

# PPP Contracts and Risks

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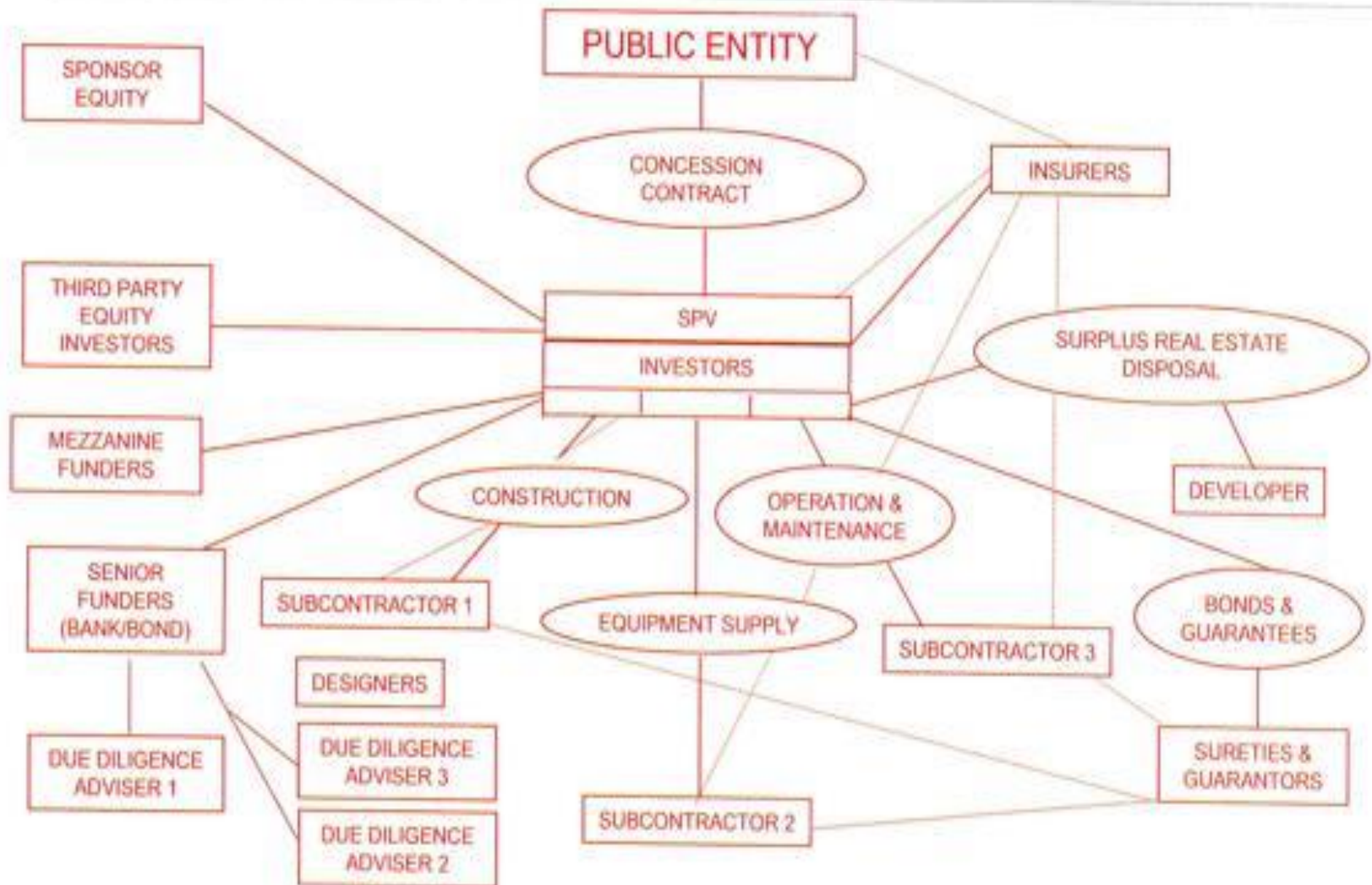
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# BOT Law/ JV Contracts

1. Long-Term Contracts
2. Multiple Components/ Bundle-Type
3. “Incomplete” Contracts
4. Legality of Substance/ Content *and* Process
5. Laws read into every contract
6. Integral Part of “Contract Suite”

# Typical PPP Structure

# PPP Contract Suite



# BOT Law/ JV Contracts

7. Governed by Non-Impairment Clause
8. Consistency between Terms of Reference – Contract - Negotiated Terms
9. Pass Test of Public Good/ General Welfare/ Most Advantageous Benefit
10. “Define the basic and legal relationship between the parties and their rights and responsibilities including the specific Government Undertakings” (2012 BOT IRR)

# Mandatory Terms BOT Law Contract

## (per BOT Law 2012 IRR)

1. specific contractual arrangement, term, and scope of work
2. project technical specifications and system features
3. implementation milestones including those for securing other approvals, project completion date
4. cost recovery scheme via proposed tolls, fees, rentals and charges, as the case may be
5. liquidated damages

# Mandatory Terms **BOT Law Contract** (per BOT Law 2012 IRR)

6. performance and warranty bonds
7. minimum insurance coverage as may be required for the project, such as Contractors' all risk, motor vehicle, workmen's compensation, third party liability, or comprehensive general liability insurance
8. acceptance tests and procedures
9. warranty period and procedures (after transfer)

# Mandatory Terms **BOT Law Contract** (per BOT Law 2012 IRR)

10. grounds for and effects of contract termination including modes for settling disputes
11. the manner and procedures for the resolution of warranty against corruption
12. compliance with all other applicable laws, rules, and regulations

# JV Agreement

1. Identification of the JV parties
2. JV Name
3. Principal place of business
4. JVA effectivity date
5. JV purpose/s and objective/s
6. JV vehicle (incorporated or unincorporated)
7. Total cost of JV activity
8. JV Term
9. Project specifications and features
10. Management role of JV parties
11. Statement that parties are co-venturers
12. Establishment of JV Fund
13. Amount and Contributions of each party



# JV Agreement

14. Creation of special bank account
15. Provision on infusion of additional capital
16. Percentages and sharing of profits and losses
17. Termination/ Liquidation of JV
18. Buy-out provisions
19. Transfer of ownership of assets
20. Creation of Management Committee or designation of General Manager
21. Implementation milestones
22. Provision for the acquisition of licenses
23. Type of insurance
24. Confidentiality of trade information
25. Ownership or retention of patents

# JV Agreement

26. Performance security requirements
27. Undivided pro-rata interests held by the co-venturers on all assets of the JV
28. Restriction regarding assignment of private sector participant's undivided pro-rata interests
29. Cost recovery scheme
30. Indemnification and liquidated damages
31. Performance and warranty bonds
32. Payout of funds
33. Minimum insurance coverage
34. Acceptance tests and procedures
35. Dispute Settlement and Alternative Dispute Resolution
36. Warranty against corruption
37. Compliance with law
38. Government exit provision

# Typical PPP Contract Terms

1. Preambulatory Clauses
2. Party Clause
3. Interpretation
4. Nature of the BOT/  
Variant
5. Term (Length) of the  
Project.
6. Contract Objective
7. Risk Allocation
8. Performance Bonds
9. Key Performance  
Indicators
10. Rights
11. Payment to  
Government and  
Private Sector
12. Insurance  
Requirements
13. Delay Provisions
14. Force Majeure

# Typical PPP Contract Terms

15. Governmental Action
16. Government and Private Sector Warranties
17. Change in the Law
18. Regulatory Regime
19. Variations
20. Termination
21. Indemnification
22. Intellectual Property
23. Claims
24. Financial Security
25. Dispute Resolution
26. Step-in Rights
27. Changes in the Composition of the Private Sector Proponent
28. Partnership Management
29. Compliance with all Laws
30. Personnel
31. Conditions Precedent

# PPP Risks

- **Definition:** unpredictable deviation from initial context or perspective/ unavoidable factor
- **Effect:** Downside and Upside
- **Allocation:** Risk-Transfer (Private Sector); Risk-Retention (Public Sector); Risk-Sharing (Both Parties)
- **Bearing Party:** Party who can best control/ manage/ bear/ absorb/ influence risk or provide insurance
- **Function-Risk-Cost-Tariff Relations:** Bearing risk has cost; bearer must be compensated; wrong allocation result in higher tariff; More functions to private sector, more risks it assumes (function-risk match); More risks results in higher tariffs; higher tariffs means higher rewards for Private Sector

# 4 Clusters of PPP Risks

Policy and  
Political

Economic and  
Fiscal

Process and  
Legal

Environmental  
and Spatial

# 52 PPP Risks

## A. Policy and Political

1. Succession
2. Corruption
3. Legislative
4. Regulatory
5. Risk mismatch
6. Taxation
7. Audit
8. Political Force Majeure

## B. Economic and Fiscal

9. Credit
10. Demand
11. Economic
12. Cost
13. Foreign exchange
14. Gearing
15. Inflation
16. Insurance
17. Interest
18. Life cycle costs
19. Market competition
20. Market familiarity
21. Payment mechanism
22. Revenue tariffs
23. Sponsor

# 52 PPP Risks

## C. Process and Legal

- 24. Acquiring planning approval
- 25. Bid process
- 26. Consortium structure
- 27. Counterparty
- 28. Feasibility studies
- 29. Legal/ Capacity
- 30. Local partners Interface
- 31. Social or protester
- 32. Time

## D. Environmental and Spatial

- 33. Asset quality
- 34. Availability
- 35. Commissioning or start-up
- 36. Construction
- 37. Demographic
- 38. Design
- 39. Environmental
- 40. Force majeure
- 41. Ground conditions
- 42. Installation
- 43. Operational
- 44. Technology
- 45. Project management ability
- 46. Project performance
- 47. Raw material Supply
- 48. Residual value
- 49. Site Acquisition
- 50. Usage
- 51. Volume
- 52. Weather



# Checklist:

## Risk Allocation

- Define the **major areas of responsibility**  
Define specific responsibilities for each area
- Identify the **risks** that are associated with each responsibility
- Note the direct and indirect **relationships** between risks and responsibilities
- Establish how the risks are interrelated

# Checklist:

## Risk Allocation

- For each risk, identify which **party** (the operator, contracting authority, or customers) is best able to bear the risk, and in particular, who can:
  - Predict the risk
  - Influence the risk
  - Control the impact of the risk
  - Diversify or absorb residual risk

# Checklist:

## Risk Allocation

- Decide whether the risk should be **fully allocated to one party or shared**
- Check for any **constraints on the ability** of the parties to bear risk (such as information problems or unwillingness of the contracting authority or operator to bear risks they appear best able to manage)
- Based on the risk analysis, assign a party to:
  - Assume each responsibility
  - Bear each risk

# Sample Risk Allocation Matrix

Risk	Public	Private	Shared
Design		X	
Construction		X	
Finance		X	
Technology		X	
Regulatory Process			X
Traffic Revenue			X
Environmental Compliance	X		
O&M		X	
Approval Process	X		
Change in Law	X		

# Risk Likelihood and Significance

<b>LIKELIHOOD</b>	Certain	Low	Moderate	High	Extreme	Extreme
	Likely	Low	Moderate	High	High	Extreme
	Possible	Low	Moderate	Moderate	High	High
	Unlikely	Low	Low	Moderate	Moderate	Moderate
	Rare	Low	Low	Low	Low	Low
		Insignificant	Minor	Signifcant	Major	Catastrophic
		<b>Significance</b>				

# Sample BOT Law Contract Provisions

1. Urban Mass Rail
2. Bulk Water Supply
3. Solid Waste Management
4. Information and Communications Technology

*(Prepared by Castalia Strategic Advisors for NEDA)*

# Plenary Exercise

## *Considerations*

1. Scope and Exclusions
2. Meaning of Words
3. Identify Risk, Risk Allocation Scheme, and Bearer(s) of Risk
4. Exclusivity or inclusivity of enumerations
5. Impact/ Import of Text
6. Propose Improvements/ Refinements

# Joint Venture Agreement for Bulk Water Supply

Know All Men by These Presents:  
(or The Public is Informed:)

This Contract is executed on this \_\_\_\_ day of \_\_\_\_\_  
by and between:



# Party Clause

This **Bulk Water Supply Agreement** (this “**Agreement**”) is made this [*insert date*], (the “**Signature Date**”) at [●], Philippines, by and between:

[**INSERT NAME OF AGENCY**], a duly organized and existing agency of the Government of the Republic of the Philippines by virtue of [●], with principal office at [●], Philippines, represented herein by its [●], [●], hereinafter referred to as the “**Agency**”;

and

[**INSERT NAME OF COMPANY**], a corporation duly organized and existing under the laws of [●], with its principal office at [●], represented herein by its [●], [●], hereinafter referred to as the “**Company**”.

# Whereas Clauses

WHEREAS, *[state the rationale for and background of the Project]*;

WHEREAS, on [●], 2009, the Agency obtained the approval of the Investment Coordination Committee (“**ICC**”) of the National Economic and Development Authority (“**NEDA**”) to develop and implement the [●] Project under a [●] contractual arrangement in line with Republic Act No. 6957, as amended, and its Implementing Rules and Regulations (the “**BOT Law**”);

WHEREAS, the Company has been selected by the Agency to undertake the Project on the terms and conditions set forth in this Agreement as the result of a competitive public bidding process conducted by the Agency under the applicable provisions of the BOT Law.

# Definition of Terms

***“Change-in-Law”*** means any of the following events occurring as a result of any action by any Government Authority of the Philippines:

- (a) A change in or repeal of a Legal Requirement;
- (b) An enactment or making of a new Legal Requirement; or
- (c) A change in the interpretation or the application of a Legal Requirement, which in any case was not reasonably foreseeable at the Signature Date, but not a change in Taxation and an improvement in ICT or operational policies or practices which are generally regarded by developers and regulatory authorities in advanced jurisdictions as appropriate for service providers to have to make.

# Definition of Terms

***“Project”*** means:

- (a) the carrying out and financing of the Works;
- (b) the operation, maintenance, renewal and financing of the integrated Facilities during the Operating Period;
- (c) the provision of the Services during the Operating Period;
- (d) the carrying out and financing of Commercial Development; and
- (e) the transfer of the integrated Facilities to the Agency at the Termination Date,

all in accordance with the terms and conditions of this Agreement and all Legal Requirements.

# Definition of Terms

***“Project Agreements”*** means:

- (a) this Agreement;
- (b) the EPC Contract;
- (c) the Shareholders’ Agreement;
- (d) the Financing Agreements; and
- (e) any other material agreement entered into by the Company pursuant to the agreements listed in sub-clauses (a) through (d) above, for the purposes of the implementation of the Project, including any agreement or subcontract for the management, operation and maintenance, and provision of technical assistance for the Project.

***“Project Milestones”*** means (i) the Effective Date; (ii) the Continuous Construction Date; (iii) the Provisional Operations Start Date; and (iv) the Operations Start Date.

# Definition of Terms

***“Prudent Utility Practice”*** means applying, in relation to the manner in which the development obligations and the performance of Services are rendered under this Agreement, the standards, practices, methods and procedures conforming to all Legal Requirements, and exercising that degree of skill, care, diligence, prudence and foresight that would reasonably and ordinarily be expected from a skilled and experienced person engaged in a similar type of undertaking under similar circumstances, including taking reasonable steps to ensure that:

- (a) adequate materials, resources, and supplies are available to meet the New ICT Services and Facilities’ needs under normal conditions and reasonably anticipated abnormal conditions;
- (b) sufficient and duly licensed operating personnel (i) are available, (ii) are adequately experienced and trained to operate the New ICT Services and Facilities properly and efficiently taking into consideration manufacturers’ guidelines and specifications in full compliance with the provisions of Section 6.4 of this Agreement, and (iii) are capable of responding to abnormal conditions;
- (c) preventive, routine, and non-routine maintenance and repairs (i) are performed on a basis that ensures reliable long-term and safe operation taking into account manufacturers’ recommendations and (ii) are performed by knowledgeable, trained, and experienced personnel who are duly licensed and are using proper equipment, tools, and procedures;
- (d) appropriate monitoring and testing is done to ensure the New ICT Services and Facilities are functioning as designed and in accordance with applicable SLAs and to ensure that equipment will function properly under both normal and abnormal conditions; and
- (e) equipment is operated in a manner safe to workers, the general public, and the environment.

# Rules of Interpretation

## 1.2 Principles of Interpretation

In the interpretation of this Agreement, unless the context otherwise requires:

- (a) Words importing a gender include any gender.
- (b) Words importing the singular number shall include the plural and *vice versa*.
- (c) References to persons shall include individuals, sole proprietorships, partnerships, associations, trusts, joint ventures, unincorporated organizations, corporations, States, governments and governmental entities.
- (d) References in this Agreement to any statute, law, decree, regulation, or other Legal Requirement shall be construed as a reference to such statute, law, decree, regulation, or other Legal Requirement as re-enacted, re-designated, amended, or extended from time to time, except as otherwise provided in this Agreement.
- (e) A reference to any person, Party, or entity includes its permitted successors and assigns. A reference to any government Agency or authority shall include any Agency or authority succeeding to such Agency's or authority's powers and functions.

# Conditions Precedent

## CONDITIONS PRECEDENT TO EFFECTIVE DATE

### Conditions Precedent to the Effective Date

This Agreement shall be effective and the Parties shall be bound by all its terms and conditions on the date (the “*Effective Date*”) when the following conditions have been fully satisfied or waived by the Parties and a written notice to such effect has been jointly signed by them:

- (a) Each of the Project Agreements shall have been duly signed by the parties thereto, shall be in full force and effect, and all conditions precedent to the effectiveness of each Project Agreement shall have been satisfied. The Company shall have also delivered a true and correct copy of each Project Agreement to the Agency.
- (b) Certified true copies of resolutions adopted by the board of directors of the Company authorizing the signing, delivery, and performance of this Agreement shall have been delivered to the Agency.
- (c) True and correct copies of the articles of incorporation and by-laws (including all amendments thereto) of the Company, certified by its corporate secretary and the SEC, shall have been delivered to the Agency.
- (d) All Consents that are required to have been obtained in connection with the execution, delivery, exercise of rights, and commencement of performance of this Agreement shall have been obtained and continue to be in full force and effect, including but not limited to, the applicable Consents listed on Schedule 9 (*Consents*).



# Term of the Agreement

## ARTICLE II

### TERM OF THE AGREEMENT

#### 3 TERM OF THE AGREEMENT

##### 3.1 Contract Term

Subject to Section 2.4 (*Specific Provisions Effective on the Signature Date*), the term of this Agreement runs from the Effective Date until the Termination Date.

##### 3.2 Provisions In Force

From the Signature Date until the Effective Date, only the provisions enumerated in Section 2.4 (*Specific Provisions Effective on the Signature Date*) shall be in full force and effect. From the Effective Date until the Termination Date, all of the provisions of this Agreement shall be in full force and effect.

# Project Scope

## Project Scope

The Project shall comprise:

- (a) the carrying out and financing of the Works in accordance with the scope and specifications prescribed in Schedule 1 (*Design and Technical Specifications*);
- (b) the operation, maintenance, renewal and financing of the integrated Facilities during the Operating Period;
- (c) the provision of the Services during the Operating Period;
- (d) the carrying out and financing of Commercial Development; and
- (e) the transfer of the integrated Facilities to the Agency at the Termination Date,

all in accordance with the terms and conditions of this Agreement and all Legal Requirements.

# Grant of Rights

## 4.2 Grant of Rights

On the terms and subject to the conditions set forth in this Agreement, the LGU hereby grants to the Company the sole and exclusive right and responsibility during the term of this Agreement to:

- (a) arrange financing for the Project;
- (b) plan, develop, design, build, test, commission, decommission and, when applicable, close the Facilities;
- (c) implement the Project in accordance with the Project Milestone Schedule;
- (d) manage, use, occupy, operate, repair, maintain, and refurbish the Facilities; and
- (e) provide and manage the Services.

# Right-of-Way

## 4.3 Land Acquisition and Right-of-Way

- (a) The Agency shall be responsible at its own cost and expense for obtaining all land rights and permanent rights-of-way required in order to build, own, and operate the Facilities, including, without limitation, temporary rights-of-way to install and construct the Facilities.
- (b) The Company shall assist the Agency, using reasonable efforts, to acquire temporary rights-of-way or construction easements which the Company needs for the construction and operation of the Facilities in addition to those that the Agency may have obtained on or before the Effective Date.

# Consents and Approvals

## Consents and Approvals

The Company shall at its own cost be responsible for obtaining all Consents required for the financing, building, construction, rehabilitation, operation, maintenance, and ownership of the Facilities and the Project other than the Consents that the Agency itself is required to secure under Schedule 9 (*Consents*) including all permanent rights-of-way or other land rights described in Section 4.3(a).

# Consents and Approvals

## 7 SUPPLY OF TREATED WATER

### 7.1 Supply of Raw Water

The Company shall be responsible for obtaining Raw Water from *[indicate raw water source]* for treatment at the Facilities.

[OPTIONAL: The Agency shall be responsible for securing the water permit authorizing extraction from the selected Raw Water source. Notwithstanding, the Company shall remain liable for its obligations under Sections 6 (*Operation and Maintenance*) and 7 (*Supply of Treated Water*) of this Agreement.]

The Raw Water shall be tested in accordance with Schedule F (*Raw Water*).

# Construction Responsibilities

## 5.1 Construction Responsibilities of the Company

The Company shall design, engineer, procure, and construct the Facilities in compliance with:

- (a) the Design and Technical Specifications;
- (b) Prudent Utility Practice;
- (c) all relevant design, engineering, and construction standards and practices in the Philippines;
- (d) all applicable Legal Requirements; and
- (e) the Project Milestone Schedule.

# Warranties

## Warranties on Design and Construction

### 5.3.1 General Warranties

The Company expressly warrants that the design and construction of the Facilities including the works to be performed by the EPC Contractor and its subcontractors will conform to the Design and Technical Specifications in all respects and will be free from defects and deficiencies.



# Performance Security

## 5.7 Performance Security

- (a) On or before the Signature Date, the Company shall provide and deliver to the Agency an unconditional and irrevocable standby letter of credit substantially in the form set out in Schedule D (*Form of Performance Security*) as security for the performance by the Company of its obligations under this Agreement from the Signature Date until the In-Service Date (the “**Performance Security**”). The Performance Security shall have a value equivalent to two percent (2%) of the Total Project Cost and shall be issued by a Performance Security Issuer in favor of the Agency.
- (b) The Performance Security shall be reduced proportionately as each phase or Project Milestone is completed following Schedule B (*Project Milestone Schedule*) and unless forfeited or otherwise called on by the Agency in accordance with this Agreement, shall be returned to the Company on the date on which the final acceptance certificate is issued but only after submitting an Operating Security in exchange pursuant to Section 6.3 (*Operating Security*).
- (c) In the event the Project Milestone Schedule is extended in accordance with this Agreement, the term of the Performance Security shall also be extended accordingly.

# Financing of Project

## Financing of Project

### 5.11.1 Percentage Shares and Contribution of the Agency

The cost of the Works shall be borne by the Parties in the following proportions:

(a) by the Agency - [●] per cent; and

(b) by the Company - [●] per cent.

The Agency shall contribute towards the financing of the Works in accordance with Schedule 4 (*Government Works Funding Arrangement*).<sup>4</sup>

# Operations and Maintenance

## 6 OPERATION AND MAINTENANCE

### 6.1 Operation and Maintenance Responsibilities of the Company

The Company shall be responsible for the management, operation, maintenance, safety and repair of the Facilities from the Provisional Operations Start Date until the Termination Date and shall ensure during such period that the Facilities operate in accordance with all Legal Requirements, Prudent Utility Practice, and the Operating Standards and Procedures.

# Revenues and Payments

## 8 PAYMENT

### 8.1 Tariff

In consideration for the supply of Treated Water by the Company, the Agency will pay the Company a tariff, expressed in PHP per cubic meter, for each Billing Month which shall be computed by applying the formulas and procedures described in this Section 8 and in Schedule L (the “*Tariff*”). The Tariff, as computed, shall include the value-added tax that the Company may be required to pay in relation to the sale of Treated Water to the Agency.

# Revenues and Payments

## 8.2 Calculation of Payment; Guaranteed Delivery

### 8.2.1 Payment for Services

The Tipping Fee for every metric ton of MSW delivered to and accepted by the Company for each Billing Month shall be calculated using the following formula:

$$T_j = VC_j + FC_j$$

Where:

# Revenues and Payments

## 8.1.2 Application of Company Revenue

Subject to the Financing Agreements, the Company shall apply the Company Revenue in the following order of priority:

- (a) all costs and expenses of an operational or administrative nature incurred by the Company in connection with the operation of the Facilities;
- (b) all costs and expenses of an operational or administrative nature incurred by the Company in connection with the maintenance or renewal of the Facilities;
- (c) applicable Taxes;
- (d) amounts due under the Financing Agreement;
- (e) the Concession Fee;
- (f) maintenance reserve account established and operated by the Company pursuant to the terms of the Financing Agreements; and
- (g) distributions (dividends).

# Revenues and Payments

## 8.1.3 Agency Revenue

- (a) The Company shall pay monthly Revenues due to the Agency (“**Agency Revenue**”) equivalent to:
  - (i) 100% of the amounts collected as Fare until Provisional Operations Start Date;
  - (ii) [●%] of the amounts collected as Fare after the Provisional Operations Start Date;
  - (iii) [●%] of amounts collected from Commercial Development [up to a threshold amount]; and
  - (iv) [●%] of amounts collected from Commercial Development exceeding the threshold amount.

# Concession Fees

## Concession Fees

- (o) The Company shall pay the Concession Fee to the Authority annually on the [●] Business Day after the end of the Contract Year in respect of which it is calculated. The Concession Fee is calculated in accordance with Schedule 19 (*Concession Fee*).
- (p) The Company shall provide to the Agency all information relating to Ridership Levels in accordance with Section 9 (*Contract Management, Monitoring and Evaluation*).
- (q) At the end of each Contract Year, the Agency shall submit to the Company an invoice in the form set out in Schedule 20 (*Form of Invoice*) showing the computation for the Concession Fee and stating the total amount due and payable to the Agency for the previous Contract Year.



# Contract Management

## CONTRACT MANAGEMENT, MONITORING AND EVALUATION

### 9.1 Contract Management Body

Within five (5) Business Days after the Signature Date, each Party shall form a contract management body within its organization, either through the appointment of a contract manager or the creation of a contract management unit, which shall be primarily responsible for monitoring, managing and evaluating the implementation of the Project (“**Contract Management Body**”). Within two (2) Business Days from its creation, each Party shall immediately send written notice to the other naming the members of its Contract Management Body.

# Insurance

## 1 INSURANCE

### 1.1 Required Insurance Policies; Endorsements

- (a) The Company at its cost shall obtain and maintain or cause its subcontractors to obtain, at a minimum, the insurance coverage and policies described in Schedule E (*Insurance*) and required by the Financing Agreements, Legal Requirements, and Prudent Utility Practice. The Company may procure additional insurance coverage not called for under this Agreement.
- (b) The insurance policies required to be obtained by the Company shall be issued by reputable and financially sound insurers or reinsurers duly licensed by the Insurance Commission and reasonably acceptable to the Agency. All policies shall have the endorsements and other terms set out in Schedule E (*Insurance*) but the Company shall not be required to obtain any insurance policy at a time when such policy or coverage is not available on reasonable commercial terms in the international or domestic insurance market.

# Representations and Warranties

## REPRESENTATIONS AND WARRANTIES

### Representations and Warranties of Each Party

Each Party represents and warrants to the other Party that as of the Signature Date and the Effective Date:

#### 11.1.1 Corporate Existence and Authority

It is a corporation duly organized and validly existing under the laws of [●] and it has all requisite legal power, authority and Consents to conduct its business, to own its properties, and to execute, deliver and implement this Agreement and the Project Agreements, as applicable.

#### 11.1.2 Consents

All Consents required to authorize the execution, delivery, and performance of this Agreement and each of the Project Agreements, as applicable, have been obtained and are in full force and effect except for those Consents and approvals identified in Schedule 9 (*Consents*) that the Parties have agreed to obtain at a later time.

# Representations and Warranties

## 13.6 Anti-Corruption Warranty

The Company warrants that neither it nor its representatives have offered any officer, official or employee of any Government Authority any consideration or commission for this Agreement nor has it or its representatives exerted or utilized any corrupt practice or unlawful influence to secure or solicit this Agreement for any consideration or commission. The Company shall not subcontract any portion or portions of its obligations under this Agreement to any public officer or Agency official or employee or to persons known by the Company to be relatives within the third degree of consanguinity or affinity of any public officer or Agency official or employee directly or indirectly involved in the award of this Agreement or the implementation of the Project. If any consideration or commission is paid to any private person, the Company shall disclose the name of the person and the amount paid. Any breach of the warranties and undertakings in this Section 13.6 shall constitute sufficient ground for the rescission or cancellation of this Agreement or the deduction of the consideration or commission paid from payments otherwise owed to the Company under this Agreement, without prejudice to the filing of civil or criminal actions against the Company and/or its representatives and officials and employees of the Agency under the Anti-Graft and Corrupt Practices Act and other applicable laws.

# Force Majeure

## 13.1 Force Majeure Events

### 13.1.1 Definition of Force Majeure Event

A “*Force Majeure Event*” means any event, condition, or circumstance and the effects thereof not within the reasonable control, directly or indirectly, of the Party affected, but only if and to the extent that:

- (a) such event, condition, or circumstance is not the direct or indirect result of the breach by such Party of any of its obligations under this Agreement or the fault or negligence of such Party, its Affiliates, or any person under the Party’s or its Affiliates’ reasonable control;
- (b) despite the exercise of reasonable diligence, such event, condition, or circumstance cannot be prevented, avoided, or removed by such Party;
- (c) such event, condition, or circumstance has a material adverse effect on the ability of such Party to perform all or a material portion of any of its obligations under this Agreement, and such Party has taken all reasonable precautions, due care, and alternative measures in order to avoid or mitigate the effects of such event on such Party’s ability to perform its obligations under this Agreement; and
- (d) such Party has given the other Party notice in accordance with Section 13.2.1 (*Notice of Force Majeure Event*).

# Non-Assignment

## 18 ASSIGNMENT OF RIGHTS; OWNERSHIP OF THE COMPANY

### 18.1 No Assignment

Neither Party may sell, assign, or transfer its rights or obligations under or pursuant to this Agreement without the prior written consent of the other Party, except that the Company may assign its rights to the Lenders in accordance with Section 18.2 (*Permitted Assignment to Lenders*).

# Step-In Rights

## 17 AGENCY STEP-IN RIGHTS

### 17.1 Step-in Rights

- (a) The Agency shall have the option to assume operational responsibility for the Facilities (in the capacity of an operator only) in order to continue operation of the Facilities or complete any necessary repairs to assure the continued delivery of the Services (“**Agency Step-in Rights**”). Agency Step-in Rights shall arise only upon the occurrence and continuance of:
- (i) a Company Event of Default that could reasonably be expected to materially adversely affect the Company’s ability to operate and maintain the Facilities in accordance with this Agreement;
  - (ii) hostilities or serious natural disasters which, in the opinion of the Agency, is or may be likely to give rise to such disruption of the means of transport such that the population in [Metropolitan Manila], or a substantial part thereof, is or may be likely to be deprived of essential goods or services.

# Dispute Resolution

## 19 DISPUTE RESOLUTION

### 19.1 Mutual Discussions

In case any Dispute occurs, the Parties shall attempt in good faith to settle such Dispute by mutual discussions between the Parties held at the principal office of the Agency and beginning not later than seven (7) Days after the receipt by one Party of a written notice from the other Party of the existence of the Dispute.

### 19.2 Expert Proceedings

#### 19.2.1 Referral of Disputes to Expert Panel

If a Dispute cannot be settled by mutual discussion within thirty (30) Days or such longer period as may be agreed in writing by the Parties after the commencement of such discussions under Section 19.1 (*Mutual Discussions*), then the Dispute shall be referred to the Expert Panel for determination.



# Dispute Resolution

## 19.3 Arbitration

If a Dispute cannot be settled by mutual discussion within thirty (30) Days after the commencement of such discussions under Section 19.1 and either:

- (a) The Parties agree in writing to refer the Dispute to arbitration rather than to the Expert Panel, or
- (b) There was fraud or manifest error in connection with the decision of the Expert Panel,

then either Party may submit such Dispute to arbitration in [●] in accordance with the arbitration rules of the United Nations Commission on International Trade Law (UNICTRAL) for the time being in force, which rules are deemed to be incorporated by reference in this Agreement. The arbitration proceedings shall be conducted in the English language. The Parties agree that the arbitrators may apply equitable principles if they consider their application to particular matters to be consistent with the spirit of this Agreement and the underlying intent of the Parties.

# General Provisions

## 21.4.1 Confidentiality

Each Party shall hold in strict confidence from any other person all documents and information concerning any other Party or any of its Affiliates furnished to it or its advisors, consultants, contractors, or agents by the other Party in connection with this Agreement or the transactions contemplated hereby ("**Confidential Information**"), unless the information or that Party is:

- (a) Required to disclose any such information by judicial or administrative process (including in connection with obtaining from Government Authorities the necessary approvals of this Agreement and the transactions contemplated by it) or by other Legal Requirements including the obligation to submit or publish the Agreement or any of the reports contemplated in Section 9;
- (b) Disclosed to persons providing or proposing to provide financing to Seller; or
- (c) Disclosed in an action or proceeding brought by either Party in pursuit of its rights or in the exercise of its remedies under the Agreement.

Notwithstanding the foregoing, this Section 21.4.1 shall not apply to such documents or information that were (i) previously known by the Party receiving such documents or information, (ii) in the public domain (either prior to or after the furnishing of such documents or information hereunder) through no fault of such receiving Party, or (iii) later acquired by such receiving Party from another source so long as such receiving Party is not aware that such source is under an obligation to the other Party to keep such documents and information confidential.

## 21.4.2 Required Disclosure

Any Party required by any Legal Requirement or in the course of administrative or judicial proceedings or in accordance with required disclosures of publicly-listed companies by registered securities exchanges to disclose information that is otherwise required to be maintained in confidence pursuant to Section 21.4.1, may disclose such information notwithstanding the provisions of Section 21.4.1; *provided, however*, that the Party making the disclosure shall give prior notice to the other Party of the

# General Provisions

## 21.6 Severability

The validity of the remaining articles, clauses, provisions, terms, and parts of this Agreement shall not be affected by a court, administrative board, or other proceeding of competent jurisdiction deciding that an article, section, provision, term, or part of this Agreement is illegal, unenforceable, in conflict with any law, or contrary to public policy. In such event the Parties hereto shall, by amendment of this Agreement, properly replace such provision by a reasonable new provision or provisions that, as far as legally possible, approximate what the Parties intended by such original provision and the purpose thereof.

## 21.7 Language

This Agreement is being executed in the English language only. All documents, notices, waivers, and all other communications written or otherwise between the Parties in connection with this Agreement shall be in the English language. Any translation of this Agreement or any such communication, if any, shall be for convenience only and shall not be binding upon the Parties.

# General Provisions

## 21.10 Amendments

No amendments or modifications of this Agreement shall be valid except by written agreement signed by duly authorized representatives of the Parties. Minutes of meetings or other informal documents shall not constitute a written agreement for purposes of the preceding sentence.

## 21.11 Governing Law

This Agreement shall be governed by and interpreted in accordance with the laws of the Republic of the Philippines and shall for all purposes be conclusively deemed to be a Philippine contract.

# Post-Award Amendments

- General Rule: No post-award amendments since contract presumed to include all relevant and material provisions
- Exceptions:
  - Amendments are formal, not material
    - Not increase burden of Government, or
    - Not accord more benefits to the PSP
  - Option to amend, material or formal, is part of terms of reference, justified and consensual (i.e., regardless of PSP, have same right/ privilege)

# Breach of Contract

## Definition:

- failure without legal reason to comply with the terms of a contract
- failure, without legal excuse, to perform any promise which forms the whole or part of the contract

# Breach of Contract: Remedies

1. Specific Performance - performance of the obligation itself
2. Substitute Performance - someone else performs or something else is performed at the expense of the defaulting party
3. Equivalent Performance - damages to preserve the interests of the promisee that may include-
  - a) "expectation interest" – the interest in having the benefit of his bargain by being put in as good a position as he would have been in had the contract been performed
  - b) "reliance interest" - the interest in being reimbursed for loss caused by reliance on the contract by being put in as good a position as he would have been in had the contract not been made
  - c) "restitution interest - the interest in having restored to him any benefit that he has conferred on the other party
4. Rescission/Cancellation
5. Extension of Project Life

# Sample JV Agreement Provisions



# Governing Law

*WHEREAS, in 2014, the City enacted Ordinance No. [●] entitled An Ordinance Governing Joint Ventures Between [●] City and Private Sector Partners, Providing for the Procedures for Identifying Joint Venture Partners, Instituting Accountability Mechanisms, and For Other Purposes (Ordinance); xxx*

# Governing Law/ Procedure

On [●], in accordance with the provisions of the 2013 NEDA JV Guidelines, the Government Entity commenced the procedure for Competitive Challenge by posting and publishing a notice inviting interested parties to submit comparative proposals to undertake the abovementioned activities on the terms and conditions set forth in this Agreement.

Based on the results of the Competitive Challenge, the Private Partner was selected by the Government Entity as having submitted the proposal that is most advantageous to the Government to undertake the Project pursuant to this Agreement.

# Contractual Intent

In entering into this Agreement, the Parties hereby declare and affirm that their primary contractual intent is to enter into a contractual joint venture for the purpose of financing, construction, design, development and operations of a Multi-Purpose Transport Terminal.

All the provisions of this Agreement shall be interpreted to accomplish the foregoing declared contractual intent.

# Scope/ Purpose

1. This JVA involves the reclamation and horizontal development of [●] hectares more or less, of foreshore and offshore areas of [●] located at the [●] as reflected in the attached Land Allocation Plan.
2. The land use development of the Project shall include mixed-use, office, commercial/residential districts, commercial development, institutional centers, public use and other related uses in accordance with the Master Development Plan.

# Contributions

[●] shall assign its rights, obligations, functions and powers to the Service Contract to the JV Partner for the purpose of implementation of this Contractual JV and the development, construction, operation, management and maintenance of the Hydropower Project.

The value of the Service Contract, as determined by an independent third party appraiser, shall be considered as [●] contribution to the Joint Venture and shall be the basis of determining [●] proportionate share in the Joint Venture.

# Contributions

The Government Entity shall contribute the following to the JV:

Contributions	Due Date	Value
Cash		
Non-Cash		
1. [Enumerate]		
2. [Enumerate]		
Total		

# Contributions (Incorporated)

The Parties shall subscribe in cash to the authorized capital stock of the JVC such that the subscribed and paid-up capital of the JVC shall be as follows:

[●], Amount Subscribed [●], Amount Paid-up [●], % [●]

[●], Amount Subscribed [●], Amount Paid-up [●], % [●]

The subscription payment of [●] shall be advanced at no interest by [●] and shall be offset against the Concession Fee equivalent to [●] of annual gross revenue of the JVC until fully paid.

# Sharing

[●] shall be entitled to a share in the *profits/ gross revenues/ net proceeds* equivalent to [●] percent ([●] %) while the JV Partner shall be entitled to the remaining [●] percent ([●]%).



# Sharing

Pursuant to the Land Allocation Plan, the reclaimed area, inclusive of the area that would be devoted for roads and open space, shall be distributed as follows:

Partner	Area Allocated	Percentage
Government	[•] inclusive of roads and open spaces	[•]
Private Sector	[•]	[•]
Total Reclaimed Area	[•]	100%

# Responsibilities of Parties

## Obligations and Responsibilities of PSP

1. Provide the Project Cost;
2. Cause the preparation of all necessary documents for the pre-construction stage such as master development and the engineering design;
3. Provide management, technology, equipment, machinery, manpower and personnel expertise and other support facilities;
4. Cause the preparation and submission of development plans, project studies and detailed engineering studies and other requirements for approval and compliance to concerned government regulatory agencies; and
5. Assume all tax liabilities that may be levied by the [●].

# Responsibilities of Parties

## **Obligations and Responsibilities of Government:**

1. Assist the PSP in the sourcing of water, power and telecommunications facilities;
2. Provide all road right-of-way to the [●] and other easement rights necessary to perform the Project, cost to be paid by the PSP;
3. Issue a resolution adopting the Master Plan/Design of the Project; and
4. Secure and obtain all government permits, licenses and authorizations as well as compliance certificate from the Department of Environment and Natural Resources with regard to the submission of the Environment Impact Assessment Report and other requirements by government regulatory agencies for the smooth implementation of the Project.

# Incorporation

The Parties agree to cause the establishment of a Philippine corporation called [●] (hereinafter referred to as the "JVC") with principal office in [●] and with an authorized capital stock of [●] divided into [●] shares with a par value of [●] per share.

# Concession

Upon incorporation, [●] and the [●] will execute a Concession Agreement for a period of [●] years (the “Concession Period”), renewable at any time prior to Expiration Date for another [●]years, pursuant to which: [●]

*Or*

The [●] shall grant an exclusive concession to the [●] for the construction, development, and operation of the [●]

# Governance

The JV shall be managed by a Governing Board composed of seven (7) members appointed annually. The PSP shall nominate five (5) members, and the City shall nominate two (2) members.

The Governing Board shall set the policies for the implementation and operation of the Project. A Project Manager shall be appointed or designated by the Governing Board.

In the event a member dies, resigns or is otherwise removed from office prior to the fulfillment of his term, the Party which nominated the member who dies, resigned, or was removed from office will nominate a replacement. The Parties shall then cause the election of such nominee as replacement for the member who died, resigned or was removed from office.

The Governing Board shall provide policy directions for the overall management and operations of the JV in accordance with this Agreement. A majority of the Board shall constitute a quorum to do business.

# Other Clauses/ Sections

# Material Adverse Government Action

## *Definition*

- MAGA means any national government agency action which has a material adverse effect on any of the rights and privileges of, or on the enjoyment and/or exercise thereof by, the Concessionaire under this Concession Agreement, or which has a material adverse effect on the Construction Schedule or the Concessionaire's ability to comply with its financial and/or other contractual obligations, including but not limited to any of the following:
  - a Change in Law;
  - the imposition of any new national or local tax, or change in maximum rate of any national or local tax, in either instance except value-added tax.



# Material Adverse Government Action

## *Consequences*

- Notice
- Burden of Proof on PSP
- PSP excused from performance
- PSP compensated depending on breach of threshold (toll rate adjustments, extension of contract life, rescheduling of milestones, damages, others)
- Negotiations

# Performance Undertaking

This shall refer to an undertaking of a department, bureau, office, commission, authority, agency, GOCC, or LGU in assuming responsibility for the performance of the Agency's/LGU's obligations under the contractual arrangement including the payment of monetary obligations, in case of default. These undertakings may be subject to payment of risk premium to the Government or LGU, or any other authorized agency.

# Contingent Liability

## *2 Categories*

1. Direct contractual obligations: explicitly identified in the PPP Agreement or Gov't guarantee
2. Implied obligations: Gov't as implied guarantor

# Contingent Liability

## *Types*

1. Minimum revenue guarantees in toll roads
2. Fuel price support for power projects
3. Force majeure guarantees for uninsurable events
4. Liquidated Damages
5. Gov't Loan Guarantees
6. Gov't commodity support payments

Thank you.

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