

Creating sustainable services through domestic private sector participation

Structuring Private-Sector Participation (PSP) Contracts for Small Scale Water Projects

Victoria Rigby Delmon

May 2014

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Abbreviations and Acronyms

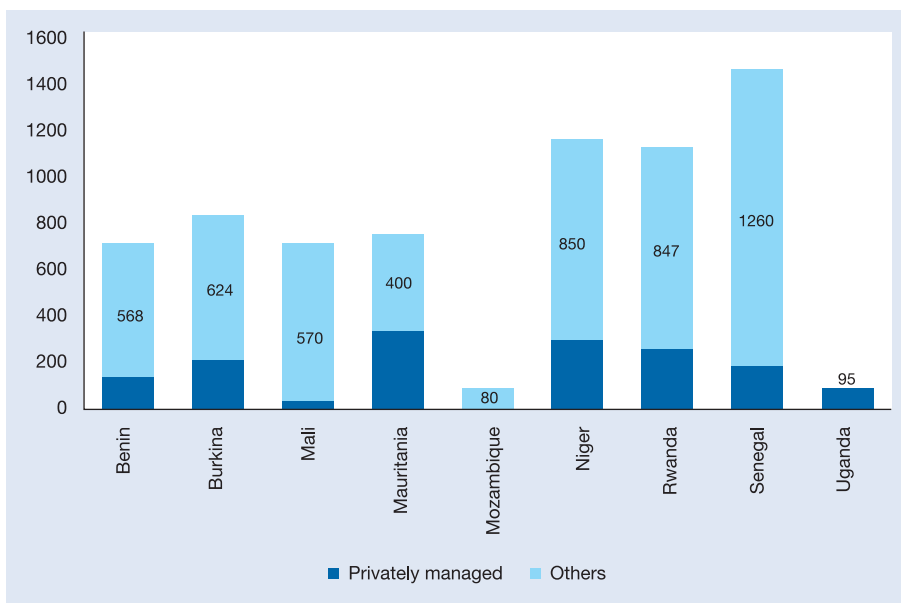
AFDB	African Development Bank
IFI	International Finance Institution
PPPIRC	World Bank PPP in Infrastructure Resource Center for Contracts, Laws and Regulation
Operator	A private operator of a water scheme
PFI	Private Finance Initiative
PPP	Public Private Partnerships
PSP	Private Sector Participation
PSP Contract	A contract relating to private sector participation in the water sector
Review	The team's review of over 20 PSP contracts, as described in the Introduction
RFP	Request for proposals
RFQ	Request for prequalification
WBG	World Bank Group
WSP	Water and Sanitation Program

Introduction

Why use a Private-Sector Participation (PSP) contract?

Water authorities in developing countries face the daunting challenge of meeting water service delivery obligations to remote rural, peri-urban, and small town communities. Thus, even in countries with a decentralized water sector, there has been an increasing trend in the last few years for local communities to enter into arrangements with private operators for provision of small-scale water supply services. Today it is well recognized that these private operators may be better placed to provide water delivery services to remote communities because they are located closer and are potentially more accountable to the users. Private local operators may also have the possibility to attract additional sources of finance, such as commercial finance.

FIGURE 1: PERCENTAGE OF PRIVATELY MANAGED SMALL SCALE SCHEMES IN A SAMPLE OF AFRICAN COUNTRIES



Source: WSP 2013

What is this toolkit used for?

The purpose of this toolkit is to provide guidance to water authorities who intend to contract private operators and sector professionals assisting such authorities, on how to structure a contract and bidding documents for private sector participation (“PSP contract”) in small scale water projects. The toolkit focuses on small scale water schemes typically serving a settlement with a population from 1,000 to 10,000—with sufficient density to warrant a network solution, but which do not generate enough scale for integration in a centralized network management. The management and regulation of these schemes are typically left

CHAPTER SUMMARY

This chapter introduces the reader to PSP contracts and ways to navigate through the toolkit.

- *Why use a Private-Sector Participation (PSP) contract?*
- *What is this toolkit used for?*
- *How do I use this toolkit?*
- *Where do the examples and key considerations in this toolkit come from?*

to less well resourced local actors and institutions, requiring more explicit and simplified guidance.

The toolkit is part of a series of standard operating procedures (SOPs) that are being developed by WSP in respect of PSP in small water schemes. Other planned volumes will look at planning and due diligence issues for PSPs in more detail, including development of a financial model, determining whether a project provides value for money, looking at the readiness of the public sector to enter into PSP contracts.

This toolkit is focused on PSP contracts for small scale projects. For a more general discussion of private sector participation in the water sector go to the World Bank Toolkit “Approaches to Private Participation in Water Services” at:

http://rru.worldbank.org/Documents/Toolkits/Water/Water_Full.pdf.

Licensing and regulation of existing informal private operators is not within the scope of this toolkit.

How do I use this toolkit?

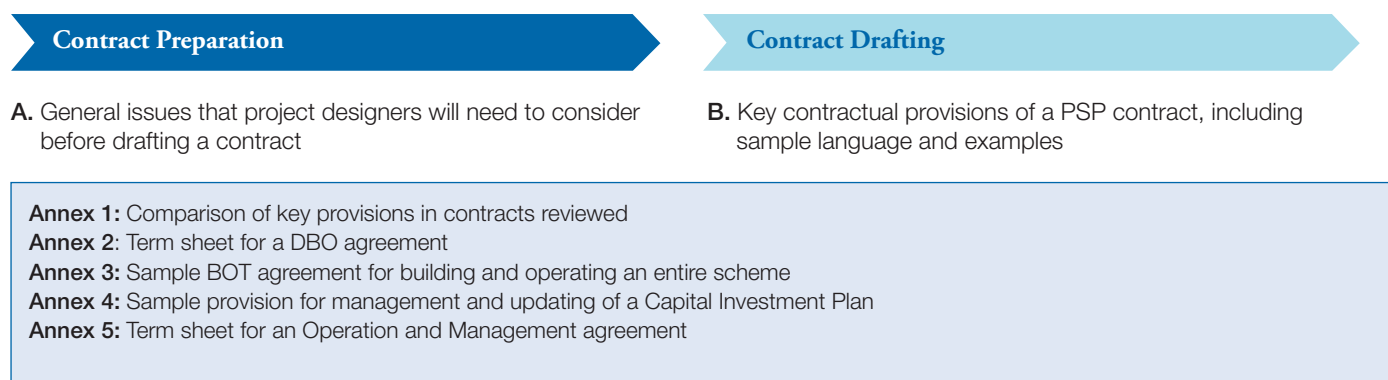
This toolkit is structured around general issues to consider prior to drafting, key contractual provisions, and annexes that provide supplemental information.

Where do the examples and key considerations in this toolkit come from?

The toolkit was developed based on:

- A review of over 20 PSP contracts developed under projects supported by the World Bank’s Water and Sanitation Program and/or the World Bank Group in Bangladesh, Benin, Burkina Faso, Kenya, India, Madagascar, Mali, Mozambique, Niger, Peru, Philippines, Rwanda, Uganda, Vietnam (see Annex 1), and international practice in larger scale project. A number of the small scale contracts reviewed can be found on the World Bank PPP in Infrastructure Resource Center for Contracts, Law and Regulation (PPPIRC) at <http://ppp.worldbank.org/public-private-partnership/ppp-sector/water-sanitation/small-water-providers>.
- Findings of a WSP survey that looked at PSP in rural water supply in several African countries and feedback from practitioners in the field – http://www.wsp.org/wsp/sites/wsp.org/files/publications/PPPs_for_small_piped_water_schemes_English.pdf.
- Reports on arrangements for PPPs in rural water sanitation supply in Benin and Senegal
- Report entitled “Professionalized Rural Service Areas – A Strategy for Improving Water Supplies” produced by the WSP and AFDB

FIGURE 2: STRUCTURE OF THE TOOLKIT



I. Issues to Consider Prior to Drafting the Bidding Documents

1.1 Process for developing a PSP

Before embarking on a PSP or PPP project it is important for government and the relevant contracting authority to examine the different options for proceeding with the project, including traditional public service options, and look at the enabling environment for the project and the political economy of introducing the private sector into the water sector, the capacity and appetite of the private sector to be involved in the project, the maturity of the market for PSP, the appetite and capacity of the local financial market and the financial viability and value for money of the project. It will also be important to engage with stakeholders including the public to ensure that the objectives of the project are well understood and to nurture social acceptance of the project. If these issues are not taken seriously and managed then a project may fail before it is launched.

A process map setting out key stages in developing and implementing a PPP project is set out in Figure 3. As can be seen, there are a number of steps and decisions that need to be taken before a tender for a project is launched, and the cost and time for these steps and the preparation and studies involved needs to be budgeted and allowed for. Once these steps have been taken then preparation of bidding documents and carrying out an effective competitive bidding process is important for transparency, to attract credible operators and to achieve sustainable and cost effective projects and sufficient time and resources should be set aside to ensure that bid documents are developed.

There are a number of steps that the government needs to take before launching a project, and a number of these are discussed in this Part I. For further discussion on developing a business case, including a financial model, looking at value for money and the underlying enabling environment, please refer to the WSP SOP series. This toolkit focuses on the design of the contract and bidding documents, as well as some key legal design issues.

1.2 Due Diligence

Overview

Before embarking on a project, the development team should carry out technical, financial and legal due diligence to assess the feasibility of the project's long-term success.

Technical Due Diligence

Technical due diligence assesses the practical viability of the project, looking at issues including:

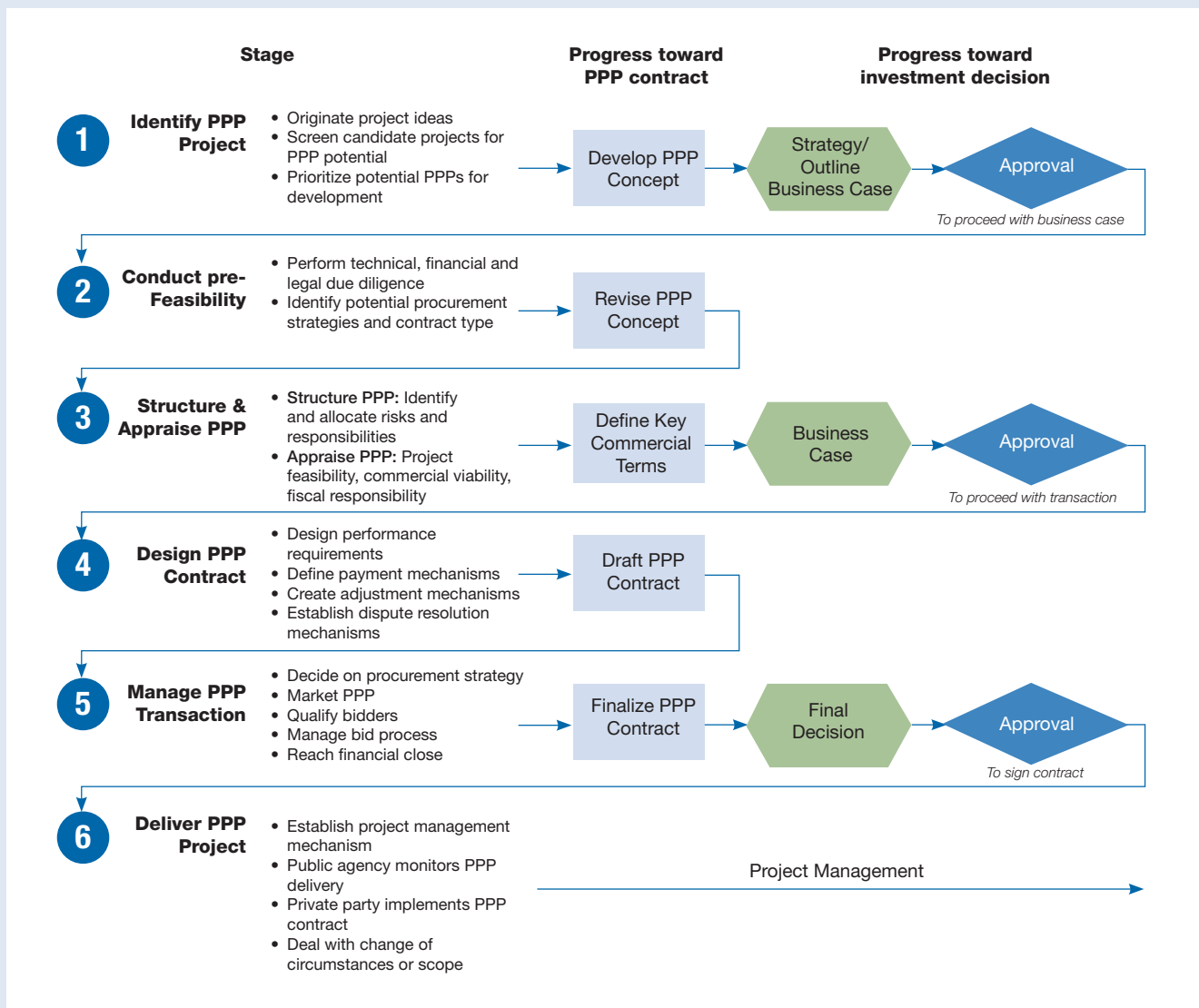
- Raw water availability and quality
- Identification of site location and site boundary (e.g., for water source, borehole and equipment such as water treatment plant)

CHAPTER SUMMARY

This chapter introduces the reader to issues that should be considered and addressed prior to drafting a PSP contract.

- *Due Diligence*
- *Form of Contract*
- *Clustering of Projects*
- *Procurement of Operator – Competitive Bidding*
- *Clarity of Contractual Provisions and Implied Terms*
- *Contract Management*

FIGURE 3: TYPICAL PPP PROCESS (ADAPTED EXTRACT FROM PPP REFERENCE GUIDE)



- Existing assets and investment requirements (including meters)
- Competing water supply sources
- Demand/consumption assumptions (ensure that project is not over or under-designed)
- Power supply options
- Availability of parts and equipment required for scheme
- Environmental and safeguards issues—will the project have an adverse impact on the environment or residents? If so, an environmental and social safeguards assessment may be required to minimize the adverse impact of the

project, where necessary apply mitigation measures. If the project is to receive donor or commercial financing, then it may need to follow safeguards policies—such as the Equator Principles (go to <http://www.equator-principles.com/> for more information). For instance, IFC Performance Standards on Environmental and Social Sustainability (http://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/ifc+sustainability/publications/publications_handbook_pps) are based on Equator Principles. World Bank has a number of environmental and safeguards

policies (<http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTSAFE/POL/0,,menuPK:584441~pagePK:64168427~piPK:64168435~theSitePK:584435,00.html>)

- Tariffs/ability and willingness to pay and expected levels of service
- Readiness and capacity of the public sector to enter into a PSP arrangement, including the political context
- Level of sector reform
- Capacity of the local private sector and maturity of the local PSP market
- Conflict of interest—transparency on potential operators and check that they are not linked to water authority (often expertise is limited in rural setting)
- Background check on operators (for corruption, bankruptcy, litigation etc)

Financial Due Diligence

Financial due diligence assesses the financial viability of the project and will assist the authority to determine whether the project is self sustaining or will need subsidy and whether it is feasible to pass revenue risk to the operator, looking at issues including:

- The financial projections for the project—looking at sources of revenue and funds and cost of operations—will revenues cover costs or will there need to be a subsidy, whether general or targeted?
- A financial model (looking at costs and revenues as well as likely returns that the private operator will expect and risk premia that the private operator is likely to include in their bid to take into account country, sector, enabling environment risk).

- The value for money of the project comparing it to the cost over the project period of using traditional public procurement.
- The appetite of the local financial markets.
- Technical and financial due diligence will be considered in more detail in the SOP on “PPP” being developed by WSP.

Legal Due Diligence

Legal due diligence looks at the legal and regulatory feasibility of the project. Key issues to check are listed in Checklist 1.

Key considerations

Project planning and capital investment requirements and performance standards should focus on realistic assumptions, such as actual water consumption in the locality of the project, to ensure that projects are designed to the appropriate specifications. If a project is over-designed, then it is likely to be more expensive to build and operate, resulting in less affordable water services. Higher water tariffs may lead to weak take-up by users and ultimately, project failure.

For example, in Benin, initial PSP projects were designed solely based on the 40 litres per person per day World Health Organization (WHO) consumption standard. However, because water consumption in these countries are lower than the WHO standard—actual consumption ranges between 3 and 25 litres per person per day—the projects have not been used to their full capacity.

CHECKLIST 1: LEGAL DUE DILIGENCE

- Who should be the contracting parties?
- Does the community or other public entity that is proposing the scheme have legal responsibility to deliver the service and have the right to delegate service obligations to a third party?
- Does it have exclusive obligation and right of service provision and can it grant exclusivity to an operator?
- Who owns the assets and land?
- Who has the right to apply for a water permit?
- Does a third party need to be a party to the contract or provide approval before the project can proceed? If so, are there specific legal implications of multi-party contracts in the jurisdiction?

- Are all of the parties legal entities that can enter into legally binding agreements and be sued?
- Is it necessary for a private operator to be a registered company, or is it sufficient for it to be an individual?
- What permits and consents are required to be entered into for the project?
- Which entity holds the license to abstract water / has the right to apply for such a license?
- Is this the community, local utility, other agency or a private individual?
- Can the operator apply for a permit on behalf of such an entity?
- Are there competing riparian rights to the source?
- Are there legal obligations regarding water quality standards or other service standards specified by law that need to be followed?
- Are the assets and lands owned by the public entity or by a third party—if a third party, how will the operator be given access to the assets rights over the lands?
- Are there are restrictions on transfer of rights over land to the operator?
- Is it clear who currently holds the land or will this be liable to challenge?
- Is there a mechanism to grant security over the right of the land to lenders?
- Does the country follow a civil or common law jurisdiction?
- Are there any legal terms that will be implied into a contract? This is typically the case in civil law jurisdictions?
- Do the parties have full freedom to determine the contractual terms? Again typically in civil law countries this may be limited by law.
- What formal requirements are required to create a “contract”? Typically in common law countries there needs to be evidence of an offer and acceptance of that offer and “consideration” being furnished (could be a payment or a contribution in kind) by the relevant party. In civil law countries a contract may require to be notarized before it is deemed enforceable.
- If lenders are likely to seek to take security over the project contract itself, over land and over any bank account into which revenues are deposited, are there legal restrictions on taking security over such assets?
- Are inhabitants of a community obliged to connect to water and sewerage infrastructure by law?
- Does the authority have a right to cut off the supply of delinquent customers (relevant if it has minimum revenue connection responsibilities) and powers to take action against illegal connection (and whether it can delegate such powers to an operator)
- Is there a PPP law, public procurement law or public finance management law setting out legal requirements for process of bidding to be followed or requiring a local authority to obtain approvals at the national level if and when it accepts contingent or direct liabilities
- Are there existing operators, contractors or existing employees that are providing any part of the service?
- If so, will their contracts be terminated prior to the PSP contract? Are there legal obligations to existing employees? Are there any legal requirements regarding the terms and conditions of employment of existing employees and/or operator employees?

- Is there a tariff policy that is to be followed in the country?
 - Has this been taken into account in the assumptions of proposed tariffs?
 - Is there a third party regulator that will be setting tariffs?
- What if any environmental framework applies, such as specific pollution laws?
 - Does the legal responsibility vest in the authority or the operator?
 - Is it possible for one party to transfer or indemnify another party for such liabilities and responsibilities?
 - Is there a requirement for an environmental and safeguards survey and plan (if there is IFI involvement then may need to follow IFI environmental and safeguards policies (see reference to safeguards above)).
- Are there taxes, abstraction fees, regulatory fees that are payable in relation to the scheme and by whom?
- General enabling environment issues such as bankruptcy, expropriation, dispute resolution mechanisms, company law, and foreign investment law. For more information on these issues go to PPP in Infrastructure Resource Center website – www.worldbank.org/ppp

1.3 Form of Contract

Overview

The form of a PSP contract will dictate the level of risk each involved party takes on. As such, the following factors should be considered in choosing the contract form:

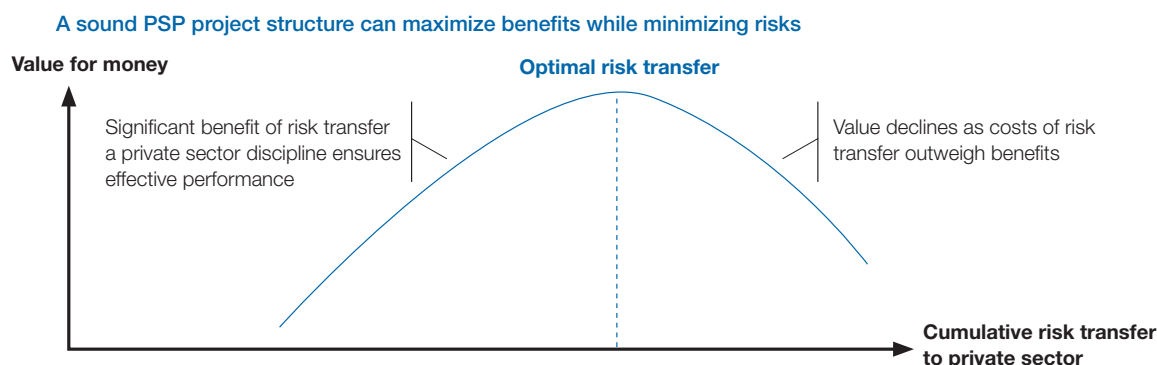
- The scope of functions to be undertaken by the operator,
- The source of payment of the operator,
- The source of revenues,
- The ability of the customers to pay,
- Whether there are contractual forms prescribed by law
- Whether the legal system is common or civil law
- Whether operator is to be providing financing (lenders will be keen for operator to have control over the project and be subject to minimum interference from authority).

In Benin, for example, legislation requires the communes (districts) to construct the water infrastructure and to provide the service and also requires it to delegate its service provision functions to private or community operators. The General Directorate of Water in Benin has developed a guide for the communes to develop water services in rural areas based on these requirements, including a set of short model agreements to be used for this purpose.

Key considerations

When forming a contract, several questions should be considered:

- Does this project involve use of existing assets, new build, or both?
- What functions will the operator be providing? Operation and maintenance? Rehabilitation/expansion/new build and financing requirements?
- Will users be paying for water and will operator be relying on tariffs for its revenue? If so, will tariffs/revenues recover operator's costs? Will some form of subsidy be required?
- Is there a model form of contract prescribed or recommended by law or a government agency in the country? If so, is it clear and well drafted? If not, is it possible to amend it/influence how it is drafted?
- Are there legal restrictions on the form of contract/risks that can be transferred to the private sector? Image 3 shows that in every PSP structure there is an optimal risk transfer that can maximize benefits while minimizing risks (and that the point at which this optimal risk transfer is reached will vary depending on the risk profile of the project). If the contract is not balanced, then operators when bidding will add a risk premium to mitigate the risks and bids will tend to be high.

FIGURE 4: A SOUND PSP PROJECT STRUCTURE CAN MAXIMIZE BENEFITS WHILE MINIMIZING RISKS.**BOX 1: COMMON LAW VS. CIVIL LAW**

Common law jurisdictions have the principle of freedom of contract - which means that generally parties to a contract are free to determine the details of their contractual relationship.

Civil law is more prescriptive and often there are requirements in law governing rights and obligations of parties, the form of contract to be used or how changes of circumstance should be managed. If this is the case, then the parties to the contract need to be made aware of these obligations, either by making specific reference to the legal provisions or by replicating them in the contract.

For instance, Jurisdictions that follow the Code Napoleon (such as Benin, Mali, Niger) typically have the legal concept of “economic equilibrium” for delegated contracts whereby the parties are to be put in the economic position that was anticipated at the commencement of the contract by the administrative courts. The doctrine typically applies to increases in costs that could not be foreseen at the time of contracting, such as a financial crisis that results in lower demand or a change in raw water quality that would require additional treatment. It could also apply to increased costs due to actions of the authority that were unforeseen and which were not dealt with elsewhere in the contract.

What the team found

Contractual arrangements for small-scale water supply PSP projects reviewed fell under four main categories: (a) management contract, (b) affermage contracts, (c) leases and (d) Design-Build-Operate (DBO) agreements, the majority falling under categories (a) and (b). None included long-term financing obligations on the operator. Refer to Figure 3.

For projects involving use of existing assets (no new build) the main form of contracts are...

Management Contract: The Operator manages assets and any existing staff in return for a fee (there might be some performance incentives added in form of bonus or penalty). In turn the authority may raise revenue through tariffs or from public budget. The operator has limited repair and renewal obligations and so the contracts tend to be for a short period of time (from 1 to 5 years).

Operation and Maintenance (O&M) Contract: The Operator operates assets in return for a fee (there might be some performance incentives added in form of bonus or penalty). The operator typically has greater control over operations than under a management contract and may also bring in his own staff. The operating fees are usually paid by the authority. In turn the authority may raise revenue through tariffs or from public budget. The operator has limited repair and renewal obligations (although may be more extensive than for management contract) and so the contracts tend to be for a medium period of time (5-10 years).

Affermage Contract: Used in civil law jurisdictions and is similar to a lease. Under an affermage the operator “fermier” has delegated to it the obligation to supply customers with potable water in the delegated area as well as operation and maintenance obligations, and a limited obligation to repair and replace (typically only minor parts). Revenue comes from tariffs and the operator’s fee is paid out of revenues. Any revenues collected above the operator’s fee are paid to the authority for investment in the scheme. The authority is owner of the scheme and is responsible for major repairs, renewal and expansion. Affermage contracts tend to be for a medium period of time (from 3 to 10 years).

Lease Contract: Contract under which the operator is granted the right to exploit the assets for a fixed period. It is usually for a medium period (5-10 years) and the operator carries more extensive repair and renewal obligations. The operator may also be required to make capital investments. The operator typically bears extensive revenue risk as it pays a fixed lease fee to the authority out of revenues as well as taking its own fees.

For new build or expansion and rehabilitation projects the main forms of contract that have been used in small-scale projects are...

Lease Contract: See description above. Leases can be used for new build as well as for existing assets

Design-Build-Operate (DBO) Contract: The Operator is required to design and build the project, and deliver the service. The Operator is not required to finance the project as he will typically be paid a lump sum for installation on commissioning of the scheme and then a periodic fee for operations. Responsibility for constructing and operating the system rests with the operator and the cost thereof rests with the authority. DBO contracts typically have longer terms than the affermage and management agreements (construction period + operating period of 6-10 years). The authority typically bears revenue risk. The DBO usually places planning responsibilities on the operator who can propose and then manage capital investments and expansion approved by the authority. The DBO has the advantage that the same party that is designing the scheme will be operating it—and so the risk of design and construction is with the operator as he will have to operate the facility. Hopefully

this will reduce the risk of under or over design and poor construction quality.

Design-Build-Lease (DBL) Contract: The Operator designs and builds a scheme, sells it to the contacting authority, and simultaneously leases it back for a fee (usually for 10 to 30 years) to operate it. On the expiry of the lease the scheme is then transferred back to the authority. It has similar advantages to the DBO mechanism in removing the procurement and risk interfaces of traditional procurement.

Under each of these PSP arrangements, the asset remains in the ownership of the authority/or are transferred to the authority prior to operations, and the responsibility for operations returns to the local authority at the end of the contract period.

The DBO and DBL agreements that were reviewed all involved a design and build contract together with an operations or lease contract that were brought together under a short-form design build operate or lease that annexed the two documents.

Other options used extensively elsewhere in the water sector but which have not been prevalent in small-scale systems are **Build-Operate-Transfer (BOT) and Concession Agreements** where the operator typically provides financing and builds an asset. The choice of contractual arrangement in small scale projects is influenced by the limited opportunities for the private sector to raise finance and the ability of the local community to pay. Refer to Table 2 for the types of contracts and associated risk.

Under a **Build-Operate-Transfer (BOT)** the operator designs, builds finances and operates a system for the duration of the contract. BOTs are often used in the water sector for bulk water supply or wastewater treatment plants. The operator owns the asset until termination when the new asset transfers it to the authority. The operator is typically remunerated through a volume (produced/treated) based fee paid by the authority.

In a concession agreement the operator is granted the right to develop and exploit assets for the duration of the

contract, and sometimes pays the authority a concession fee in return. This may involve the use of existing assets and/or the development of new assets. The operator is remunerated from tariffs and typically takes end user demand and payment risk. The team came across only one example of a concession in the rural sector (in Madagascar, although it was called a “delegation contract”).

The limited use of concessions in small scale projects may be due in part to the significant risk transfer to the operator over a long period and the difficulties that the small scale operators have in raising finance for significant periods. If sources of longer term funding could be accessed by small scale operators, concessions might be a useful option as the majority of operating risks in a project is passed for the duration of the contract to the operator. This toolkit makes some recommendations on how to move in appropriate cases towards BOT and concession arrangements.

A sample BOT/concession agreement can be found in Annex 3.

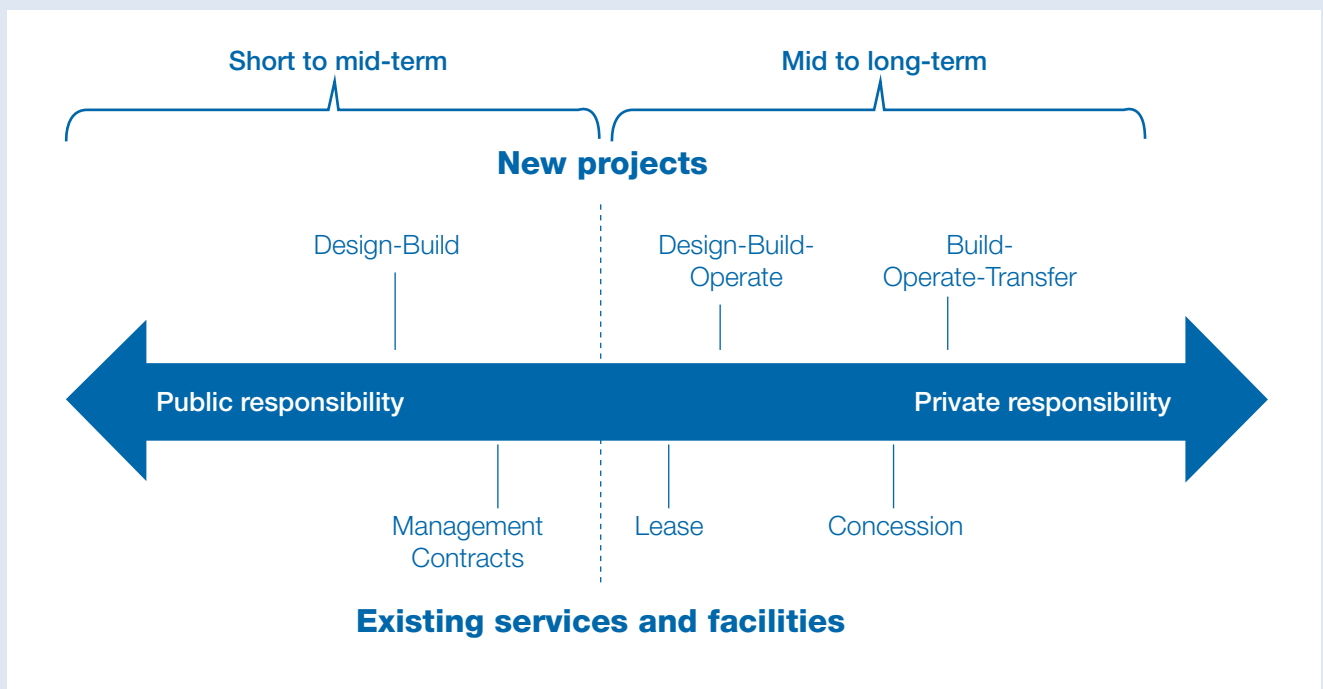
Advantages of BOT and concession agreements:

- In a BOT or concession the operator is responsible for the design and construction and lives with the consequences of under or over-designing the scheme (as opposed to projects where construction and operations are separated into different contracts)
- Responsibilities and risks are bundled into one accountability structure
- Concessionaire taking risk of poor interface between design and construction
- Costs of construction and financing are with the operator. Public budget is not tied up on investments.

Disadvantages of BOT and concession agreements:

- The operator’s financing costs are typically significantly higher than those of the public sector
- It is typically difficult for small-scale operators to raise finance.

FIGURE 5: THE SHARE OF PRIVATE SECTOR RESPONSIBILITY IN SMALL SCALE SUPPLY PSP CONTRACTS FALL ALONG A SPECTRUM.



In a nutshell

Based on PSP contracts reviewed, the typical characteristics of contracts are listed in Table 1 below.

TABLE 1: TYPICAL CHARACTERISTICS OF CONTRACTS REVIEWED

	Management / O&M Contracts	Affermage Contracts	Lease Contracts	Design-Build-Operate / Design-Build-Lease
Description	Public party delegates management of system to operator	Public party delegates service provision to operator	Public party leases asset to operator to operate the service	Operator agrees to design build and operate a system
New / Existing Asset	Existing asset	Existing asset	Existing asset + new build/ rehabilitation	New build or rehabilitation
Scope of Operator	Manage the system (limited repair) (takes risk of cost of operation)	Operate and maintain the system (limited repair/renewal)	Operate and maintain the system (limited repair)(takes risk of cost of operation)	Design build and operate (+ repair/renew)
Ownership	Public party	Public party	Public party	Operator until paid for capital investment, then public party
Fee	Public party pays fee to operator	Operator pays public party % of revenues towards capital expenditure/operator retains fee (linked to revenue generated) and pays rest to public party	Operator pays to public party a fixed fee	Public party pays a fee on completion of the asset and then an operating fee
Revenue Source	Tariffs or public budget	Tariffs	Tariffs	Tariffs or public budget
Revenue Risk	Public party	Shared between parties	Operator	Operator
Duration	1 – 10 years	2-10 years	5-10 years	7-20 years
Investment Obligations	None	None	Some	Some
Bidding Parameter	Lowest management fee	Highest percentage of revenues to public party/ lowest operator fee	Highest lease fee. This increases lessee risk if assumptions on revenue were too optimistic or if lessor fails to expand system	Lowest fee for construction + lowest fee for operations
Civil / Common Law	Common law	Civil law	Common law	Common law
Countries where used	Uganda, Kenya and Punjab, India	Benin, Mali, Niger, Peru, Burkina Faso	Vietnam	Bangladesh, Vietnam, Uganda
Key Issues	Limited risk taken by operator Limited incentives for operator to increase revenues Revenue risk with Grantor	Need good auditing as there is information asymmetry. Need to set clear allocation of risk on repairs and renewals	Taking revenue risk and obligation to pay lessor fixed fee can cause difficulties if revenues found to be deficient	Construction by operator and repaid construction fee on commissioning. Operation risk on operator

1.4 Clustering of Projects

Overview

A challenge facing smaller scale projects is to achieve economies of scale or attract experienced water operators, particularly in more remote areas, for a stand-alone project. Standalone projects may not always be affordable and may not be attractive to investors.

Future PSP projects could consider clustering (aggregation) in order to attract more experienced operators and achieve economies of scale (both in respect of capital investment and operating costs) as well as creating a larger asset base for which to attract commercial financing. Clustering (aggregation) can be used as a mechanism to bid out a number of separate schemes using similar bidding documents and the same bidding procedure and/or through implementing a number of schemes under one contract. Clustering needs to be optimal (meaning not so big or dispersed as to make the project unmanageable).

Key considerations

- Are there a number of potential schemes located in the same geographic area?
- Is there a commercial logic to clustering the implementation of these projects (i.e., economies of scale and efficiencies in operations to be achieved)?
- Who is the authority (is there one or more than one body responsible for service delivery)? Is the legal basis on which it is contracting well understood?
- Will clustering just be for the purpose of bidding schemes out or to implement several schemes under one contract?
- Will the clustering be just clustering in name, and each of the communities a party to the contract and a counterpart for the operator to work with? Or will they all be parties but nominate one party to be the day to day counterpart and entity to which the operator reports? Will the communities form a unit which in turn contracts with the operator, so that the operator has one body with whom it is contracting?
- Can the operator pool revenues from users or does it need to keep them separate? Can revenues from a different scheme support another scheme in the cluster?
- How will investments be prioritized between schemes?

- Can assets of different schemes and communities be pooled? If so, are there limitations on this? Is there already a functioning supply scheme for one community that could serve others?
- How will tariffs be set in respect of the clustered schemes (especially if there are a number of authorities involved)?
- Are there legal restrictions on the form of contract/rights and risks that can be transferred to the private sector?
- What technical and financial capacity will be required from bidders for multiple schemes? Will they need to show more expertise and financial capacity than for single schemes? Will bidders be permitted to bid for more than one package? If so, will there be discounting if awarded more than one package?

What the team found

The team only found in the Review examples of bundling or clustering a number of smaller schemes within one geographic area for tendering purposes rather than implementation of a number of schemes under one project. In Niger, 55 schemes were clustered for the purpose of developing procurement documents and carrying out procurement processes. Clustering clearly reduced transaction costs for the contracting authorities. However, bidders were required to prepare one bid per water system so there would likely have been further savings if the schemes had been bundled into a smaller number of bid packages so that bidders were bidding, and authority was reviewing bids, on fewer separate packages. In the end 18 operators were selected to operate 55 small water systems so there were some cases of operators managing multiple schemes, but each scheme had its own contract.

In the Niger case, bidders could bid for one or more schemes—so clustering was in preparation of bid documents and the bidding process rather than the implementation of projects. This is more straightforward than clustering of schemes under one contract but economies of scale will only be achieved in implementation of projects if a bidder wins several of the bids. WSP hopes to find examples of clustering of implementation of project in due course and will publish these at www.worldbank.org/ppp.



TIP: The below wording only relates to clustering for bidding purposes. It could be adapted, where schemes were to be packaged into one contract, to specify “He will be selected, for a package of schemes [as set out in paragraph XYZ] and an operator can be selected to operate a number of packages of schemes.”

BOX 2: SAMPLE REQUEST FOR PROPOSALS LANGUAGE

Wording used in a Niger Request for Proposals (translated from French)

“An Operator of the service, whether an individual or a private company, is responsible for the technical, commercial and financial operation of the service. He will be selected, scheme by scheme, and an operator can even be selected to operate a number of schemes.”

1.5 Procurement of the Operator: Competitive Bidding

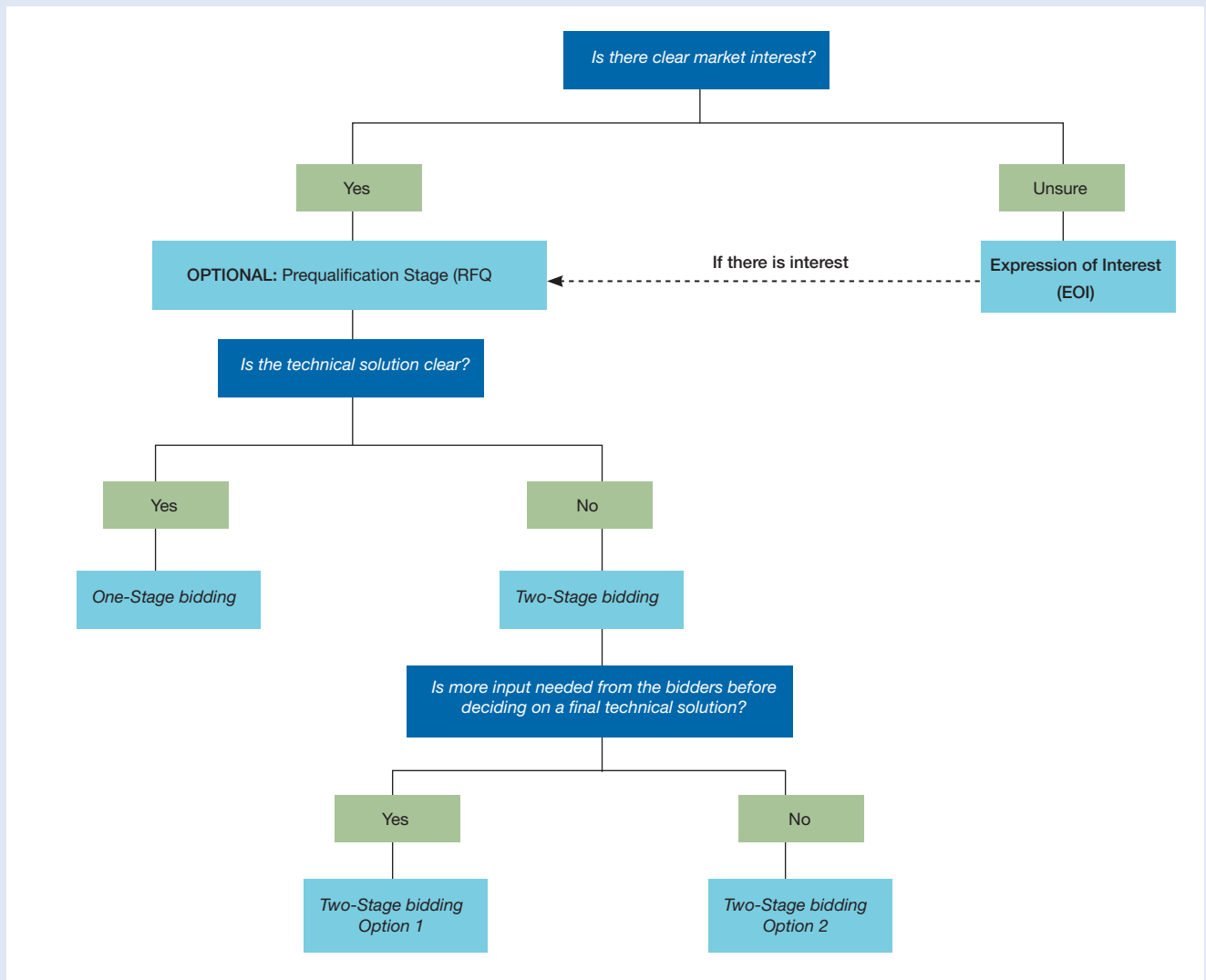
Overview

The authority will need to consider how it is going to procure the operator for the project. It is recommended that procurement be competitive. For rural projects, if no operator financing is involved, this process should be kept as simple as possible. Similar to traditional public procurement, it is important for bidders to be assured that the process is transparent, clear and fair before they spend resources on preparing a bid. This is also important for the authority as the procurement process seeks to achieve value for money for the project being undertaken.

Key considerations

- Is there a public procurement or PPP law that will apply to this project?
- Will procurement requirements or guidance of donor or IFI apply?
- Will alternative bids be permitted (bringing different technical solutions)? This can bring benefits of proposing alternative perhaps more effective solutions but can also be difficult to compare bids. The RFP should clearly state that all bidders’ technical solutions should meet the minimum performance specifications. The bidder is free to provide their lowest cost solution, so long as it meets the criteria outlined in the RFP.
- The authority may consider developing a simple information memorandum (see a template in Annex 6).
- Authority may seek advice from larger utilities on possible suppliers and contractors to advertise the bidding process for the project.
- Consider including a prequalification stage if procuring authority wants only candidates that meet specified criteria to bid (for more complex or larger projects) or where the law requires this. This can help to filter out weak firms with limited relevant expertise or capacity from the process and can also provide an opportunity for authority to prepare a balanced contract after hearing views from the private sector in pre-bid meetings. This process can be lengthy and cumbersome, however, and so may not be appropriate for most small scale projects unless the operator is bringing finance or the technical solution is potentially complex. Consider what the qualification criteria should be (technical or management experience/strong balance sheet) and weightings for criteria.
- Will bidders be organized as consortia/will joint ventures be accepted? If so, consider requiring consortia to indicate how responsibilities will be allocated and determine how to compare experience and references from consortia (e.g., would experience of sub-contractors be taken into account?).

FIGURE 6: HIGH-LEVEL PROCESS FLOW FOR COMMON COMPETITIVE BIDDING OPTIONS



- Are there model bidding documents already mandated/ recommended for such projects in the country?
- What will be the evaluation criteria for the project? (This should be clearly set out in the request for proposals.) Will the evaluation criteria be based on lowest price (having had a pass/fail for the technical bid) or a combination of technical specification and lowest price? If technical specifications are to contribute to the final score, the criteria should be kept simple and the number of parameters limited and may only be appropriate for more complex projects as the evaluation may be

- less objective and more complex than in the pass fail scenario. For price, again this should be kept simple— lowest subsidy, lowest tariff or lowest operator fee. For a DBO contract there will be two price parameters, the cost of construction and the operation costs.
- What is the appropriate time frame for receiving bids?
- If there is only one compliant bidder, will the authority proceed with the project or restart the process? Is there likely to be very limited competition if the authority launches the procurement? The concern with one compliant bid or with direct negotiation is that the

TABLE 2: PROCUREMENT PROCESS OPTIONS

Stage	Description	Evaluation	When Used	Comment
Expression of Interest (EOI)	Authority issues a request for EOI to gauge interest from market	Not usually binding	When it is unclear if there will be market interest or if the law requires it	N/A
Request for Pre-Qualification (RFQ)	Potential bidders seek prequalification by providing details of experience and capacity (technical and financial)	Pass /fail or a point system. This process can also limit the number of prequalified bidders	For larger or more complex projects. If one wants to limit bidding to bidders that demonstrate experience and capacity, if there is a concern that inexperienced bidders may otherwise bid, or if required by law	This can make the bidding process lengthier. The qualification criteria needs to be determined carefully
Request for Proposals (RFP)	One stage bidding (two envelopes)	This can be used with or without EOI. Bidders submit a technical proposal and a financial proposal at the same time in separate envelopes	First, the technical bids are opened and evaluated – usually pass/ fail. Then, financial bids only of technically compliant bids are reviewed. Select usually bid with lowest price/ subsidy/tariff	When the technical solution is clear and the value of the contract is low This is a simple and relatively quick process
	Two stage bidding	Option A A preliminary RFP is issued to bidders requesting preliminary technical bids. Authority reviews technical options and issues final RFP based on preferred option. Technical and financial bids to be submitted based on this.	Final technical bid is often pass/fail. Select usually bid with lowest price/ subsidy/tariff. If there is potential variability amongst bidders that could be valuable to authority, technical bid is scored and weighted and then financial bid is scored and weighted, with final score being sum of these scores.	When technical solution is not clear and authority seeking input from bidders before deciding on final technical solution This is a lengthier process
	Two stage bidding	Option B Request for technical proposals is issued. Proposals are evaluated and scored. Highest technically evaluated bidder is then asked to submit financial proposal.	Evaluation is on technical and financial bid	When technical requirements could be achieved in different ways and authority is looking for best technical solution This can be protracted and difficult negotiation with highest evaluated bidder as have reduced competition through process.



***TIP:** For small-scale projects, it is important to keep the evaluation criteria simple – a pass/fail for the technical bid and then evaluate financial bids of those bidders that have passed the technical criteria on a lowest cost basis. This might not be the best approach in exceptional cases where the project is more complex or where there is significant risk transfer to the private sector (for example in the case of a BOT or concession project), where it may be more appropriate to ask for the best value financial bid taking into account a number of specified evaluation criteria rather than just the lowest cost.*

authority loses its negotiating power if there is only one potential operator in the race. However, it is recognized that where the project is in a remote location that the number of potential bidders is likely to be low. In this case the authority may have little choice but to negotiate with one bidder – it may be able to mitigate the risk by benchmarking the unit costs of equipment to determine if the prices are reasonable.

- Are unsolicited proposals (where a project proponent proposes a project) permitted under law, and if so how are such proposals to be handled? It may be appropriate to promote them in limited circumstances, provided that they can demonstrate economical viability and value for money. If so, consideration will need to be given whether they need to be subject to competitive bidding or are suitable for direct negotiation. The process and treatment may be provided in law. For further discussion on treatment of unsolicited proposals in projects go to www.worldbank.org/ppp.
- Ensure that there is a balanced contract (a contract that places risks on the private sector that it cannot manage will either cause a potential bidder not to bid or the bid to be higher as the bidder will include a risk premium in their bid).

What the team found

The team found from the Review that the bidding documents broadly set out the parameters on which projects were to be bid out and set down the ground rules for bidders when submitting their bids and the body evaluating the bids. In most cases these were clear and concise.

If the documents are not clear and transparent then this can lead to:

- Complaints against the bidding process once a bidder is selected
- A limited number of bidders (if the perception is that the bidding may be rigged)
- More expensive projects and possible cancellation of the bidding process (with the time delays involved)

The majority of the projects reviewed involved an open bidding process, where the main bidding document was the Request for Proposals (RFP), or call for tender. In a couple of projects there was also an Expression of Interest (EoI). It is unlikely in small-scale projects that a prequalification process (where potential bidders are asked to provide qualifications and experience as a first stage to determine if they pre-qualify to bid for a project) will be necessary unless the technical capacity and experience of the operator is deemed critical. However, this may be required by law, and indeed the bidding documents prepared for Benin and Niger included a prequalification document (request for prequalification, or RFQ).

A straightforward example of a request for proposals (appel a concurrence) in French is the model developed for Benin for the affermage contract. This can be found at: http://eaubenin.bj/docs/SDC/A3_DAC_fermier.pdf.

Sample bidding documents for small scale water projects can be found in English at www.worldbank.org/ppp.

In a nutshell

Key steps that should be included in an RFP are listed below in Checklist 2.

CHECKLIST 2: KEY PROVISIONS OF AN RFP
<input type="checkbox"/> Develop a description of the bidding process
<input type="checkbox"/> Identify the authority
<input type="checkbox"/> Determine key dates for submission of bids and time limits, submitting questions for clarification on the bids, opening of bids
<input type="checkbox"/> Address to which correspondence should the bid be sent and submitted
<input type="checkbox"/> Determine what documents need to be included in the bid – technical and financial bids
<input type="checkbox"/> Determine the evaluation criteria
<input type="checkbox"/> Draft contract and specifications
<input type="checkbox"/> Determine how to file complaints regarding bidding process
<input type="checkbox"/> Provide a description of the bidding process.

1.6 Clarity of Contractual Provisions and Implied Terms

Overview

It is good practice for contracts to have clear drafting, performance specifications and targets. This is particularly important in smaller projects where the parties may have limited capacity and have to live along-side each other, in order to limit the risk of misunderstandings, dissatisfaction and disputes.

It is also important to establish mechanisms for day to day project management and information exchange between the parties and dispute resolution mechanisms that can resolve issues before they escalate. For more guidance on contract management, see Section A.6. In the rural context contracts should be kept as short and simple as possible.

Key considerations

Some jurisdictions, particularly civil law jurisdictions, may have requirements provided in law establishing rights and obligations of parties, the form of contract to be used or how changes of circumstance should be managed. If this is the case, then the parties to the contract need to be

made aware of these obligations, either by making specific reference to the legal provisions or by replicating them in the contract. In Peru, a Supreme Decree issued under the General Law of Sanitation Services contains specific requirements for specialized operators of domestic water and sanitation services in small cities, which the operator must comply with regardless of whether these requirements are set out in the contract

What the team found

The team found in the Review that jurisdictions that follow the Code Napoleon (such as Benin, Mali, Niger) typically have the legal concept of “economic equilibrium” for delegated contracts. This means that parties are put into the anticipated economic position by the administrative courts. The doctrine typically applies to increases in costs that could not be foreseen at the time of contracting, regarding such as a financial crisis that results in lower demand or a change in raw water quality that would require additional treatment. It could also apply to increased costs due to actions of the authority that were unforeseen and which were not dealt with elsewhere in the contract.

The affermage agreements developed for rural water projects in Benin, Mali, and Burkina Faso, and the management agreement prepared for Kenya are generally good examples of clearly drafted agreements, especially with respect to the obligations of the operator, performance standards included in the annexes to the agreements, and technical and financial monitoring requirements on the part of the authority. Sample wording has been taken from these precedents for specific contractual issues discussed in Section B.

1.7. Contract Management

Overview

In most rural projects there is a close interface between the operator, the authority and the users. The operator is delivering a public service and it is important that this is monitored and managed. There are mechanisms that can be built into the contract to help with this monitoring and management.

The contract is unlikely to anticipate every circumstance that may arise and in some cases it will be necessary for the parties to renegotiate the contract. Approvals may be needed from third parties, such as a sector regulator, before an authority can enter into a material amendment. The authority may not have the capacity or willingness to manage the operator and so consideration will need to be given as to whether to appoint another agency or person to monitor on behalf of the authority. For more guidance on monitoring of contracts and regulation of operators, see Section B.10.

Key considerations

Several items should be considered when determining how to manage a contract. The key items are listed in Checklist 3 below.

CHECKLIST 3: MONITORING AND MANAGEMENT MECHANISMS CHECKLIST

- Regular reporting requirements
- Clear drafting of obligations and specifications to ensure that parties understand their obligations
- Forum to discuss issues that come up on a regular basis (such as an operations committee).
- Begin with short duration contracts if the relationship between the parties is new to enable the parties to get out of the contract relatively soon. Termination mechanisms can also enable parties to terminate in the event of poor performance
- Determine a mechanism for managing changes in circumstances (tariff reviews and variation mechanisms)
- Create dispute resolution mechanisms that enable dialogue and resolution before a dispute escalates. A third party may also assist with mediation or may be chosen as the dispute resolution forum (rather than a court)

II. Key Contractual Provision

2.1 Contracting Parties

Overview

Each party should be clearly identified in the contract (ideally with the registered or official office). It is also important to specify that reference to each party includes “its successors and assigns” in case a party is merged with another entity, or assigns its interest in the contract. If this is not made clear in the contract disputes can arise as to whether the contract still binds the successor entity. It is also important to provide contact details for notifying parties.

Key considerations

- Does the proposed contracting authority have the right to enter into the contract and delegate services/assign rights as are envisaged in the contract?
- Is the name and registered address of each of the parties identified?
- Who will represent each party and what are the contact details for each party?
- Should a third party be a party to the contract (for example where a central regulatory agency or a water association is to monitor contractual performance)?
- Can contract be sub-contracted/assigned to a third party? If so, consider including minimum experience requirements for sub-contractor. For contracts of longer duration, assignment may be appropriate. If so, each party should have a right of approval for the new party (and may require minimum experience/financial standing). Consideration will also need to be given on the formalities required under law to assign a contract—in some cases assignment must be in writing and signed by all parties

What the team found

In the majority of agreements reviewed, the “public” party to the contract is a local entity—the community or a municipal government. Refer to Table 3 for contracting party per country reviewed. Most of the contracts identified the parties by name and registered office but not all of them referred to “permitted successors and assigns”. A few of the contracts made specific reference to sub-contracting and assignment. In the Benin model contracts, if the operator subcontracts minor repairs to a third party, the latter must be identified in the contract.

In several countries, water user associations were a party to the contract (sometimes a third party). Under one of the affermage models for Benin, the water user association monitors performance of the contract. In Niger the association also represents the users. Where a third party is to be given rights and obligations in a contract the contract should specify which provisions of the contract will apply to the third party as it is unlikely that all obligations should apply to them.

CHAPTER SUMMARY

This chapter provides an overview of key provisions that should be included in PSP contracts.

- *Contracting Parties*
- *Duration of Contract*
- *Conditions Precedent*
- *Rights Granted to the Operator*
- *Functions and Obligations of the Operator*
- *Capital Investment Obligations of the Operator*
- *Functions and Obligations of the Authority*
- *Performance (penalties and bonuses)*
- *Revenues, Tariffs and Cost Recovery*
- *Monitoring of Contracts and Regulation of Operators*
- *Accounts and Reporting*
- *Operators Obligations in respect to Customers*
- *Dispute Resolution*
- *Liability, Insurance and Indemnification*
- *Expiry and Early Termination*

Whilst water associations may be in a better position than central ministries to monitor contract performance in rural areas, in some cases in West Africa using them has not worked well, as in practice the water association has taken a fee for monitoring the contract but has not provided the

monitoring service (particularly where the operator has replaced the water association in operating the scheme). The user then suffers as the contract is not monitored and the fee is passed onto the user.

TABLE 3: CONTRACTING PARTY PER COUNTRY REVIEWED

Country	Contracting Party
Benin, Burkina Faso, Niger, Madagascar (+ ministry)	Commune
Mali, Philippines, Peru	Local authority municipality
Mozambique	National water directorate
Madagascar	Ministry of water
Uganda	Town water supply authority
Benin (operator, monitor)	Water user association

BOX 3: SAMPLE CONTRACTING LANGUAGE

Example from a Kenya O&M contract

"[OPERATOR] of [], established under the laws of [COUNTRY] having its principal place of business at [], and represented by [] (the "Operator")."

"references to any Party or person include references to its respective successors and permitted assigns."

The Grantor shall not assign or transfer all or any part of its rights or obligations under this Agreement without the prior written consent of the Operator, such consent not to be unreasonably withheld or delayed.

The Operator shall not without the prior written consent of the Grantor [], such consent not to be unreasonably withheld or delayed], transfer all or any part of its rights or obligations under this Agreement."

2.2 Term: Duration of Contract

Overview

The duration of the contract will affect the level of risk that can be passed to the operator. For parties that are not familiar with PSP, it can also be a risk to make the contract too long in case significant disputes arise that cannot be resolved.

The contract should be clear as to:

- When it commences and expires
- When obligations of each party will become effective
- Whether a contract can be renewed, and if so for how long

Key considerations

The appropriate duration of a contract will partly depend on the type of contract being entered into and the level of risk that is being passed to the operator. For management and affermage contracts, where there is limited risk passed to the operator then contracts tend to be for shorter durations. For projects involving investment by the operator, such as leases and BOTs, then the contract is usually long enough to allow the operator to recover its investment or to cover the average life of the asset.

There is sometimes a trade off between what the authority is willing to provide to a scheme and the duration. If the authority is not willing to provide a subsidy or cover the cost of major repairs then the contract may need to be longer as the operator will be accepting greater risk.

The longer the contract the more important it is to ensure that there are appropriate monitoring mechanisms and clear performance specifications and targets in place, as well as dispute resolution mechanisms that are suited to the small-scale setting. It is also important to provide a mechanism for managing changes through tariff review mechanisms.

Factors that influence keeping contract terms short:

- Concerns of authority to hand over control of scheme for a long period of time
- Concerns of reducing potential competition that comes with rebidding a contract regularly where there is limited expertise of private party in running water schemes then authority may want a short contract to “test out” the party. They may be more willing to have a longer contract with an operator with a track record or with whom they have worked before.

Factors that influence keeping contract terms long:

- Operators are more likely to be willing to accept additional risks, even risk of financing assets, if they have a longer period within which to achieve targets and recoup investments and achieve a return commensurate with the risk taken. This in turn enables operators to have a greater impact and they may be able to attract commercial financing if they can show that they have steady and dependable cashflow over a reasonable time period (it is difficult to convince a bank if cashflows last only two or three years).
- Possibility of commercial finance—Operators are more likely to be able to attract commercial financing (even just for cash flow) if they can show that they have a long term revenue stream.
- Potential growth in demographics – some of this risk may be built into the contract although beyond a certain level this will trigger either a change in scope or lead to the authority needing to establish a separate contract.

For contract renewal, it's important to determine:

- Whether a contract can be renewed
- For how long it may be renewed



TIP: In the contracts that provide for investment obligations, longer operating periods are recommended to allow for recovery of investment.

What the team found

The patterns that the team observed in the Review are outlined in Table 4.

TABLE 4: TYPE AND DURATION OF CONTRACTS REVIEWED

Contract Type	Country	Duration
Affermage	Benin	3-5 years (renewable for similar term)
Affermage	Burkina Faso	5 years (renewable up to 5 years)
Affermage	Mali	Not stated in standard document
Affermage	Niger	5 years, (renewable for up to 5 years)
Affermage	Rwanda	5 years (renewable for up to 5 years)
DBO	Uganda	7 years
DBO/DBL	Bangladesh	18 years
DBO/DBL	Vietnam	Construction period + 10 years operations
Delegation contract (similar to a lease)	Mozambique	5 years
Delegation contract (similar to affermage)	Peru	10 years (renewable for up to 10 years)
Delegation contract (similar to BOT)	Madagascar	20 years (renewable)
Management contract	Uganda	3 years
O & M	Kenya	5 years
O & M	India	7 years
Partnership contract (similar to affermage)	Mozambique	4 years

Most of the management and affermage contracts reviewed were first generation contracts that established private sector operations for the first time. For countries with more experience in small-scale PSP contracts, and where some of the operators have a track record, consideration should be given to introducing longer terms, for 5 years or even, where the operator has been performing well and it is technically appropriate, to 7, 10 or 15 years.

Kenya has been exploring the possibility of bringing in commercial banks to support operators in the construction of rural water infrastructure, and it has been recognized that in order to make these projects “bankable” the contracts will need to be for longer terms. This would enable the operator to establish predictable revenues and a stable business, and therefore give commercial lenders a revenue stream that they can rely on and take security over, if needed.



TIP: *Contracts of longer duration could introduce a possibility for sourcing financing from commercial banks.*

BOX 4: SAMPLE CONTRACTING LANGUAGE

Example Uganda DBO and Kenya Management Contract:

“This agreement shall come into effect on the Commencement Date and shall continue in force for a period of [five (5)] years ending on the [] anniversary of the Commencement Date.”

“Unless terminated earlier pursuant to Section [Y], this Contract may be renewed for a further period not exceeding [5] years, subject to agreement by the parties of the terms and conditions applicable to such renewal period.”

2.3 Conditions Precedent

Overview

There will be a number of actions that need to be taken before a project can become effective, such as the operator and/or authority obtaining finance, relevant rights over project land being acquired or transferred, permits being obtained. Often these are actions that are required prior to contract signature and if they cannot be achieved then the contract is not signed or (in the case of an action to be taken by a winning bidder, if it cannot achieve that requirement, the authority will go to the next lowest qualified bidder to see if it is able to enter into the PPP agreement).

Sometimes parties agree to sign the contract before all of the actions have been taken and set such actions or conditions in the contract that need to be fulfilled by one or other party before the main obligations of the contract become effective—these are called conditions precedent (CPs).

Typical conditions precedent will be:

- Provision of land (usually the responsibility of the authority)
- Securing applicable permits (mostly the responsibility of operator, but there may be permits such as right to abstract that are better obtained by authority)
- Developing and agreeing on an asset register or inventory (both parties) and
- Financing.

The contract will typically set out the mechanism for the parties to confirm that conditions have been met or waived and for the authority to issue a “notice to proceed.”

Key considerations

- What should be in place at contract signature and what can be left until commercial operations date or financial close (in case of operator financed deal)?
- Which of the CPs will be better managed by the operator?
- What obligations should apply from signature and what obligations only become effective at fulfillment of the CPs?
- What happens if any of the CPs is not achieved in time? Will it be waived by the other party or will there be damages to pay by the party failing to achieve the CP?
- Are there any legal limitations on drafting of CPs in the jurisdiction?

What the team found

None of the projects in the review contained CPs. This may have been because they did not involve commercial financing or because the conditions had been achieved prior to signature. It is simpler to have all issues resolved prior to signature and it may also be easier for the parties to understand simultaneous signature and effectiveness rather

BOX 5: SAMPLE CONTRACTING LANGUAGE

Example of a Condition Precedent Clause

“Clauses [] shall come into force and effect on the signature of the Agreement (the “Execution Date”) and other remaining Clauses and any related Annexes shall come into force and effect on the Effective Date, the Effective Date being the date on which all conditions precedent are confirmed met or waived.

The Conditions Precedent to be fulfilled by Party X are:[]

The Conditions Precedent to be fulfilled by Party Y are: []

The Parties shall notify each other of the satisfaction of such of those conditions for which it is responsible, promptly and, in any event, no later than [5] Days after the date of satisfaction of each Condition Precedent. If the Conditions Precedent are not fulfilled or waived by mutual agreement of the Parties within sixty (60) days of the date of the signature of this Agreement, each Party shall have the right to terminate this Operator Contract immediately and no Party hereto shall be liable to the other Parties for any damages or losses in respect thereof...”

than an initial period where the contract is effective in some respects but not fully effective. It is not always possible to achieve all the conditions prior to signature and so where there are issues, a conditions precedent clause may be necessary.

2.4 Rights Granted to the Operator

Overview

The contract needs to specify clearly what rights the operator is being given regarding:

- The right to provide water services to customers (whether exclusive, within a specified service area and whether excluding certain customers)
- Rights over land and existing assets (these need to be clearly described and identified), and where relevant with a plan illustrating the boundaries of a site
- Right to enter third party premises and land to lay pipes and make repairs
- Right over raw water resource (if a third party needs to provide permission, how this is achieved)

Key considerations

- Are there existing assets and existing asset register? If so, this should be attached to contract. If not, consider having parties draw one up prior to contract or as a condition precedent. Operator should also have requirement to maintain and update register. Where operator is providing financing, banks will want to know exactly what assets initially formed part of the concession and what has been added later.
- Should and can exclusivity be granted to the operator in the service zone? Particularly important if operator is investing, as projected revenues may be substantially reduced if alternative sources are permitted. Design of alternative sources are permitted as with less than predicted uptake. In a small scale context it may be difficult to prevent alternative sources in practice, particularly in rainy seasons, and so this limitation may need to be built into design. It may also not be appropriate or practical to require customers to draw from one supply or close off existing handpumps or transfer operation to the operator.
- What happens if authority wishes to expand service zone?

- What rights can be granted to operator over assets? Will operator be granted ownership rights or something short of this?
- Can rights over third party land be granted to operator to lay and repair pipes
- Will operator have the right to cut off supply to non-paying customers (see further discussion at B.12).
- Will the operator have the right to take action against illegal connections (or will it refer the matter to the authority?)

What the team found

In the contracts reviewed in the Review the form of rights that the operators were being granted over the assets was generally not clear. It was also not always clear whether rights over the raw water source were being granted to the operator (or indeed if the authority had the right to grant such rights). In the affermage contracts for Burkina Faso and Mali, the DBO agreement for Madagascar, and the

management contracts for Kenya and Uganda, the contracts give the operator's exclusive rights to provide the service within the perimeter expressly specified in the agreement. In the agreement developed for Niger, the contract also authorizes the third parties who operate the standpipes to forbid any activity within a radius of 15 meters from the water point covered under the contract.

Several agreements reviewed, in particular the African affermage agreements and the Uganda contract, contain a useful provision requiring the preparation of an initial inventory of assets upon commencement of the contract. This is an important requirement, as all parties should be well informed about the condition of the facilities in order to avoid conflicts during the contract. In Niger, the affermages covered systems that were not completely rehabilitated, and the absence of clear inventories was a source of conflict between the operator and the communes, leading in some cases to termination.

BOX 6: SAMPLE CONTRACTING LANGUAGE

Example Uganda DBO Contract:

"The Operator shall have the right and obligation to provide the Services in the Service Area on an exclusive basis during the Operator Contract Period. Should the Grantor desire to expand the Service Area, the Grantor and the Operator shall meet and negotiate in good faith with a view to agreeing on the provision of Services by the Operator to such expanded Service Area and the payment to the Operator thereof.

The Grantor hereby grants free of charge to the Operator, as from the Commencement Date, access to all land within the Service Area in respect of which access is required for the performance of the Services by the Operator.

The Grantor hereby grants free of charge to the Operator, as from the Commencement Date, the right to use the Facilities. The use of Existing Facilities is granted to the Operator "as is" with no warranty as to state of repair. Within six (6) months after the Commencement Date, the Operator will conduct a review of the Existing Facilities (the "Initial Review") to determine if such Existing Facilities need to be repaired, replaced or rehabilitated and the eventual presence of Snag Items."

2.5 Functions and Obligations of the Operator

Overview

The operator will only do what he is obliged or incentivized to do in order to receive payment. The contract should set out each of his functions and responsibilities and the consequences of his failing to meet those functions and responsibilities.

Typical performance parameters to be met by the operator include:

- Water quality
- Service continuity (how long service to be available each day)
- Water pressure
- Level of water losses
- Forms of service delivery (house connections, standpoints etc.) and specifications regarding each form of service delivery
- Asset maintenance
- Billing and collection

Sometimes, operators will be required to improve service provision or increase connections during the course of the project. These targets will be subject to the capacity of the scheme and available capital investments to expand and improve the scheme. Refer to Table 4 for a schedule of service improvement targets reviewed.

Typical performance targets include:

- Reduction in losses
- Increase in connections
- Increase in supply continuity
- Expansion of the scheme
- Improvement in collection rates (technical and commercial)

Key considerations

Performance specifications in small-scale projects should be clear, easily measurable, achievable and limited to a few parameters. PPP contracts should be focused on outputs rather than inputs.

- What should be the extent of the operator's repair and maintenance obligations? What defines minor vs. a major

repair? Who will have responsibility for preventative maintenance?

- What repairs and replacements is the operator expected to implement prior to contract expiry, if any (and within what timeframe prior to expiry date)?
- Will the operator be responsible for development of business and asset management plans?
- Will there be penalties for underperformance and incentives/bonuses for outperformance?
- Should there be bonuses for over performance as well as penalties for underperformance?
- If the operator is to identify non-revenue connections, will it have powers to stop these connections or will it be required to refer the matter to the authority?
- Will the operator have incentives for community outreach and customer care?

What the team found

The World Bank reviewed over 20 PSP contracts in rural water supply across Asia, Latin America, and Sub-Saharan Africa. The contracts reviewed all provided a general obligation to operate and maintain the facilities and contained a clear description of the operator's minor repair and maintenance obligations. Some but not all the contracts set out clearly what constitutes maintenance and repairs.

In the model contracts for Benin, the operator's duties cover routine maintenance and repairs of all water assets and equipment, including an obligation to procure a permanent supply of spare parts to perform immediate small repairs when required, and paying for repairs performed by third parties (artisans réparateurs) hired by the operator for this purpose. The operator pays the commune an annual fee that is supposed to go towards preventative maintenance (that may be carried out by the commune or by the operator on behalf of the commune). In Niger, the operator is required to perform regular maintenance and ensure the availability of spare parts and fuel, while the water user association maintains the boreholes/other water source. In the Uganda O&M contract, the operator is responsible for all repairs and replacements to the system, subject to the approval of the authority, which reimburses the operator for these expenses.

Most of the contracts reviewed set out performance specifications clearly. The affermage and management contracts set out well-defined performance obligations. In Benin, for example, the contracts require the operators to manage the system, perform simple repairs and maintenance, notify the commune (and the water users association, if applicable) of service interruptions of more than 24 hours, and provide technical and financial reports. The Uganda management contract also requires the operator to comply with applicable health, safety, environmental, and tax laws, as well as with the requirements of any water or waste discharge permit granted to the authority.

Very few of the contracts reviewed included targets for improved performance, service expansion or for increasing connections. This may be due to the lack of contractual investment obligations on either party. Some modest performance targets are included in the contracts for Benin, Mali, Niger, and Uganda. The Uganda management contract contains simple and clear targets covering

availability, service coverage, pressure and quality of water supplies, continuity of service, maintenance and repairs, prevention of pollution, and customer service.

Very few of the contracts reviewed provide specific requirements for the operator to increase household connections. In the affermage contracts, where the operator keeps a portion of the revenues generated, there is a natural incentive to increase connections. For other contracts, if increased service coverage is a key outcome of the project then there should be an express obligation.

None of the contracts reviewed set out a mechanism for managing illegal connections (whether by the operator or by the authority).

In a nutshell

Based on lessons learned, the “Functions and Obligations of the Operator” clause should cover the items captured in Checklist 4.



TIP: For schemes involving valuable equipment such as diesel generators, it is important to include preventative maintenance in the functions and obligations of the operator clause such that they can ensure access to technicians and availability of spare parts.

CHECKLIST 4: FUNCTION AND OBLIGATIONS OF THE OPERATOR CLAUSE
<input type="checkbox"/> General obligation to operate and maintain the facilities in accordance with reasonable operating standards and applicable laws
<input type="checkbox"/> Capital Investment obligations of operator, if any
<input type="checkbox"/> Specification of maintenance and repair to be carried out by operator, and what replacements are required prior to expiry of the contract (including preventative maintenance)
<input type="checkbox"/> Obligation to prepare business plan/asset management plan (as appropriate)
<input type="checkbox"/> Specification of the inventory of spare parts that needs to be kept and what should be included
<input type="checkbox"/> Identify boundary for obligations
<input type="checkbox"/> Decide who will maintain and calibrate meters (usually the operator)
<input type="checkbox"/> Identify performance standards and how to be measured
<input type="checkbox"/> Identify performance targets, how they will be measured and the time frame in which they will be achieved (specify any conditions for meeting targets and consequences of non-achievement)

BOX 7: SAMPLE CONTRACTING LANGUAGE

Example from a Kenya Operating Contract

TABLE 5: SCHEDULE OF SERVICE IMPROVEMENT TARGETS

Target	How measured/ definition	Timeframe	Conditions on Authority	Consequences of not reaching target
Increase in connections	Number increase from baseline agreed at contract signing	+ [10]% by end of year 2 + [20]% by end of year 4	Carry out agreed capital investment on upgrading mains	Annual deduction from operating fee of [] per percentage target missed
Non-revenue water Reduction	NRW = volume entering into pipes from treatment plant – volume billed to customers	- [x]% by end of year 2 - [x]% by end of year 2	Carry out agreed capital investment on pipes	Annual deduction from operating fee of [] per percentage target missed

2.6 Capital Investment Obligations**Overview**

For new build contracts, the operator will typically be required to design and build the scheme in accordance with output specifications and then show through commissioning tests that the scheme functions in accordance with the design specifications. Financing such investment may fall with the operator (in the case of a BOT) or with the authority (in the case of a DBO).

For existing schemes, particularly as they age, the contract needs to specify periodic rehabilitation and renewal to sustain the project in addition to any expansion that is anticipated. In most cases the cost of rehabilitation and renewal will be the responsibility of the authority (other than possibly in a concession) but they should be planned and be part of asset management and investment planning. The operator may be best placed to carry out asset management and investment planning, particularly in longer term contracts and where there are performance targets built into the contract, and where the operator is closer to operations, even where the operator is not responsible for funding major repair, rehabilitation and expansion.

The operator can also be required to implement capital investments on behalf of the authority, acting as project manager for the works. In such case the operator is often paid a project management fee in addition to his operating fee for procurement and management of the works. In some cases, the operator may agree to finance the investments. This may even be appropriate for operating and affermage contracts provided that the terms of the contract are long enough for the operator to recover its investment. In such cases the contract will need to clearly specify what investment he is responsible for and how the operating fee is to be adjusted to take into account such investments.

As discussed in Section 2.9 Revenues, Tariffs and Cost Recovery it is important to ensure that funds are budgeted for to cover the cost of rehabilitation and repair as well as operating costs, otherwise the authority will have to find financing as and when the repair is necessary.

Key considerations

- Will authority or the operator on its behalf procure the capital investments? Unless the operator has economies of scale or good contacts, it may be more expensive for operator to procure parts and implement repairs.

- If operator is to be responsible for project managing the capital investments, will it be paid a fee based on percentage of the overall construction cost or a flat fee? Will there be a fixed schedule of rates for works included in the contract?
- Will the operator be responsible for developing a business plan and an asset management plan? This may even be appropriate for affermage and management contracts. Will this then require approval of the authority?
- How will capital investment be financed? Will this be by the operator or by the authority? Authority may not be used to budgeting for repairs and so provision needs to be made through a capital fund or budget line to ensure funding will be covered either through revenues or sourced elsewhere, such as from donors.
- On rare occasions DBO contracts include distribution networks as well as bulk supply. In these cases it may be appropriate to include obligations for the operator to increase connections and expand the network to meet increased demand and replace the network where necessary during the operations. It will also be important to clearly identify which party is responsible for funding such work.

Additional investment obligations should be clearly specified. As these systems are relatively simple it would be possible to specify in an annex which of the equipment/parts the operator would be responsible to replace and renew and which if any would fall outside his responsibility. It may also be appropriate for the operator to develop the business plan and prepare and update periodically an investment plan for the scheme. One way this is sometimes done is through a DBO where government still finances most part replacement, but delegates investment planning and implementation to the operator who is required to operate the scheme over the long term under clear performance parameters. Hybrid performance-based contracts that include an obligation on the operator to carry out investment planning are being used increasingly, especially for bigger systems.

What the team found

All of the affermage and management contracts reviewed place very limited investment obligations on the operator. The contracts developed for water supply systems in Francophone Africa, Peru, Kenya, and Uganda generally require the operator to manage the facilities in accordance with certain performance requirements, but do not require the operator to invest in increasing connections or in rehabilitating the infrastructure. In the contracts developed for Benin, Mali, and Rwanda, the lease fee paid to the lessor is intended to cover depreciation on the pumping and energy equipment, and so the lessor has the responsibility for financing the replacement of such equipment. Specific investment requirements in the management contracts involve only expenditures in minor repairs and routine maintenance.

Under the affermage contract for Benin, the operator is required to deposit a fee in a bank account held by the commune or by the water users association. This fund is used toward the renewal of pump equipment, the rehabilitation of works or the extension of connections. In Niger, part of these funds is to be used to conduct the technical and financial audits required under the agreement. The contract also requires the community to assist the association in mobilizing funding necessary to extend service to other small water systems. In Mozambique and Peru, this fee is a percentage of gross revenues.

Refer to Annex 4 for sample wording for a clause by which the operator manages and updates an agreed capital investment program.

Also see the sample BOT agreement set out in Annex 3 and the DBO term sheet set out in Annex 2 which includes obligations on the Operator to renew and repair the facilities.



TIP: System needs to be repaired and rehabilitated to maintain a sustainable service. It may be more efficient and effective to ask operator to oversee an asset management plan as he is responsible for the quality of the service throughout the project.

2.7 Functions and Obligations of the Authority

Overview

The authority's active role in the project will be critical to the success and sustainability of the project throughout the project. It should not be assumed that by entering into a PSP contract the authority can effectively ignore the project.

The authority typically has a number of key functions and obligations including:

- Obligation to provide land and assets (see section B.4) and right of way
- Obligation to obtain water permit, get permissions and consents from third parties
- Obligation not to hinder operator
- Obligation to pay operator (where tariffs do not cover operator remuneration)
- Obligation to manage the repair and renewal and expansion account (in the affermage model)
- Obligations to agree or obtain approval (where third party regulator is involved) of tariffs and tariff reviews
- Repair, rehabilitation and investment obligations
- Responsibility to set targets and monitor performance of operator

Key considerations

- If authority has payment obligations, the contract needs to set out clearly how they are calculated and processed (submission of invoices), time periods for review and payment of invoices, mechanism for disputing invoices and what happens in the case of a dispute (operator continues to perform and authority required to pay over any undisputed amounts), when payments are due and consequences of late or non-payment (such as interest penalties, possible termination event)
- Separation of water revenues from other authority revenues—By moving water revenues into an escrow account held with a third party bank. A cushion of funds

could also be kept in the escrow account representing a number of months of fees that can be paid out in case of non-payment. Water budget should also be separated from budget for other activities of authority

- Who is responsible for repairs (major versus minor, rehabilitation), financing and project management?
- Who is to be responsible for developing and maintaining an asset management plan (and business plan)? Often the operator will be better placed to prepare drafts of these plans and the authority would then review and agree them
- If there is a rehabilitation and repair account, who is to maintain it, where the funds are to come from to fund it
- Monitoring of the operator is a key element of implementation of a PSP contract. Does authority have the capacity to monitor or is a third party better placed, such as a water user association or a branch of a water or planning ministry, to monitor on authority's behalf?

What the team found

Most of the contracts reviewed included clear obligations on the authority to provide the land and make payments. A number were less clear about water permits and who should obtain them, if at all. As noted in sections B.5 and B.6, some contracts were clearer than others on allocation of responsibilities for repair, preventative maintenance and replacement of parts. Most of the contracts included a responsibility to monitor the performance of the operator although in some cases this was shared with a third party (see section B.10).

In a nutshell

Based on the findings from the team, a checklist for repair, rehabilitation and expansion have been provided in Checklist 5.

CHECKLIST 5: REPAIR, REHABILITATION AND EXPANSION CHECKLIST

- Make clear what assets and land are to be granted by the authority (or other relevant party), when these are to be handed over and for what purpose
- Set out clearly the payment mechanism for the operator's fee (includes setting out a process for invoicing and payment and also set out what happens in the case of non- or late payment)
- Set out the process for planning and implementing major repairs and renewals (if the authority will be responsible for this)
- Specify who is responsible for developing an asset management plan with a schedule for major repair and replacement (and expansion). Operator may be best placed to prepare this. The process for submission of the draft plan by operator to authority and frequency and deadlines for preparation and submission should be set out, together with the mechanism and time frame for approval
- Specify how a repair and renewals account will be maintained and funded, and whether it is in the name of the authority or the operator

BOX 8: SAMPLE CONTRACTING LANGUAGE

Example from Uganda DBO Contract for Preparation of Business Plan:

“The Operator shall, within one month of the Commencement Date, prepare and submit to the Authority a five-year business plan.

The business plan under sub-clause [] shall be reviewed, updated and submitted to the Authority at most on an annual basis and as directed by the Authority.

Failure to submit a business plan in accordance with this clause shall amount to a breach of this Agreement, subject to clause [], at the discretion of the Authority and shall result in withholding of a portion of the Service Fee in accordance with sub-clause [].

A business plan shall be in a form approved by the Authority and shall include:

- the objectives of the plan;*
- the overall strategies and policies that the Operator is to follow to meet the objectives in sub-clause [];*
- the services that the Operator plans to provide and the standards that are planned to be maintained in providing those services;*
- performance indicators and targets, both financial and operational;*
- financial matters as set out in sub-clause [].”*

BOX 9: SAMPLE CONTRACTING LANGUAGE

Example Kenya Operating Contract

“OBLIGATIONS**1.1. Access to land**

The Grantor hereby grants free of charge to the Operator, as from the Commencement Date, access to all land within the Service Area in respect of which access is required for the performance of the Services by the Operator. For the avoidance of doubt, the term “Operator” as used herein shall include duly authorized officers, employees, Operator’s representatives and sub-contractors.

1.2. Right to Use Facilities

The Grantor hereby grants free of charge to the Operator, as from the Commencement Date, the right to use the Facilities.

1.3. Payments by the Grantor

The Grantor shall make payments to the Operator in accordance with section [] of this Operator Contract.

1.4. Support by the Grantor

1.4.1. The Grantor shall, wherever possible, assist the Operator in its relationship with the regulatory authorities.

1.4.2. The Grantor shall use its best efforts to secure adequate finance pursuant to the Project as defined herein to fund any Capital Investment Program and shall keep the Operator informed of the progress of such applications and negotiations. Any failure or delay by the Grantor to finance the Capital Investment Plan that prevents the Operator to meet any of its obligations under this Operator Contract shall relieve the Operator of that obligation to the extent that such obligation cannot be achieved.

1.5. Supervision by Grantor

1.5.1. The Grantor shall supervise the Operator in the performance of its obligations under this Operator Contract.

1.5.2. The Grantor shall review and approve or comment upon all reports submitted by the Operator pursuant to Schedule [].

1.5.3. The Grantor shall be given reasonable access during normal working hours to premises, works and sites of the Operator for the purposes of inspection and certification to the extent this does not disturb the Operator’s performance of its obligations under this Operator Contract. For the avoidance of doubt the term “Grantor” as used herein shall include duly authorized officers, employees and representatives as well as the Financial and Technical Auditors.

1.6. Tariffs

1.6.1. The Grantor shall consult on changes in Tariff in accordance with clause [] and then present changes of Tariff to the Regulatory Authority for Approval.”

2.8 Performance Penalties and Bonuses

Overview

The performance specifications set out the minimum required levels of service. This clause needs to explain the consequences of failing to achieve the minimum level for each performance parameter and any performance incentive or bonus that may be paid to the operator for achieving greater levels of performance.

Key considerations

- Choose a few clear performance parameters that are measurable and achievable to be linked to penalties and bonuses
- Penalty and incentive/bonus regime should incentivize operator, negatively and positively, to perform its obligations. Penalties and incentives/bonuses should be at levels that will encourage good behavior but not so large to bankrupt operator after a few minor defaults or over-reward him.
- Minimum performance levels need to be well matched to penalties and incentives/bonuses – so what might be an appropriate level of penalty for one default may not be for another.
- There may be legal restrictions on levels of damages. In some common law countries penalties may be held to be invalid as only preset liquidated damages can be imposed which reflect a reasonable estimate of loss.
- Will the penalties be offset against operator fees? If operator is collecting tariffs, should a separate account be created for tariffs to ensure that any penalties can be paid.

- Incentives/bonuses payable need to be affordable to the scheme and the source of funds for the bonuses should be identified.
- The contract needs to state clearly what happens in the case of dispute over penalties—whether the sum is held back from the operator until the dispute is resolved.
- Need to specify when penalties will apply and circumstances which would excuse operator default (authority action, force majeure etc. (and any cure periods).
- Should there be a third party adjudicator such as an independent engineer to ensure objectivity?

What the team found

Most of the contracts reviewed contained some sort of mechanism for imposing penalties for failure to meet the contractual performance standards. The contracts for water projects in Uganda, Kenya, and Benin are particularly clear and linked to a few measurable parameters. These can be found at <http://ppp.worldbank.org/public-private-partnership/ppp-sector/water-sanitation/small-water-providers>.

The Benin model contract provides that in the event of an unjustified interruption of the service for a period longer than 24 hours, the commune is authorized to impose a penalty equivalent to 50% of the revenues for water sales estimated during the period that the service was interrupted.

BOX 10: SAMPLE CONTRACTING LANGUAGE

Example Penalty Schedule from a Kenya Operating Contract

“Subject to Section [of this Operator Contract, if the Operator’s performance is below the Service Standards set forth in Schedule 4 and the reasons provided for such below par performance are not acceptable to the Grantor, payments to the Operator at the end of each quarter will be decreased by the sum of the following penalty reductions wherever applicable:

The penalty reductions indicated above are subject to revision by the Parties 6 months after completion of the Baseline Survey

TABLE 6: SCHEDULE OF SERVICE IMPROVEMENT TARGETS

#	Service Standard	Service Standard	Penalty criteria
1	Quality of treated water	More than 5% of the water in the distribution system does not meet the treatment guidelines at any one time, and the cause of poor water quality cannot be attributed to external factors beyond the control of the Operator	[AMOUNT] per occurrence, where an occurrence refers to a spot check carried out by the Grantor at any time
2	Continuity of supply	Less than 12 hours of water supply per day for 2 consecutive days subject to the availability of electricity, raw water and proper functionality of the System	[AMOUNT] per occurrence, where an occurrence refers to any 2 consecutive days that the system is operated below the established standard
3	Meter reading and billing	More than 10% of active accounts have not been billed according to actual meter readings within 7 days of the end of the billing period	[AMOUNT] per month for each month that the service fails the service criteria
4	Physical water loss	Ratio of volume water billed to volume water produced is greater than 10% above the ratio established in the baseline survey and the Grantor has implemented system maintenance recommendations proposed by the Operator	[AMOUNT] per month for each month that the service fails the service criteria

2.9 Revenues, Tariffs and Cost Recovery

Overview

A key element to the sustainability of a PSP scheme is ensuring that there are sufficient funds available to operate and maintain the scheme and to rehabilitate and expand the scheme (i.e., full cost recovery). If not, the scheme will deteriorate over time and/or not be able to meet requirements. Funds can come from tariffs and from other sources such as donor funding, subsidies or commercial financing. Tariffs will play a key part in establishing this balance as tariffs are likely to be the main source of funding over the long-term. Tariff setting methodology may be prescribed by law, in which case this needs to be reflected. During the preparation phase of any project it is important to establish the costs and expenses of the project over the duration of the contract, expenditure, and revenues (both actual and projected). A financial model can assist in then calculating what level tariffs and subsidies/other sources of funding need to be to achieve full cost recovery. For more discussion on this, see the WSP SOP series.

The rate of collection is also an important factor and so there should be analysis on willingness to pay. In established systems a challenge in larger systems which can also affect smaller systems is illegal connections. Consideration needs to be given as to whether to require the operator to maximize billing/reduce illegal connections and what if any powers the operator can be given to stop illegal connections.

Key considerations

- In order to achieve cost recovery it is important to understand the costs of the system. The key operating costs are likely to be energy to drive the pumps, chemicals, manpower, spare parts, minor repairs, reasonable rate of return for the operator. Where operator fee is paid, fee usually includes these costs (subject to escalation).
- The authority needs to understand the sustainability of the source of funds, especially if the cost of rehabilitation and expansion does not come from tariffs. This is often neglected in both small and large projects. This is also critical where the operator is financing investment as

cost of investment and return on investment will need to be provided from revenues or through a subsidy.

- Tariff setting methodology. Contract should be kept simple and objective, set out initial tariff and include a formula for tariff revision (with indexation using an index such as RPI or CPI, or a formula based on a few variables). If tariff formula is prescribed by law then this needs to be reflected.
- If it is not possible to achieve cost recovery for a scheme, need to consider reducing costs through clustering, simplification of design and subsidies for certain categories of customer.
- What are the consequences of tariffs not being increased in line with contract/bid? Will compensation be payable? It is important that the operator's revenues are increased in line with its base assumptions and so there should be a mechanism for compensation in the contract (in civil law jurisdictions this would probably be implied into the contract under the principle of economic equilibrium)
- What fees need to be paid (whether for water permit or to the authority) in addition to the operator's fee?
- Who should be responsible for tariff setting and the process? Whilst the authority or a regulator may be obliged to approve a tariff by law, by keeping formula simple and objective this should reduce the potential for dispute
- Consider reducing the cost of the scheme, through a simplification in the design and/or clustering of projects, particularly if there is a risk that the tariff level will lead to a lack of take up by customers.
- Is there any guidance or limitation in law or otherwise on social tariffs or indeed on how much the tariff may be increased in any given period?

Tariffs depend on service levels. Generally speaking, tariffs for domestic connections are lower than for stand-posts, except where the tariff includes a component that covers the full costs of installation of individual household connection.

Tariffs include the cost of:

- water delivery (energy, operation and maintenance, treatment)
- cost of capital investment, including cost of capital, and debt services/investor returns

Energy costs in several systems are a key factor in the cost-recovery analysis, as the majority of water systems are equipped with diesel-powered engines or generators, and these energy costs represent a large share of the operating expenses.

What the team found

The affermage contracts prepared for Benin, Mali, Niger, and Rwanda, and the agreement for Peru, are all designed on the basis of cost recovery. In the agreements developed for Niger and the Philippines, the contracts provide for block tariffs, with one tariff applicable to consumption of between 0 and 10 cubic meters, and another tariff applicable to consumption above 10 cubic meters. Most of the contracts contained a clear methodology for determining the tariff but only a few of them, typically those of longer duration, included a requirement for a periodic review. Finally, in the affermage contracts and the Peru agreement, the operator takes end user revenue risk and, in the case of the affermages, it pays a lease fee to the commune that goes towards a rehabilitation and renewal fund. In Kenya and Uganda, on the other hand, the operator is paid a fee, and thus the revenue risk rests with the public party, although in Kenya the operator is required to catch a minimum number of illegal connections (and report to the authority) and to reduce non-revenue water. Experience with several of these projects has shown that it is possible for operators to take revenue risk in these circumstances and that there is a willingness to pay on the part of the residents served by the projects. When designing future contracts it may be appropriate to pass revenue risk to the private sector, especially where there is an established pattern of water consumption and revenue collection.

BOX 11: SAMPLE CONTRACTING LANGUAGE

Example Adapted from Uganda DBO Contract

Example 15: TARIFF SETTING

“1.1. The Authority shall have the right to set the tariffs, fees, rates and charges to be charged and collected by the Operator under clause []. At the Commencement Date the water tariff is set at the level specified in Schedule [] to this Agreement.

1.2. The Authority undertakes to review, and if so required, adjust the water tariff on a [semi-annual] basis in line with the provisions of Schedule []. Failure to undertake tariff adjustments required in accordance with this clause constitutes a breach of this Agreement subject to termination under this Agreement unless the Operator is compensated through other means in an amount corresponding to the reduction in revenues resulting from the failure to adjust the water tariff.

1.3. In exercising its rights under this clause, the Authority shall give due consideration to proposals submitted by the Operator in its business plans and seek any necessary explanations and information from the Operator.

1.4. The Authority shall publish a schedule of approved tariffs, fees, rates and charges and related instructions and shall furnish the Operator with such schedule.”

2.10 Monitoring of Contracts, Tariff Review and Regulation of Operators

Overview

One key issue that arises repeatedly in the development of small-scale water projects is how to regulate and monitor performance under these contracts as the projects are often too remotely located for bodies that regulate and monitor larger urban utilities to oversee satisfactorily.

This provision should cover:

- Process for tariff setting and adjustment
- Conflicts
- Performance monitoring
- Financial audits
- Business planning and investment planning
- Review of asset register (at commencement and exit)

Key considerations

- Is party responsible for day to day monitoring the same party that sets or approves tariffs? Tariff setting

may be based on agreement between the parties, or involve a third party such as a regulator or state water body. The choice of entity to set, or approve tariffs may be prescribed by law. Sometimes small scale providers fall outside or do not get the attention of any formal regulatory mechanism and so consideration needs to be given in each contract as to which entity is best placed carry out the different obligations.

- The process for tariff adjustment should be specified (and consistent with law) including the process for proposing a tariff change—when (periodic process and/or on the request of a party). If it is at a request, it needs to be decided if there will be a threshold in cost increase/decrease before adjustment is triggered. Who shall propose and justify a request (usually operator)? Who will approve the tariff (only the authority or a third party, such as the water regulator)? Should there be public consultation?
- The process for resolving disagreements on tariff setting will also need to be identified. This may be prescribed in

law. It may be appropriate to refer this to a central body such as a regulator or water ministry.

- The operator will provide financial and operational performance data. The contract should specify who will review and verify it. It may be authority (particularly day to day) but if authority lacks capacity a third party auditor or consultant could be appointed (cost thereof will need to be built into the project). The contract also needs to specify the process in the event of disagreement on data – again, this may be by an auditor or it may go through the dispute resolution.
- The responsible party for business and investment planning must also be determined. This partly depends on responsibilities of the operator—if operator has performance targets that are dependent on investment, then it should be able to propose the necessary investments and put forward the business plan. If the operator is only maintaining the existing performance of a scheme and the contract is short term then investment planning may not be as crucial. However it is good practice to develop a business and asset management plan to determine how to ensure that the scheme is sustainable (from a structural and financial perspective). Business and investment plans should be updated periodically.
- The party responsible for monitoring performance must also be identified. The local government may not want to adjudicate between the operator and the communities served, and the operator may also be concerned about the local government not being impartial and objective in the event of a dispute. Monitoring can be carried out by the communities, water user associations, or ministries, or a combination of all of them. In practice, the authority when monitoring tends to focus only on payment by operator of lease fees or taxes owed, and neglects to monitor other performance indicators or review reports, which allows operators to ignore contract compliance.
- Section B.4 recommends a requirement to develop and update an asset register. This should be approved by the parties at the start of the contract and verified periodically and prior to termination of the contract to ensure that assets have been maintained and that any replacement or rehabilitation that has been agreed has been implemented. The asset register should also be updated to reflect any scheme expansion.

- A variety of approaches has been taken with respect to the entity responsible for tariff setting and monitoring. Consideration should be given to whether public consultation should be part of the tariff-setting process in other countries. If so, the enabling environment should provide a clear framework on tariff methodology. When designing these mechanisms thought should be given as to who is best placed to be objective about tariff setting and to ensure that disputes are kept to a minimum.

What the team found

Some of the contracts reviewed provide a tariff-setting methodology and a right of periodic tariff review with the purpose of ensuring cost recovery. Under the Benin contract, for example, the operator may request tariff increases, and the commune may request tariff decreases, but such requests must be based on objective elements. In Mali, the operator is required to submit adequate justification, specifically records of operation, inventory, and the capital investment plan, as part of this request. These types of provisions should be considered in future contracts for water projects in other regions, even if cost recovery means recovering only the costs of operation and not of construction of facilities, and even if such costs are paid out of grants and not out of the revenues obtained from the operation of the project. Some of the agreements reviewed, for example those for Kenya, Mozambique, and Uganda, contain provisions allowing the grantor inspection rights. The Uganda management contract, in particular, contains a useful provision allowing the authority to inspect the land and assets, as well as to perform any tests, take any measurements or samples, and inspect any records necessary to confirm the operator's compliance with the contract.

In Niger, for example, the water user association is charged with representing water users; persuading them to pay the negotiated price for water and to respect the third parties managing the stand-posts; ensuring due care of the infrastructure and protection from water theft; and promptly advising the operator of any malfunctions in the service. Theoretically at least the water user associations have an incentive to make sure that the system is functioning well and is economically viable, although this has not always proved the case in practice, particularly where there is a conflict of interest due to the operations having been

moved from the water user association to the private party. In Mali and Niger independent auditors are used to verify accounts—see the wording set out below extracted from the Niger contract.

In the Niger and Uganda contracts there is an obligation for the operator to develop a business plan (see Uganda example below). See also Annex 4 that sets out sample wording for management and updating of a capital investment plan. See also Sections 2.7 and 2.9 on Authority obligations and rights for tariff setting and monitoring wording.



TIP: *Contractual authority to monitor the operator compliance should be commensurate with an institution's capacity.*

2.11 Accounts and Reporting

Overview

Reporting requirements are important to ensure that sufficient information on financial and operational performance is shared by the parties and with other relevant stakeholders to enable them to track performance.

Key considerations

Reporting requirements in a small scale project should not be too burdensome. A balance needs to be struck to provide enough information to allow the authority to get an accurate picture of the project whilst not causing too great a burden on the operator. The following should be considered:

- The information that needs to be included in reports
- The frequency of reports
- Whether any form of verification or audit will be required for reports

- The limited capacity of the operator and the authority to prepare and review reports

What the team found

All of the contracts reviewed contain provisions on accounts and reporting, but vary as to the frequency of the reporting and the receiving entity. These requirements seem relatively simple and easy to implement. In Benin, the operator is required to submit monthly technical and financial information, as well as annual reports, to the commune. In Niger, the operator is required to submit technical and financial reports to the water users association, with copies to the community and the Ministry of Hydraulics. In Madagascar, the operator is required to submit technical and financial reports to the commune and the Water Ministry every six months. The contracts developed for Benin, Mali, and Madagascar contain useful provisions that describe the type of information to be included in the technical and financial reports.

In practice, the receiving entity does not typically read the reports. The contract for Niger contains a provision that could help address this, obliging the water user association to examine the accounting report and provide comments to the operator within a time period. Disagreements are to be resolved by an independent accountant using renewal funds allocated.

The team also identified that in smaller-scale projects, operators have had difficulty performing basic accounting tasks, such as keeping track of income and expenditures, completing bank account transactions, managing cash, and preparing reports. They often fail to keep records of renewal funds.

BOX 12: SAMPLE CONTRACTING LANGUAGE

Extract from Benin Affermage (on reporting)

“The Operator is required send technical and financial reports to the commune on a monthly basis, in a form of table, to enable the commune to carry out its monitoring responsibilities.

The technical report should include:

- *Volumes of water withdrawn, produced, distributed and sold*
- *Customers benefiting from the service*
- *The output of the scheme, the average pump flow, the average amount of consumables used (fuel, oil), the number of hours that the system was running during the period and since the scheme came into service*
- *Routine maintenance carried out, with records of visits and repairs*
- *Large repairs carried out or planned*
- *Renewal works implemented and to be implemented through financing from the renewal and extension account*

The financial report should specify:

- *Expenses, with a comparison with the previous month*
- *Revenues from operations for the household connections and the standpipes with a comparison with the preceding month*
- *Amounts paid in respect of lease fees together with the corresponding receipts.*

The operator should create a spreadsheet for each month setting out the technical and financial details in accordance with the model provided by the commune. This spreadsheet should be sent to the Technical Unit of the commune within 5 days of the following month.”

2.12 Operators Obligation in Respect to Customers

Overview

The contract needs to be clear on the Operator’s obligations to customers. Key considerations are listed below and a term sheet and sample BOT/concession agreement can be found in Annex 3. This provision should cover:

- Billing procedures and the contract between the operator and the customers
- New connections – how they are requested, agreed and funded
- Obligation to meet certain water standards (for example, pressure, continuity, water quality and proximity of a water source to the community).

- Whether there is a right to cut off delinquent customers
- A customer complaints mechanism.

Key considerations

- Specify the basis of the relationship between operator and customers, particularly key terms and conditions of the arrangement, billing procedures, if and how the operator may cut off supply for delinquency, and how to bring complaints. It may be appropriate to append a model form of customer contract.
- It needs to be clear whether the operator is billing on its own behalf or as agent of the authority (this may be prescribed by law).

- Billing procedures should take into account the type of service – standpipe or house connection, whether involving pre-payment, how meters will operate and be maintained.
- Clarity on how and within what timeframes repairs are to be carried out.
- Clear policy on new connections, including who is responsible for the cost of the connection, whether operator obliged to accept all requests for new connections, time frame for responding to requests.
- For household connections, operator needs to be able to recover tariffs and to have recourse against delinquent customers. Cutting supply is a useful mechanism but it should be used carefully, as it can lead to abuse. There may also be a legal prohibition or restriction against cutting supply.
- A complaints procedure should be easy for the customers to access, such as a register at the local communal meeting place. There should be clear time frames for response by the operator and for reporting on complaints.
- Consider whether customer relations (measured in terms of response time for handling complaints etc) should be a performance requirement and whether there should be a penalty or incentive attached.

What the team found

Several of the contracts give the operator a right to cut off the service. The agreements in Benin and Madagascar give the operator a right to cut off water supply to customers for non-payment, according to the terms set forth in the service contracts. Other contracts require the operator to restore the water supply once the delinquent payments have been made. Some agreements impose certain conditions for using this power, or require grantor approval, which could help deal with this risk. Where there is an alternative source, such as a standpipe, then cutting off individual connections may be appropriate.

The Benin contract allows anyone to request a household connection, subject to approval by operator and commune, and provided the new connection does not affect existing distribution points. The cost of connection is for the prospective customer, and operator finances the cost of the meter. In Niger, the user requesting a connection must finance the primary piping, but expenses associated with

secondary piping are paid by the water users association from the renewal and rehabilitation fund.

The agreement developed in Niger provides a useful example that could be adapted when drafting the next generation of contracts. Specifically, the operator is required to provide an office for the public in the center of the village, which shall remain open during reasonable hours, and no less than 8 hours a day. The operator is also required to collect customers' complaints (both oral and written) with respect to the quality of service provided, and to respond to such queries within one week, provided the complaint is justified. There should also be an agreed procedure for checking meters where readings are disputed.

Most agreements reviewed lack a customer complaints mechanism. In the affermage contracts, such complaints are typically informally addressed to the commune, since it is a party to the contract.

2.13 Dispute Resolution

Overview

During the course of a project disputes are likely to arise between the parties to the contract. Whilst the risk of dispute can be reduced through clear contract drafting and due diligence prior to the contract, and good day to day contract management during the contract, it still exists. A dispute resolution mechanism should enable resolution of disputes before they become litigated and may move disputes to a third party forum better suited to handling contractual disputes than a court. Key considerations are listed below.

Traditional dispute resolution mechanisms are the courts. Depending on the country these may be more or less effective, independent and efficient, particularly in a rural or smallscale context. Alternative dispute mechanisms typically provide for:

- **Negotiated settlement** between the parties
- **Conciliation or mediation** (which involves a third party assisting the parties to come to a resolution and is typically non-binding)
- **Expert determination** (often used in the case of construction projects, it may be the independent

engineer or other technical specialist that can decide on technical issues)

- **Adjudication** - panel of experts that is established for the duration of the contract (or could cover a number of contracts) to which issues are referred. As it is familiar with the contract then decisions are relatively fast. Depending on the contract decisions can be binding or non-binding on the parties. Typically used in construction contracts but used increasingly in PPP arrangements.
- **Arbitration** (which is typically a binding panel or individual arbitrator selected pursuant to the contract that has evidence presented to it by both parties and then makes a binding judgment)

Key considerations

- Is there a legal mechanism for resolving disputes between the parties? In civil law countries the administrative courts typically have jurisdiction in respect of public service agreements. In a regulated environment a regulator or water ministry may have the legal function of resolving disputes between parties.
- What mechanisms would help to manage disputes that arise day to day? Should there be an operations committee put in place between the parties to meet regularly to discuss operations? Is there capacity on the public sector side for this? Is there a water user association that would be suitable to act as a mediator or an arbitrator? Is there a branch office of a central ministry that would have the capacity to make decisions on disputes?
- Are the courts likely in the context to provide efficient and fair decisions? If not, then arbitration should be considered. Does law require arbitral awards to be recognized by the courts or can the courts overturn the arbitral award on enforcement?
- Should an independent engineer be put in place to monitor the project and make decisions on technical disputes? For large civil works contracts a dispute review or adjudication board is typically appointed at the beginning of a contract as a board that is in place for the duration of the project, is familiar with the project and is available to give swift advice or opinions. Such a mechanism may be too costly for these smaller projects but could be adapted for the small scale context through

use of local experts or desk reviews by experts (so physical attendance is not required) or appointed for a group of projects.

- If there is to be arbitration, where will it be located and what rules of procedure should apply. There are a number of rules of procedure that have been developed around the world in dispute resolution centers, including the UNCITRAL arbitration rules. The law may prescribe a procedure for arbitration of disputes that may be required to be followed.

What the team found

The majority of the contracts reviewed included an alternative form of mediation or arbitration. The great majority of the contracts, however, did not provide a procedure for the resolution of disputes and in such cases it will be the courts that will have jurisdiction. This may not be practical for smaller projects as court decisions can be slow and protracted and so it is recommended that the alternative resolution mechanism is binding on the parties.

The contracts with an alternative dispute resolution mechanism are listed in Table 7.

TABLE 7: CONTRACTS WITH AN ALTERNATIVE DISPUTE RESOLUTION MECHANISM

Country	Dispute Mediator
Niger	Ministry of Hydraulics
Burkina Faso	Dept of water and supervisory authority (mediation), then administrative courts
Benin	Ministry of Water
Kenya	Expert selected by parties
Rwanda	Mediation/arbitration from PNEAR then to courts
Uganda	Arbitrator appointed by agreement between parties
Madagascar	Water Ministry
Peru	Not specified
Bangladesh	Expert engineer of ministry
Vietnam	In accordance with arbitration law

BOX 13: SAMPLE CONTRACTING LANGUAGE

Extract from Benin Affermage

“Arbitration of Disputes: The Ministry of Water agrees to try to settle amicably all disputes that arise between the Operator, the Association and the Local Authority under this agreement, and these three parties agree to his arbitration. It is only after exhausting all possibilities of a settlement that court action may be considered.”

BOX 14: SAMPLE DISPUTE RESOLUTION CLAUSE FROM KENYA OPERATING AGREEMENT

“Amicable Settlement: If a dispute arises out of or in connection with this Agreement, either Party may give notice to the other Party of the same, whereupon the Parties shall meet promptly and in a good faith attempt to reach an amicable settlement. In the event that the Parties are unable to resolve the dispute within thirty (30) days of notice of the dispute being given, then either Party may refer the dispute to the Expert by written notice to the Expert, copied to the other Party, for determination pursuant to the procedure set out in sub-clause [].”

“Expert Determination: The Expert shall decide on a dispute that is referred to him under this sub-clause. It shall be independent of the Parties and shall act impartially. The Expert’s appointment shall be on such terms as the Parties agree.

In making its determination, the Expert shall:

- *have regard to the Services required to be performed hereunder and the terms and conditions of this Agreement; and*
- *ensure that the position of the Parties is restored to the position they would have been in if the event triggering the dispute under this sub-clause had not occurred and all the Parties had complied with the Agreement.*

The Party who initially issued the notice of intention to refer the dispute to the Expert shall within ten (10) days of such notice submit to the Expert and to the other Party the following written documents:

- *a description of the dispute;*
- *a statement of that Party’s position; and*
- *copies of relevant documentary evidence in support.*

Within ten (10) days of receipt of the above documents, the other Party shall submit:

- *a description of the dispute;*
- *a statement of that Party’s position; and*
- *copies of relevant documentary evidence in support.*

The Expert may call for such further documentary evidence and/or interview such persons as it deems necessary in order to reach their decision. The Expert shall give notice to the Parties of its decision within twenty (20) days of receipt of the documents provided under sub-clauses [] as the case may be.

Unless this Agreement has already been terminated or abandoned, the Parties shall in every case continue to proceed with the performance of their rights and obligations under this Agreement with all due diligence whilst the Expert is reviewing the dispute.

The decision of the Expert shall be binding unless and until one Party, within ten (10) days of the date of such decision, issues a notice of intention to refer the matter to arbitration in accordance with sub-clause [].

The costs of the engaging of the Expert shall be borne equally by the Parties, and each Party shall bear its own costs of preparing the materials for and making presentations to the Expert.]]”

“Arbitration: All disputes arising out of or in connection with this Agreement, not settled by amicable settlement or by the Expert under the provisions of sub-clauses [] and [] shall be finally settled under the [Rules of Arbitration of the Republic of Kenya] by one or more arbitrators appointed in accordance with the said Rules.

The arbitration shall take place in [].

The arbitration shall be conducted in the [English]”

2.14 Liability, Insurance and Idemnification

Overview

This provision sets out the scope of legal liability of the operator and the extent to which the parties need to indemnify (ie compensate/reimburse) each other for loss or damage caused by it.

Key considerations

- Contract should make clear whether penalties are intended to cover loss and damage caused by the breach in full or whether the authority still has a right to claim compensation at law. It should also specify any cap on operator’s liability (or a cap on penalties) within a period (such as a year). This is a different issue from any liability the operator has to pay customers for failure to deliver the required service.
- What happens in respect of damage to third party property and also for environmental liability and pollution. Typically the operator and the authority will be responsible at law for environmental pollution and it will be important to specify how the liabilities are shared, and if indemnification by one party by the other is possible.
- Insurance can mitigate the risk of costs from environmental and other damage e. For smaller or very remote schemes this may not be available or cost effective and so consideration needs to be given as to whether there are other mitigation measures. Clustering may help here also.
- The extent of liability of the operator will depend partly on the extent of its functions and responsibilities—if it is not responsible for renewal and repair of the assets, for instance, it may not be possible to make it liable for the consequences of damage to or breakdowns in the scheme. In larger contracts for operations it is common to see liability capped at the annual remuneration of the operator.
- Indemnification is typically for loss or damage caused to property of third parties or for liability suffered due to the negligence or willful default of the other party. There may be legal limitations on what a party can indemnify—for instance the laws may preclude the assignment of legal offences that result in prison terms.
- Environmental liability is increasingly relevant as environmental laws are tightened and increased resources are devoted to prosecution. It is typical that where

environmental damage goes unprosecuted when it is a public party causing the pollution, once a private party is in place then prosecution may be more likely.

It is recommended that for larger projects, particularly where there is clustering of schemes and where there are additional repair, rehabilitation and expansion obligations placed on the operator, that these issues are clearly covered.

What the team found

Very few of the contracts included any form of limitation of liability provision or any indemnification clause. There were also few insurance provisions.

BOX 15: SAMPLE CONTRACTING LANGUAGE

Adapted from Kenya Operating Agreement (Limitations on Liability)

- “1.1.1 The Operator agrees and undertakes to provide and manage the Services in the Service Area so as to meet the Service standards, as set forth in Schedule [].*
- 1.1.2 If the Operator fails for reasons attributable to the Operator to meet specific Service standards, the Operator shall be subject to Penalty Reductions, as set forth in the Section [] and Schedule [].*
- 1.1.3 The Operator shall not be liable for failure to meet Service standards and shall not be subject to Penalty Reductions where such failure is caused by:*
- (i) Grantor Event of Default pursuant to Section [];*
 - (ii) Materially Adverse State Action pursuant to Section [];*
 - (iii) Force Majeure pursuant to Section [];*
 - (vi) the existence of a Snag Item which cannot be reasonably cured by minor works; and*
 - (v) a System taken over by the Operator which does not meet, as determined by Technical Auditors, service standards required to achieve the objectives of the Grantor.*
- 1.1.4 For the avoidance of doubt, where (i), (ii), (iii), (iv) or (v) above do not affect all the Systems, the limitation of liability provided in this Section [] shall relate only to the affected Systems.*
- 1.1.5 The Operators performance will not be tied to the Capital Investment Program implemented by the Grantor.*
- 1.1.6 The Operator’s liability under this Agreement will not exceed 20% of the Operator Fee in any contract year.”*

2.15 Expiry and Early Termination

Overview

If the project is going as planned then the contract will terminate on expiry of the contract term, unless renewed. The contract should specify what happens on expiry, particularly for handover of the assets and repair or replacement requirements prior to handover, and handover of updated operating manuals and asset register. It should also include an inspection regime for the authority to verify the state of the assets. It will also need to indicate if any staff will be handed over on expiry and also if there is to be any training of authority staff or handover process to a new operator. It is important to build in sufficient time for handover to proceed smoothly.

The contract also needs to anticipate situations where the project does not go as planned and the project is so badly affected that early termination is appropriate, or where there has been a material change in circumstance.

The termination will need to provide for the different reasons for early termination:

- Termination for cause
- Voluntary termination
- Force Majeure

The clause should also set out any cure periods within which the parties can seek to bring the project back on track and the consequences of early termination.

Key considerations

- Grounds for termination for cause – for operator and for authority. These should be for material and or recurrent defaults. Authority default events may relate to non-payment of operator fee or failure to carry out a planned capital investment. Operator defaults will include persistent or material failure to meet performance requirements, as well as bankruptcy or un-authorized assignment of the contract.
- Should there be termination in the event of a force majeure event (an event beyond the control of either party) that prevents the project or a significant part of the project from operating for a sustained period of time? If there is insurance available and can be applied to physical

damage caused by a force majeure event then the project may be able to recommence.

- Should there be an opportunity for the authority to terminate at will (termination for convenience)? It may be appropriate for the authority to have this flexibility but it will be a concern to bidders and to financiers as termination will be outside the control of the operator and the operator will expect to be compensated well (including loss of profits).
- Should there be cure periods (i.e., a set period from delivery of a notice of default within which the operator may cure the default) for these defaults – for some defaults this will be appropriate, for defaults such as insolvency this is unlikely to benefit from a cure period.
- What is the notification procedure for termination? This needs to be clearly spelt out.
- What are the consequences of termination – in terms of termination compensation? This will usually vary depending on whether the termination is due to the operator or for another reason. If the termination is due to the operator then compensation should be lower. If the termination is due to authority default or at will termination by the authority, typically the operator also recovers a portion of the profits that it has lost. The level of compensation will also vary according to whether the operator is out of pocket for certain investments. Where there is commercial financing termination compensation will be a key issue for lenders (they will want to ensure that their loans are repaid) and is typically heavily negotiated and agreed prior to contract signature.
- What provisions of the contract should survive termination? Typically payment clauses, obligations of the operator to make good defects and dispute resolution.

What the team found

All of the contracts reviewed give each party the right to terminate the agreement in the event of the other party's failure to perform its obligations. In some cases the types of default that will trigger such a right are set out very clearly. Under the model contract developed for Benin, the commune has a right to terminate the contract if the operator fails to comply with its obligations under the contract, specifically the suspension of water supply for more than

10 days for causes attributable to the operator; the lack of, or insufficient maintenance; bankruptcy, reorganization, or liquidation of the operator; and its failure to pay required fees. In Niger, in addition, the operator's failure to produce annual accounts is an event of default authorizing the water user association to terminate the contract.

Some contracts provide for a procedure to be followed by the party wishing to terminate the agreement. For example, under the Kenya management contract, the non-breaching party is required to serve a notice of intention to terminate, specifying the event of default giving rise to such notice, and the parties must consult with each other for a period of 30 days to discuss options to avoid termination. Upon expiration of such period, the non-breaching party may

serve a notice of termination and stop performance of its obligations.

The Niger agreement contemplates automatic termination of the agreement due to force majeure, consisting of war and other hostilities, natural disasters, attacks and sabotages, rebellion, insurrections, coups, strikes, boycotts, and the unavailability of water. In the Mozambique agreement, on the other hand, force majeure only suspends the parties' obligation during the force majeure event. Whilst automatic termination may not be appropriate, it is probably advisable to provide a mechanism to allow the affected party to terminate the contract in the event of extended force majeure www.worldbank.org/ppp.

Annex 1: Comparison Table of Small Scale Contracts Reviewed

Country	Benin	Mali	Uganda	Kenya	Peru (Sechura)	Peru (Natura)	Vietnam	Rwanda	Bangladesh	Burkina Faso	Uganda
Title	Affermage	Delegation de Gestion des AEPs dans les Centres Semi-Urbains et Ruraux	Management Contract for Town Water Supply	Operator Contract	Contracto de usufructo/gestion Management contract	Contracto de gestion Management contract	DBO Agreement for water supply system	Model Operation Contract	Grant agreement (World Bank)	AEPS affermage agreement	DBO (with separate civil works and operating contracts)
Parties	Community and Service Provider (SP)	Local authority and SP	Town Water Supply and Sewerage Authority (the "Authority") and a private operator	Community Water Trust and Private Operator	Consorcio PROGESTION ("Operator") and Municipality of Sechura	Municipality of Loreto, City of Nauta ("Municipality") and Aguas del Oriente ("Operator")	Municipal Utility Company and Private Operator	Water district and private operator	Bangladesh Water Supply Program Project and the private operator	commune + operator	town and operator
Duration	3/4/5 years, renewable	N/A, but renewable	3 years, subject to a review every 12 months	5 years, with the possibility of renewal	10 years from transfer of service to Operator	10 years with option to extend with 6 mo prior notice	Construction Period (not more than 75 weeks) + 10 year O&M period	5 years, possible conversion to 10 years	18 years (subject to "negotiation" between operator and community)	7 years renewable	7 years
Service	Operation, management and maintenance of AEV	Production, transportation and distribution	Operation and maintenance for water supply	Exclusive service of supply of potable water in Service Area	Water and sewage service to the municipality of Sechura	Operation, maintenance, administration and sale of water and sewage	Exclusive service of supply of drinking water in Service Area	Operation of facilities and provision of potable water	Construction and operation of water supply facilities + provision of water to community	exclusive delegation of potable water services and operation and maintenance	Design, build and operate and provide potable water
Investment obligations	SP must replace electro-mechanical equipment at own cost, but in practice SP seeks reimbursement whenever replacement or repair is done.	SP responsible for maintenance, repair, and operating the meters.	SP responsible for repairs, extensions and implementation. Cost reimbursed.	No - Operator prepares annual Capital Investment Reports for Grantor. (3.4 and 3.5) Responsibility for parts in schedule 7.	S/100,000. (One hundred thousand Soles) with a performance guarantee of \$100,000 USD.	20,000 soles (initial capital) = 50,000 soles in performance guarantee required of Operator	Construction of works + expansion at year 5	for smaller repairs + operation and maintenance	Operator to invest in infrastructure – and to be reimbursed from grant	commune responsible for major investment K14	practices responsible for design build/ repair and renew
Funding source	Revenues are too low for full recovery of costs. O&M costs are recovered. Fees are generally paid by the SP to the local council but fee level is low to allow for renewal of assets	Revenue from tariffs (operator charge, renewal fund and community charge)	Tariffs. Cost recovery for fees, investments and repair costs	Revenue from tariffs	Operator	Municipality and consumers, as agreed jointly through the Neighborhood Supervisory Board	Grant + tariffs	Tariffs	Reference is made to ensuring cost recovery (5.5)	tariffs	tariffs + financing + capital contribution (grant)
Maintenance and rehab obligations	SP to maintain the works and equipment in good working condition and make repairs where necessary	Renewal of equipment	SP to manage repairs and replacements. Also managing extensions to distribution system	Yes - to be funded from water tariff	Operator performs general maintenance and upkeep of the system	Operator	Repair and routine periodic maintenance. Major repairs and renewals to be Compensation Events	yes	Not clear	commune responsible for major investment K1	SP responsibility
Service levels specified	Yes	Yes	Yes	Yes	Yes	Yes	Yes	yes - statutory + other requirements	not included	set out in appendix 4	Yes + SP to prepare business plan
Performance targets	No	N/A	Yes	Yes	Baseline and projected targets of the above service levels	Yes		no	Not clear	no	Yes – schedule of agreed improvements
New connections	User pays connection cost and for meter	User pays new connection cost	People not connected to be reduced by 20% within 12 months of contract and 20% for each successive year	Cost of new connection is for customer	No specific target, but Operator has a natural incentive to increase connections since it retains revenues from users	No target indicated; Municipality to pay for new connections	Contractor to supply water to customers who apply for a service connection within Service Area – in interests of contractor to supply as keeps revenues	fee paid for individual connection. No minimum levels of new connections specified	Not specified	operator to connect. Subscriber to pay costs (19)	Schedule of agreed improvements

Country	Benin	Mali	Uganda	Kenya	Peru (Sechura)	Peru (Natua)	Vietnam	Rwanda	Bangladesh	Burkina Faso	Uganda
Bonus/penalty system	Penalty for interruption in supply	SP to establish a guarantee to the local authority	Forfeit a portion of the Base Fee	Fee subject to penalty reductions	Penalty fee for not meeting the targets	N/A	Yes – liquidated damages for late completion and penalty system for failure to meet performance standards	not in main contract terms - not clear if in an annex - may be part of the standard requirements	Not specified	penalties	yes – schedule 2
Tariff setting - who performs	Tariffs can be reviewed annually and approved by Community Council	Change of tariff and license fee approved by Community Council	SP submit proposals and Authori set the tariffs	Consent required of Grantor's membership, with notification to Water Services Board.	Tariff is approved by Municipality and administered by Operator	Operator sends proposal to Municipality, if it agrees, new tariff is set for public debate. Parties must both support proposal, after 30 days for comment, parties agree modifications and new prices	From 2nd anniversary of completion of works, Tariff adjusted in accordance with contractual formula – subject to Utility approval	tariffs set under a tripartite agreement between operator, district and users committee - based on a calculation matrix in operating agreement	Not clear	Operator proposes changes to commune. Tariff to approve in accordance with methodology in contract. Subject to review by town council.	Directorate of Water Development
Tariff collection	Licence fee set in contract: either a % of tariff applied to water produced (e.g., 15% of 500 FCFA) per m ³ produced, or a fixed fee per cubic meter produced (e.g., 100 FCFA/m ³ produced)	SP collects the revenue and then transfers the levy/ license fees to local authority	SP collects and shall be paid into the Escrow Account	Operator collects on behalf of Grantor and deposits it in the Grantor's Revenue Collection Account.	Operator collects.	Operator collects.	By contractor – for contractor's account	operator collects tariff on own behalf	operator	operator.	operator
Revenues	Operator keeps revenues (less fee)	Operator keeps revenues	Authority pays SP a mangement fee	Operator paid fixed fee less penalty + fee for new connections and identification and prosecution of illegal connections, 20% of operating surplus.	Operator receives revenues and sets aside a percentage for the municipality	Operator keeps revenues, minus the Investment Fund contribution	Lump sum for construction + tariffs from customers for water supply (less lease fee and supervision fee payable to Utility)	tariffs less fee to district - operator keeps revenues	SP gets paid grant for construction milestones. Contract does not specify that revenue is kept by operator – but this is assumed	Town may impose levy - rest of revenues go to operator	Operator paid fee from revenues
Rehabilitation fund?	A Bank account is opened and feed from money from licence fee paid by the SP. However, local councils do not use this money for rehab or for extensions	Yes (from license fee)	No - all revenues are paid into Escrow Account.		10.2% of monthly billing minus sales tax for investment, improvements, and emergency. Operator makes quarterly contributions to a fund administered by the Municipality.	11.25% of monthly revenues to be submitted by Operator to Municipality for and Investment Fund	Not clear	Yes - fee equal to 5% of water produced paid to district, 75% of which goes into rehabilitation and extension fund	surplus would be maintained	none specified	A Bank account is opened and feed from money from licence fee paid by the SP. However, local councils do not use this money for rehab or for extensions
Accounts and reporting	Contract requires monthly and annual accounts prepared by accountants, and approved by Community. In practice monthly accounts poorly prepared and incomplete and no annual report provided.	Yes - semi-annual, annual reports and accounts and also monthly reporting	SP to keep records, monthly, quarterly and annual. Prepare a 3 year business plan and updated annually	Monthly, quarterly and annual	Operator provides monthly reporting to Municipality	Operator to provide detailed statements on billing and income, and explanation if income is low. Also annual report to Municipality and NSB	Quarterly and annual reports	quarterly reports on customers, revenues etc + annual report + quarterly report on operation and maintenance	During construction - Monthly progress report + invoice for disbursement of grant and final completion report. There is no annual reporting but 9.10 refers to audited accounts	twice a year reporting - technical and financial - contract specifies content	Contract requires monthly and annual accounts prepared by accountants, and approved by Community. In practice monthly accounts poorly prepared and incomplete and no annual report provided.
Capex and renewal	SP is supposed to propose to Community program of investments each year, to be financed from the rehabilitation fund. But in practice this does not happen.		Include in the business plan. Extensions and renewals are approved by Authority	Capital investment report – recommends capex – determined by Community	Jointly agreed with Municipality on Annual Plan	Through a negotiated annual improvement plan agreed by Parties		district responsible for financing large renewals and repairs and extensions	Not clear	commune	operator - but none specified for end of contract

Country	Benin	Mali	Uganda	Kenya	Peru (Sechura)	Peru (Natua)	Vietnam	Rwanda	Bangladesh	Burkina Faso	Uganda
Asset ownership	Local council (both existing and new)	Community	Authority	Community	Municipality	Municipality	Utility	District	Operator – transfer to Water User Association at end of operating period	commune	transferred to authority on termination/ expiry
Regulator/ Monitoring body	Local council regulates and monitors SP performance. If a disputes arises (unlikely in Benin cultural context), go to dispute resolution.	Community & the Direction Nationale de l'Hydraulique	Minister of Lands, Water and Environment	Water Service Board and Water Resources Management Authority (re water source)	N/A	NSA composed of 2 delegates from each locality. NSA then elect a directive board.	During construction – project manager appointed by employer	District monitors the contract	BWSPP	state water department has certain matters (re sanctions) referred to it	Directorate of Water Development
SP right to cut off supply	Yes – for non payment		Not specified		Yes, for non-payment after 2.5 months	Yes, for non-payment after 2 months	Yes	not mentioned	Not specified	not specified	not specified
Dispute resolution	Reconciliation; litigation (article 23)	Reconciliation; litigation	Arbitration	Amicable settlement, then expert determination then Arbitration	Stict time limits. Silence is deemed acceptance. Administrative procedural law applies (Clause 18, 19). Thereafter, or if municipality has a claim, arbitration		In accordance with Vietnam Ordinance on Commercial Arbitration	amicable settlement, then possible for mediation or arbitration from PNEAR, then due legal process (courts?)	Arbitration – Construction - BWSPP (8), operation – local DPHE engineer. Appeal to executive engineer of DPHE	twon supervisory authority + dept of water to conduct conciliation, if this fails, goes to administrative courts (40)	arbitration in accordance with Ugandan law
Customer complaints mechanism	None specified - but in triparty contract (Local council - SP - Water user association group) customer relations are set between SP and water users	Local authority	No provision	Operator to register and manage customer service enquires and complaints and develop a customer response plan	Customer complaint resolution as required by "Ordenanza N° 017-2005-MPS". (Local regulation)	Operator to handle customer complaints promptly and in accordance with Ordinance	None specified	yes	Not specified	not specified	yes

Annex 2: Sample Term Sheet – DBO

If prefer to use a standard civil works contract + an operation and maintenance contract, then can use the O&M term sheet in Annex 5. Care should be taken to ensure consistency between documents—have an overarching agreement that specifies priority in case of inconsistency.

This could be for a new build or for extension/refurbishment and extensive new build of a facility. DBOs are typically used for bulk supply facilities in green field projects (treatment, pumps etc) but could also include transmission and distribution network and a brownfield where substantial replacement is required.

Item	Description
Parties	Authority Operator [Regulatory Agency/other agency]
Definitions and interpretation	Set out all definitions and interpretation Definitions include Existing Facilities, New Facilities, Project, Services, Service Area, Service Standards, Service Targets, Penalties, Applicable Law, Construction Period, Operations Period
Contract documents	List documents that form the contract and order of priority in case of inconsistency
Notices	Details of parties including address, party to receive receipt, telephone and email and specify how receipt will be proven (delivery with receipt, deemed delivery...)
Assignment	Assignment of rights and obligations under the Agreement by each party – whether this needs to be with consent of other party Sub-contracting – are there limitations? Is authority consent required?
Term of contract	[] years, or construction period + [] years, renewable for up to [] years with serving notice of [] months prior to expiry [either party][authority], subject to agreement of parties
Appointment and general responsibilities of operator	Specify Service Area Is this exclusive or non-exclusive appointment? Provision of Services – design and build (see below) + plus operations. Will this include some repairs of larger parts, renewal? Services to be performed in accordance with the Specifications, Applicable Law, Reasonable Operating Standards Operator to maintain in good working condition and operate Facilities (need to specify extent of the maintenance and repair obligations of the Operator during operations period) and provide Potable Water to Customers in accordance with Service Standards, Applicable Law and Reasonable Operating Standards Operator to safeguard the assets Operator not dispose of or create liens or interests over the assets without express consent of Authority Open and maintain Revenue Collection Account Operator to employ qualified personnel Keep spare parts Carry out specific renewals if there is a renewals schedule Consequences of failure to perform – penalties

Rights of operator	<p>Exclusive right to provide services to customers in Service Area</p> <p>Access to the land and Facilities and third party land (to lay pipes etc)</p> <p>Right to use Facilities and assets</p> <p>Right to abstract water</p> <p>Right to Operator Fee and termination fees</p> <p>Right to provide services to customers</p> <p>Charge customers [on behalf of Authority] and enter into customer agreements</p> <p>Right to receive payments from customers</p>
Design and build obligations	<p>Operator to design and build the New Facilities in accordance with the Specifications, Applicable Law and Reasonable Operating Standards and within the time for completion</p> <p>Is there a requirement to refurbish Existing Facilities?</p> <p>Is the construction fee to be paid in instalments following testing commissioning of sections of the new facilities or at the end of construction, testing and commissioning?</p> <p>Liquidated damages for delay</p> <p>Testing and commissioning – how and when is performance certificate issued</p> <p>Is the authority to monitor construction or a third party such as an engineer?</p> <p>Operator to prepare as – build drawings of new facilities</p> <p>Operator to prepare monthly progress reports and submit these to the authority [and the engineer]</p>
Charges to customers and collection	<p>Operator to collect tariffs and fees in accordance with Tariff and Fee Schedule</p> <p>Operator to enter into customer agreements in agreed form</p> <p>Operator to pay tariffs into Revenue Collection Account</p> <p>Circumstances when Operator may cut off non-paying Customer, if any, and when to restore connection</p> <p>Customer complaints mechanism[may be set out in model customer agreement]</p> <p>Operator to maintain record of customer complaints</p>
New connections	<p>Operator to achieve []% new connections by year []</p> <p>Operator to provide new connection to every potential customer making written application for such connection, subject to overall capacity of the Facilities</p>
Records, accounts and reports	<p>Operator to keep proper and adequate records of performance and incidents</p> <p>Operator to keep accounts [Monthly], quarterly, six monthly annual and send them to authority</p> <p>Do any of the reports and accounts need to be audited?</p> <p>Does authority have right of review/audit? If so, what is time frame? If there is a dispute, consider using an independent auditor to settle dispute over accounts</p>
Business plans	<p>Operator to prepare and submit business plans within [] months of commencement date to cover [5] years</p> <p>Business plan to be update periodically [annually]</p> <p>To be reviewed by Authority</p> <p>Business plan to include:</p> <p>Operations – overall strategies, services to be provided and standards and targets, performance indicators, necessary investments, plans for expansion (if any) and strategy for new connections</p> <p>Finance – financial targets, financial strategies (including tariffs, fees, charges), forecast revenue</p>

Asset register	Operator obligation to prepare/update an asset register within [] months of commencement date and keep up to date (to take into account new facilities) and to hand over on expiration or termination
Operating manuals	Operator to prepare operating manuals within [] months of commencement date, to keep up to date and to handover on expiration or termination
Allow inspection of land, assets, records and documents	Allow inspection by authority (and regulatory agency), access to facilities, to take tests, make copies of documents
Employees	Requirement to employ staff with relevant experience and qualifications. Duty to provide statutory remuneration and benefits as minimum, and any follow other statutory requirements regarding staff What happens to staff at end of agreement
Indemnification	No liability of either party for damage to persons or property of other party arising other than out of the negligence or wilful default of that party
Limitation of liability	Liability for environmental pollution etc – is there a limitation General limitation of liability if any
Duties and rights of authority	Provide (lease over) facilities and land, obtain abstraction permit Grant [exclusive] right to provide services to customers in Service Area Set tariffs [with regulatory agency authority] in accordance with tariff methodology set out in Agreement and periodic reviews as specified in the Agreement Pay operator fee Pay capital contribution [or carry out certain repairs and renewals as set out in schedule] Monitor performance of Operator Review/audit accounts and review reports and records Approve business plan Not to interfere with operations Carry out environmental impact assessment [if there is to be construction]
Force majeure	Events Consequences Extended force majeure – early termination
Early termination	For cause – operator default, authority default, termination at will, termination for extended force majeure Notice and cure periods for default Consequences of termination – termination fees
Handover on expiry or termination of agreement	Handover of Facilities in good working condition (wear and tear excepted), spare parts and assets, operations manual, asset register, royalty free license to use software and other IP for the purposes of delivering the Service and operating the Facilities. Should there be specific parts replaced within a specified period prior to expiry? Employees (any to be transferred to authority?)
Dispute resolution	Mutual agreement, conciliation or expert determination (could be local branch of regulatory agency), arbitration or courts

Miscellaneous	Operator duty to keep insurance—for third party liability, employees assets Governing law Language Confidentiality Variations/amendments of agreement Severability of contract provisions in case a clause is invalid Authorized representative Survival of specific clauses after termination and expiration Conflict of interest
Schedule – Service Area	Service Area map
Schedule - Existing Facilities	Describe the main existing assets that the authority is to provide to the operator at the beginning of the contract
Schedule – New Facilities	Specifications Time for completion Liquidated damages for delay in completion
Schedule – Performance specifications and minimum service levels	Availability of supply Service coverage Quality of treated water Water pressure Continuity of service Maintenance and repairs Prevention of pollution Non-revenue water Percentage of billing enquiries in a period
Schedule – performance targets – service levels	Could include Connections Non-revenue water Availability of supply
Schedule – Penalties [and bonuses]	Consequence of failure to meet service standards and targets – plus maximum penalties to be charged in one period Any bonuses for outperformance/early completion of construction?
Tariffs	Initial tariffs and tariff review methodology – is there regulatory approval required Periodic reviews – how often? Is there an appeal process if authority to approve?
Schedule – operator fees	Operator Fees, how to invoice, when paid, interest to be charged for late payment of authority Typically for a DBO these will include: Payments in instalments/lump sum on issue of Performance Certificate for New Facilities Operating Fee (may be fixed to cover fixed costs + variable to cover consumables) + mechanism for adjustment of fees
Schedule – termination payments	Termination for cause Operator Authority Termination at will Termination for extended force majeure

Annex 3: Sample BOT/Concession Agreement for Constructing and Operating the Whole Small Scale Scheme

(for a completely new scheme or expanding existing scheme)

Note: In this example, the developer takes revenue risk. This template could be adapted to have authority taking revenue risk and paying developer a fee.

DATED

**BUILD OPERATE TRANSFER (BOT) AGREEMENT
FOR [] SMALL SCALE WATER PROJECT**

Between

[AUTHORITY]

And

[OPERATOR]

[Prepared as a sample. Lenders may want to be a party to this agreement and have certain rights under the agreement]

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BUILD OPERATE TRANSFER (BOT) AGREEMENT

THIS AGREEMENT (hereinafter referred to as the “Agreement”) is made the day of

BETWEEN:

[CONTRACTING AUTHORITY] (the “Authority”) a corporate entity established under the Laws of [COUNTRY] and with a mandate under the [WATER LAW] to provide potable water services to the [COMMUNITY], whose address is []; AND

(2) [OPERATOR] (the “Operator”) a limited liability company incorporated in whose address is [ADDRESS AND COUNTRY].

The Authority and the Operator being called individually as “Party” and collectively as the “Parties.”

WHEREAS:-

The Authority is the owner and developer of water sources under a permit granted by [RELEVANT AGENCY];

The Authority is mandated to undertake water supply infrastructure development and supply water services to [TOWN].

the Authority wishes to contract with the Operator to design, build, operate and finance the scheme and then transfer it to the Authority at the end of the scheme.

NOW THEREFORE, in consideration of the mutual covenants and agreements hereinafter set forth, the Parties AGREE AS FOLLOWS:

1. DEFINITIONS AND INTERPRETATION

1.1. Definitions

In addition to the terms defined elsewhere in this Agreement, whenever used in this Agreement (including Schedules hereto), unless the context otherwise requires, the following terms shall have the following meanings:

“Abstraction Permits” means the permits issued by [RELEVANT AGENCY] to the Authority to develop the Water Source and to abstract water therefrom.

“Agreement Period” has the meaning assigned to it in Section 2.2.

“Applicable Law” means laws and any other legal instruments having the force of law in [COUNTRY] and includes any applicable statute, ordinance, decree, regulation or by-law or any rule, circular, directive or any licence, consent, permit, authorization, concession or other approval issued by any Government authority which has appropriate jurisdiction.

“Certificate of Effectiveness” means the certificate to be issued by the Authority certifying the satisfaction of all conditions precedent to this Agreement.

“Construction Period” has the meaning assigned to it in Section 2.2.

“[Currency]” means the lawful currency of [COUNTRY].

“Customer” means any person or legal entity within the Service Area who has signed a Customer Agreement with the Operator for receipt of Services.¹

“Customer Agreement” means an agreement in the form of the Model Customer Agreement entered into between the Operator and a Customer.

“Effective Date” means the date determined in accordance with Section 2.1.

“Eligible Payments” means payments to regulatory authorities including the Regulatory Fees, other statutory fees and the Operator Fees payable in accordance with this Agreement.²

“Existing Facilities” means the Water Resource and other facilities, whether immovable or movable, equipment, supplies and other property, owned or used by the Authority on the date of signature of this Agreement in connection with developing a potable water supply for the Service Area.

“Expiry Date” means the last day of the Operating Period as specified in section 2.2.

[“Environmental Impact Assessment” means an assessment of the environmental and social impact of the Project;]

“Facilities” means Existing Facilities and New Facilities.

“Financial Year” means the period from 1 January to 31 December of any year during the Agreement Period, with the first financial year running from the Effective Date until 31 December of that year.

“Force Majeure” means the events specified in Sub-Section 11(b).

“Initial Tariffs” means the Tariffs as approved and set out in Schedule 3.

[“Lease” means the lease agreement to be entered into between the Authority and the Operator in relation to the land necessary for the Operator to construct the New Facilities and operate the Facilities;]

“Model Customer Agreements” means the form of customer agreement to be entered into between the Operator and the household customers as agreed between the Parties [and approved by the Regulatory Agency].³

[“Monitoring Agency” means the agency appointed by the Authority to monitor the Services and Facilities on its behalf;]

“New Facilities” means facilities, whether immovable or movable, including vehicles, equipment, supplies and other property, constructed or purchased by the Operator during the Agreement Period for the provision, by the Operator, of Services in the Service Area including those facilities set out in Schedule 2.

“Operation Commencement Date” means the date following the date on which the Authority issues, or is deemed to have issued, the Performance Certificate under Section 5.3, whichever is the earlier.

[“Operator Fees” are the fees to be paid to the Operator for Services as set out in section [] and Schedule 8.]⁴

“Operator Staff” has the meaning assigned to it in Section 8.3.

¹Assuming that operator will have direct relationship with customers (ie will collect user fees (either on its own behalf or on behalf of Authority

²Depending on arrangements with financiers, financiers are likely to want to take a charge over the Revenue Collection Account and to be paid ahead of the Operator. These arrangements may be set out in a separate financing agreement but may also be referred to in the BOT agreement

³See footnote 22

⁴Only relevant in cases where the operator is collecting revenue on behalf of the authority or is only permitted to keep a portion of the proceeds for its own account and leave some in an escrow account that can then be put towards expansion of the system

“Operating Period” has the meaning assigned to it in Section 2.2.

“Penalty” has the meaning assigned to it in Schedule 6.

“Performance Certificate” means a certificate issued under Section 5.3.

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

“Potable Water” means water either treated or in its natural state complying with the requirements of Applicable Law.

“Project” means the project described in the Agreement including the development of the New Facilities, the operation, repair and maintenance of Facilities and the provision of Services by the Operator.

“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 (including the conditions of the Existing Facilities at the Effective Date) as contemplated by this Agreement.

“Raw Water” means any untreated water.

“[Regulatory Agency]” means [REGULATORY AGENCY].⁵

[“Regulatory Fee” means an amount payable to the Regulatory Agency during the Agreement Period.]

“Recitals” means recitals of this Agreement.

“Relevant Bank Base Rate” means the base rate of the central bank of [COUNTRY] from time to time.

“Revenue Collection Account” means an account in the name of the Operator at a bank acceptable to the Lender and the Authority where customers deposit payment for Services pursuant to Section 6.2.

“Service Standards” means those standards listed in the Schedule 5.

“Services” means the services provided by the Operator in the Service Area during the Operating Period under this Agreement.

“Service Area” means the geographical area covered by the Services set out in Schedule 1 and the Customers served within that area, as may be expanded from time to time pursuant to the terms of this Agreement.

“Specifications” mean the specifications for the New Facilities set out in Schedule 2.

“Tariffs” means the charges levied on the consumption of water services as well as for access to a water system.

“Termination Payments” mean the amounts payable to the Operator under Schedule 8.

“Time for Completion” means the date by which the New Facilities are to have passed the Performance Tests as set out in Schedule 2 (or as extended under Sub-Clause 5.3), calculated from the Effective Date.

“Treated Water” means any Raw Water that has been treated and processed by the Operator through the Facilities in accordance with this Agreement.

1.2. Interpretation

- a) The Recitals and the Schedules to this Agreement shall form an integral part thereof. This Agreement shall be read as a whole. In event of discrepancy and/or contradiction between the Agreement and its Schedules, the Agreement shall prevail.
- b) References to Schedules shall be references to Schedules to this Agreement unless otherwise agreed by the Parties. The following Schedules which are incorporated by reference into this Agreement shall be referred to as follows:
 - Schedule 1: Service Area
 - Schedule 2: Facilities and Specifications
 - Schedule 3: Initial Tariffs
 - Schedule 4: Reporting Requirements

⁵if applicable

Schedule 5: Service Standards

Schedule 6: Penalties

Schedule 7: Operator Fees

Schedule 8: Termination Payments

- c) The headings of Sections 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.
- d) 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.
- e) The words “include,” “includes,” and “including” shall at all times be construed as if followed by the words “without limitation.”

2. COMMENCEMENT, DURATION, RENEWAL

2.1. Commencement

- a) This Agreement shall become effective (the “Effective Date”) from the date when the following conditions precedent are fulfilled:
 - i) [Approval by the [Regulatory Agency] of this Agreement];
 - ii) the Operator obtaining from its finance institution confirmation that the funds for financing the New Facilities are available for drawdown;
 - iii) [execution by the Operator and the Authority of the Lease];
- b) The Operator, and the Authority shall use their best efforts and endeavours to procure the satisfaction of the conditions precedent specified in Section 2.1(a) as soon as is practicable and in any event no later than [ninety (90)] days after the date of signing this Agreement.
- c) The Operator shall take over the Existing Facilities and commence the provision of the Services within fifteen (15) days of the Effective Date. The Authority shall provide the Operator with written notice of the Effective Date, and this shall be deemed to be the Effective Date for the purpose of this Agreement.
- d) If the conditions specified in Section 2.1(a) are not fulfilled or waived by mutual agreement of the Parties within ninety (90) days of the date of the signature of this Agreement, each Party shall have the right to terminate this Agreement immediately and no Party hereto shall be liable to the other Party for any damages or losses in respect thereof.

2.2. Agreement Period

Unless terminated earlier pursuant to Section 9 or 10, this Agreement shall remain in full force for the sum of the Construction Period and the Operating Period (the “Agreement Period”). The Construction Period shall commence on the Effective Date and end on the date of issue of the Performance Certificate, which shall be no longer than [12] months from the Effective Date. The Operating Period shall be a period of [10-20] years⁶ from the Operation Commencement Date.

2.3. Renewal

Unless terminated earlier pursuant to Section 9 or 10 below, this Agreement shall be eligible for renewal for a maximum period of [3] years, subject to successful negotiation by the parties of any terms and conditions applicable under this contract. If the Parties do not agree to the terms of renewal, the Operator shall have the right to bid on any new contract tendered by the Authority.

⁶Duration will depend on factors such as length of period necessary for operator to recover investment

3. REPRESENTATIONS AND WARRANTIES

3.1. Operator

The Operator represents and warrants that:

- a) It is a legal entity duly registered/incorporated under the Laws of [COUNTRY] and has all requisite legal power and authority to enter into this Agreement and such other agreements, being agreements to which the Operator will be a party, as are contemplated elsewhere in the Agreement and in the Schedules and to carry out the terms, conditions and provisions thereof.
- b) There is no litigation, actual or pending at the date of execution of this Agreement, which relates to the Operator and to which the Operator is a party or of which the Operator is aware which would materially affect the Operator or its ability to perform its Obligations under this Agreement and the transactions contemplated hereby.

3.2. Authority

The Authority represents and warrants that:

- a) The execution, delivery and performance of this Agreement and the transactions contemplated hereby do not and will not infringe and are not and will not be contrary to any laws or regulations of any Governmental, administrative or regulatory body.
- b) It will provide to the Operator all necessary access to, and exclusive use of, the Existing Facilities, free of charge and without responsibility for any debt charges on such assets and without interruption from any other person provided that the Authority and the [Monitoring Agency⁷] has the right at all reasonable times, in all reasonable places, and subject to the operational needs of the provision of the Services to visit, inspect and conduct tests on all documents and the Service Area and the Operator shall make reasonable provision to assist the Authority and the [Monitoring Agency] in such events.
- c) The Authority will not, for the Agreement Period, retain, use or employ another contractor, or employ any other person or body to perform the Services within the Service Area unless such alternative provision is caused or made necessary by any failure by the Operator to perform its obligations under this Agreement.

4. RIGHTS AND OBLIGATIONS

4.1. Operator Obligations

The Operator shall:

- a) design, build and construct the New Facilities in accordance with the Specifications, the Construction Schedule and Prudent Industry Practice;
- b) provide all financing for the New Facilities and all necessary and adequate working capital at all times during the Agreement Period to enable it to fulfill its obligations under the Agreement and to provide Services in the Service Area, including repair and maintenance of the Facilities;
- c) operate the Facilities in accordance with Prudent Industry Practice and the Service Standards and provide Potable Water and deliver the Services to Customers in accordance with Service Standards;
- d) operate the Water Resource in accordance with the applicable Abstraction Permits;
- e) obtain all necessary licenses, permits and warranties necessary to carry out its obligations under this Agreement, other than the Abstraction Permits;
- f) arrange for an electricity supply for the Facilities;⁸

⁷May be a water user association or regulatory authority, whichever is the most appropriate entity to monitor performance, if Authority so delegates

⁸In some cases it may be more appropriate to make this a Authority obligation?

- g) repair and maintain the Facilities in good working order and not dispose of any of the Facilities without the authorization of the Authority, other than to assign its interest in the New Facilities to the Lender pursuant to its financing arrangements;
- h) prepare an asset register within 12 months of the commencement of the Operating Period, keep a copy thereof on site and maintain such asset register;
- i) open a Revenue Collection Account [in its name/ in joint names with Operator] and direct payments from customers into such account and only withdraw Eligible Amounts from that account;
- j) employ staff who have the relevant qualifications/ experience;
- k) provide as a minimum to staff statutory benefits and terms and conditions of employment;
- l) ensure that all employees who have contact with the public have identification documents to be produced when required;
- m) obtain appropriate insurance coverage for the Agreement Period with an insurance company of repute against claims, losses, damages to assets, accidents, injury or death, as more fully described in section 13.5;
- n) prepare and submit reports in accordance with this Agreement;
- o) prepare operating manuals within 12 months of the commencement of the Operating Period, keep a copy thereof on site and keep such operating manuals up to date;
- p) cooperate with the Authority, the [Monitoring Agency] and the [Regulatory Agency]⁹ to allow effective monitoring;
- q) publicize Tariffs at pay stations, all offices to which Customers have access and on standpipes and water kiosks;
- r) be responsible for all fees and expenses related to provision of the Service and construction of the New Facilities and operation, repair and maintenance of the Facilities, including but not limited to electricity charges, chemicals, raw water extraction fees, spare parts, equipment, employee salaries, levies, water permit fees and taxes;
- s) pay any Regulatory Fees out of the Revenue Collection Account; and
- t) comply with Applicable Laws.

4.2. Operator Rights

The Operator is entitled for the Agreement Period to:

- a) exclusive¹⁰ use of the Existing Facilities and [use and operation]¹¹ of the Facilities for the purposes of complying with its obligations under this Agreement and the provision of Services;
- b) exclusive right to provide Potable Water to residents within the Service Area;
- c) a lease of the Water Source and the land necessary to develop the New Facilities, together with necessary easements and the right to lay pipes in the Service Area;
- d) conclude Customer Agreements with Customers for the supply of Potable Water [in the name and on behalf of the Authority] in the form of the Model Customer Contract;
- e) charge Tariffs [as approved by the [Regulatory Agency] from time to time] and issue customer bills to Customers for Potable Water provided;¹²
- f) receive payments from Customers into the Revenue Collection Account;
- g) be paid the Operator Fees, if any, in accordance with Schedule 8;
- h) be paid the Termination Payments in accordance with Schedule 10;
- i) disconnect Customers for non-payment on receiving express authorization from the Authority to do so;
- j) reconnect customers on assessment that customers have cleared their financial obligations to the Operator;

⁹If relevant

¹⁰Exclusivity is appropriate if operator is taking revenue risk

¹¹It may be able to own the facilities, depending on the country

¹²This will need to be amended If collecting on behalf of authority and authority paying operator fee

- k) enter into premises and properties within the Service Area and to exercise all other statutory powers within the Service Area necessary for the purposes of fulfilling its obligations under this Agreement and the Customer Agreements;
- l) and exclusive right to abstract water from the Water Source; and
- m) to apply to the [Regulatory Agency] for Tariff adjustments from time to time in accordance with the relevant guidelines published by the Regulatory Agency.

4.3. Authority Obligations

The Authority, as from the Commencement Date:

- a) grants free of charge to the Operator a lease over the Water Source and other Existing Facilities and access to all land within the Service Area in respect of which access is required for the performance of the Services by the Operator [in accordance with the Lease¹³];
- b) grants the Operator the [exclusive] right to provide Services to Customers in the Service Area;
- c) provides exclusive access to the Water Source and a copy of the terms of relevant Abstraction Permits;
- d) [shall make arrangement for the renewal of Abstraction Permits;¹⁴]
- e) shall make all reasonable efforts to assist the Operator to gain access to assets or to other land on which it is required to exercise its duties. [If access cannot be obtained even with the assistance of the Authority, and there is no fault or negligence on the part of the Operator, the Operator shall not be considered to be in default of its Obligations under this Agreement];
- f) not interfere and cause its employees and sub-contractors not to interfere or obstruct the Operator in carrying out its obligations under this Agreement and providing the Services;
- g) shall arrange for the carrying out of surveys and review business plans investment plans;
- h) [shall prepare studies of demand forecast and expansion of the water supply systems in consultation with the Operator¹⁵];
- i) [shall carry out an Environmental Impact Assessment where appropriate or compulsory according to Applicable Law];
- j) shall obtain and keep in force all licences, permits and warranties outside the responsibility of the Operator;
- k) shall give the Operator full access to all necessary information, plans, policies, papers, reports and data in order to enable the Operator to carry out the services and assist the Operator to obtain, from the Government, local government or statutory bodies, all necessary consents and permits as required by Applicable Law; and
- l) shall monitor the performance of the Operator under this Agreement.

4.4. Supervision by the Authority

- a) The Authority shall supervise the Operator in the performance of its obligations under this Agreement.
- b) The Authority shall review and approve or comment upon all reports submitted by the Operator pursuant to Schedule 3.
- c) The Authority shall be given reasonable access during normal working hours to the Facilities and to premises, works and sites of the Operator for the purposes of inspection and certification to the extent this does not disturb the Operator's performance of its obligations under this Agreement. For the avoidance of doubt the term "Authority" as used herein shall include duly authorized officers, employees and representatives as well as the financial and technical auditors.

¹³Is a separate lease is required – otherwise can be granted under this agreement

¹⁴This may be an Operator responsibility, if the law allows this

¹⁵May be more appropriate for operator to carry out this exercise, even if on behalf of the authority

5. CONSTRUCTION, TESTING AND COMMISSIONING

5.1. Construction of New Facilities

- a) The Operator shall commence the design and construction of the New Facilities within 15 days of the Effective Date. The Operator shall then proceed with construction of the New Facilities with due expedition and without delay.
- b) The Facilities shall have passed the Performance Tests by the Time for Completion.
- c) The Operator is entitled to an extension of the Time for Completion if he is or will be delayed either before or after the Time for Completion by any of the following causes:
 - i) a change in the Specifications for the New Facilities that delays materially the Time for Completion set out in Schedule 2;
 - ii) a Force Majeure event (as defined in Section 11);
 - iii) physical conditions or circumstances on the site for the New Facilities, which are adverse and were not (by the Effective Date) drawn to the Operator's attention or within its knowledge (as is evidenced by written records) or foreseeable from the data supplied to the Operator by the Authority;
 - iv) any breach of this Contract, delay, impediment or prevention by the Authority; or
 - v) an action by a legally constituted public authority which has delayed, impeded or prevented the Operator from installing the New Facilities other than due to the negligence or wilful default of the Operator.
- d) If the Operator intends to apply for an extension of the Time for Completion, the Operator shall give notice to the Authority of such intention as soon as possible, together with supporting information. The Operator shall keep such contemporary records as may be necessary to substantiate any application, at the site and such other records as may reasonably be requested by the Authority. The Operator shall permit the Authority to inspect all such records, and shall provide the Authority with copies as required. The Authority shall respond within 28 days of receiving a claim from the Operator by either confirming the Authority's entitlement, or denying the claim with detailed reasons. Any dispute may be referred for resolution in accordance with Section 12.
- e) The Operator will provide monthly status reports to the Authority and the [Engineer] during the Construction Period setting out progress on the New Facilities and whether there are any delays or issues that have arisen. The first report shall be provided following the first calendar month after the Effective Date and shall be provided within 14 days of the end of such calendar month.

5.2. Delay in Construction

If the Operator fails to comply with Section 5.1(b) for reasons other than those set out in Section 5.1(c) above, the Operator shall pay to the Authority the sum set out in Schedule 2 as liquidated damages for such default (which sum shall be the only monies due from the Operator for such delay) for every week which shall elapse between the relevant Time for Completion and the date stated in the Performance Certificate, provided that the total of all liquidated damages payable by the Operator pursuant to this Section 5.2 shall not exceed the sum set out in Schedule 2.

5.3. Performance Tests

- a) The Operator shall carry out the Performance Tests in accordance with this Section 5.3 and the Specifications (Schedule 2). The Operator shall give to the Authority 7 days' notice of the date on which the Operator will carry out the Performance Tests and invite the Authority [and the Engineer to attend]. The Performance Tests may proceed as scheduled irrespective of whether the Authority [or the Engineer] is attending.
- b) As soon as the Facilities have passed the Performance Tests, the Operator shall provide the Authority [and the Engineer] with a certified report of the results of all such Performance Tests.
- c) If the Facilities fail to pass the Performance Tests, the Operator shall promptly and in any event within [14] days inform the Authority of the action it proposes to take to ensure that it does pass them when retested and such failed Tests shall

then be promptly repeated under the same terms and conditions. Such failed Tests shall be repeated in accordance with this Section 5.3 until the Facilities pass the Performance Tests.

- d) The Operator may apply by notice to [the Engineer on behalf of] the Authority for a Performance Certificate not earlier than 14 days after it has provided the certified report of the results of the Performance Tests to the Authority. The Authority [or the Engineer on behalf of the Authority] shall, within 14 days after the receipt of the Operator's application:
 - i) issue the Performance Certificate to the Operator, stating the date on which the Facilities have passed the Performance Tests; or
 - ii) reject the application, giving its reasons for believing that the Facilities have not passed the Performance Tests and specifying the work required to be done by the Operator to enable the Performance Certificate to be issued. The Operator shall then complete such work before issuing a further notice under this Section.
- e) If the Authority/Engineer, as the case may be, fails either to issue the Performance Certificate or to reject the Operator's application within the period of 14 days, and if the Facilities have passed the Performance Tests, the Performance Certificate shall be deemed to have been issued on the last 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.

6. TARIFFS AND CUSTOMER RELATIONS

6.1. Tariffs

- a) The Initial Tariffs to be charged to Customers are set out in Schedule 6.
- b) Increases in Tariffs must be approved by the [Regulatory Agency¹⁶]. Tariffs shall be sufficient to cover the reasonable cost of providing the Services, maintaining the Facilities, any upgrades in Facilities or extension of Services agreed by the parties, servicing of financing for the New Facilities and to meet any other costs specified in this Agreement. The Operator and the Authority shall carry out a a Tariff review to adjust the Tariffs and/or remuneration of the Operator or the Authority within 30 days of the anniversary of the Agreement. Such Tariff adjustment proposal shall be established in cooperation by the Operator and Authority justifying the Tariff adjustment with all necessary documentation and estimates. The proposed Tariff adjustment shall be presented in accordance with the Applicable Law to the Regulatory Agency for approval. The Regulatory Agency may approve the tariff application and confirm the new Tariff.¹⁷
- c) If one of the parties does not agree to the adjustment proposal or does not respond to the request of the other party within three (3) months, it may declare a dispute in writing and seek dispute resolution in accordance with Section 12.

6.2. Customer Relations

- a) The Operator will install new household connections to all potential Customers who make a written request to be connected, subject to any limitations on resources within the Service Area. New connections shall be installed in accordance with good utility and industry standards. Customers will be required to meet the entire cost of new connections which they shall be required to pay in full prior to installation of the connection. Any payments will go into the Revenue Collection Account.
- b) The Operator will enter into a Customer Agreement with each Customer in the form of the Model Customer Agreement.
- c) The Operator will ensure that all household connections are metered and that meters installed comply with good utility standards and the Regulatory Agency's specifications on meters and shall be installed in such a manner as to be accessible to the meter readers. The Operator shall be responsible for maintenance and repair of meters and cost thereof.

¹⁶This will be modified if it is only on agreement of Authority

¹⁷May want to specify requirement for parties to request additional opportunities to revise tariffs, standards, specifications etc. Process will take into account whether there is an existing regulatory agency and law relating to tariff approval

- d) The Operator will bill the Customers in accordance with the approved Tariff and will collect payment from Customers in accordance with the Customer Agreement.
- e) Payment collected will be immediately deposited in the Revenue Collection Account and [any regulatory payments will be transferred to the Regulatory Agency].
- f) The Operator shall ensure that Customers throughout the Service Area have easy access to information from the Operator and are able to lodge complaints with it. The Operator is obliged to display prominently a schedule of Tariffs and details of how to contact the Operator and file complaints at water kiosks.
- g) The Operator shall record all complaints from Customers and shall report to the Authority on an annual basis on the complaints received. The Operator shall promptly respond to requests for information and complaints according to the Minimum Service Level Guidelines published by the Regulatory Agency. The Operator will use every reasonable effort to resolve complaints from Customers within its Service Area.
- h) [The Regulatory Agency may take a decision that the Operator should pay compensation to Customers for failure to provide Services, provided that such failure is due to the negligence or willful default of the Operator.]

7. REPORTING AND PLANNING

7.1. Reporting

The Operator shall be responsible for submitting periodic reports to the Authority, the Lender and the Regulatory Agency, as set out in Schedule 4.

7.2. Planning

The Operator shall prepare a five-year draft business plan not later than one (1) month prior to the end of the first financial year of the Agreement and this will be updated annually and sent to the Authority and the Lender. The business plan will also set out any proposals for significant expansion of the Facilities or capital investment in addition to the New Facilities. The business plan will be reviewed by the Authority. In the event that any proposed investment would require additional funding then the Operator would need approval of the Authority and the Lender prior to making such investment.

8. FACILITIES AND PERSONNEL

8.1. Title to the Facilities

- a) Title to the Existing Facilities shall remain at all times in the Authority. Title to New Facilities shall remain in the Operator up until the expiry or termination of the Agreement, when they shall pass to the Authority.¹⁸

8.2. Title to Documents

- a) All plans, drawings, specifications, designs, reports, and other documents and software prepared by the Operator in the course of performing its obligations under this Agreement shall remain property of the Operator. On expiry or termination of the Agreement the Operator shall deliver a copy of all documents and software to the Authority, together with a detailed inventory thereof and grant a nonexclusive royalty free license to use such documents and software in connection with the Project.
- b) The Operator may retain copies of such documents and software.

8.3. Operator Staff

- a) The Operator shall at its own cost provide such qualified and experienced staff (the "Operator Staff") and sub-contractors, as are required to carry out effectively construction of the New Facilities and the Services.
- b) If the Authority has reasonable cause to be dissatisfied with the qualification and/or performance of any Operator

¹⁸Subject to law of country

Staff or sub-contractors, the Operator shall, at the Authority's written request specifying the grounds thereof, provide as a replacement a person with qualifications and experience acceptable to the Authority. For the avoidance of doubt, "reasonable cause" shall not include causes not related to technical qualifications or performance of the Operator Staff.

- c) The Operator shall have no claim for additional costs arising out of or incidental to the removal and/or replacement of Operator Staff or sub-contractors.
- d) On expiry or termination of this Agreement the Operator Staff will not be transferred to the Authority unless and subject to prior agreement of the Operator and the Authority.

9. LIABILITY

- a) The Operator is obliged to meet the Service Standards and shall be subject to Penalties to the extent that it fails to meet the Service Standards, as set out in Schedule 6.
- b) The Operator shall not be liable for failure to meet Service Standards and shall not be subject to Penalties where such failure is caused by:
 - i) Failure by the Authority to perform its obligations under this Agreement;
 - ii) Force Majeure pursuant to Section 11;
- c) Notwithstanding any other provision of this Agreement, the Parties agree that the maximum cumulative liability of the Operator to the Authority (i) for liquidated damages for delay during the Construction Period shall be as stipulated in Schedule 2 and (ii) for each calendar year of the Operating Period arising under or in relation to this Agreement shall not exceed CURRENCY [AMOUNT], provided that such limitation shall not apply to fraud, gross negligence or willful misconduct of the Operator, any sub-contractor, or their respective agents or employees.
- d) Any Party alleging a breach of contract or right to be indemnified in accordance with this Agreement shall be under a duty to take all necessary measures to mitigate the loss which has occurred, provided that it can do so without unreasonable inconvenience or cost.
- e) No Party shall be liable to any other Party by way of indemnity or by reason of any breach of this Agreement or of its statutory duty or by reason of tort (including negligence), strict liability or otherwise for any incidental, consequential, punitive or special damages or any consequential or economic loss including, but not limited to, any loss of profit, use, opportunity, production or other indirect or consequential loss that may be suffered by that other Party. [NEED TO CONSIDER WHO BEARS RISK OF ENVIRONMENTAL POLLUTION AND HEALTH RISKS, ESPECIALLY WHEN THE RAW WATER FALLS OUTSIDE THE SCOPE OF THE SCHEME (AND SO MAY BE DIFFICULT TO TREAT)].
- f) A Party shall indemnify, defend and hold harmless the other Party and/or its 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 to the extent that the same arises out of any negligence, default or breach of statutory duty on the part of the other Party, its subcontractors or their officers, agents or employees.

10. TERMINATION, EXPIRY AND HANDOVER

10.1. Termination and Expiry

- a) This Agreement will terminate on the Expiry Date unless terminated earlier under this section 10.
- b) The Authority shall be entitled to terminate the Agreement early by giving [three (3)] months notice where:
 - the Operator fails to perform any of its obligations under this Agreement and this has a material impact on the Project and such failure continues for [thirty (30)] days after written notice from the Authority to the Operator requesting that such failure be cured;
 - the actions of the Operator directly cause a widespread danger to the health of the public in the Service Area and such failure continues for thirty (30) days after written notice from the Authority to the Operator requesting that such failure be cured;

the Operator becomes insolvent or bankrupt or goes into liquidation whether compulsory or voluntary; or the Operator in the reasonable judgment of the Authority has engaged in corrupt or fraudulent practices in competing for or in executing this Agreement.

- c) The Operator shall be entitled to terminate the Agreement early by giving [three (3)] months notice where the Authority fails to perform any of its obligations under this Agreement in a material respect and such failure continues for [thirty (30)] days after written notice from the Operator to the Authority requesting that such failure be cured.
- d) In respect of section 10.1(b) and (c) such right to terminate shall not arise to the extent that the default occurred solely as a result of any breach of the other party of this Agreement or is due to Force Majeure.
- e) In the case of extended Force Majeure, the Parties may terminate this Agreement in accordance with Section 11.

10.2. Termination payments

Upon early termination this Agreement, the Authority shall pay to the Operator the termination fees set out in schedule 8.

10.3. Handover

- a) 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.
- b) On termination or expiration of this Agreement, the Operator shall handover to the Authority the Facilities in good working condition (wear and tear excepted) and operational control of the Facilities and shall not remove any part of the Facilities that are necessary to operate the System. It shall also handover drawings for the New Facilities as well as any other drawings, a royalty free license to use any software developed under the Agreement for delivery of the Services, a set of operating manuals and an update inventory of assets.
- c) Except in the case of early termination pursuant to Sections 10.1(b) and (c), the Operator and the Authority shall cooperate as reasonably necessary during the six (6) month before expiration of this Agreement in order to ensure the smooth continuation and provision of Services.

11. FORCE MAJEURE

- a) For the purposes of this Agreement, **“Force Majeure”** means an event which is beyond the reasonable control of a Party, is not foreseeable, is unavoidable, and which makes a Party’s performance of its obligations hereunder impossible or so impractical as reasonably to be considered impossible in the circumstances, and includes, but is not limited to, war, riots, civil disorder, earthquake, fire, explosion, storm, flood or other adverse weather conditions, strikes, lockouts or other industrial action (except where such strikes, lockouts or other industrial action are reasonably within the power of the Party invoking Force Majeure to prevent), and with respect to the Operator only, any failure, shortage or interruption of the supply of electricity for more than two (2) consecutive days.
- b) Force Majeure shall not include (a) any event which is caused by the negligence or intentional action of a Party or such Party’s sub-contractors or agents or employees, nor (b) any event which a diligent Party could reasonably have been expected both to take into account at the time of the conclusion of this Agreement, and avoid or overcome in the carrying out of its obligations hereunder.
- c) The failure of a Party to fulfill any of its obligations hereunder shall not be considered to be a breach of, or default under, this Agreement insofar as such inability arises from an event of Force Majeure, provided that the Party affected by such an event has taken all reasonable precautions, due care and reasonable alternative measures, all with the objective of carrying out the terms and conditions of this Agreement.
- d) A Party affected by an event of Force Majeure shall continue to perform its obligations under this Agreement as far as is reasonably practical, and shall take all reasonable measures to minimize the consequences of any event of Force Majeure.

e) A Party affected by an event of Force Majeure shall notify the other Party of such event as soon as possible, and in any case not later than fourteen (14) days following the occurrence of such event, providing evidence of the nature and cause of such event, and shall similarly give written notice of the restoration of normal conditions as soon as possible. In the case of disagreement between the Parties as to the existence or extent of Force Majeure, the matter shall be settled according to Section 12 below.

If any event of Force Majeure continues for longer than sixty (60) days, the Parties shall enter into discussions in order to agree on a mutually satisfactory solution to continue the performance of this Agreement. If the Parties fail to reach a mutually satisfactory solution within sixty (60) days of the commencement of such discussion, either Party shall have the right to terminate this Agreement early by written notice (the "Force Majeure Termination Notice") to the other Party and this Agreement shall then immediately terminate.

12. DISPUTE RESOLUTION AND APPLICABLE LAW

- a) If any dispute arises out of or in connection with this Agreement, a Party shall give a written notice of fourteen (14) days to the other Parties. The Parties shall meet promptly and in good faith attempt to reach an amicable settlement through mutual consultation and negotiation.
- b) In the event that the Parties do not resolve a dispute within thirty (30) days of notice of the dispute either Party may refer the dispute to an agreed mediator before submitting the dispute to the [Regulatory Agency¹⁹] for determination. The party which has established the dispute will give written notice to the other party at least fourteen (14) days before referring the dispute to the [Regulatory Agency].
- c) The decision of the [Regulatory Agency] over the dispute shall be final but in the event that the [Regulatory Agency] shall be considered to have erred in law, an appeal on its decision may be made to the High Court of [COUNTRY].

13. MISCELLANEOUS

13.1. Applicable Law

This Agreement shall be governed by and construed pursuant to the Laws of [COUNTRY].

13.2. Survival

The dispute resolution provisions contained in Section 12 shall survive termination of this Agreement.

13.3. Conflicts of Interest

Neither the Operator nor its sub-contractors nor the Operator Staff shall engage during the term of this Agreement, either directly or indirectly in any business or professional activities in the [COUNTRY] which would conflict with the activities assigned to them under this Agreement. Where a dispute arises over definition of conflict of interest, the dispute shall be handled in accordance with Clause 12 of this Agreement. Notwithstanding this Section, the Operator will be eligible to bid for additional contracts related to the Services.

13.4. Authorized Representative

Any action required or permitted to be taken, and any document required or permitted to be executed under this Agreement by the Authority or the Operator may be taken or executed by the officials specified in the Section 13.13.

13.5. Insurance

- a) The Operator shall procure and maintain, and shall cause any Operator sub-contractors to procure and maintain, throughout the term of this Agreement a professional liability insurance coverage and insurance coverage for the

¹⁹Such other agency with an express mandate to decide over disputes in the water sector/ or, if not relevant, such other entity as the parties deem appropriate – could be appointment of arbitrator

Facilities. Such professional liability insurance shall be purchased by the Operator 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 Operator, the Operator Staff and sub-contractors.

- b) The Operator shall provide the 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 Authority obtained not less than thirty (30) days before the intended date of cancellation or modification.
- c) To the extent that a loss or damage suffered by the Operator falls within the terms of the insurance cover required under this Section 13.5, the Operator shall forthwith make the appropriate claims thereunder and shall replace or repair such loss or damage.

13.6. Assignment of this Agreement

- a) The 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 Operator, such consent not to be unreasonably withheld or delayed.
- b) The Operator shall not without the prior written consent of the Authority and the Lender, 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 Lender.
- c) The Lender shall not assign or transfer all or any part of its rights or obligations under this Agreement without the prior written consent of the Authority and the Operator, such consent not to be unreasonably withheld or delayed.

13.7. Confidentiality

- a) Each of the Parties, their employees, sub-contractors, consultants and agents, shall hold in confidence all documents and other information, whether technical or commercial, supplied to it by or on behalf of the other Party in relation with this Agreement, and shall not publish or otherwise disclose or use the same for its own purposes otherwise than as may be required by the Applicable Law or to perform its obligations under this Agreement.
- b) The Parties' obligations under this Section shall survive for a period of two (2) years following the termination of the Agreement or any extension or renewal thereof.

13.8. Relations between the Parties

- a) Subject to the provisions of this Agreement, the Operator 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 Operator, the Lender and the Authority.
- b) All Operator Staff and sub-contractors shall be under the complete control of the Operator and nothing contained in this Agreement or any sub-contract awarded by the Operator shall be construed to create any contractual relationship between the Operator's representatives or subcontractors and the Authority.
- c) None of the Parties has any responsibility whatsoever with respect to the obligations assumed by the other Parties under this Agreement and nothing in this Agreement shall constitute the Operator, the Lender or the Authority to be a partner, agent or local representative of the other or create a fiduciary relationship or trust between them.

13.9. Variations in Writing

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

13.10. Entire Agreement

This Agreement, 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.

13.11. Severability

If any part or parts of this Agreement are agreed by the Parties or declared by any competent tribunal to be invalid, the other parts shall remain valid and enforceable.

13.12. 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.

13.13. Notices

Unless otherwise agreed by the Parties, notices to be given under this Agreement shall be in English, 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 Authority: []
Attention: [] (Authorized Representative)
Address: []

The Operator: []
Attention: [] (Authorized Representative)
Address: []

or such other address as may be notified by that Party to the other Party from time to time, and shall be deemed to have been made or delivered when delivered by hand, by recognized international courier or by mail (registered, return receipt requested) at that address.

13.14. Language

This Agreement is made in the English language.

IN WITNESS WHEREOF, this Agreement has been executed by duly authorized representatives of the Parties hereto on the day, month and year above written.

Authority

Witnessed by:

By:

Name:

Name:

Title:

Title: Company seal:

Date:

Date:

Operator

Witnessed by:

By:

Name:

Name:

Title:

Title: Company seal:

Date:

Date:

SCHEDULE 1: SERVICE AREA

[Insert Map]

SCHEDULE 2: FACILITIES AND SPECIFICATIONS

Existing Facilities

Water Resource

[]

New Facilities

During the Construction Period the Operator shall ensure that the Water Resource is functioning and design, build and finance the following New Facilities:

[New Facilities]

The New Facilities shall meet the following Specifications:

[Specifications]

Time for Completion: [date]

Liquidated damages for delay in completion: CURRENCY [] per day, up to a total maximum of CURRENCY []

SCHEDULE 3: INITIAL TARIFFS

The Initial Tariffs, which will apply for a minimum of one year from the Effective Date, shall be:

Category of Customer	Initial Tariff
Household customer	
Standpipe customer	
Kiosk customer	

SCHEDULE 4: REPORTING REQUIREMENTS

The Operator shall submit the following reports to the Authority:

Construction Period

The Operator will provide monthly status reports on construction of the New Facilities in accordance with Section 5.1.

Operating Period

Monthly Report including the following information:

- Total volume and amount of water billed for the previous month
- Total volume of water produced for the previous month
- Revenue collection summary for the previous month

Project expenditure summary for the previous month

Any failures in meeting the minimum supply specifications during the previous month

Number of new household connections in the previous month

within 14 days following the end of the month to which the Monthly Report relates.

Quarterly Report including the following information:

Volume of total water produced, total water billed and non-revenue water

Revenue collection and costs summary including breakdown of energy, chemical and maintenance costs

Volumes and amounts billed based on actual meter readings by customer category and zone

Billing to collection ratio by customer category and zone

Numbers and categories of active connections, disconnections and reconnections

Water quality test results and commentary on raw, treated and distributed water

Renovation works and repairs carried out or to be carried out at the Project

Interruptions and emergency actions at the Project

Number, type and response time to customer enquiries and complaints

within 28 days following the end of the month to which the Monthly Report relates.

Annual Report to Authority and [the Regulatory Agency in accordance with Applicable Laws] including the following information:

Summary of quarterly report data for the full financial year

Diagnostic assessment of operating and financial performance of the Project (benchmarked against service standards set out in Schedule 4)

Condition of assets of the Project and status of raw water sources

Number and roles of staff employed at the Project

Diagnostic of levels of service performance

Suggested Capital Investment plans – for next few years and more detail for coming year

Annual business plan updated

Revenue and expense budget for forthcoming year

Compliance with any statutory reporting and operating requirements

Financial accounts of the Operator shall be submitted to an independent financial and technical audit at the Operator's cost. Not later than three (3) months following the end of the Financial Year, the Operator shall provide the Authority with the audited Annual Report.

SCHEDULE 5: SERVICE STANDARDS

During the Operating Period the Operator shall achieve the Service Standards set out below, and shall be subject to penalties in the event that the Operator's performance is below the Service Standards. [The Service Standards shall be established by the Expert on completion of the Baseline Survey within 6 months of commencement of the Operation Period. The Service Standards that are subject to approval by the Expert shall not be subject to penalty reduction until the baseline survey is complete.]

	Factor	Requirement	Minimum Service Standard	Subject to baseline survey
1	Continuity of supply	12 hours of constant supply to all active connections every day subject to availability of raw water, chemicals, and sound technical functionality of the system	360 hours supply per month	NO
2	Water pressure	[]		
2	Meter reading and billing	Number of active accounts that have been billed according to actual meter readings within 7 days of the end of the billing period	90%	NO
3	Percentage of water produced that is sold	Volume water billed as a percentage of volume water produced	Xx %	YES
4	Customer response plan	Develop a plan for handling customer enquiries and complaints within 3 months of the Commencement Date	Average customer response time of 48 hours	NO
5	Interruptions and emergency actions	Develop an Emergency Action plan applicable to interruptions of services and emergency actions in case of potential danger to public health within 3 months of the Commencement Date	Time to implement emergency action measures set out in the Emergency Action plan	YES
6	Financial & system operations reporting	Develop standard reporting formats within 3 months of the Commencement Date	Accounts to conform to International Accounting Standards	YES

SCHEDULE 6: PENALTIES

Subject to Section 5.1.3 of this Agreement, if the Operator's performance is below the Service Standards set forth in Schedule 5 and the reasons provided for such below par performance are not acceptable to the Authority, the Operator at the end of each quarter will be subject to the following penalty payments to the Authority wherever applicable:

	Service Standard	Penalty criteria	Penalty Reduction
1	Continuity of supply	Less than 12 hours of water supply per day for 2 consecutive days subject to the availability of raw water, chemicals (if required) and proper functionality of the System	[CURRENCY AND AMOUNT] per occurrence, where an occurrence refers to any 2 consecutive days that the system is operated below the established standard
2	Meter reading and billing	More than 10% of active accounts have not been billed according to actual meter readings within 7 days of the end of the billing period	[CURRENCY AND AMOUNT] per month for each month that the service fails the service criteria
3	Physical water loss	Ratio of volume water billed to volume water produced is less than 10% of the ratio established in the baseline survey and the Authority has implemented system maintenance recommendations proposed by the Operator	[CURRENCY AND AMOUNT] per month for each month that the service fails the service criteria
3	Interruption of Water Supply	Unannounced interruption 20-36 hours <15% (calculated) 36-48 hours <8% annually) >48hours<3%**	[AMOUNT] per year [AMOUNT] per year [AMOUNT] per year

[The penalties indicated above are subject to revision by the Parties 6 months after completion of the Baseline Survey indicated in Schedule 4: Service Standards.]

[SCHEDULE 7: OPERATOR FEES]²⁰

The Operator shall be entitled to payment of the following fee, on a monthly basis, subject to any penalties to be paid by the Operator under schedule 6 of this Agreement:

Base Monthly Charge: ²¹	[] plus [Service Tax]
Variable Charge:	[] per m ³ of treated water supplied by Operator from the Facilities (as evidenced by Customer bills)
Reimbursement for New Connections	All new connection charges received into the Revenue Collection Account during the previous month ²²

On or after the Completion Date, the Operator shall issue an invoice for the first payment of the Base Monthly Charge for the month in which the Completion Date has fallen and for the month following the month in which the Completion Date has fallen. In respect of all subsequent monthly invoices the Operator shall issue an invoice on or after the first day of each month for:

- the Base Monthly Charge in respect of the month following the month in which the invoice is issued; and

²⁰Only relevant where Operator is either being paid directly by the authority or is to take only a portion of the revenues as fees,. This will need to be tailored to the relevant project

²¹This is supposed to cover the cost of financing and other fixed costs

²²Assuming that operator receives all of the new connection charge for own account

- the Variable Charge for the month preceding the month in which the invoice is issued

together with reimbursement for new connections less any Penalties payable by the Operator during the relevant period.

The Base Monthly Charge shall be adjusted in accordance with the following formula applied annually on the anniversary of the Base Date:

[Adjustment formula including indexation, increases in volume, exchange risk, actual operation cost]

[Adjustment formula including indexation, increases in volume, exchange risk, actual operation cost]

The Authority shall have 14 days from receipt of the invoice to dispute or accept the invoice. Following this period in the event of no response from the Authority the Authority will have been deemed to accept the invoice and the Operator may withdraw the amount corresponding to the invoice from the Revenue Collection Account.

In the event that the Authority disputes the invoice then the Parties shall seek to resolve the dispute in accordance with clause 12. During the period of dispute the dispute amount shall not be paid to the Operator. In the event that the dispute is found in favour of the Operator then it shall be paid the disputed amount together with interest calculated at the rate of [] over Relevant Base Rate.

SCHEDULE 8: TERMINATION PAYMENTS²³

All payments due under this Schedule 8 shall be paid within 30 days of the date of early termination and the debtor shall otherwise comply with the provisions of Clause 10. Where relevant, title in the Facility and Materials purchased by the Authority under the terms of this Agreement shall be transferred on the date when any relevant termination payment is made in full. This Schedule 8 shall apply to termination before the Expiry Date, whether it occurs before or after the issue of the Performance Certificate.

On early termination of the Contract the Authority shall compensate the Operator as follows:

Category of termination	Amount Payable
Termination for Operator default	[]% of aggregate of the Base Monthly Charge for the period from the date of termination of the Contract until the Expiry Date ²⁴ less the reasonable Cost of rectification of the Facilities, if any, which the Operator is required to carry out to bring the Facilities up to the standard set out in clause 10.3 minus any insurance proceeds relating to the Facility
Extended Force Majeure	[]% of aggregate of the Base Monthly Charge for the period from the date of termination of the Contract until the Expiry Date as set out in Schedule 3 plus other unavoidable Costs (including breakage costs for financing) minus any insurance proceeds received by the Operator for the Force Majeure event, subject to a duty on the Operator to use reasonable endeavours to minimise Costs
Termination for Authority Default	<p>²⁵[]% of aggregate of the Base Monthly Charge for the period from the date of termination of the Contract until the Expiry Date as set out in Schedule 3; plus an amount comprising costs of work carried out by Operator, breakage Costs (including market value of Materials purchased by Authority), repatriation Costs, subject to a duty of mitigation of the Operator to minimise Costs; plus reasonable loss of profit calculated as the aggregate Variable Charge based on a projected take of [] m³ per day</p> <ul style="list-style-type: none"> • for the period from the date of termination to the Expiry Date, up to a maximum of [].

²³Termination payments will vary depending on whether there is an Operator fee or not. The principal is that in cases of early termination there is likely to be a termination payment that needs to be paid, which will be more in the case of authority default or voluntary termination than in the case of termination for operator default or force majeure

²⁴This could also be based on a percentage of debt outstanding

²⁵This could be formulated as a 100% recovery of debt outstanding +an element of profit (could also be for instance 150% of the equity value) less insurance proceeds and any damages payable

Annex 4: Sample Wording for Management and Updating of Capital Investment Plan by Operator

1. The Agreed Capital Investment Program (ACIP) for the System is set out in Schedule [] (Agreed Capital Investment Programme) and totals [CURRENCY AND AMOUNT]. The Grantor agrees to commit the Capital Expenditure in accordance with Schedule [] for the first [five] years of the Contract to a value of [CURRENCY AND AMOUNT].
2. The ACIP for the System identifies the agreed minimum Capital Expenditure required during the Contract in order to:-
 - a. maintain the System to meet the Performance Standards; and
 - b. meet the Performance Targets set out in Schedule [].
 - c. Updating of Agreed Capital Expenditure Programme
3. The Operator shall update and revise the ACIP at the end of Year 3 (for Years 6-10), and at the end of Year 9 (for Years 11-15) for review and approval by the Grantor, such approval shall not be unreasonably withheld or delayed.
4. The updates to the ACIP shall be made in line with the Asset Management Plan, and submitted to the Grantor in a report that includes, as necessary:
 - a. rehabilitation of above-ground assets;
 - b. rehabilitation of underground assets;
 - c. installation of meters, valves and monitoring equipment;
 - d. installation of water mains;
 - e. implementation of appropriate management information systems; and
 - f. installation of any relevant Customer service infrastructure,
 - g. any other projects identified by the Operator from time to time;
 - h. a description for each identified item of Capital Expenditure of the short- and long-term performance improvements as set out in the Technical Specification that should be achieved by the implementation of that Capital Expenditure in order to ensure that the performance specifications are met;
 - i. a schedule of the anticipated life expectancy of all identifiable installed plant and machinery;
 - j. and is consistent with achieving the Performance Specifications and Targets.
5. The Grantor shall be responsible for obtaining funding for all Capital Expenditure.
6. In the implementation of the ACIP, the Operator shall, and shall be authorised by the Grantor to:
 - a. manage the implementation process including planning, scheme identification, project appraisal, design and specification;
 - b. manage all procurement processes pursuant to the ACIP;
 - c. select and supervise all consultants and contractors and supervise the disbursement of Capital Expenditure and execution of related projects; and
 - d. provide, to the extent relevant, the Outsourced Activities following completion and commissioning of specific projects.
7. A monthly charge for all responsibilities related to the management of the ACIP including (without limitation) carrying out the requisite engineering, monitoring construction and testing will be paid to the Operator in accordance with Clause []. The Grantor will cooperate with Operator in implementing the ACIP.

8. The Operator shall manage the complete implementation of the ACIP and shall make all associated requests to the Grantor for funding for Capital Expenditure in accordance with the ACIP.
9. The Operator shall apply a Schedule of Rates for Capital Expenditure as agreed by the Parties. The Schedule of Rates shall be updated annually in accordance with market rates.
10. In the event that, in the opinion of the Operator, from time to time Major Capital Expenditure (being capital expenditure in excess of [amount and currency]) needs to be undertaken (other than as set out in the ACIP) the Grantor and the Operator shall agree between them how to adjust the ACIP to allow for such expenditure, or the Operator shall make recommendations to the Grantor for increasing the budget ceiling for the ACIP.
11. The Parties acknowledge that the Operator's ability to provide the Services in accordance with the Performance Specifications and the Performance Targets is dependent upon the availability of the Capital Expenditure.
12. The Grantor may request the assistance of the Operator to identify cost-effective sources of financing for Capital Expenditure. The Operator will submit to the Grantor any proposals for financing arrangements or sources known to the Operator that might satisfy the Grantor's requirements. The decision in relation to the method of financing Capital Expenditure shall remain solely with the Grantor and the Grantor shall be solely responsible for obtaining funding for Capital Expenditure.
13. If the Operator undertakes, under a separate written agreement with the Grantor, to finance part of the Capital Expenditure, the Grantor shall use its best endeavours to provide all securities, warranties and authorisations to the Operator, and the Operator shall acknowledge any security over assets as required by lenders provided that in each case the security provided to the lenders by the Grantor should not in any manner hinder or hamper the provision of the Outsourced Activities by the Operator or the performance by the Operator of any of its obligations under the Contract.

Annex 5: Sample Term Sheet – Operation and Maintenance Agreement

This could also be adapted to an affermage agreement – the payment mechanism is likely to be different but most of the parameters will be the same for the term sheet.

Item	Description
Parties	Authority Operator [Regulatory Agency/ other agency]
Definitions and interpretation	Set out all definitions and interpretation Definitions include Facilities, Project, Services, Service Area, Service Standards, Service Targets, Penalties, Applicable Law
Contract documents	List documents that form the contract and order of priority in case of inconsistency
Notices	Details of parties including address, party to receive receipt, telephone and email and specify how receipt will be proven (delivery with receipt, deemed delivery...)
Assignment	Assignment of rights and obligations under the Agreement by each party – whether this needs to be with consent of other party Sub-contracting – are there limitations? Is authority consent required?
Term of contract	[] years, renewable for up to [] years with serving notice of [] months prior to expiry [either party][authority], subject to agreement of parties
Appointment and general responsibilities of operator	Specify Service Area Is this exclusive or non-exclusive appointment? Provision of Services Services to be performed in accordance with the Specifications, Applicable Law, Reasonable Operating Standards Operator to maintain in good working condition and operate Facilities (need to specify extent of the maintenance and repair obligations of the Operator) and provide Potable Water to Customers in accordance with Service Standards, Applicable Law and Reasonable Operating Standards Operator to safeguard the assets Operator not dispose of or create liens or interests over the assets without express consent of Authority Open and maintain Revenue Collection Account Operator to employ qualified personnel Keep spare parts Consequences of failure to perform - penalties
Rights of operator	Exclusive right to provide services to customers in Service Area Access to the land and Facilities and third party land (to lay pipes etc) Right to use Facilities and assets Right to abstract water Right to Operator Fee and termination fees Right to provide services to customers Charge customers [on behalf of Authority] and enter into customer agreements Right to receive payments from customers

Charges to customers and collection	<p>Operator to collect tariffs and fees in accordance with Tariff and Fee Schedule</p> <p>Operator to enter into customer agreements in agreed form</p> <p>Operator to pay tariffs into Revenue Collection Account</p> <p>Circumstances when Operator may cut off non-paying Customer, if any, and when to restore connection</p> <p>Customer complaints mechanism[may be set out in model customer agreement]</p> <p>Operator to maintain record of customer complaints</p>
New connections	<p>Operator to achieve []% new connections by year []</p> <p>Operator to provide new connection to every potential customer making written application for such connection, subject to overall capacity of the Facilities</p>
Records, accounts and reports	<p>Operator to keep proper and adequate records of performance and incidents</p> <p>Operator to keep accounts [Monthly], quarterly, six monthly annual and send them to authority</p> <p>Do any of the reports and accounts need to be audited?</p> <p>Does authority have right of review/ audit? If so, what is time frame? If there is a dispute, consider using an independent auditor to settle dispute over accounts</p>
Business plans	<p>Operator to prepare and submit business plans within [] months of commencement date to cover [5] years</p> <p>Business plan to be update periodically [annually]</p> <p>To be reviewed by Authority</p> <p>Business plan to include:</p> <p>Operations – overall strategies, services to be provided and standards and targets, performance indicators, necessary investments, plans for expansion (if any) and strategy for new connections</p> <p>Finance – financial targets, financial strategies (including tariffs, fees, charges), forecast revenue</p>
Asset register	<p>Operator obligation to prepare/ update an asset register within [] months of commencement date and keep up to date and to hand over on expiration or termination</p>
Operating manuals	<p>Operator to prepare operating manuals within [] months of commencement date, to keep up to date and to handover on expiration or termination</p>
Allow inspection of land, assets, records and documents	<p>Allow inspection by authority (and regulatory agency), access to facilities, to take tests, make copies of documents</p>
Employees	<p>Requirement to employ staff with relevant experience and qualifications.</p> <p>Duty to provide statutory remuneration and benefits as minimum, and any follow other statutory requirements regarding staff</p> <p>What happens to staff at end of agreement</p>
Indemnification	<p>No liability of either party for damage to persons or property of other party arising other than out of the negligence or willful default of that party</p>
Limitation of liability	<p>Liability for environmental pollution etc – is there a limitation</p> <p>General limitation of liability if any</p>
	<p>Monitor performance of Operator</p> <p>Review/ audit accounts and review reports and records</p> <p>Approve business plan</p> <p>Not to interfere with operations</p> <p>Carry out environmental impact assessment [if there is to be construction]</p>

Force majeure	Events Consequences Extended force majeure – early termination
Early termination	For cause – operator default, authority default, termination at will, termination for extended force majeure Notice and cure periods for default Consequences of termination – termination fees
Handover on expiry or termination of agreement	Handover of Facilities, spare parts and assets, operations manual, asset register, royalty free license to use software and other IP for the purposes of delivering the Service and operating the Facilities Employees (any to be transferred to authority?)
Dispute resolution	Mutual agreement, conciliation or expert determination (could be local branch of regulatory agency), arbitration or courts
Miscellaneous	Operator duty to keep insurance – for third party liability, employees assets Governing law Language Confidentiality Variations/ amendments of agreement Severability of contract provisions in case a clause is invalid Authorized representative Survival of specific clauses after termination and expiration Conflict of interest
Schedule – service area	Service Area map
Schedule - Facilities	Describe main equipment that constitutes the Facilities to be used for the Service
Schedule – Performance specifications and minimum service levels	Availability of supply Service coverage Quality of treated water Water pressure Continuity of service Maintenance and repairs Prevention of pollution Non-revenue water Percentage of billing enquiries in a period
Schedule – performance targets – service levels	Could include Connections Non-revenue water Availability of supply
Schedule – Penalties [and bonuses]	Consequence of failure to meet service standards and targets – plus maximum penalties to be charged in one period Any bonuses for outperformance?
Tariffs	Initial tariffs and tariff review methodology - is there regulatory approval required Periodic reviews – how often? Is there an appeal process if authority to approve
Schedule – operator fees	Operator Fees, how to invoice, when paid, interest to be charged for late payment of authority + mechanism for adjustment of fees
Schedule – termination payments	Termination for cause Operator Authority Termination at will Termination for extended force majeure

Annex 6: Template for Information Memorandum

Information Memorandum

[Project]

[Contracting Authority]

[Date]

DISCLAIMER

This Information Memorandum (“Memorandum”) is provided solely for informational purposes in order to assist the recipient and its advisors in assessing whether they wish to consider participating in the competitive tender for [project] (the “Project”). The Memorandum is being issued by [Contracting Authority] solely for use by prospective bidders and their advisors in considering the Project. The Memorandum does not constitute a solicitation to participate in the Project, is not intended to form the basis for any decision to bid for the Project and should not be considered as a recommendation by the Contracting Authority or any of their consultants in relation to the Project.

The data herein, including any estimates, projections or statements about the Project have not been audited or verified by the Contracting Authority or their consultants or any other person. Such estimates, projections or statements reflect various assumptions concerning possible results and are subject to significant business, economic and competitive uncertainties and contingencies beyond their control. There can be no assurance that the statements or projections are accurate or will prove to be correct. Nothing contained in this Memorandum is, or should be relied upon as, a promise or forecast of future performance.

The Memorandum does not contain or purport to contain all the information that a prospective bidder may desire. In all cases, interested parties should conduct and rely on their own investigation and analysis of the Project and of the data set forth in this Memorandum. Neither the Contracting Authority nor any of their consultants or agents make any representation (expressed or implied) or warranty as to the accuracy, reasonableness or completeness of this Memorandum or any information, whether oral, written, electronic or in any other form, that is made available to a prospective bidder; and none of them shall have any liability to any prospective bidder for this Memorandum or for errors in or omissions from this Memorandum or based on or relating to the use of the information contained in it. The Contracting Authority may amend, supplement, or replace any information contained in this Memorandum at any time, without giving prior notice or providing any reason.

Nothing contained in this Memorandum or otherwise made available to interested parties, their representatives or advisors shall be construed as giving legal, financial, technical or other advice of any kind. It is recommended that prospective investors consult their own financial, accounting, legal, technical and other advisors.

Each prospective investor receiving this Memorandum agrees that by accepting receipt of this Memorandum, it agrees to keep confidential all information contained herein. Except as otherwise agreed, this Memorandum must not be copied, reproduced, distributed or passed to others at any time for any purpose other than for evaluating the Project.

Introduction

1. Project Objectives

[summary of project objectives]

2. Transaction Process & Timelines

The issuance of the Requests for Proposals (RFP) and the Information Memorandum (IM) in [date] to the interested parties will mark the start of the tender process. The expected timetable is:

TABLE 1: TRANSACTION TIMELINE

Activity	Expected Timeline
Issue of RFP & Information Memorandum	
Site Visit & Pre-bid Conference	
Submission of bids	
Project Award	

Project Summary

3. Description of Project

- [summary description of project]
- Parties
- Scope – whether design, build, operate or maintain
- Duration
- Service area – exclusive or non-exclusive (+ map showing boundary)
- Payment mechanism
- Key terms including performance standards

4. Background

Information about:

- Country
- relevant laws
- economic climate
- population profile
- geography
- climate.

5. Existing Arrangements

[description of current arrangements for water supply and whether these will continue].

6. Environmental and Social Issues

[]

Bidding Process

The main steps of the tender process are as follows:

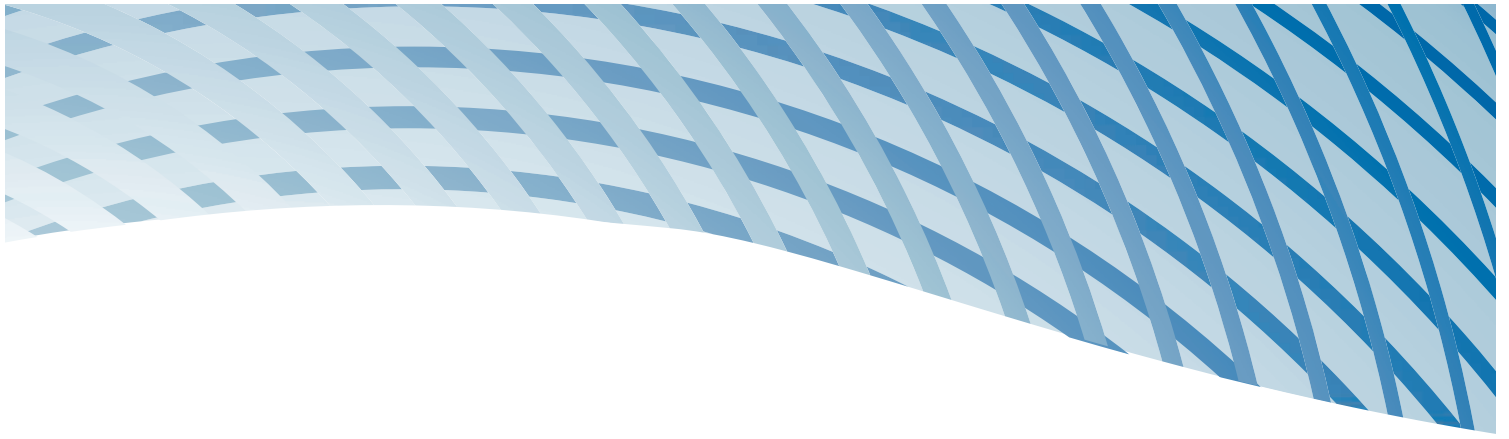
Request for Proposal (Bid Documents): The bid documents will be issued in [].

Bidders Meeting and Site Visit: [date]

Bidders' Due Diligence: Bidders will have the ability to submit questions in writing before and during the bidders' meeting.

Tender: Bidders will be invited to submit one technical proposal and one financial proposal. The technical and financial bid will be evaluated by committees formed by the Contracting Authority. Technical proposals of Bidders will be evaluated first on a [pass/fail basis]. Only the Bidders whose technical proposal obtains a "pass" will have their financial proposals evaluated.

Award: The Contracting Authority will issue the winning bidder a letter of award. Upon satisfaction of any conditions to signing the Contracting Authority and the winning [bidder]/ [the Project Company newly formed by the winning bidder] will enter into the Agreement.



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