

III. Contents and implementation of the ~~concession contract~~ PPP contract

Model provision ~~33~~28. Contents and implementation of the ~~concession contract~~ PPP contract (see the *Legislative Guide, recommendation 40 and chap. IV, paras. 1-11*)

The ~~concession contract~~ PPP contract shall provide for such matters as the parties deem appropriate,³⁷ such as:

- (a) The nature and scope of works to be performed and services to be provided by the ~~concessionaire~~ private partner (see chap. IV, para. 1);
- (b) The conditions for provision of those services and the extent of exclusivity, if any, of the ~~concessionaire~~ private partner's rights under the ~~concession contract~~ PPP contract (see ~~recommendation 5~~);
- (c) The assistance that the contracting authority may provide to the ~~concessionaire~~ private partner in obtaining licences and permits to the extent necessary for the implementation of the infrastructure project;
- (d) Any requirements relating to the establishment and minimum capital of a legal entity incorporated in accordance with model provision 30 (see ~~recommendations 42 and 43 and~~ model provision 30);
- (e) The ownership of assets related to the project and the obligations of the parties, as appropriate, concerning the acquisition of the project site and any necessary easements, in accordance with model provisions 31 to 33 (see ~~recommendations 44 and 45 and~~ model provisions 31-33);
- (f) The remuneration of the ~~concessionaire~~ private partner, whether consisting of tariffs or fees for the use of the facility or the provision of services; the methods and formulas for the establishment or adjustment of any such tariffs or fees; and payments, if any, that may be made by the contracting authority or other public authority (see ~~recommendations 46 and 48~~);
- (g) Procedures for the review and approval of engineering designs, construction plans and specifications by the contracting authority, and the procedures for testing and final inspection, approval and acceptance of the infrastructure facility (see ~~recommendation 52~~);
- (h) The extent of the ~~concessionaire~~ private partner's obligations to ensure, as appropriate, the modification of the service so as to meet the actual demand for the service, its continuity and its provision under essentially the same conditions for all users (see ~~recommendation 53 and~~ model provision 38);

³⁷Enacting States may wish to note that the inclusion in the concession contract of provisions dealing with some of the matters listed in this model provision is mandatory pursuant to other model provisions.

(i) The contracting authority's or other public authority's right to monitor the works to be performed and services to be provided by the ~~eoneessionaire-private partner~~ and the conditions and extent to which the contracting authority or a regulatory agency may order variations in respect of the works and conditions of service or take such other reasonable actions as they may find appropriate to ensure that the infrastructure facility is properly operated and the services are provided in accordance with the applicable legal and contractual requirements ~~(see recommendations 52 and 54, subpara. (b))~~;

(j) The extent of the ~~eoneessionaireprivate partner~~'s obligation to provide the contracting authority or a regulatory agency, as appropriate, with reports and other information on its operations ~~(see recommendation 54, subpara. (a))~~;

(k) Mechanisms to deal with additional costs and other consequences that might result from any order issued by the contracting authority or another public authority in connection with subparagraphs (h) and (i) above, including any compensation to which the ~~eoneessionaire-private partner~~ might be entitled ~~(see chap. IV, paras. 73-76)~~;

(l) Any rights of the contracting authority to review and approve major contracts to be entered into by the ~~eoneessionaireprivate partner~~, in particular with the ~~eoneessionaireprivate partner~~'s own shareholders or other affiliated persons ~~(see recommendation 56)~~;

(m) Guarantees of performance to be provided and insurance policies to be maintained by the ~~eoneessionaire-private partner~~ in connection with the implementation of the infrastructure project ~~(see recommendation 58, subparas. (a) and (b))~~;

(n) Remedies available in the event of default of either party ~~(see recommendation 58, subpara. (e))~~;

(o) The extent to which either party may be exempt from liability for failure or delay in complying with any obligation under the ~~eoneession contractPPP contract~~ owing to circumstances beyond its reasonable control ~~(see recommendation 58, subpara. (d))~~;

(p) The duration of the ~~eoneession contractPPP contract~~ and the rights and obligations of the parties upon its expiry or termination ~~(see recommendation 61)~~;

(q) The manner for calculating compensation pursuant to model provision 47 ~~(see recommendation 67)~~;

(r) The governing law and the mechanisms for the settlement of disputes that may arise between the contracting authority and the ~~eoneessionaire private partner~~ ~~(see recommendation 69 and model provisions 29 and 49)~~;

(s) The rights and obligations of the parties with respect to confidential information (see model provision 24).

<p>Model provision 342⁹. Governing law (see the <i>Legislative Guide, recommendation 41 and chap. IV, paras. 5-8</i>)</p>
<p>The concession contractPPP contract is governed by the law of [the enacting State] unless otherwise provided in the concession contractPPP contract.³⁸</p>
<p>Model provision 350. Corporate structure Organization of the concessionaireprivate partner (see the <i>Legislative Guide, recommendations 42 and 43 and chap. IV, paras. 12-18</i>)</p>
<p>The contracting authority may require that the successful bidder establish a legal entity incorporated under the laws of [the enacting State], provided that a statement to that effect was made in the pre-selection documents or in the request for proposals, as appropriate. Any requirement relating to the minimum capital of such a legal entity and the procedures for obtaining the approval of the contracting authority to its statute and by-laws and significant changes therein shall be set forth in the concession contractPPP contract consistent with the terms of the request for proposals.</p>
<p>Model provision 361. Ownership of assets³⁹ (see the <i>Legislative Guide, recommendation 44 and chap. IV, paras. 20-26</i>)</p>

³⁸Legal systems provide varying answers to the question as to whether the parties to a concession contract may choose as the governing law of the contract a law other than the laws of the host country. Furthermore, as discussed in the *Legislative Guide* (see chap. IV, “~~PPP implementation~~Construction and operation of infrastructure: legislative framework and PPP contract/project agreement”, paras. 5-8), in some countries the concession contract may be subject to administrative law, while in others the concession contract may be governed by private law (see also the *Legislative Guide*, chap. VII, “Other relevant areas of law”, paras. 24-27). The governing law also includes legal rules of other fields of law that apply to the various issues that arise during the implementation of an infrastructure project (see generally the *Legislative Guide*, chap. VII, “Other relevant areas of law”, sect. B).

³⁹Private sector participation in infrastructure projects may be devised in a variety of different forms, ranging from publicly owned and operated infrastructure to fully privatized projects (see the *Legislative Guide*, “Introduction and background information on ~~PPP~~privately financed infrastructure projects”, paras. 47-53). Those general policy options typically determine the legislative approach for ownership of project-related assets (see the *Legislative Guide*, chap. IV, “Construction and operation of infrastructure: legislative framework and project agreement”, paras. 20-26). Irrespective of the host country’s general or sectoral policy, the ownership regime of the various assets involved should be clearly defined and based on sufficient legislative authority. Clarity in this respect is important, as it will directly affect the ~~concessionaire~~private partner’s ability to create security interests in project assets for the purpose of raising financing for the project (see the *Legislative Guide*, chap. IV, “Construction and operation of infrastructure: legislative framework and project agreement”, paras. 52-61). Consistent with the flexible approach taken by various legal systems, the model provision does not contemplate an unqualified transfer of all assets to the contracting authority but allows a distinction between assets that must be transferred to the contracting authority, assets that may be purchased by the contracting authority, at its option, and assets that remain the private property of the ~~concessionaire~~private partner, upon expiry or

The ~~concession contract~~PPP contract shall specify, as appropriate, which assets are or shall be public property and which assets are or shall be the private ~~partner's own property of the concessionaire~~private partner. The ~~concession contract~~PPP contract shall in particular identify which assets belong to the following categories:

(a) Assets, if any, that the ~~concessionaire~~private partner is required to return or transfer to the contracting authority or to another entity indicated by the contracting authority in accordance with the terms of the ~~concession contract~~PPP contract;

(b) Assets, if any, that the contracting authority, at its option, may purchase from the ~~concessionaire~~private partner; and

(c) Assets, if any, that the ~~concessionaire~~private partner may retain or dispose of upon expiry or termination of the ~~concession contract~~PPP contract.

Model provision 372. Acquisition of rights related to the project site ~~(see the Legislative Guide, recommendation 45 and chap. IV, paras. 27-29)~~

1. The contracting authority or other public authority under the terms of the law and the ~~concession contract~~PPP contract shall make available to the ~~concessionaire~~private partner or, as appropriate, shall assist the ~~concessionaire~~private partner in obtaining such rights related to the project site, including title thereto, as may be necessary for the implementation of the project.

2. Any compulsory acquisition of land that may be required for the implementation of the project shall be carried out in accordance with *[the enacting State indicates the provisions of its laws that govern compulsory acquisition of private property by public authorities for reasons of public interest]*.

Model provision 383. Easements⁴⁰ ~~(see the Legislative Guide, recommendation 45 and chap. IV, para. 30)~~

Variant A

1. The contracting authority or other public authority under the terms of the law and the ~~concession contract~~PPP contract shall make available to the ~~concessionaire~~private partner or, as appropriate, shall assist the

termination of the concession contract or at any other time.

⁴⁰The right to transit on or through adjacent property for project-related purposes or to do work on such property may be acquired by the ~~concessionaire~~private partner directly or may be compulsorily acquired by a public authority simultaneously with the project site. A somewhat different alternative, which is reflected in variant B, might be for the law itself to empower public service providers to enter, pass through or do work or fix installations upon the property of third parties, as required for the construction, operation and maintenance of public infrastructure ~~(see the Legislative Guide, chap. IV, "Construction and operation of infrastructure: legislative framework and project agreement", paras. 30-32)~~.

~~concessionaire private partner~~ to enjoy the right to enter upon, transit through or do work or fix installations upon property of third parties, as appropriate and required for the implementation of the project in accordance with [*the enacting State indicates the provisions of its laws that govern easements and other similar rights enjoyed by public utility companies and infrastructure operators under its laws*].

Variant B

1. The ~~concessionaire private partner~~ shall have the right to enter upon, transit through or do work or fix installations upon property of third parties, as appropriate and required for the implementation of the project in accordance with [*the enacting State indicates the provisions of its laws that govern easements and other similar rights enjoyed by public utility companies and infrastructure operators under its laws*].

2. Any easements that may be required for the implementation of the project shall be created in accordance with [*the enacting State indicates the provisions of its laws that govern the creation of easements for reasons of public interest*].

Model provision 394. Financial arrangements (see the *Legislative Guide, recommendations 46, 47 and 48 and chap. IV, paras. 33-51*)

1. ~~Where the private partner operates a facility used by the public or provides a service to the public under the PPP contract, the~~ ~~concessionaire private partner~~ shall have the right to charge, receive or collect tariffs or fees for the use of the facility or its services in accordance with the ~~concession contract PPP contract. The PPP contract, which~~ shall provide for methods and formulas for the establishment and adjustment of those tariffs or fees [*in accordance with the rules established by the competent regulatory agency*].⁴¹

2. The contracting authority shall have the power to agree to make direct payments to the ~~concessionaire private partner~~ as a substitute for, or in addition to, tariffs or fees for the use of the facility or its services ~~under the preceding paragraph~~.

⁴¹Tolls, fees, prices or other charges accruing to the ~~concessionaire private partner~~, which are referred to in the *Legislative Guide* as “tariffs”, may be the main (sometimes even the sole) source of revenue to recover the investment made in the project in the absence of subsidies or payments by the contracting authority or other public authorities (see the *Legislative Guide*, chap. II, “Project ~~planning and preparation risks and government support~~”, paras. 30-60). The cost at which public services are provided is typically an element of the Government’s infrastructure policy and a matter of immediate concern for large sections of the public. Thus, the regulatory framework for the provision of public services in many countries includes special tariff-control rules. Furthermore, statutory provisions or general rules of law in some legal systems establish parameters for pricing goods or services, for instance by requiring that charges meet certain standards of “reasonableness”, “fairness” or “equity” (see the *Legislative Guide*, chap. IV, “~~Construction and operation of infrastructure: legislative framework and project agreement~~”, paras. 36-46).

3. Where the private partner operates a facility used by the public or provides a service to the contracting authority or other public body, the private partner shall have the right to the rental, usage fees or other payments set forth in the contract for the actual use or availability of the facility or service, its services in accordance with the PPP contract. The PPP contract shall provide for methods and formulas for the establishment and adjustment of those payments.

Model provision 4035. Security interests (see the *Legislative Guide, recommendation 49 and chap. IV, paras. 52–61*)

1. Subject to any restriction that may be contained in the ~~e concession contract~~PPP contract,⁴² the ~~e concessionaire~~private partner has the right to create security interests over any of its assets, rights or interests, including those relating to the infrastructure project, as required to secure any financing needed for the project, including, in particular, the following:

(a) Security over movable or immovable property owned by the ~~e concessionaire~~private partner or its interests in project assets;

(b) A pledge of the proceeds of, and receivables owed to the ~~e concessionaire~~private partner for, the use of the facility or the services it provides.

2. The shareholders of the ~~e concessionaire~~private partner shall have the right to pledge or create any other security interest in their shares in the ~~e concessionaire~~private partner.

3. No security under paragraph 1 may be created over public property or other property, assets or rights needed for the provision of a public service, where the creation of such security is prohibited by the law of [*the enacting State*].

Model provision 4136. Assignment of the ~~e concession contract~~PPP contract (see the *Legislative Guide, recommendation 50 and chap. IV, paras. 62 and 63*)

Except as otherwise provided in model provision 35, the rights and obligations of the ~~e concessionaire~~private partner under the ~~e concession contract~~PPP contract may not be assigned to third parties without the consent of the contracting authority. The ~~e concession contract~~PPP contract shall set forth the conditions under which the contracting authority shall give its consent to an assignment of the rights and obligations of the ~~e concessionaire~~private partner under the ~~e concession contract~~PPP contract, including the acceptance by the new ~~e concessionaire~~private partner of all obligations thereunder and evidence of the new ~~e concessionaire~~private partner's technical and financial capability as necessary for providing the service.

⁴²These restrictions may, in particular, concern the enforcement of the rights or interests relating to assets of the infrastructure project.

Model provision 4237. Transfer of controlling interest⁴³ in the ~~concessionaire~~private partner (see the *Legislative Guide, recommendation 51 and chap. IV, paras. 64–68*)

Except as otherwise provided in the ~~concession contract~~PPP contract, a controlling interest in the ~~concessionaire~~private partner may not be transferred to third parties without the consent of the contracting authority. The ~~concession contract~~PPP contract shall set forth the conditions under which consent of the contracting authority shall be given.

Model provision 3843. Operation of infrastructure (see the *Legislative Guide, recommendation 53 and chap. IV, paras. 80–93 (for para. 1) and recommendation 55 and chap. IV, paras. 96 and 97 (for para. 2)*)

1. The ~~concession contract~~PPP contract shall set forth, as appropriate, the extent of the ~~concessionaire~~private partner's obligations to ensure:

- (a) The modification of the service so as to meet the demand for the service;
- (b) The continuity of the service;
- (c) The provision of the service under essentially the same conditions for all users;
- (d) The non-discriminatory access, as appropriate, of other service providers to any public infrastructure network operated by the ~~concessionaire~~private partner.

2. The ~~concessionaire~~private partner shall have the right to issue and enforce rules governing the use of the facility, subject to the approval of the contracting authority or a regulatory body.

Model provision 4439. Compensation for specific changes in legislation (see the *Legislative Guide, recommendation 58, subpara. (e), and chap. IV, paras. 122–125*)

The ~~concession contract~~PPP contract shall set forth the extent to which the ~~concessionaire~~private partner is entitled to compensation in the event that the cost of the ~~concessionaire~~private partner's performance of the ~~concession~~

⁴³The notion of "controlling interest" generally refers to the power to appoint the management of a corporation and influence or determine its business. Different criteria may be used in various legal systems or even in different bodies of law within the same legal system, ranging from formal criteria attributing a controlling interest to the ownership of a certain amount (typically more than 50 per cent) of the total combined voting power of all classes of stock of a corporation to more complex criteria that take into account the actual management structure of a corporation. Enacting States that do not have a statutory definition of "controlling interest" may need to define the term in regulations issued to implement the model provision.

~~contractPPP contract~~ has substantially increased or that the value that the ~~eoneessionaireprivate partner~~ receives for such performance has substantially diminished, as compared with the costs and the value of performance originally foreseen, as a result of changes in legislation or regulations specifically applicable to the infrastructure facility or the services it provides.

Model provision 4540. Revision of the ~~eoneessionaireprivate partner~~ contractPPP contract (see the *Legislative Guide, recommendation 58, subpara. (c), and chap. IV, paras. 126-130*)

1. Without prejudice to model provision 4439, the ~~eoneessionaireprivate partner~~ shall further set forth the extent to which the ~~eoneessionaireprivate partner~~ is entitled to a revision of the ~~eoneessionaireprivate partner~~ contractPPP contract with a view to providing compensation in the event that the cost of the ~~eoneessionaireprivate partner~~'s performance of the ~~eoneessionaireprivate partner~~ contractPPP contract has substantially increased or that the value that the ~~eoneessionaireprivate partner~~ receives for such performance has substantially diminished, as compared with the costs and the value of performance originally foreseen, as a result of:

(a) Changes in economic or financial conditions; or

(b) Changes in legislation or regulations not specifically applicable to the infrastructure facility or the services it provides;

provided that the economic, financial, legislative or regulatory changes:

(a) Occur after the conclusion of the contract;

(b) Are beyond the control of the ~~eoneessionaireprivate partner~~; and

(c) Are of such a nature that the ~~eoneessionaireprivate partner~~ could not reasonably be expected to have taken them into account at the time the ~~eoneessionaireprivate partner~~ contractPPP contract was negotiated or to have avoided or overcome their consequences.

2. The ~~eoneessionaireprivate partner~~ contractPPP contract shall establish procedures for revising the terms of the ~~eoneessionaireprivate partner~~ contractPPP contract following the occurrence of any such changes.

3. The contracting authority shall require the approval of *[the enacting State indicates the public body or entity]* for any amendments to the PPP contract:

(a) that exceeds *[the enacting State indicates the percentage]* of the value of the original contract; or

(b) that provides for additional works or services to be provided by the private partner that were not included in the initial contract but have since become necessary and for the performance of which it would not be in the public interest to select another private partner

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(i) because of economic or technical reasons such as requirements of interchangeability or interoperability with existing equipment, services or installations procured under the initial contract; and

(ii) because the selection of another private partner would cause significant inconvenience or substantial duplication of costs for the contracting authority.

4. The contracting authority may not accept, and the *[the enacting State indicates the public body or entity]* may not approve any amendment or modification to the PPP contract that would render the contract materially different in character from the one initially concluded. A modification shall be considered to be substantial where one or more of the following conditions is met:

(a) the modification introduces conditions which, had they been part of the initial contract award procedure, would have allowed for the admission of bidders other than those initially selected or for the acceptance of a proposal other than that originally accepted or would have attracted additional participants in the contract award procedure;

(b) the modification changes the economic balance of the contract in favour of the private partner in a manner which was not provided for in the initial contract;

(c) the modification extends the scope of the contract considerably;

(d) where a new private partner replaces the one to which the contracting authority had initially awarded the contract in other cases than those provided for under Model Provision 47.

Model provision 4641. Takeover of an infrastructure project by the contracting authority *(see the Legislative Guide, recommendation 59 and chap. IV, paras. 143-146)*

Under the circumstances set forth in the ~~eoneession-contract~~PPP contract, the contracting authority has the right to temporarily take over the operation of the facility for the purpose of ensuring the effective and uninterrupted delivery of the service in the event of serious failure by the ~~eoneessionaireprivate~~partner to perform its obligations and to rectify the breach within a reasonable period of time after having been given notice by the contracting authority to do so.

Model provision 4742. Substitution of the ~~eoneessionaireprivate~~partner *(see the Legislative Guide, recommendation 60 and chap. IV, paras. 147-150)*

The contracting authority may agree with the entities extending financing for an infrastructure project and the ~~eoneessionaireprivate~~partner to provide for the substitution of the ~~eoneessionaireprivate~~partner by a new entity or person appointed to perform under the existing ~~eoneession-contract~~PPP contract

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upon serious breach by the ~~concessionaire~~private partner or other events that could otherwise justify the termination of the ~~concession contract~~PPP contract or other similar circumstances.⁴⁴

⁴⁴The substitution of the ~~concessionaire~~private partner by another entity, proposed by the lenders and accepted by the contracting authority under the terms agreed by them, is intended to give the parties an opportunity to avert the disruptive consequences of termination of the concession contract (see the *Legislative Guide*, chap. IV, “PPP implementationConstruction and operation of infrastructure: legislative framework and PPP contractproject agreement”, paras. 147-150). The parties may wish first to resort to other practical measures, possibly in a successive fashion, such as temporary takeover of the project by the lenders or by a temporary administrator appointed by them, or enforcement of the lenders’ security over the shares of the ~~concessionaire~~private partner company by selling those shares to a third party acceptable to the contracting authority.