

International Airport Expansion Project

Terms of Reference for Legal Advisor

A. Background

1. [] International Airport (IA) is a medium size airport with a total passenger per year volume of []. IA has been experiencing high growth rates (30% per year in passenger, and 35% per year in cargo during the last two years). IA infrastructure is in relatively poor condition. The landside infrastructure (i.e., passenger terminal) is operating beyond capacity, under tough conditions for passengers with levels of service that need improving.
2. IA, therefore, needs to upgrade and expand its airport infrastructure to keep pace with traffic growth and improve service levels. The Government recognizes that without a strong local carrier, and given the proximity of IA to the country's main hub system (comprised of the three largest airports), there are limited possibilities to develop a hub. Therefore, the airport development strategy revolves around catering for and developing origin and destination (O&D) traffic. The Government is exploring options to develop the airport facilities and related infrastructure via a public-private partnership. Given the regulatory restrictions that ban private participation in the ownership of the airside facilities, one of the possible options is a Master Concession Agreement that combines two different projects, one for the airside facilities (O&M) and the other for landside facilities (BOOT).
3. It has been estimated that the development costs for the new terminal and related infrastructure will be []. [] are estimated for the airside facilities. These figures are estimates based on the Master Plan developed by [], for IA expansion.

Defining the Transaction

4. Two different schemes are being considered under a **single 25 to 30 years Master Concession Agreement (MCA)** that will provide for design, construction and operation of (a) the landside facilities (i.e., passenger and cargo terminals and related infrastructure), and (b) the airside facilities (i.e., runway, taxiways and apron). The transaction is defined as the successful bidding of the MCA by an experienced bidder (consortium) ensuring optimization of the bid award criteria (to be defined). The report attached as Annex B sets out the legal advice provided to date on the structure to be adopted. Though the legal advisor will be free to provide alternate advice if it disagrees with that set out in the report.
5. Preliminary calculations indicate that the BOOT is financeable on a non-recourse basis, but only with significant government financial support. Estimates for a [] million passenger/year terminal seem to indicate that the BOOT (basic design) for the new terminal will start operations with a base annual revenue of [], but with upside for commercial revenues. The terminal may need an expansion fee in order to make the financing possible. This increase or additional airport development fee (used in the past in several airport cases) will still leave IA airport fees competitive with other regional airports. **Technical Assistance Team**

6. The Government (“executing agency for the project”) is contracting the services of the following advisors as part of the technical assistance team: (i) financial advisors, (ii) legal advisors, (iii) traffic consultants, and (iv) engineer / technical advisors. The technical assistance team will work closely with IA and the Government in the proposed airport expansion project.

B. Objective and Scope of the Assignment

7. The objective of the assignment is to ensure, in coordination with the financial and technical advisors, the successful procurement of private investors for the IA Expansion Project, through to financial close, using good international practice in the context of the law of the country. The legal advisors will be tasked to develop and finalize key documents such as the MCA, other related Agreements and annexes, legal and regulatory texts and Bidding Documents for the Airport project. The legal advisors will draft or revise, review and negotiate and help in the preparation of all other project documents related to project development. The advisors will also assist the Government during the pre-qualification phase, bidding process and financial close. This is to ensure that the project agreements are of high quality and as per market standards, which, in turn, will lead to a fair and equitable project. Annex C provides a more detailed description of the scope of services to be required of the legal advisor.

Scope of the Assignment

Due to the demands of a tight timetable, a legal analysis of private sector participation options has already been completed by external legal advisors (see the report at Annex A). This analysis has determined the use of a MCA as the most suitable scheme. A draft of the legal assessment is included as Annex A to these terms of reference.

Phase I: Review of legal analysis on PSP Options and Draft Pre-Qualification Documents.

- (a) Review of the legal analysis of the PSP Options for the IA Expansion as well as the initial draft for pre-qualification documents.

The legal advisor will review of both these documents making sure that all the key issues regarding private sector participation in this transaction have been addressed and are adequately covered in the legal analysis and draft pre-qualification documents.

Phase II: Support to the Government during the prequalification stage of the PPP transaction

During Phase II, the legal advisor will provide strategic advice and guidance to the Government and its advisors on the items listed below. In particular, the legal advisor will have the responsibility for the completion of the deliverables indicated below for each activity.

- (a) Marketing of the Transaction

The legal advisor will assist with marketing efforts, including road shows and project

presentations, and in this context will review language and text of presentations and marketing material for the transaction involved with promoting the transaction and ensure their compliance with legal standards. The advisor will be required to answer queries to help potential stakeholders better understand the project. The legal advisor will also participate in meeting with potential investors and where required will make presentations.

(b) Pre-qualification and tender process and documents

The legal advisor will have primary responsibilities for advising on the legal structure of the procurement process and the preparation of the pre-qualification and bidding documents, including the PPP/concession agreement and any other commercial contracts or legal/regulatory documents. The legal advisor will support the Government, IA, and the technical assistance team (the Project Team) in ensuring the compliance of pre-qualification and tender documents with [COUNTRY] legal standards and international good practice.

(c) Pre-qualification

The legal advisor will support the Project Team to develop operational and legal criteria to be used in judging the suitability of prospective bidders, assist in providing clarifications and written responses to bidders' inquiries and assist the Government in conducting a fair and transparent pre-qualification process.

Phase III: Support the Government during the bidding process

The legal advisor, along with the financial and technical advisors, will have the primary responsibility for the completion of:

(a) Competitive bidding process

Preparation of bid evaluation criteria and methodology; organizing a public competitive bidding process to award the project to the best bid, as well as any other necessary steps in the bidding process.

(b) Bidders' review and comments

Advising on the process post-bid to reduce the time needed to achieve financial close and the number of issues that remain outstanding after the bid award, to maintain the government's negotiating position and identify in advance any outstanding issues that will require resolution, before or after financial close.

Phase IV: Support the Government during the bid award and financial close of the transaction.

The legal advisor, along with the financial and technical advisors, will have the primary responsibility for the completion of the items deliverables for each activity:

(a) Bid evaluation

Bid analysis, including checks of the compliance of the bidders and their applications with the criteria set forth in the tender documentation, and evaluation of the bids.

(b) Transaction closure

The legal advisor will also be required to provide assistance to the Government for negotiating, preparing and executing the concession contract, shareholders agreement(s) and other documents necessary for the satisfactory closing of the transactions.

C. Proposal Structure

Those wishing to apply for the role as the legal advisor will be required to present two proposals, which will include the following details:

(a) **Technical proposal**

- Scope of work: understanding of the tasks along the lines of the outline in this document and an indication of what issues would need to be addressed and how those issues would be addressed.
- Project team: the team that will be made available for this project – the advisor will need to warrant their availability - and their individual experience in similar transactions in this sector and other infrastructure areas).
- Institutional experience: with PPP projects in the infrastructure sectors
- Staff time: Please provide detailed staff allocation time to this project.
- Proposed timetable

When developing the technical proposal please see Annex C (suggested timetable).

(b) **Financial proposal.** The financial proposal should be structured into two components:

Fixed budget

- Staff time cost estimates
- Travel costs
- Other expenses

Risk sharing

- Budgeting during different project phases
- Sharing of risk of project progress

D. Selection Criteria

The Selection Committee (“executing agency as the secretary”) will evaluate the proposals in two phases:

1) Technical evaluation:

Criteria for the evaluation of technical proposals are:

Points

- (i) Specific experience of the Advisors relevant to the assignment: **10**

- (ii) Adequacy of the proposed methodology and work plan in responding to the Terms of Reference including:
 - (a) technical approach and methodology;
 - (b) work plan;
 - (c) organization and staffing **25**
- (iii) Key professional staff qualifications and competence for the assignment: **50**

The number of points to be assigned to each of the above positions or disciplines shall be determined considering the following three sub-criteria and relevant percentage weights:

- 1) General qualifications 30%
- 2) Adequacy for the assignment 50%
- 3) Experience in region and language 20%

Total weight: 100%

- (iv) Local presence in [COUNTRY] **10**
- (v) Experience in [COUNTRY] **5**

Total points for the four criteria: **100**

The minimum technical score required to pass is: **70 Points**

2) Financial evaluation. The formula for determining the financial scores is the following:

$S_f = 100 \times F_m / F$, in which S_f is the financial score for the advisor's financial proposal, F_m is the lowest price submitted by all potential advisors, and F is the price of the proposal under consideration.

The weights given to the Technical and Financial Proposals are:

T (technical) = **0.6**, and

P (price) = **0.4**

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Annex A
Legal Advice on Structure for the Project

Annex B

Terms of Reference for Legal Advisers

The Legal Advisor will provide [COUNTRY] law and international good practice advice on project design, bidding through to financial close, coordinating with and responding to the requirements of the Project Team, including without limitation

1. Project design

- Review of risk allocation regime
- Interface with tax and insurance advisers
- Licensing, permitting, land, land acquisition and other legal risks
- Other contractual and commercial relationships in the sector or related to the sector and how those relationships will interface with the Project.
- Capital grant and other payment flows from the Government

2. Tender process

- Applicable procurement requirements at State and Federal level
- Advice on mechanisms to maximize competition while avoiding unrealistic bids and project vulnerability from overly aggressive bidding.
- Information to be provided by the Government to bidders
- Designing pre-qualification procedure
- Drafting pre-qualification documentation
- Assisting with the implementation of the pre-qualification procedure
- Responding to requests for clarification and advice on comments or requests for changes to the pre-qualification procedure
- Assisting with the assessment of pre-qualification applications
- Designing tender procedure
- Assisting the Government in its assessment of different key aspects of the tender procedure, for example deciding whether and to what extent

to accept variant bids and non-conforming bids, how many bidders must bid before the process is valid, what rules to set in relation to the assessment of bids (scoring regimes, timing of bids and rejecting of excessively low bids) and how to maximize competition without sacrificing quality of bids.

- Drafting tender documentation
- Drafting the Concession Agreement (CA) , land lease agreement and any other required legal arrangements or agreements
- Proposing any legislative, administrative or regulatory changes that need to be made to implement the proposed legal/commercial structure
- Assisting with the implementation of the tender procedure, including responding to requests for clarification and advice on comments or requests for changes to the pre-qualification procedure, involvement in bidder conferences and responding to communications with bidders to manage Government liabilities.
- Assisting with the assessment of bids, variant bids and their viability.
- Assisting with process for selection of preferred bidder and the relationship with second and third place bidders, including managing bid bonds and on-going discussions to prepare for the eventual withdrawal of the preferred bidder.
- Negotiations with the preferred bidder to reach agreement on outstanding elements of the CA.

3. Financial close

- Reviewing proposed sub-contracts, in particular with the construction contractor and operator, for Grantor approval.
- Advising on proposed changes to the agreed sub-contracts.
- Review of preferred bidder satisfaction of the conditions precedent to the CA.
- Negotiations with lenders, including review of financing agreement, to reach financial close.
- Legal opinion that transaction is binding on its terms.
- Legal opinion on security and financial management structure.

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- Legal opinion on revenue structure and current regulatory mechanism.

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Annex C

Proposed Project Timetable