service Provider: [•]  
Attention: [•] (Authorized Representative)  
Address: [•]

or such other address as may be notified by that Party to the other Party from time to time.

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed by their respective duly authorized representatives.

Made in [•], on [•] in [•]([•]) originals by:

[•]

**As Service Provider**

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[•]

**As Contracting Authority**

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## Schedule 1 - Project Specific Information, Conditions Precedent and Financing

### Part 1 - Project Specific Information

*[Should indicate the Project specific information, and at least the following information:]*

1.	Base Case Equity IRR	[•]
2.	Bid Submission Date	[•]
3.	Construction Period	[•]
4.	Country	[•]
5.	Default Interest Rate	[•]
6.	Escrow Account	[•]
7.	Escrow Agent	[•]
8.	Expiry Date	[•]
9.	Existing Facilities	[•]
10.	Financing Costs	[•]
11.	Land Rights <sup>50</sup>	[•]
12.	Liquidated Damages for Delays	[•]
13.	Performance Indicators	[•]
14.	Project Fee	[•]
15.	Regulatory Agency	[•]
16.	Related Agreements	[•]
17.	Reference Shareholder	[•]
18.	Required Liquidity Support Amount	[•]
19.	Service Period	[•]
20.	Site	[•]
21.	Site Handover Date	[•]

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<sup>50</sup> Drafting note: if any.

## Part 2 - Conditions Precedent

### 1. CONDITIONS PRECEDENT UNDER SERVICE PROVIDER'S RESPONSIBILITY

- 1.1 In accordance with Clause 3.2 (*Conditions Precedent*), it shall be condition precedent to the Commencement Date that each of the following is provided by the Service Provider in form and substance satisfactory to the Contracting Authority:
- (a) Certificate of Insurance Policies to be subscribed as specified in Schedule 7;
  - (b) Copies of the certificate of incorporation and the articles of incorporation of the Service Provider;
  - (c) A certificate of good standing issued by the [relevant corporate and business registration administration to be specified] dated no more than five (5) days before the Commencement Date;
  - (d) A certificate (or equivalent) from the Lenders confirming that Financial Closing has occurred (or is conditional upon full effectiveness of the Agreement);
  - (e) the Performance Security;
  - (f) all the Approvals that are required prior to the Commencement Date;
  - (g) *[to be completed as may be necessary in the light of the specificities of the Project]*.

### 2. CONDITIONS PRECEDENT UNDER CONTRACTING AUTHORITY'S RESPONSIBILITY

- 2.1 In accordance with Clause 3.2 (*Conditions Precedent*), it shall be condition precedent to the Commencement Date that each of the following is provided by the Contracting Authority in form and substance satisfactory to the Service provider:
- (a) A signed copy of the Government Guarantee;
  - (b) A signed copy of the Escrow Letter and of the First Demand Guarantee, with a Liquidity Support Balance not inferior to the Required Liquidity Support Amount; (*optional*)
  - (c) *[to be completed as may be necessary in the light of the PPP Project]*

### 3. CONDITIONS PRECEDENT UNDER BOTH PARTIES' AUTHORITY

- 3.1 In accordance with Clause 3.2 (*Conditions Precedent*), it shall be condition precedent to the Commencement Date that each of the following is provided by both Parties:
- (a) the Asset Transfer Plan agreed between the Parties and attached in Schedule 9;
  - (b) the Assets Handover Agreement agreed between the Parties and attached in Schedule 10;
  - (c) the Lenders' Direct Agreement is in full force and effect,
  - (d) *[to be completed as may be necessary in the light of the PPP Project]*

### Part 3 - Financing

*[Should contain, among others, the following information. In any case, this table will have to be filled in and reviewed by financial advisors of the municipality/service provider, as applicable]*

Element of Financing	Maximum Limit
Principal amount of the credit granted	[•]
Indemnities or other payments due in the event of early repayment of the credit outstanding, including the early repayment penalties, as appropriate.	[•]
Calculation methodologies of the applicable interest rate	[•]
Applicable late payment interest rate	[•]
Arrangements for amortization of the credit/amortization table	[•]
Information on the planned hedging instruments (for rates/ currencies), and percentage of the debt concerned.	[•]
Maturity of the credit (and the various tranches as appropriate)	[•]
Interest Rate	[•]
Fees	[•]

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## Schedule 2 - Works Specifications

*[Should indicate specifications and standards to be complied with concerning the reinstatement (if any) of the Existing Facilities, and design and construction of the New Facilities. Should also indicate penalties the Service Provider may face if the Works Specifications are not met, as well as the Performances Tests to be carried out before the Contracting Authority issues the Performance Certificate]*

### 1. GENERAL TECHNICAL REQUIREMENTS

- 1.1 The Project shall be designed, installed, commissioned, tested and operated in accordance with Prudent Industry Practice, the Applicable Law, and relevant international standards including but not limited to those listed in the table below<sup>51</sup>:

Code	Standard Title
[•]	[•]

### 2. WORKS DELIVERY PLAN

- 2.1 The Service Provider shall develop and maintain a Works Delivery Plan.
- 2.2 The Works Delivery Plan shall include as a minimum:
- the Design and Construction Plan; and
  - the Testing and Commissioning Plan.
- 2.3 Each plan that forms part of the Works Delivery Plan shall:
- describe how the Service Provider plans to deliver the Facilities<sup>52</sup> demonstrating a clear critical path;
  - outline the order and timing of the major operations and major activities; temporary works; procurement of equipment; construction; commissioning; and Performance Tests;
  - be sufficiently detailed to enable an experienced third party, who does not have prior knowledge of the Project, to take over the Works identified in the current Works Delivery Plan without undue delay or disruption;
  - describe communications strategy and procedures for interfacing between all parties and covering inter alia: parties within the Contracting Authority; the interfaces between [designers, constructors and operators]<sup>53</sup>, and other relevant Government entities and utilities;
  - describe reporting procedures; and
  - describe use of IT and software.
- 2.4 The Service Provider shall provide information on the parties undertaking each component of the Works, including:
- team structure and management;
  - employment of Contractors;
  - named persons responsible for health and safety with contact details; and
  - details of responsible persons for each site at daytime and out of hours contact details.

### 2.5 Design and Construction Plan

- 2.5.1 The Service Provider shall prepare the Design and Construction Plan which shall provide a comprehensive explanation of the Service Provider's approach to designing and constructing the Facilities and shall include, as a minimum:
- design codes and standards to be used;
  - security arrangements during construction;
  - procedures for supervision, quality control and reporting that will be applied to ensure quality of workmanship and that the requirements of this Agreement have been met; and
  - strategy for managing public relations.

<sup>51</sup> Drafting Note: depending on the project, it may be necessary to specify the applicable standards for each works category (e.g. mechanical installations, electric installations, structures, etc...)

<sup>52</sup> Drafting Note: drafting to be adapted depending on the delivery or not of New Facilities.

<sup>53</sup> Drafting Note: to be adapted depending on the various parties involved in the Project.

## 2.6 Testing and Commissioning Plan

- 2.6.1 The Service Provider shall prepare the Testing and Commissioning Plan which shall provide a comprehensive explanation of how the Service Provider intends to commission and carry out the Performance Tests on the Facilities and shall include, as a minimum:
- (a) clear explanations of how the constraints on testing and commissioning are to be complied with;
  - (b) details of testing and commissioning and Performances Tests activities;
  - (c) detailed measurement and testing regime to demonstrate compliance with the **[specify the applicable requirements]**; and
  - (d) **[specify any additional element that should be part of the Testing and Commissioning Plan]**.

## 3. OPERATION AND MAINTENANCE PLAN

- 3.1 The Service Provider shall, in accordance with Clause 10 (Operation And Maintenance Plan), prepare and submit to the Contracting Authority an Operation and Maintenance Plan. This Operation and Maintenance Plan shall include the following:
- (a) **[specify details of all critical and routine operating tasks to be executed with the objective of achieving and maintaining the technical specifications set out in this schedule and the Performance Indicators]**

## 4. SERVICE PROVIDER PENALTIES

*[Should describe the penalties applicable to the Service Provider in the case where the Works do not comply with the Works Specifications. Liquidated damages that the Service Provider may have to pay to the Contracting Authority should be deduced from the bulk payment paid by the Contracting Authority (when applicable), and paid to the Contracting Authority when the Service Provider remuneration only comes from user fees]*

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## Schedule 3 - Facilities Services and Specifications

*[Should indicate specifications and standards to be complied with concerning the operation and maintenance of the Facilities by the Service Provider. Should also indicate penalties the Service Provider may face if the Facilities Services and Specifications are not met]*

### 1. GENERAL SERVICES REQUIREMENTS

- 1.1 The Services shall be provided in accordance with Prudent Industry Practice, the Applicable Law, and relevant international standards including but not limited to those listed in the table below:

Code	Standard Title
[•]	[•]

### 2. ADMINISTRATIVE REQUIREMENTS

*[Depending on the Project, this section may be used to describe the administrative requirements to be followed by the Service Provider in performing the Services (i.e. records to be kept, format of documents, etc.) If no administrative requirements are necessary for the Project, this section may be deleted]*

### 3. SERVICE DELIVERY PLAN

- 3.1 The Service Provider shall develop and maintain a Service Delivery Plan describing how the Service Provider intends to deliver the Services. The Service Delivery Plan shall include, as a minimum:
- Operation and Maintenance Plan (including Operation and Maintenance Manuals); and
  - Environmental Management Plan
  - [to be completed depending on the Project]
- 3.2 Each plan that forms part of the Service Delivery Plan shall:
- be structured so as to cover the Services at the Facilities;
  - be consistent with the Applicable Law standards and Prudent Industry Practice;
  - be sufficiently detailed to enable an experienced service provider, who does not have previous knowledge of the Assets, to take over the delivery of the Services without undue delay or disruption; and
  - [specify any other applicable standard. IFC Performance Standards, or standards from another IFI, may be required by such IFI].***
- 3.3 Each plan that forms part of the Service Delivery Plan shall include, as a minimum:
- the relationship between that Service Delivery Plan and other plans maintained by the Service Provider;
  - parties contributing to and affected by the activities covered by the Service Delivery Plan;
  - employment of Contractors;
  - team structure and management;
  - named persons responsible for health and safety with contact details;
  - details of responsible persons for the Site and day-time and out of hours contact details;
  - contain communications strategy and procedures for interfacing between all parties and covering inter alia: parties within the Contracting Authority, the interfaces between designers, constructors and operators, other relevant Government entities and utilities;
  - reporting procedures;
  - use of IT and software;
  - strategy and procedures to comply with health and safety requirements in accordance with Prudent Industry Practice;
  - strategy and procedures for ensuring the minimization of environmental impact;
  - quality procedures including checking and approval, document management and control, change control; and
  - numbers of key human resources<sup>54</sup>.

<sup>54</sup> Drafting Note: this list is to be completed depending on the Project specifications.

*[Depending on the Project, the Service Provider may have to provide the Contracting Authority with other plans, such as Facilities management plan (enabling the condition and performance of the Facilities to be monitored)]*

**4. SERVICE PROVIDER PENALTIES**

*[Should describe the penalties applicable to the Service Provider in the case where the Services do not comply with the Services Specifications. Liquidated damages that the Service Provider may have to pay to the Contracting Authority should be deduced from the bulk payment paid by the Contracting Authority (when applicable), and paid to the Contracting Authority when the Service Provider remuneration only comes from user fees]*

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## **Schedule 4 - Permits to be obtained by the Contracting Authority**

*[Enumerates the permits required to be obtained by the Service Provider for the project, including the deadlines for acquisition of such permits, beyond which such delay may be considered a MAGA. Permits to be obtained are generally in relation with the following topics, but will and will vary depending on the local law applicable to the project as well as the project itself:*

- *Construction/urban planning permits (as the case may be, construction permits may have to be obtained at the national/municipal level);*
- *Exploitation permits (as the case may be, exploitation permits may have to be obtained at the national/municipal level);*
- *Environmental permits (generally only at the national level);*
- *Foreign exchange permits (generally only at the national level); and*
- *Foreign employees permits (generally at the national level)]*

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## Schedule 5 - Bulk and User Payments

*[Must contain a detailed discussion of the terms of payments, depending on whether the project is availability-based or concession/user-fee based with/without some Government support or subsidy.*

*The income of the Service Provider may come from:*

- (a) *A bulk payment from the Contracting Authority made up of:*
  - (1) *Fixed payment for non-variable costs; and*
  - (2) *Variable payment, availability based.*

*In the case of a bulk payment, any liquidated damages to be paid by the Service Provider to the Contracting Authority will be through deduction on the amount to be paid to the Service Provider by the Contracting Authority.*

*Bulk payment formula is to be specified in this schedule, as well as the formula related to liquidated damages imputation on bulk payments.*

- (b) *A user fee made up of fees paid by users in order to benefit from the Services.*

*Amount of fees to be paid will be determined within a separate agreement between the Service Provider and users, but may be subject to specific regulations depending on the local law applicable to the project]*

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## Schedule 6 - Reporting Requirements

*[Must indicate the reports that need to be submitted by the Service Provider to the Contracting Authority, the content of these reports, as well as the deadlines and frequency of submission. The construction and service reports are to be submitted on a monthly basis, and provide for information on the Works and Services. The financial report are to be submitted on an annual basis. The following sample clause may be used]*

### 1. MONTHLY CONSTRUCTION REPORT

- 1.1 During the Construction Period, the Service Provider shall prepare the Monthly Construction Reports.
- 1.2 Each Monthly Construction Report shall provide the Contracting Authority with information reasonably required to assess the progress of the construction and commissioning of the Works; and be structured to cover the Works as a whole.
- 1.3 Each Monthly Construction Report shall include, as a minimum:
- (a) A summary;
  - (b) Project summary data including;
  - (c) Progress update including:
    - (1) an up to date construction program;
    - (2) progress against key milestones;
    - (3) commentary on areas that are behind construction program and details of measures being taken to mitigate delays;
    - (4) a summary of testing and commissioning activities results (if any); and
    - (5) health and safety record (including accident records).

### 2. MONTHLY SERVICE REPORT

- 2.1 During the Service Period, the Service Provider shall prepare the Monthly Service Reports.
- 2.2 Each Monthly Service Report shall provide the Contracting Authority with information reasonably required to assess the adequacy of the delivery of the Services and be structured to cover the Project as a whole.

Each Monthly Service Report shall include, as a minimum: ***[specify content of the Monthly Service Reports]***

### 3. ANNUAL FINANCIAL REPORT

- 3.1 During the ***[specify the period]***, the Service Provider shall prepare the Annual Financial Report.
- 3.2 Each Annual Financial Report shall provide the [Contracting Authority/Lenders] with information reasonably required to assess the adequacy of the financial model for the delivery of Works and Services and be structured to cover the Project as a whole.
- 3.3 Each Annual Financial Report shall include, as a minimum: ***[specify content of the Annual Financial Reports]***

## Schedule 7 - Insurances

*[Should include a list of insurance policies to be obtained by the Service Provider in relation with the execution of Works and Services. The required insurance policies listed in this schedule are usually condition precedents to the Commencement Date. This list is generally provided by insurance experts from IFC (or any other relevant IFI). For information purpose, this list may include, but not limited to:*

- *Construction insurance policy;*
- *Transportation insurance;*
- *General liability insurance;*
- *Environmental liability insurance;*
- *Workmen's compensation insurance; and*
- *Vehicle insurance;]*

Sample Document, Adapt as Appropriate



## Schedule 8 - Termination Payments<sup>55</sup>

For the purpose of this Schedule, words and terms beginning with a capital letter herein shall have the meaning ascribed to them below. Capitalized terms used and not defined herein shall have the meaning set out in the Agreement.

**Adjusted Net Equity** means, on and as of the Termination Date, an amount equal to the sum of:

- (a) An amount equal to the sum of the Adjusted Value of all Equity less the sum of the Adjusted Value of all Distributions, in each case in **[specify currency]** and in each case within a period of [**•**] years prior to the Termination Date (or such lesser period as may then exist between the Commencement Date and the Termination Date); and
- (b) An amount equal to the sum of all Equity less the sum of the Adjusted Value of all Distributions, in each case in **[specify currency]** and in each case made outside a period, if any, of [**•**] years prior to the Termination Date,

provided that, if any such difference in sub-clause (a) or (b) shall result in an amount that is less than zero (0), such amount shall be deemed to be zero (0).

**Adjusted Value** means, on and as of the Termination Date, the value of any Equity or Distribution, as the case may be, which value shall be determined by taking the amount of such Equity or Distributions (in each case in **[specify currency]**) adjusting such value for each year during the period from the date of such Equity or Distributions to the Termination Date, using as an upward adjustment factor for each such completed calendar year of **[•]** per cent. (**[•%]**).

**Compensation Payment Date** has the meaning given to it in Clauses 1.2.2, 2.2 and 3.2 of this Schedule (as applicable).

**Connected Person** means, in relation to the Service Provider:

- (a) any Shareholder of, or other provider or owner of subordinated loans or capital contributions to, the Service Provider or an Affiliate of the Service Provider, or any Affiliate of that shareholder or provider; or
- (b) any Affiliate or director of the Service Provider; or
- (c) any Person in which any one or more of the Service Provider, a Shareholder, or any Affiliate of the Service Provider, of a Shareholder, or of any other person within the description in paragraph (a) above, has any direct or indirect interest or connection (whether that interest or connection is financial, economic or of any other nature), and indirect shall include (without limitation) through a chain of any one or more Persons or interests.

**Deferred Equity Amounts** means, on the Compensation Payment Date, any amount of unfunded Equity that has been committed to the Service Provider as of the Financial Close.

**Distribution** means whether in cash or in kind:

- (a) dividend or other distribution in respect of share capital;
- (b) reduction of capital of the Service Provider, redemption or purchase of shares or any other reorganization or variation to share capital of the Service Provider;
- (c) payments under any subordinated financing agreements (whether of principal, interest, fees, charges, breakage costs or otherwise) to a Shareholder or one of its Affiliates or any Connected Person of the Service Provider;
- (d) payment, loan, contractual arrangement or transfer of assets or rights to the extent (in each case) it was put in place after Financial Close and was neither in the ordinary course of business nor on reasonable commercial terms; or
- (e) the receipt of any other benefit which is not received in the ordinary course of business and on reasonable commercial terms.

<sup>55</sup> This schedule should be amended to take into account the risk profile of the project and jurisdiction.

**Financial Close** means the date which all conditions precedent to initial disbursement under the Lenders Documents have been fulfilled or waived.

**Initial Equity** means, as of the date of termination of the Agreement, the initial equity investment disbursed by the Shareholders plus any such other equity contributions approved by the Contracting Authority expressed in **[specify currency]**.

**Insurance Proceeds** means all proceeds from Insurances paid or payable to the Service Provider or the Lenders (or that should have been payable to the Service Provider or the Lenders except in the event of a failure of the Service Provider to take out or maintain such Insurance in accordance with the terms of this Agreement).

**New Tender Costs** means the reasonable and proper costs incurred/to be incurred and/or reasonably expected to be incurred by the Contracting Authority in carrying out a new award procedure.

**Outstanding Senior Debt** means the sum of:

- (a) the total amount outstanding, if any, to the Lenders under any Lenders Documents and interest (including default interest); plus
- (b) any winding-up costs, prepayment charges, costs of terminating any hedging arrangements or similar charges or costs passed through by the Lenders in accordance with the Lenders Documents;

less:

- (a) all credit balances held on any bank accounts held by or on behalf of the Service Provider on the termination date of the Agreement which are available for application in or towards discharge of the amounts referred to in (a) and (b) above on the Termination Date of the Agreement;
- (b) all amounts payable by the Lenders or the hedging counterparty to the Service Provider as a result of a repayment of amounts outstanding under the Lenders Documents; and
- (c) without double counting, all other amount received by the Lenders on or after the Term and before the date on which compensation is payable by the Contracting Authority to the Service Provider as a result of enforcing any other rights that they may have.

**Redundancy Payments** means the payment of all wages earned, accrued unused vacation time and any other payments required by Applicable Law.

**Service Provider Default Deduction Amount** meant the amount equal to the aggregate of the following:

- (a) the New Tender Costs; and
- (b) any delay contractual penalties accrued and unpaid as at the Termination Date.

## 1. CONTRACTING AUTHORITY TERMINATION

### 1.1 Service Provider Default

**1.1.1** If the Contracting Authority terminates this Agreement in the event of a Service Provider Event of Default, the Contracting Authority shall, to the extent permitted under Applicable Law, pay to the Service Provider a compensation amount equal to the aggregate sum of:

- (a) **[•]** percent (**[•]**%)<sup>56</sup> of the Outstanding Senior Debt;

less

- (b) the Service Provider Default Deduction Amount;
- (c) the Deferred Equity Amounts; and
- (d) Insurance Proceeds (excluding proceeds of personal injury, property damage or other third party liability insurance payable to or for the account of a third party).

**1.1.2** The Compensation Payment Date for the Termination Payment referred to in Clause 1.1 above shall be a date twelve (12) months after the Termination Date (or earlier if the Contracting Authority so chooses).

<sup>56</sup> To be adjusted depending on the jurisdiction. In most developing countries, haircut on debt will not be accepted by the Lenders.

## **1.2 Material Adverse Government Action and Change in Law**

- 1.2.1** If the Contracting Authority terminates this Agreement in the event of a Material Adverse Government Action or a Change in Law, the Contracting Authority shall, to the extent permitted under Applicable Law, pay the Service Provider the amount equal to the aggregate sum of:
- (a) one hundred percent (100%) of the Outstanding Senior Debt, if any;
  - (a) one hundred percent (100%) of the Adjusted Net Equity;
  - (b) Redundancy Payments for employees of the Service Provider that have been incurred as a direct result of the termination of this Agreement; and

less

- (c) the Deferred Equity Amounts; and
- (d) Insurance Proceeds (excluding proceeds of personal injury, property damage or other third party liability insurance payable to or for the account of a third party).

- 1.2.2** The Compensation Payment Date for the Termination Payment referred to in Clause 1.2.1 above shall be the later of:
- (a) a date three (3) months after the Termination Date; and
  - (b) if the Contracting Authority notifies the Service Provider prior to the date referred in Clause 1.2.2(a) that it elects to defer payment of the Termination Payment, the date (being not later than a date twelve (12) months after the Termination Date) that the Contracting Authority so specifies as the Compensation Payment Date by written notice to the Service Provider.

- 1.2.3** Interest shall be payable on the unpaid Termination Payment from the Termination Date to the due date for payment, in accordance with the Default Interest Rate.

## **2. SERVICE PROVIDER TERMINATION**

- 2.1** If the Service Provider terminates this Agreement in the event of a Contracting Authority Event of Default, a Material Adverse Government Action or a Change in Law, the Contracting Authority shall, to the extent permitted under Applicable Law, pay the Service Provider the amount equal to the aggregate sum of:
- (a) one hundred percent (100%) of Outstanding Senior Debt, if any;
  - (b) one hundred percent (100%) of the Adjusted Net Equity;
  - (c) Redundancy Payments for employees of the Service provider that have been incurred as a direct result of the termination of this Concession Agreement;

less

- (c) the Deferred Equity Amounts; and
- (d) Insurance Proceeds (excluding proceeds of personal injury, property damage or other third party liability insurance payable to or for the account of a third party).

- 2.2** The Compensation Payment Date for the Termination Payment referred to in Clause 2.1 above shall be the later of:
- (a) a date three (3) months after the Termination Date; and
  - (b) if the Contracting Authority notifies the Service Provider prior to the date referred in Clause (a) that it elects to defer payment of the Termination Payment, the date (being not later than a date twelve (12) months after the Termination Date) that the Contracting Authority so specifies as the Compensation Payment Date by written notice to the Service Provider.

- 2.3** Interest shall be payable on the unpaid Termination Payment from the Termination Date to the due date for payment, in accordance with the Default Interest Rate.

## **3. TERMINATION FOR FORCE MAJEURE EVENT**

- 3.1** If this Agreement is terminated by any Party as a result of a Force Majeure Event, the Contracting Authority shall pay the Service Provider the amount equal to the aggregate of:

- (a) one hundred percent (100%) of Outstanding Senior Debt, if any;
- (b) the Initial Equity less the sum of all Distributions to Shareholders from the Commencement Date to and including the Termination Date; and
- (c) Redundancy Payments for employees of the Service Provider that have been incurred as a direct result of the termination of this Agreement;

less

- (d) Insurance Proceeds (excluding proceeds of personal injury, property damage or other third party liability insurance payable to or for the account of a third party).

3.2 The Compensation Payment Date for the Termination Payment referred to in Clause 3.1 shall be a date twelve (12) months after the Termination Date, or earlier if the Contracting Authority so chooses.

3.3 Interest shall be payable on the unpaid Termination Payment from the Termination Date to the due date for payment, in accordance with the Default Interest Rate.

#### **4. TAX GROSS-UP PROVISIONS**

4.1 If any Termination Payment payable by the Contracting Authority to the Service Provider in accordance with Clauses 1, 2 and 3 of this Schedule 8 is subject to Tax payable by the Service Provider to a Government entity in the Country, then the Contracting Authority shall, subject to paragraph 3, be jointly and severally liable and shall pay to the Service Provider such additional amount as will put the Service Provider in the same after Tax position as it would have been had the Termination Payment not been subject to Tax, such Tax liability to be determined for this purpose in accordance with Clause 4.2.

4.2 For the purpose of determining the additional amount referred to in paragraph 4.1 above, the liability of the Service Provider for Tax in the Country with respect to a Termination Payment for the purpose of Clause 4.1 shall be deemed to be reduced to take full account of any relief, allowance, deduction, setting-off or credit in respect of Tax which may be available to the Service Provider or any Shareholder, or any Affiliate of the Service Provider, to reduce the Tax. For the purpose of this Clause 4.2 a reduction in Tax shall be treated as including obtaining any refund of Tax paid or any credit in respect of any Tax payable.

4.3 If the Service Provider wishes to claim the additional amount referred to in paragraph 4.1 above in accordance with paragraph 4.1, the Service Provider must make that claim prior to the Compensation Payment Date. The Contracting Authority may dispute any such claim, in which case (if not agreed between the Parties) the claim will be determined in accordance with Clause 26 (*Dispute Resolution*). The Contracting Authority shall be entitled to withhold from payment to the Service Provider any additional amounts agreed or determined to be payable by the Contracting Authority pursuant to paragraph 4.1 and pay those amounts directly to the Government entity upon the date the relevant Tax becomes due and payable by the Service Provider, in which case such payment shall discharge any liability to the Service Provider in respect thereof.

#### **5. CLAWBACK AFTER TERMINATION DATE**

Any amounts paid by the Lenders to the Service Provider after the date on which the Contracting Authority pays termination compensation to the Service Provider in accordance with this Schedule 8 as a result of repayment of the amounts outstanding under the Lenders Documents shall be repaid by the Service Provider to the Contracting Authority within thirty (30) days from the date on which it is paid to the Service Provider.

## **Schedule 9 - Assets Transfer Plan**

*[Details which assets are to be transferred, as well as the procedure and schedules for the transfer. This schedule is to be proposed by the Contracting Authority, discussed between the Parties and finally integrated to the Agreement as a Condition Precedent]*

Sample Document, Adapt as Appropriate

## Schedule 10 - Assets Handover Agreement

[Details which assets are to be handed over from the Service Provider to the Contracting Authority at the term of the agreement. *This schedule is to be proposed by the Contracting Authority, discussed between the Parties and finally integrated to the Agreement as a Condition Precedent*]

Sample Document, Adapt as Appropriate

## Schedule 11 - Government Guarantee

**[Specify Government of the Country]** (the “**Government**”) represented by its Ministry of Finance and Economic Planning<sup>57</sup>; and

....., a company incorporated under the laws of ....., whose registered office is located in **[insert Address]**, and with registration number [.....] (the “**Service Provider**”).

(The Government and the Service Provider are collectively referred to as the “**Parties**” and each a “**Party**”)

**WHEREAS**, [Contracting Authority] and the Service Provider have entered into a Public Private Partnership Agreement (“**Agreement**”) in relation to the [design, planning, financing, construction, commissioning, operation and maintenance]<sup>58</sup> of a **[specify the relevant Facilities]** (“**Facilities**”) located in ..... (“**Project**”). Pursuant to the Agreement, the Contracting Authority undertakes, inter alia, to pay **[specify the relevant payments to be made by the Contracting Authority]**, starting on the Services Commencement Date, until the date which is [•] ([•]) years from the Commencement Date.

**WHEREAS**, in accordance with Schedule 1 of the Agreement, the provision of this guarantee (the “**Government Guarantee**”) by the Government is a Condition Precedent to the Commencement Date.

### 1. DEFINITIONS - INTERPRETATION

- 1.1** The terms of Articles 1 (*Definitions And Interpretation*) and 2 (*Interpretation*) of the Agreement apply mutatis mutandis to this Government Guarantee as if they were expressly stated herein.
- 1.2** Capitalized terms used herein and not otherwise defined herein shall have the meanings set forth in the Agreement.

**NOW THEREFORE, IT IS HEREBY AGREED** as follows:

### 2. GOVERNMENT GUARANTEE

- 2.1** In consideration of the Service Provider entering into, and performing or having agreed to perform its obligations under the Agreement (and for valuable consideration, receipt of which the Government hereby acknowledges), the Government irrevocably and unconditionally, as a continuing obligation:
- (a) guarantees to the Service Provider, the payment of any and all sums which the Contracting Authority has failed to pay when due under the Agreement; and
  - (b) undertakes, upon failure of the Contracting Authority to pay any amount now or hereafter owing, due or payable by the Contracting Authority to the Service Provider under the Agreement, to immediately on demand pay that amount, each and every liability of, and sum owing, due or payable by, the Contracting Authority referred to in this Article 2.1, the “**Liabilities**”.
- 2.2** [Without prejudice to its obligations under Article 2.1, [and to the extent permitted under Applicable Law], the Government unconditionally and irrevocably undertakes with the Service Provider as a separate, additional, continuing and primary obligation, that, should any amount not be recoverable from it or any obligation not be enforceable against it under Article 2.1 for any reason whatsoever (including, for the avoidance of doubt and without limitation, as a result of any unenforceability, invalidity or illegality of the Agreement) then, notwithstanding that such reason may have been known to the Service Provider, the Government shall, upon first written demand by the Service Provider make payment of any amount the Service Provider would otherwise have been entitled to recover from the Contracting Authority as is provided for in the Agreement.]<sup>59</sup>

### 3. PRESERVATION OF RIGHTS

- 3.1** The obligations of the Government under this Government Guarantee shall be in addition, independent of and not in substitution to or derogation of, any other security which the Service Provider may at any time hold in relation to any of the Liabilities. The Service Provider may enforce this Government Guarantee notwithstanding that it may hold any other guaranty, lien, or security

<sup>57</sup> Drafting Note: to be adapted depending on the local law applicable to the Project[•]

<sup>58</sup> Drafting Note: to be adapted depending on the Project.

<sup>59</sup> Drafting Note: this clause may have to be adapted depending on the local law. In most civil law countries, guarantees are accessory of the guaranteed debt. Unenforceability of the initial debt may have the effect to make the guarantee unenforceable.

of or for the obligations of the Contracting Authority under the Agreement or have available to the Service Provider any other remedy at law or equity.

- 3.2** Any settlement or discharge given by the Service Provider to the Government in respect of the Government's obligations under this Government Guarantee or any other agreement reached between the Service Provider and the Government in relation to it shall be, and be deemed always to have been, void if any act on the faith of which the Service Provider gave the Government that settlement or discharge or entered into that agreement is subsequently avoided by or in pursuance of any provision of law.

#### **4. WAIVER OF DEFENCES**

- 4.1** Neither the obligations of the Government contained in this Government Guarantee nor the rights, powers and remedies conferred in respect of the Government upon the Service Provider by this Government Guarantee shall be discharged, modified, impaired or otherwise affected by the occurrence from time to time of any act, event or omission which, but for this Article, might operate to discharge, impair or otherwise affect any obligation of the Government contained in this Government Guarantee or any of the rights, powers or remedies conferred upon the Service Provider by this Government Guarantee, including, but not limited to, the following:
- (a) the privatization, winding-up, dissolution, administration, reorganization or any other legal alteration of the legal structure of the Contracting Authority, the Service Provider, the Government;
  - (b) any failure of the Contracting Authority, the Government, the Service Provider or any other person to comply with the requirements of any law, regulation or order;
  - (c) any time or other indulgence being granted or agreed to be granted to, or any composition with, the Contracting Authority or any other person in respect of any of the Liabilities or under any other security;
  - (d) any amendment to, or any variation, waiver, departure from or release of, the Agreement, or any of the Liabilities or obligations of the Contracting Authority under any other security;
  - (e) the taking, variation, compromise, exchange, renewal or release of, or refusal or neglect to perfect, take-up or enforce, any rights against the Contracting Authority, including under any other security, payment guarantee, letter of credit, other liquidity support or otherwise;
  - (f) [to the extent permitted under Applicable Law, any of the Liabilities or obligations of the Contracting Authority under any security relating to any of the Liabilities or obligations of the Contracting Authority being or becoming illegal, invalid, unenforceable or ineffective in any respect, or the Contracting Authority having or purporting to have any defense or counterclaim against the Service Provider]<sup>60</sup>;
  - (g) the extension for payment of any amounts due or of time for performance of any of the covenants, terms, undertakings or obligations of the Contracting Authority set forth in the Agreement;
  - (h) the failure, omission, or delay by the Service Provider to enforce, ascertain, or exercise any right, power, or remedy under or pursuant to the terms of the Agreement;
  - (i) the failure or financial disability of the Government;
  - (j) any insolvency or similar proceedings in respect of the Contracting Authority or any other person; or
  - (k) any assignment by the Service Provider of the Agreement or this Government Guarantee in accordance with their respective terms and conditions.

#### **5. CONTINUING SECURITY**

- 5.1** The liabilities and obligations of the Government contained in this Government Guarantee shall constitute and be continuing obligations and shall not be considered satisfied by any intermediate payment or satisfaction of all or any of the obligations of the Contracting Authority in relation to the Liabilities and shall continue in full force and effect until final payment in full of all amounts owing by the Contracting Authority in respect of the Liabilities and total satisfaction of all the Contracting Authority's actual and contingent obligations in relation to the Liabilities is received and can be retained by the Service Provider. The Service Provider is entitled to enforce this Government Guarantee at any time when any of the conditions set forth in Article 6.1 has occurred. No demand made by the Service Provider hereunder shall prejudice or restrict the right of the Service Provider to make further or other demands.

<sup>60</sup> Drafting note: see the above drafting note in relation to civil law countries.



## 6. CLAIM MECHANISM

### 6.1 Right to make a claim

The Service Provider shall make a claim under this Government Guarantee only upon the occurrence of a [Contracting Authority Event of Default referred to under Clause 18.2.1 (a)]<sup>61</sup> of the Agreement in respect of which the Service Provider has sent a Notice in accordance with Clause 28.11 (*Notices*) of the Agreement.

### 6.2 Demand - Certification

6.2.1 If the event set out in Article 6.1 has occurred, the Service Provider may send a written demand (a "**Demand**") for payment to the Government under this Government Guarantee, and the Government shall make payment of the requested sum within ninety (90) days thereafter.

6.2.2 Any Demand shall be signed by a duly authorized officer of the Service Provider in person at the Government's offices indicated below or by national or international courier sent at the below address:

**[specify the relevant office]**

and shall be accompanied by a certificate signed by such duly authorized officer of the Service Provider stating the following:

"We hereby certify that (1) **[the name of the Service Provider]** is making this demand on the Government of **[specify country]** (the "**Government**") in the amount of **[insert amount]** **[specify currency]** in accordance with Article 2 of the Government Guarantee dated [•], between the Government and the Service Provider; (2) the amount specified above is due and payable by **[specify name of the Contracting Authority]** under the Agreement entered into on **[specify the date]** between the Service Provider and the Contracting Authority and (3) the Government Guarantee is enforceable in accordance with its terms.

### 6.3 Non Business Days

If a payment under this Government Guarantee is due on a day which is not a business day in **[specify country]**, the due date for that payment shall instead be the next business day in the same calendar month (if there is one) or the preceding business day (if there is none or the next business day would fall after the expiry of the Government Guarantee).

### 6.4 Account - Currency

6.4.1 Any Demand shall specify the account on which the payment of any amount payable under this Government Guarantee shall be paid.

6.4.2 Any amount payable under this Government Guarantee shall be paid in the same currency in which such amount is expressed to be payable under the Agreement, and the Government waives any right it may have in any jurisdiction to pay any amount under this Government Guarantee in another currency or currency unit.

6.4.3 If any sum due from the Government under this Government Guarantee (a "**Sum**"), or any order, judgment or award given or made in relation to a Sum, has to be converted from the currency (the "**First Currency**") in which that Sum is payable into another currency (the "**Second Currency**") for the purpose of:

- (a) making or filing a claim or proof against the Government, or
- (b) obtaining or enforcing an order, judgment or award in relation to any litigation or arbitration proceedings,

the Government shall as an independent obligation, within three business days of demand, indemnify the Service Provider against any cost, loss or liability arising out of or as a result of the conversion including any discrepancy between (A) the rate of exchange used to convert that Sum from the First Currency into the Second Currency and (B) the rate or rates of exchange available to that person at the time of its receipt of that Sum.

<sup>61</sup> Drafting note: add, if need be, additional Contracting Authority Event of Default entitling the Service Provider to make a claim under the Government Guarantee. The clause is limited to the event the Contracting Authority did not paid the Service Provider.

**7. IMMEDIATE RECOURSE**

Except as expressly provided in Article 6.2.1, the Service Provider shall not be obliged to exercise any other remedies that may be available to the Service Provider under or in respect of the Agreement or to initiate any proceedings or obtain judgment or an arbitration decision against the Contracting Authority before enforcing its rights arising under this Government Guarantee.

**8. NON-COMPETITION**

Until this Government Guarantee expires, the Government shall not, after a claim has been made in accordance with this Government Guarantee, be subrogated to any rights, security or money held, received or receivable by the Service Provider or be entitled to any right in respect of any payment made or money received on account of the Government's liability under this Government Guarantee.

**9. NO SET-OFF**

No set-off, counterclaim, reduction, or diminution of any obligation that the Government has or may have against the Service Provider shall be available to the Government against the Service Provider in connection with any obligation of the Government to the Service Provider under this Government Guarantee.

**10. OBLIGATIONS ABSOLUTE**

[To the extent permitted under Applicable Law,]<sup>62</sup> the Government's payment obligations under this Government Guarantee are absolute and unconditional and accordingly, but without limitation, the Government shall have no right to defer, withhold or adjust any payment due to the Service Provider arising out of this Government Guarantee, nor to obtain the deferment of any judgment for any such payment or part thereof nor to obtain deferment of execution of any judgment. Should the Government default in any of its obligations in terms of this Government Guarantee, the Government hereby indemnifies and holds the Service Provider harmless on demand against all and any losses which may be incurred or sustained or claimed from or threatened against the Service Provider by reason of or pursuant to such default.

**11. ARBITRATION; JURISDICTION**

In the event that the Parties, notwithstanding the use of reasonable endeavors to do so, are unable to resolve a difference or dispute between them arising out of or in connection with this Government Guarantee (including, without limitation, any question regarding its existence, validity or termination), then, either Party shall be entitled to require that such matter be referred to and finally resolved by arbitration as provided in Clause 26.4 (*Arbitration*) of the Agreement.

**12. SOVEREIGN IMMUNITY**

- 12.1** The Government unconditionally and irrevocably agrees that the execution, delivery and performance by it of this Government Guarantee constitute private and commercial acts. In furtherance of the foregoing, the Government irrevocably and unconditionally agrees that:
- (a) should any proceedings be brought against the Government or its assets, other than Excluded Assets, as defined below, in any jurisdiction in connection with this Government Guarantee, or any of the transactions contemplated by this Government Guarantee, no claim of immunity (sovereign or otherwise) from such proceedings will be raised by or on behalf of the Government on behalf of itself or any of its assets, other than Excluded Assets;
  - (b) it waives any right of immunity (sovereign or otherwise) which it or any of its assets, other than Excluded Assets, now has or may in the future have in any jurisdiction in connection with any such proceedings; and
  - (c) it consents generally in respect of the enforcement of any judgment against it in any such proceedings in any jurisdiction to the giving of any relief or the issue of any process in connection with such proceedings, including, without limitation, the making, enforcement or execution against, or in respect of, any of its assets, other than Excluded Assets, of any order or judgement which may be made or given in such proceedings.

- 12.2** For the purpose of this Government Guarantee, "**Excluded Assets**" means (i) [*specify assets to be excluded from the scope of the Government's waiver of right of immunity*] and (ii) property of the Government subject to the Vienna Convention on Diplomatic Relations or the Vienna

<sup>62</sup> Drafting note: this clause may have to be adapted depending on the local law. In most civil law countries, guarantees are accessory of the guaranteed debt. Unenforceability of the initial debt may have the effect to make the guarantee unenforceable.

Convention on Consular Relations that is being used exclusively for diplomatic or consular purposes.

**13. TAXATION**

The Service Provider shall be liable for any tax levied or imposed by a Government authority or any political subdivision or authority thereof on or with regard to any payment hereunder if such payment, if made by the Contracting Authority, would have caused the Service Provider to become liable for the tax, provided for the sake of clarity that the Service Provider shall not have to pay any tax already deducted in full from sums payable by the Contracting Authority under the Agreement.

There shall be no additional taxes or fees imposed on the Service Provider in connection with a payment by the Government to the Service Provider under this Government Guarantee, provided that, if any law or regulation imposes any such additional taxes or fees such amounts will be paid by the Service Provider and subsequently reimbursed by the Government. Should the Government default in its obligations to pay such additional taxes or fees, the Government hereby indemnifies and holds the Service Provider harmless on demand against all and any losses which may be incurred or sustained or claimed from or threatened against the Service Provider by reason of or pursuant to such default.

**14. DURATION**

This Government Guarantee shall remain in full force and effect from and after the date hereof for so long as any amount owed to the Service Provider by the Contracting Authority is or may be outstanding and the Government and the Contracting Authority have fulfilled all their respective obligations under this Government Guarantee and the Agreement in full.

**15. NO WAIVER; REMEDIES CUMULATIVE**

**15.1 No Waiver**

15.1.1 No failure by the Service Provider to exercise, nor delay by the Service Provider in exercising, any right or remedy under this Government Guarantee shall constitute a waiver of that right or remedy or constitute an election to affirm this Government Guarantee. No single or partial exercise of any right or remedy shall preclude any other or further exercise thereof or the exercise of any other right or remedy. No waiver or election to affirm this Government Guarantee by the Service Provider shall be effective unless it is in writing.

**15.2 Remedies Cumulative**

The rights and remedies of the Service Provider provided by this Government Guarantee are cumulative and not exclusive of any rights or remedies provided by law.

**16. NOTICES**

**16.1** Unless otherwise provided in this Government Guarantee, all notices and other communications required or permitted between the parties by this Government Guarantee shall be in writing and either hand delivered, sent by nationally or internationally reputable courier or by electronic or facsimile transmission to the address of the Party concerned as set forth below. No communication shall be effective until received and such shall be deemed to have been received:

- (a) by hand when so delivered;
- (b) on the date indicated by the courier's delivery tracking system when delivered by nationally or internationally reputable courier;
- (c) if by facsimile, when received in legible form; and
- (d) if by electronic transmission, when actually received (or made available) in readable form.

However, a notice given in accordance with the above but received on a day which is not a business day or after business hours in the place of receipt will only be deemed to be given in the next business day.

**Address for notices**

For the Government

**[specify the Government's address]**

For the Service Provider

**[specify the Service Provider's address]**

**16.2** Either Party may change its nominated address to another address by giving at least fifteen (15) days prior written notice to the other Party.

**17. ASSIGNMENT**

**17.1 Assignment by the Government**

The Government may not assign or transfer all or any part of its rights or obligations hereunder without the prior written consent of the Service Provider.

**17.2 Assignment by the Service Provider**

The Service Provider may not assign or transfer all or any part of its rights or obligations hereunder without the prior written consent of the Government. Notwithstanding the provision of the immediately preceding sentence, the Service Provider may, pursuant to the terms of the Agreement, (i) assign or create a security interest over its rights and interests in and to this Government Guarantee in favour of the Lenders under the Lenders Documents, or (ii) transfer the benefit of this Guarantee to a third party to which the Service Provider rights and liabilities under the Agreement are transferred [in accordance with the Direct Agreement]<sup>63</sup>.

**17.3 Successors**

This Government Guarantee shall be binding upon and inure to the benefit of the Government and the Service Provider and the respective lawful successors and permitted assigns of each of them.

**18. GOVERNING LAW**

The provisions of this Government Guarantee, including but not limited their validity, interpretation, execution, and termination, shall be governed by and construed under the **[specify the applicable law]**.

**19. MISCELLANEOUS**

**19.1 Severability:**

If one or more provisions contained in this Government Guarantee is held or found to be invalid, illegal, or unenforceable in any respect, the provision(s) shall be given effect to the extent permitted by law and the invalidity, illegality, or unenforceability of any provision shall not affect the validity of the remaining provisions of this Government Guarantee.

**19.2 Representations and Warranties:**

The Government represents and warrants as of the date of signing of this Government Guarantee, that:

- (a) it has the full power, authority and legal right to incur the obligations, to execute and deliver, and to perform the terms and provisions of this Government Guarantee;
- (b) this Government Guarantee constitutes legal, valid and binding obligations of the Government, enforceable against the Government in accordance with its terms;
- (c) all necessary actions have been taken and all necessary approvals and consents have been obtained under the laws of **[specify country]** to enable the Government to enter into and to perform its obligations hereunder;
- (d) the execution, delivery and performance of this Government Guarantee does not, and will not, constitute a violation of any statute, judgment, order, decree or regulation or rule of any court, Government authority or arbitrator of competent jurisdiction applicable or relating to the Government, its assets or its business or any contract or agreement to which it is a party or by which it or its property may be bound;
- (e) the person signing this Government Guarantee for the Government is authorized to do so.

<sup>63</sup> Drafting note: to be adapted. It is however usual to have a direct agreement being signed for the project.

**The Government of [specify country]**  
Represented by **[specify the relevant official]**

-----  
By:

**Service Provider**

-----  
By:

Sample Document, Adapt as Appropriate

## Schedule 12 - Form Of Escrow Letter

To: **[Escrow Agent's Name]**  
**[Escrow Agent's address]**

*[Pro forma letter subject to tailoring according to jurisdiction of the Escrow Agent/Escrow Account]*

Dear Sirs  
Date: [•]

We are writing to confirm the terms on which funds deposited in the account [number] (the "**Escrow Account**") today and from time to time thereafter by *[Contracting Authority]*<sup>64</sup> (the "**Contracting Authority**") may be transferred, pursuant to the terms of the agreement dated [•] made between the Service Provider and the Contracting Authority (the "**Agreement**").

These terms are:

- (1) You shall maintain the Escrow Account as an interest-bearing account numbered [•].
- (2) Subject to paragraph 4 below, you shall hold the funds in the Escrow Account (or any part of it) in the name of the Contracting Authority.
- (3) If a payment is made from the Escrow Account to the Service Provider:
  - (a) such payment shall be made gross;
  - (b) in the event that a deduction or withholding is required by law, you shall increase the sum due to the extent necessary to ensure that, after such deduction or withholding, the Service Provider receives a sum equal to the sum it would have received had no deduction or withholding been made; and
  - (c) in the event that such payment will be or has been subject to tax, you shall pay to the Service Provider on request, from the Escrow Account, the amount (after taking into account any tax) necessary to ensure that the Service Provider receives and retains a net sum equal to the sum it would have received had the payment not been subject to tax.
- (4) If the Service Provider notifies you that it is entitled to a payment in accordance with the Agreement and provides a copy of a notice from [a director] of the Service Provider confirming such entitlement, you shall pay or hold the amount notified to or for the Service Provider or in the manner directed in the Service Provider's written instructions.
- (5) You shall provide to the Service Provider a copy of the account statement on a monthly basis.
- (6) The balance on the Escrow Account shall earn interest at such rate and on such terms as may be agreed between you and the Contracting Authority from time to time. Interest shall be paid [annually/monthly] by you into the Escrow Account.
- (7) The Contracting Authority will pay your costs in respect of your duties under or in respect of this letter and the maintenance of the Escrow Account as such costs may be agreed between you and the Contracting Authority from time to time.
- (8) You acknowledge that security over the Escrow Account may be granted in favour of any lenders to the Service Provider, and the rights of such lenders will prevail over any rights you may have over the Escrow Account or the funds standing to the credit of the Escrow Account.
- (9) This letter and any contractual obligations arising out of or in connection with it shall be governed by, and construed in accordance with, **[specify the applicable law to the Escrow Letter]**.

Please countersign this letter to confirm your acceptance of the terms set out above.

**[Contracting Authority]**  
By:

**Service Provider**  
By:

-----  
We confirm our acceptance of the terms of this letter.

**[Name of Escrow Agent]**  
Escrow Agent  
By:

<sup>64</sup> Drafting note: to be adapted depending on who will deposit funds on the Escrow Account, i.e. the Contracting Authority or the Government.

## Schedule 13 - Form of First Demand Guarantee

FORM OF FIRST DEMAND GUARANTEE - LETTER OF FIRST DEMAND GUARANTEE

[Specify name and address of the Service Provider]

Letter of Guarantee No.: \_\_\_\_\_

Date: \_\_\_\_\_

Since you have signed with our clients, \_\_\_\_\_ (the "**Contracting Authority**") a Public-Private Partnership Agreement for [Financing, Construction and Operation]<sup>65</sup> of a [briefly describe the Project infrastructure] on [•] (the "**Agreement**");

We, \_\_\_\_\_ (the "**Bank**"), hereby unconditionally and irrevocably undertake to pay you any sums up to a maximum amount of [*specify applicable currency*] \_\_\_\_\_ (the "**Maximum Amount**"), in connection with the Contracting Authority's obligations under the Agreement and in accordance with the following:

- (a) Unless otherwise defined herein, terms defined in the Agreement shall have the same meaning herein.
- (b) We shall pay you immediately upon your written demand and irrespective of any objection by the Contracting Authority or any other party such amount or amounts as you may demand up to the Maximum Amount, by transfer to your account or in any other manner acceptable to you.
- (c) All payments made based on your demand shall be free and clear of, and without any present or future deduction for payment of, any taxes, levies, duties, charges, fees, deductions or withholdings of any nature whatsoever and by whomsoever imposed.
- (d) The undertakings contained in this guarantee constitute direct and fundamental obligations of ours and are unconditional and irrevocable. We shall not be excused from any or all of these obligations for any reason or reasons of whatever nature or source, such as change in the conditions of the Agreement or extension thereof or change in the scope or nature of work to be performed, or any omission, act or proceeding by you or by a third party which would excuse or discharge us from the obligations and liabilities stated in this guarantee.
- (e) This guarantee shall remain valid and in full force and effect up to the end of the \_\_\_\_\_ day of the month of \_\_\_\_\_ of the year \_\_\_\_\_. This guarantee shall be governed by and construed in accordance with the laws, regulations, decisions, rules and instructions of the [*specify applicable law*] and any dispute with respect to this guarantee shall be resolved exclusively by the competent authorities in the [*specify the relevant country*] and according to [*specify applicable law*].

The Bank  
Authorized signatories

<sup>65</sup> Drafting note: to be adapted depending on the obligations to be performed by the Service Provider under the Project.

## Schedule 14 - Form of Performance Security

### FORM OF PERFORMANCE SECURITY - LETTER OF FIRST DEMAND GUARANTEE

[Specify name and address of the Contracting Authority]

Letter of Guarantee No.: \_\_\_\_\_

Date: \_\_\_\_\_

Since you have signed with our clients, \_\_\_\_\_ (the "**Service Provider**") a Public-Private Partnership Agreement for [Financing, Construction and Operation]<sup>66</sup> of a [briefly describe the Project infrastructure] on [●] (the "**Agreement**"):

We, \_\_\_\_\_ (the "**Bank**"), hereby unconditionally and irrevocably undertake to pay you any sums up to a maximum amount of [*specify applicable currency*] \_\_\_\_\_ (the "**Maximum Amount**"), in connection with the Service Provider's obligations under the Agreement and in accordance with the following:

- (f) Unless otherwise defined herein, terms defined in the Agreement shall have the same meaning herein.
- (g) We shall pay you immediately upon your written demand and irrespective of any objection by the Service Provider or any other party such amount or amounts as you may demand up to the Maximum Amount, by transfer to your account or in any other manner acceptable to you.
- (h) All payments made based on your demand shall be free and clear of, and without any present or future deduction for payment of, any taxes, levies, duties, charges, fees, deductions or withholdings of any nature whatsoever and by whomsoever imposed.
- (i) The undertakings contained in this guarantee constitute direct and fundamental obligations of ours and are unconditional and irrevocable. We shall not be excused from any or all of these obligations for any reason or reasons of whatever nature or source, such as change in the conditions of the Agreement or extension thereof or change in the scope or nature of work to be performed, or any omission, act or proceeding by you or by a third party which would excuse or discharge us from the obligations and liabilities stated in this guarantee.
- (j) This guarantee shall remain valid and in full force and effect up to the end of the \_\_\_\_\_ day of the month of \_\_\_\_\_ of the year \_\_\_\_\_. This guarantee shall be governed by and construed in accordance with the laws, regulations, decisions, rules and instructions of the [*specify applicable law*] and any dispute with respect to this guarantee shall be resolved exclusively by the competent authorities in the [*specify the relevant country*] and according to [*specify applicable law*].

The Bank  
Authorized signatories

<sup>66</sup> Drafting note: Drafting note: to be adapted depending on the obligations to be performed by the Service Provider under the Project.



## Schedule 15 - Lender's Direct Agreement Key Principles

The Lenders' Direct Agreement shall be drafted on terms that are customarily provided in such agreements in use in the international project finance market and shall include, among others, the following provisions:

**1. GENERAL SUPPORT**

The [Government and the]<sup>67</sup> Contracting Authority (the Public Entities) shall reiterate their support to the PPP Project and undertake to perform their obligations under this Agreement and any Government guarantee (the PPP Documents) as applicable.

**2. CONSENT TO SECURITY**

Each Public Entity shall acknowledge and consent to the security to be listed in the Lenders' Direct Agreement over any PPP Document granted to Lenders.

**3. CURE RIGHTS**

A suspension period of [120] days starting on the date on which the Finance Parties receive a default notice (the Default Notice) from a Public Entity notifying that a default has occurred under a PPP Document (the Suspension Period) shall apply during which the Lenders and the Service Provider may cure any such default. During the Suspension Period, no Public Entity shall take any action against or with respect to the Service Provider or any of its assets.

**4. STEP IN RIGHTS**

During a Suspension Period or if an event of default has occurred under the Lenders Documents and is continuing (the Financing EoD Period), the Lenders may appoint an additional obligor to step-in and act with the Service Provider to cure the default as applicable and, if applicable, step out again. The identity of the additional obligor will be subject to objective criteria to be agreed. Where step-in rights have been exercised, an extended cure period of [210] days shall apply starting on the date on which the Lenders receive a Default Notice (and other than in relation to default for outstanding amounts due and payable to the Public Entities at the appointment date which shall be paid within 30 days after such date).

**5. SUBSTITUTION RIGHTS**

During a Suspension Period or a Financing EoD Period, the Lenders may appoint a substitute operator, possessing or having available to it under contract the technical and financial capacity required to build and/or operate (as applicable) the PPP Project, who may assume (by novation or otherwise) the rights and obligations of the Service Provider under the PPP Documents. Where substitution rights have been exercised, an extended cure period of [210] days starting on the date on which the Lenders receive a Default Notice (and other than in relation to default for outstanding amounts due and payable to the Public Entities at the transfer date which shall be paid within 60 days after such date).

**6. INFORMATION NOTICES**

The Lenders shall be entitled to (i) certain information relating to any PPP Document as requested by Lenders during a Financing EoD Period, and (ii) copies of various notices given to the Service Operator and details of related unperformed liabilities, in particular, the right to be informed of any default by the Service Provider.

**7. PAYMENTS AND OTHER RIGHTS**

The Public Entities agree to make payments owing to the Service Provider to specified accounts or, in the event of a default under the Lenders Documents, in the manner specified by the Lenders.

**8. SET-OFF**

All payments are to be made free of set-off or deductions except that, in effecting payments to the Service Provider, the Contracting Authority shall have a right of set-off for mature amounts due and owing to the Contracting Authority by the Service Provider under the Agreement.

<sup>67</sup> Delete if no government guarantee is issued.

**9. REPRESENTATION**

The representation and warranties made by each Public Entity shall include the lawful execution by the relevant Public Entity of the Lenders' Direct Agreement and the validity, enforceability, and lawful execution of each PPP Document.

**10. SECURITY AND RELATED MATTERS**

The Public Entities shall undertake (i) not to terminate any PPP Document or the Service Provider's rights thereunder by reason of Lenders' enforcement of security over such documents and rights, and (ii) consent to the change in control of the Service Provider through Lenders' enforcement of their security.

**11. CERTAIN CONFIRMATIONS AND GENERAL ASSURANCES**

The Public Entities shall make the confirmations required with respect to any PPP Document as agreed with Lenders and provide general assurances with respect to Project and its assets and, including in the event a PPP Document is terminated or expires.

**12. GOVERNING LAW AND DISPUTE RESOLUTION**

The Lenders' Direct Agreement shall be governed by [specify the Country law] Law and provide for international arbitration as dispute resolution forum.

**13. BENEFICIARIES, TERM AND MISCELLANEOUS**

The Lenders' Direct Agreement shall contain miscellaneous customary provisions satisfactory to the Lenders, including in relation to the beneficiaries, language, notices, and liability of, or in connection with, the Lenders' Direct Agreement.

Sample Document, Adapt as Appropriate



