**Agreement Synopsis, Context and Review**

**Sector:** Transport

**Name of Agreement:** The Design, Construction, Completion and Commissioning of a new airport and its Operation and Maintenance for a period of 10 years following completion.

**Type of Agreement:** Design Build Operate Maintain [DBOM] Contract

**Region (if known):** Southern Hemisphere

**Year of Agreement:** 2011

**Principal Author(s) (firm and contact person):** MDY Legal

**Annotated by:** STC

**Purpose and Context:** DBOM Contract for the development of an airport in return for periodic payments during construction and service payments during operation.

**Circumstances where this contract may be appropriate:** Where passenger transport for a remote community is most cost effective by air although bulk materials and other heavy cargo might continue to be brought in by surface transport (in this case by sea). On a value for money basis specific to this type of project where the income generated would not necessarily cover running costs, let alone capital costs, the costs are met both during construction and operation by the public sector.

**Drafted for common law/ civil law jurisdiction:** Common Law

**Main Features:** Term: Ten years after date of issue of the Taking Over Certificate [see definition of “Contract Expiry Date”]

**Special Issues**

There are particular issues which arise as a result of a project being located in a remote community.

These are exemplified by:

- Clause 9 dealing with health and safety particularly contagious diseases such as sexually transmitted diseases and how these need to be addressed but on a non-discriminatory basis.

- Clause 22.8 where additional time is allowed to overcome an event of Force Majeure in cases where additional or replacement parts and or materials have to be brought in by surface transport.

The need to address, away from the location of the community, the consequences of a failure to complete an action- thus under Clause 1.15 the time for completion of an action required on a day certain is by noon on that day rather than close of business hours as might ordinarily be expected.

**Contractual Approach**

The Agreement is in three parts namely the General Agreement containing conditions of general application to both the construction phase [Phase1] and to the operational phase [Phase 2], the Conditions specific to Phase 1 (which sets out the amendments to and required particulars for the FIDIC conditions for Plant and Design and Build) and the special conditions drafted for the operation and maintenance of an airport. In addition the Contract contains other attachments such as the Employer’s Requirements for Construction and the Contractor’s Proposals and similar attachments for the Operational Phase 2.

**Contractor’s Obligations**

*The technical Annexes are missing from the suite of documents. These are important, as they comprise documents for the commercial relationship including details for design/construction and o&m However owing to the specific nature of the project, details of the identity of the project would be revealed through these annexes.*

There are 3 key events for Phase 1 to be certified by the Engineer to be appointed by the Employer, namely the Effective Date for Phase 1 to be certified pursuant to Clause 7.1 of the General contract, the Commencement Date when work may start on Site and the date of issue of the Taking Over Certificate for the Rest of the Works which is when...
Phase 2 and the Phase 2 Conditions come into effect.

In addition to the procuring of the Phase 1 works and the Phase 2 Services the Employer is to enter into agreements with the Engineer (as indicated above who carry out the duties of a certifier in respect of the Phase 1 Works, an Airport Contract Manager who, among his roles, monitors performance of the Phase 2 Services, a Scheduled Air Services Provider for regular air services to the location and a Fuel Management Contractor who will take responsibility for the bulk fuel storage facilities. The Site minus the bulk storage facilities is referred to as “Rest of the Works”.

There is a separate schedule which sets out the sharing of risk for 8 items such as fuel, Rock and earthworks, insurance deductibles etc. There was an assumed amount for each item but if the cost was higher than expected then the additional cost would be shared 50:50 up to a cap per item. The overall cap for all eight items was less than the aggregate of each of the items. If the total cost of claims made was less than the total cap then the difference would be shared between the parties on a 50:50 basis. If the cap was exceeded whether for an individual item or in the aggregate then any additional cost would be born by the Contractor.

There are two elements to the security for performance. During Phase 1 there is a Performance Security which is enhanced by a Top Up Performance Security (to be provided pursuant to Clause 3) and during Phase 2 there is a Retention Money Guarantee to be issued prior to the date of the of the Taking Over Certificate for the Rest of the Works.

There are two restrictions in relation to discretions exercisable by the Engineer namely he must report to a designated entity where certain criteria apply to either or both the grant of an extension of time under Phase 1 Condition 8.4 and the issue of a Variation Order under Phase 1 Condition 13.1. Other submittals are subject to review but positive action either in approving or commenting is required from the Engineer. There is no deemed acceptance or rejection if he does nothing.

The Engineer is entitled to attend tests on manufacturing and on completion and commissioning. Unlike certain standard forms, neither the issue of the Final Payment Certificate pursuant to Phase 1 Condition 14.3 nor the Performance Certificate at the end of the Defects Notification Period pursuant to Phase 1 Condition 11.9 reduces the Employer’s rights of action in respect of design or construction defects. In addition as this is a contract governed by common law principles, the obligation in relation to design is one of fitness for purpose and clear wording is required by the contract if that implied term is to be excluded and no such wording is used. In addition, under Phase 1 Condition 7.4, any failure by the Engineer or Contractor to discover a defect during a test or inspection does not relieve the Contractor of his duty to remedy any defect which subsequently arises.

In relation to continuing liability for defects, under Phase 2 Condition 14.4 the Yearly Operating Charge is to cover, among other things, defects whether due to design or workmanship.

Payment Structure: There are two sets of periodic payments one to be made during construction and certified by the Engineer and the other for services during Phase 2 and to be signed off by the Airport Contract Manager. During Phase 1 the Contractor may receive a mobilization loan under Phase 1 Condition 14.2 and there is a final adjustment under Phase 1 Condition 14.3.

Where there is a failure to perform during Phase 2 the Employer may make deductions from the monthly installments pursuant to Phase 2 Condition 15.3 in accordance with a table appearing in an annex to the Contract. In addition to the Yearly Operating Charge (which is indexed under Phase 1 Condition 15.2), the concept is that there is a Replacement Budget which is agreed between the parties pursuant to Phase 2 Condition 14.4 on a rolling three year basis and that the Contractor can then work within a discretion of 105 per cent of the agreed budget item. There is a fund set up by the Employer from which the Contractor can draw down.

The carrying out of replacement work during Phase 2 is on the basis that the Contractor is an agent for the Employer. In addition the Replacement Budget is prepared by the Contractor on the basis of a Reasonable and Prudent Contractor. Under common law principles an agent is not entitled to make an undisclosed profit. Under Phase 2 Condition 17.1, the Contractor is obliged to collect from Third Party Users all Fees and Charges and to pay them to the Employer. The Contractor is not entitled, through the express wording of Phase 2 Condition 17.2 to offset against the Fees and Charges collected (or any other monies due to the Employer) any monies
which the Contractor may claim is due to him. 

Whilst insurance is arranged through the Contractor but with the approval of the Employer during Phase 2, the premium is paid directly by the Employer whilst during Phase 1 the insurance is procured and paid for by the Contractor as might be more traditionally expected under a construction contract.

Under Phase 2, Condition 18 the Contractor is encouraged to put forward proposals, which will reduce costs to the Employer, increase efficiency or otherwise benefit the Employer. When putting forward proposals in accordance with Phase 2 Condition 18.2, one of the elements to be covered by the Contractor is his proposal for an adjustment to the services payment, contribution by the Employer and/or income sharing allowing for a reasonable profit for the Contractor.

Changes or Variations may be sought during both Phase 1 and Phase 2 although the approach is different. During Phase 1 the Engineer pursuant to Phase 1 Condition 13 instigates the Variation whereas for Phase 2 it is the Airport Contracts Manager who takes the lead under Phase 2 Condition 19. The Contractor may refuse a change on the basis of inter alia safety.

Under Phase 2 Condition 2.3 certain intellectual property rights are to be licensed to the Employer in addition to the licence given to the Employer by the Contractor pursuant to Phase 1 Condition 1.10 in relation to the Contractor's Documents.

An obligation on the Employer to make available possession of the project site to the Contractor appears at Phase 1 Condition 2.3 and following issue of the Taking Over Certificate for the Rest of the Works, the Contractor is given access to the area covered by the certificate.

The handback procedures at the end of the operating period envisages at Phase 2 Condition 14.3 an inspection by surveyors and aviation experts with which the Contractor agrees to cooperate.

There are two regimes for Force Majeure, the first is dealt with under Phase 1 Condition 19 and the second at Phase 2 Condition 22. It should also be noted that there are separate definitions for each phase.

Termination: In addition to termination due to default and force majeure there is a right for the Employer to terminate at will during Phase 2.

Upon termination, calculations for payment by either party are set out in the agreement.

Dispute Resolution: Disputes have to be referred to a Disputes Adjudication Board as a condition precedent to litigation. Decisions of DAB are not final and binding unless parties otherwise agree.

Possible additional provisions that it might be appropriate to include:
Without the detailed schedules it is difficult to know what else is missing.

Provisions that may not be advisable to replicate/ may need further thought:

Provisions of wider general use:
The concept of shared risk exists in some FIDIC forms and is worth considering where the price, which a Contractor may seek for assuming the whole of a particular contingency, may not give best value for money. Where it is possible to leave residual risk with the Contractor if the amount of the cap is exceeded this is advantageous because if the risk after the cap is with the Employer then this creates a perverse incentive to breach the cap as has happened on some road projects.

Experience Since Coming
The Employer reached agreement with the preferred bidder in late 2011 so it is still
Into Force (including any amendments) if draft form, whether it has been applied:

Tracking Number: