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**Concession for essential public services meeting the SDG's in  
LDC's and MIC's (PfPPP)**

**Proposed list of clauses and guiding principles**

*Note from the secretariat*

The present document is submitted as an informal document for information, prepared by the International Specialist Centre of Excellence on PPP Law, Policy and Institutions in France.

## CONCESSION FOR ESSENTIAL PUBLIC SERVICES MEETING THE SDG'S IN LDC'S AND MIC'S (PFPPP)

### PROPOSED LIST OF CLAUSES AND GUIDING PRINCIPLES

#### INTRODUCTION

Bridging the unacceptable public infrastructure gap evaluated at \$3,3 trillion per year and at \$1 to \$1,5 trillion per year for the next five years for developing countries<sup>1</sup> alone is a world priority. This is in practice a prerequisite for reaching the sustainable development goals (SDG's) in the low and middle income countries (LIC's and MIC's).

An important step in that direction is to streamline the planning and procurement process of public infrastructure projects, to stimulate tax collection and foster good governance. The process of standardization of public procurement by aggregating international best practices with the objective to have projects developed on time, within budget and for limited transaction costs has been engaged for several years. The situation in many LIC's and MIC's has substantially improved for standard infrastructure projects (a public infrastructure is built on basis of employer specifications and paid for upon completion).

However taking into account the difference between expectations, time and cost upon contract signature and actual completion, several programs have been engaged to review and improve the situation. This is one of the focuses of the *Global Procurement Partnership* (GPP) program which under the MAPPP program address both the processes and the outcome.

The good news is that despite budgetary constraints, which will not permit to finance all the needs in public infrastructures in LIC's and MIC's, the development of essential public infrastructure services having at the same time a maximum transformational effect and minimum impact on current and future tax budgets is possible at a much larger scale than today. It is feasible essentially through the Concession PPP delivery method.

The success of Concession PPP is based on well prepared projects where the private company is entrusted with the financing, designing, building (or rehabilitating) a public infrastructure supporting a public service fully delivered to the end users by the project company which recovers entirely or mostly from user's fees. Although there is a long practice of this delivery method both in developed and developing countries, the procurement framework and contract conditions which underline the long term success of Concession PPP remain to a large extent to be further analyzed, debated and promoted around the world.

An important consideration for Concession PPP is the existence of many underlying common issues and related legal or contractual conditions applying in a similar manner to most projects irrespective of countries and sectors. Successful projects are based indeed on cores of equitable principles leading to sets of interrelated clauses often similar when the common needs of the people for a public service (representing general interest) are in the frontline.

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<sup>1</sup> Source : McKinsey, 2016 – *Bridging the infrastructure gap*

This is not a real surprise since the needs of the people for such services meeting the SDG's, their interest and capacity to pay for a service well adapted to their common interest together with the conditions of engagement of a reliable project company and lenders obeys to multiple common factors where long term economic equilibrium is the centerpiece.

This first draft of key clauses is not intending to deal with all families of PPP. It is limited to Concession PPP (including rehabilitation of a public infrastructure) meeting the SDG's for use in LIC's and MIC's. It is the result of numerous exchanges and analysis of projects around the world as well as many workshops conferences and seminars to which the ETIC-PPP experts have participated during the last decade with a particular focus on Africa.

This project is part of the UNECE PPP Centre of Excellence program developed by the International Centre of Excellence Concession/PPP 'Policies, Laws and Institutions' headquartered in France.

All clauses and guiding principles derive from real Concession PPP projects in various sectors and countries in which members of expert team have been directly involved. To our knowledge it is the first time that those clauses and guiding principles are included in a single inclusive document aggregating the at the same time international best practices and developing countries experience. For the sake of homogeneity and clarity, for sets of clauses deeply interrelated, we have avoided to be too detailed in some areas by comparison to others. However for each set of clauses and guiding principles data and documents have been compiled for future use.

The overall exercise is to contribute to set the scene for future work with the objective to foster exchanges and debate toward template contract conditions governing the relationships between the contracting authority and the private partner in situations where the interest of the people for essential public services is paramount.

Based on the feedback received we intend to coordinate the next steps with all parties interested in order to propose the first draft of a template of inclusive recommended contractual provisions for Concessions PPP in LIC's and MIC's meeting the SDG's as part of the people first PPP (PfPPP) projects promoted by UNECE .

In our experience and based on the benefits of standardization of contracts for traditional procurement together with the experience of standardization for sector specific Concession/PPP existing in some countries we are confident that future template contract conditions deriving from this exercise will reduce substantially the transaction costs and satisfies the parties including project companies, lenders and last but not least the people using from the public service

Paris, September 15<sup>th</sup> 2017

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## ❖ WHEREAS

It is recommended to summarize the main considerations which have conducted each party to enter in this Concession agreement.

It is often useful to clarify that the main objective for the parties is to deliver the essential public service as described in the contract recognizing that, without prejudice of the main terms of the agreement, it may have to be adapted in accordance with the contractual process, to meet general interest and the possible changing needs of the end users during the project lifecycle.

Examples of common objectives:

- to best deliver an essential Public Service affordable and adapted to the needs of the end users for the lifetime of the Concession and meeting the SDG's in an economically viable manner based on a full mandate given by the Authority to the Concessionnaire to finance, design and build the Construction and to deliver the Public Service by recovering entirely or mostly from end users.

## ❖ PRELIMINARY PROVISIONS

### Art 1. Definition of important concepts

*Note: The composite nature of Concession/PPP triggering at the same time global obligation of the Concessionnaire under strict monitoring to design and build the Construction and to provide a full service to be delivered to the public often over decades may only be sustainable and resilient if a real partnership is organized based on simple and clear concepts including clauses and provisions which are often not desirable in other types of contracts.*

- **Asset Replacement Plan:** this plan will guarantee that the construction assets will remain at all times fit for the purpose and able to deliver the service.
- **Conceptual Design:** blueprint of Construction design prepared by the Contracting Authority deriving from the prefeasibility studies for the particular Public Service and which is the basis of all design developments by the Concessionnaire.
- **Concession Asset:** tangible and non tangible assets built or developed only for the purpose of delivering the Public Service.
- **Concession Perimeter:** the boundaries of land or piece of land directly necessary for the Construction and operation of the Public Service.
- **Construction:** buildings, civil works and/or facilities of all kind including their equipments which are the support of the Public Service to be delivered.
- **Contracting Authority Requirements:** physical and functional specifications and norms which govern the construction and the delivery of the Public Service
- **Economic and Financial Viability:** Indicator or series of indicators deriving from the Project Business Case and representing the common expectations of the parties for the project lifecycle at the date of signature.
- **Final Design:** Design of the Construction complying with the Contracting Authority Requirements developed from the Tender Design that the Concessionnaire must develop prior the start of Construction.
- **Operation and Maintenance Plan:** Minimum requirements in terms of maintenance of the Construction and operation of the service in order to comply at all time with the Public Service obligations.
- **Performance Parameters:** List of performance criteria to be reached by the Concessionnaire in terms of time for completion and on output quality, consumable, availability, satisfaction, return, etc.
- **Project Business Case:** Presentation of the main characteristics of the project on an agreed matrix for the whole project lifecycle including key parameters and indicators also used for reporting of the economic and financial situation at all times.
- **Public Service:** Service to be provided to the benefit of a large number of people at the same time for meeting their essential needs and in a situation of de facto monopoly triggering several

obligations and rights both to the Contracting Authority and the Concessionnaire generally not required from a commercial service provider.

- **Tender Design:** design developed by the Concessionnaire at the tender stage on the basis of the Conceptual Design and which is the basis for Construction development.

### **Art 2. Language of contract**

The clause should provide that the language of contract is the language of the country where the project is developed.

Some limited exceptions could be envisaged if duly justified and if there is sufficient language capacity on both sides during contract performance.

### **Art 3. Contract documents: Order of precedence**

The clause should provide that the documents which all together constitute the contract must be read and construed as an integral part of the contract and be listed in the Special Conditions.

In case of any conflict, ambiguity, inconsistency or discrepancy between any of the contract documents, it is recommended to have the following order of precedence for interpretation purposes:

- General Conditions
- Special Conditions including any other document ancillary to the Special Conditions
- Contracting Authority's Requirements including the Performance Parameters
- Tender

### **Art 4. Duration**

It is recommended to have duration or term in line with the project lifecycle.

Main consideration should be given to the amortization period of the main assets.

### **Art 5. Purpose**

This clause should provide that the contract is a global contract for financing, designing and building a Construction and to deliver an essential Public Service to the citizens which will be paying for the service.

It should clarify that the main obligations of the Concessionnaire are to deliver at its own risks, subject to the provisions of the contract, a complete service to the citizens and to recover entirely or mostly from user's fees.

It should also clarify that unless otherwise specified, upon termination of the contract the Construction and all equipments necessary for the performance of the Public Service are transferred (at no costs) to the Contracting Authority in good state and operating conditions.

### **Art 6. General description of the Construction**

This clause should provide that the Special Conditions specify the main physical characteristics of the Construction together with the functional specifications and the main characteristics of the Public Service (including Performance Parameters).

## ❖ GENERAL OBLIGATIONS OF THE CONCESSIONNAIRE

This chapter should address the main obligations during the lifetime of the project inter alia in terms of Construction, operation, maintenance and delivery of the Public Service and particularly:

### **Art 7. International best practices and standards**

This clause should provide that the Concessionnaire shall:

- use equipment and materials complying with international standards and any other particular norms or standards applicable as provided for in the Special Conditions ;
- subscribe international quality assurance procedures facilitating the monitoring and control of work carried out and equipment and material fit for their purpose;
- include in any subcontract, supplier or service provider contract same duty of compliance with international best practices and standards.

### **Art 8. Origin of supplies and materials**

It is recommended, when specified in the tender, to indicate that the supplies and materials must have their origin in an eligible source country.

### **Art 9. Environmental and Social Management Plan**

This clause should provide that the Concessionnaire as well as any of its subcontractors, suppliers or service providers will at all time comply with the project environmental and social management plan.

## ❖ GENERAL OBLIGATIONS OF THE CONTRACTING AUTHORITY

### **Art 10. Supply of documents**

This clause should provide that the Special Conditions list all the documents prepared by the Contracting Authority which are intended to be binding on the Concessionnaire.

It is recommended to organize in the Special Conditions a process for delivering these documents in a non ambiguous manner within a given time period from the contract signature.

The clause should also organize cooperation between the Contracting Authority and the Concessionnaire if the latter consider that the documents are not clear or contradictory.

### **Art 11. Transfer of land to the Concessionnaire**

#### **11.1 General**

*Note: The availability of the land for the Construction and for providing the Public Service as well as the conditions of transfer of pieces of land or rights of way necessary for the project need to be addressed in detail since the process is sometimes controversial, complex and always time consuming.*

The clause should provide that the Special Conditions determine the limits of the perimeter of the land or pieces of land (the Concession Perimeter) to be assigned to the project either on a permanent or temporary basis (Construction, delivery of Public Service, etc.).

It should further provide that a process, complying with applicable laws and international best practices, is detailed in the Special Conditions. The Concessionnaire shall be transferred the exclusive right to use the land either permanently or temporarily for developing the project free of encumbrances. This process should permit to transfer all rights necessary to build the Construction and to deliver the Public Service over the contract period.

The clause should also indicate that the Special Conditions will provide for the financial conditions of permanent land occupancy if any.

#### **11.2 Steps prior to transfer**

The clause should provide for the need of an environment and socio-economic impact study complying with applicable laws and international standards and policies.

When expropriation is necessary It is recommended to provide for a fair and transparent consultation and process complying with international best practices, guidelines and policies for resettlement action plan (RAP). This clause could also indicate a date of commencement of the expropriation procedure for the land situated within the Project Perimeter together with a date for transfer of the land to the Concessionnaire. This date should not be earlier than the date of full completion of the RAP.

#### **11.3 Actual transfer of the land and related title**

The clause should clarify the scope of the rights granted to the Concessionnaire of the land which should permit to develop all activities linked to the operation of the Public Service.

The clause should also provide that the Concessionnaire will not enjoy full property rights and that in particular he has no right to sell any or all part of the land or to lease it. However the clause should indicate that leasing could be acceptable, subject to prior approval of the Contracting Authority for

contractors and service providers which contribute under the responsibility of the Concessionnaire to the delivery of the Public Service.

The clause should also provide that the Special Conditions specify the nature of the legal instrument transferring the exclusive use of the land to the Concessionnaire for the operation of the service. The related title should permit, subject to applicable laws, to pledge or mortgage during the contract period the Concessionnaire assets built on the land for the benefit of the lenders or provide some similar liens.

The clause should include a public undertaking to protect all the rights granted to the Concessionnaire for the land necessary for the project against any trespassing or infringement by using when appropriate special rights of protection of public goods, public land and Public Services.

### **Art 12. Authorizations and permits**

*Note: The problems of authorizations and permits in complex projects where cooperation with various public authorities are an important part of the success of the venture and overall governance needs to be addressed in some details .*

The clause should indicate that the public authority will facilitate the issuance of any administrative instrument, approval, authorization, permit, visa, title etc. to the Concessionnaire within a given time period. It should also clarify that this time period only starts from the receipt by the competent authority of a complete and complying application.

The clause could further provide that when the Concessionnaire has filed an application in full compliance with the applicable regulations and procedure before the competent Authority and in the absence of answer within a time period indicated in the Special Conditions the corresponding authorization or permit shall be deemed to have been granted.

### **Art 13. Assistance with local regulations**

This clause should provide that the Contracting Authority will assist the Concessionnaire upon request in obtaining copies of laws, regulations and information on local customs, orders or by-laws, which may affect the Concessionnaire in the performance of its obligations under the contract.

The clause should also provide that the assistance by the Contracting Authority under this article shall not prevent the Concessionnaire to keep him fully informed, to analyze and to comply with all public laws, regulations, procedures, local customs or by-laws of the country.

## ❖ CONSTRUCTION DESIGN AND EXECUTION STUDIES

### **Art 14. Sufficiency of information**

*Note: It is important for the Concessionnaire committed to develop under its responsibility a complex construction project including a mandate to deliver an essential Public Service for a long time period to prepare an offer based on all information it considers necessary to build the Construction and deliver the Public Service in accordance with the provisions of the contract and Performance Parameters.*

This clause should clarify that the Concessionnaire is deemed to have obtained all necessary information on any circumstances which may affect the execution and completion of the Construction and of the operation of the Public Service to have inspected and examined the site and its surroundings and to have satisfied itself before submitting its tender, as to the nature of the ground and sub-soil. It should also be deemed to have conducted all necessary preliminary studies, including all applicable laws including tax laws, environmental law, land use regulations, permits requirement procedures, labor and Public Service practices and policies of the country.

### **Art 15. Design development**

The clause should provide for early exchanges on the design process for optimizing methods, systems and processes and minimizing the operation and maintenance costs.

The clause should also provide that the design development should be carried out by phases depending on the nature of the construction as further developed in the Special Conditions.

Unless otherwise indicated in the Special Conditions, the phases should be divided as follows:

-Preliminary design: this design should develop the general composition of the Construction, including general plans and volume, external aspect and identification of main technical options.

It should also include a provisional Construction program and a conceptual operation and maintenance manual.

-Final design: The clause should describe the content of the final design such as detailed description of the Construction including drawings and calculations needed to satisfy all regulatory approvals, and to provide evidence of the operability, stability and resistance of the structures as well as their fitness for purpose for the continuous delivery of the Public Service.

It should include the final Construction programme

-Execution studies: The clause should provide the conditions under which execution studies are prepared.

It is also recommended to describe in the clause the review and approval mechanisms of design documents at various phases based on a structured process including situation of deemed approval.

Due to the impact of non approval of design documents in situation where the Concessionnaire is fully liable for delays, fitness for purpose and delivery of Public Service meeting all Performance Parameters, the Special Conditions should provide a time limit for approval.

The clause should indicate that in all situations the Concessionnaire is and shall remain fully responsible for the design of the Construction in accordance with the contract and no action or failure

to act by the Contracting Authority's Representative shall relieve the Concessionnaire of its responsibility.

## ❖ CONSTRUCTION PHASE

### **Art 16. Planning**

This clause should provide that the Concessionnaire submit to the Contracting Authority a detailed Construction planning in accordance with timing and conditions provided for in the Special Conditions.

### **Art 17. Monitoring**

This clause should provide for an inspection and monitoring of Construction in accordance with the Concessionnaire design, planning and Contracting Authority requirements.

The clause should also provide that due consideration must be given to the particular nature of the Concessionnaire freedom of organization and implementation to meet all objectives and parameters inter alia in terms of fitness for purpose of the Construction and delivery of the Public Service.

### **Art 18. Acceptance**

*Note: Acceptance by the Contracting Authority of the Construction designed and built by the Concessionnaire or by a subcontractor under full responsibility of the Concession for delivering a Public Service for many years needs to follow a particular process since on the one hand the Concessionnaire is not discharged of its obligations by acceptance and since on the other hand the main purpose of the contract is not to accept a Construction but to operate an essential Public Service.*

The clause could provide that when the Construction is a building or civil works the acceptance procedure should comply both with local laws and international best practices such as FIDIC MDB or standard World Bank conditions of contract for civil works in civil law countries.

In other situations the clause should develop in some details the process of testing and commissioning from pre-commissioning up to trial operation and as the case may be reliability and availability tests .

The clause should address the situation where the commissioning requirements and Performance Parameters are not met. Two situations may then arise:

- Performance is within an agreed percentage of compliance. This is generally remedied by way of liquidated damages
- Performance is below this percentage leading to a breach of contract: it can nevertheless be remedied under various conditions and within time limits.

### **Art 19. Defects liability**

*Note: Taking into account the complexity of the Construction, the paramount requirements of fitness for purpose and of reliability and continuity of the Public Service, the following should be considered;*

The clause should provide that the Concessionnaire shall be responsible for the perfect execution and completion of the Construction in accordance with the Contracting Authority's Requirements and able

to meet the Performance Parameters in a sustainable manner and for making good any defect in, or damage to, any part of the Construction which may appear or occur during the Defects liability period.

This clause should refer to applicable laws and often provide for additional requirements in the Special Conditions for the defect liability, its nature, status of limitation and related remedies. The following principles deserve to be considered in the interest of a resilient Public Service:

- Punch list: duty to make good without delay and in all cases before the commencement of the commercial operation of the Public Service
- Defect in the materials and equipment needed for the operation of the Public Service: Strict liability for one or two years and duty to make good in the shortest time frame
- Defect in the Construction affecting its strength and/or fitness for purpose: strict liability for several years as specified in the Special Conditions.

## ❖ OPERATION OF THE PUBLIC SERVICE

### **Art 20. General provisions of operation of the Public Service**

The clause should provide that the Concessionnaire guarantees, subject to the provisions of the contract and applicable laws, the equality of treatment for the users, continuity of the Public Service and if justified by public interest the adaptability of the Public Service to the needs. These principles should comprise the following:

Equality of treatment: All the users of the service in a same situation shall be offered the same service on the same basis for the same price.

Continuity: The Concessionnaire shall ensure a continuous delivery of the essential Public Service meeting the Performance Parameters except in specific situations such as force majeure or imminent threats to the security of the persons and property.

The clause should also provide that in case of disruption of the service not excused by a contract provision or applicable laws, the Contracting Authority is entitled to step in and to use provisionally the equipment and work force of the Concessionnaire.

Adaptability: The clause should provide that the Concessionnaire shall pay a permanent attention to conditions permitting to improve and adapt the service to public needs within the existing Performance Parameters and if appropriate to propose changes and adaptation.

A process should be organized in the contract, starting with the partnering procedure, for exchanging and agreeing on such changes and adaptations and their impact on contract conditions with the objective of maintaining the Economic and Financial Viability.

When public interest is justified, the Contracting Authority may impose unilateral changes and adaptations. If such unilateral changes and adaptations deteriorate the Economic and Financial Viability of the project, the Concessionnaire shall have a right of full restoration of the Economic and Financial Viability commensurate with the impact of this specific cause of deterioration (such as an increase of the tariff).

## **Art 21. Performance Parameters**

This clause should be divided into time milestones and performance specifications.

It is recommended that within a certain threshold in terms of nature of the impact on the operation of the Public Service, the only remedy for failure to meet Performance Parameters is liquidated damages. Beyond this limit a breach of contract is materialized.

The clause could also provide for performance incentive above a certain threshold of performance for instance in terms of: output performance, service performance, productivity performance, operation and maintenance costs performance.

## **Art 22. Liquidated damages**

The clause should indicate that if the Concessionaire does not comply with some key milestones referred to in the Special Conditions, it shall pay to the Contracting Authority an amount of liquidated damages.

The clause should also provide for liquidated damages for performance in case of failure to meet the performance parameters below a certain limit.

It is also recommended that the clause provides a cap for liquidated damages which are the sole remedy of the Contracting Authority for delay and performance below the cap.

## **Art 23. Maintenance and renewal obligations**

The clause should provide:

- that the Concessionaire shall at its sole risk and expense maintain the Construction within and around the Concession Perimeter and keep same in good maintenance and operating condition so as to ensure that it is always suitable for the delivery of the Public Service and avoid any service inadequacy or suspension thereof.
- that the renovation and repair of damaged Construction shall be carried out as soon as possible as of discovery or (without prejudice to any subsequent right of action against the parties having caused such damage).

### **23.1 Maintenance programme**

The clause should provide:

- that a maintenance and monitoring programme shall be drawn up by the Concessionaire in respect of Construction and all equipments and other assets necessary for the delivery of the Public Service located within the Concession Perimeter.
- that the Concessionaire shall be responsible for renovation of Construction located within the Concession Perimeter based on a multiyear renovation programme updated on a regular basis between the parties.

## **Art 24. Reporting**

### **24.1 Yearly report**

The clause should provide that the Concessionaire shall provide each year a report comprising a technical report, an operating report, a public satisfaction report, a financial report and a human resources report.

## **24.2 Financial and accounting statements**

The clause should provide that the financial and accounting statements for the Concession shall be established in conformity with a matrix and pro-forma statements. The same matrix and pro-forma statements shall be used for the initial establishment and subsequent updating the Project Business Case.

An update of the initial Project Business Case shall in all case be drawn up at the date of commencement of the commercial delivery of the Public Service.

## **❖ ECONOMIC AND FINANCIAL PROVISIONS**

*Note: Since the Concessionnaire recovers its investment and costs of Construction and of operation of the service entirely or mostly from user's fees in a situation where both parties recognize that the Concessionnaire is entitled to have a fair return, a general clause should address this matter before more specific clauses.*

### **Art 25. General**

The clause should provide that the Project is based on provisional accounts and Project Business Case annexed to the contract permitting to the Concessionnaire to invest and deliver the service under conditions of Economic and Financial Viability including a fair return.

When it is agreed that in order to reach the Economic and Financial Viability an element of subsidy is needed (which is the situation in most cases for Concessions for essential Public Services) the amount of the subsidy and the conditions of its payment shall be part of the contract and duly taken into account for determining the agreed Economic and Financial Viability objectives and parameters.

### **Art 26. Tariffs**

The clause should provide that the tariff to be paid by the end users for the Public Service as agreed between the parties in the Special Conditions is part of the Project Business Case.

It should also provide that the tariffs shall be updated at the date of commencement of operation in accordance with the methodology annexed to the Project Business Case.

Thereafter the clause should indicate that the tariffs shall be regularly updated and at least on an annual basis to the extent necessary and calculated with the same methodology as the one which has been used for their initial determination.

The clause could further provide that the common objective is to have the tariffs always calculated in such a way that the Concessionnaire has the opportunity to develop the project and deliver the service for the project lifecycle in accordance with the Economic and Financial Viability parameters as provided for in the Project Business Case (as updated for from time to time).

The clause may add that if the Concessionnaire is in default in any of its obligations the contracting Authority shall not be obliged to accept a tariff which permit to maintain full economic and financial viability until the default is made good.

## **Art 27. Economic Stability**

*Note: Stability of key economic factors is an essential feature of success of long term investment projects for essential Public services. The following clauses are designed to strive a reasonable balance between the interest of the Concessionnaire and Contracting Authority for the optimum operation of the Public Service based on precedents both in underlying contract laws and contracts in LDC's and MIC's.*

### **27.1 Change in laws**

The clause should provide that legislative or regulatory provisions taking effect after the date of the signature of the contract which may have the effect of changing, cancelling or of restricting the provisions of the legislative or regulatory regime, in such a way that it deteriorate substantially the Economic and Financial Viability shall not be applicable to the Concessionnaire unless otherwise agreed between the parties.

The same will apply for the employees of the Concessionnaire and to the suppliers and service providers participating to the construction and operation of the service.

### **27.2 Change in the tax and custom regime**

The clause should provide that the stability of the tax and custom regime is guaranteed to the Concessionnaire with respect to scope, rates, collection methods and audits in such a way that it will not deteriorate the Economic and Financial Viability.

The Concessionnaire shall not be liable unless otherwise agreed between the parties for any taxes created after contract signature or which arises from any amendment effective after such date.

### **27.3 Unforeseen change of economic circumstances (hardship)**

This clause should provide that when unforeseeable economic circumstances outside the Concessionnaire's control which do not render impossible the operation of the Service arise and deteriorating substantially on the Economic and Financial Viability the parties shall meet to remedy the situation and restore the Economic and Financial Viability up to a certain threshold

### **27.4 change in physical conditions**

This clause could provide that if the Concessionnaire encounters artificial obstructions or physical conditions, other than weather conditions, which could not reasonably have been foreseen, and if such obstruction deteriorates on the Economic and Financial Viability above a certain threshold , the Concessionnaire shall be entitled to compensation to restore part of the Economic and Financial Viability;

## **Art 28. Force Majeure**

This clause should describe force majeure in simple terms such as any unforeseeable act or event that is extraneous to and lies outside the control of the Party that seeks to rely thereon, (ex natural disasters, fires, explosions, war, uprisings, mobilisation, strikes, earthquakes, acts of State, etc.)

It should clarify that no party is held liable for non-performance of its obligations deriving from the occurrence of a force majeure event and that each party has a paramount duty to mitigate the consequences of the event.

The clause should also indicate that the parties shall seek any solution allowing continued performance of the Concession.

If force majeure event does not lead to early termination the Contracting Authority shall compensate or have the Concessionnaire compensated in order to restore the Economic and Financial Viability as if the force majeure event would not have occurred.

### **Art 29. Tax and customs provisions**

*Note: The applicable tax and custom regime and forecast of the related custom and tax budget for the project is complex to determine inter alia due to the number of different suppliers, contractors and service providers participating to the project at various levels either from abroad or in country.*

*The proper evaluation of the project custom and tax budget is an important element for establishing the Economic and Financial Viability.*

It is recommended to provide for a tax and accounting annex a describing the applicable tax regime both for the Concessionnaire and other project participants including provisions on cooperation and reporting.

It is recommended not only to list applicable tax, duties and levies in an annex but also the conditions under which they will be calculated.

Due care to be taken in the annex to municipality and local taxes including levies and fees for authorizations and permits.

## **❖ MISCELLANEOUS**

### **Art 30. Concessionnaire personal performance**

The clause should provide that since the contract has been entered into due regard to the qualification and capacity of the Concessionnaire company and its staff to build the construction and to operate the Public Service during the project lifecycle the Concessionnaire is not entitled, without prior authorization by the Contracting Authority, to assign all or part of this contract or any benefit or interest deriving from it.

The clause should also provide that the Concessionnaire shall not without prior approval of the authority change of majority ownership and of referenced shareholder

The clause should indicate that when the Concessionnaire is part of a consortium the main terms of the consortium agreement shall be approved by the Public authority, and that the Concessionnaire will remain in all cases fully responsible for all acts and omission of the consortium members.

### **Art 31. Substitution**

This clause should provide that in case of insolvency liquidation or winding up of the Concessionnaire, the lenders which have not been fully repaid shall be entitled to, subject to the non objection of the Contracting Authority, to appoint a third party to replace the Concessionnaire and vested with all rights and obligations provided for in this contract.

### **Art 32. Subcontracting**

The clause should provide that the Concessionnaire is not entitled to subcontract any substantial part of the activities of Construction, supply or of operation of the service without approval of the Contracting Authority.

The clause should indicate that the Special Conditions list as the case may be suppliers, contractors and service providers for which the prior approval is deemed to have been granted.

The clause should provide that the Concessionnaire shall remain responsible for the acts, defaults or negligence of the subcontractors, their agents or employees. The approval by the Contracting Authority of the sub-contracting of any part of the contract and in particular for subcontractors to perform any part of the Construction or operation of the service shall not relieve the Concessionnaire of any of its obligations under the Contract.

### **Art 33. Staff**

*Note: Taking into account the international nature of most of the Concession for infrastructure Public Services and/or of the need to use experts and services providers from various countries having different kind of employment regime and the need to employ and in priority local people, it is important to consider special conditions for staff.*

The clause should provide that

- all the employees of the Concessionnaire and of its subcontractors and service providers are governed by local employment laws. However expatriate employee's benefits, including retirements and similar benefits, may be governed by foreign laws.
- the Concessionnaire should give employment priority to local citizens or residents and provide them a remuneration and employment package locally competitive.
- the Concessionnaire should contribute to the design of a long-term human resource programme comprising training of local citizens and residents.
- when there are no local citizens or residents having the necessary skills, the Concessionnaire is free to hire any foreign or expatriate employee as deemed appropriate in terms of qualifications and numbers.
- as appropriate the Contracting Authority will assist the Concessionnaire for the application and granting of works and permits for employees and their family as the case may be.

### **Art 34. Environment**

The clause should provide that the Concessionnaire should abide by local regulations as well as international best practices.

Special Conditions should describe the steps already made by the Contracting Authority in terms of environmental and social impact studies and environmental and social management plan. Those conditions should describe the additional steps to be taken jointly or separately by the Contracting Authority or the Concessionnaire for finalizing all the necessary studies with appropriate indicators complying with applicable laws and international best practices in order to obtain approval of a complete environmental and social management plan and obtaining the related authorizations and permits as the case may be.

The clause could also clarify that if the Concessionnaire has complied with the applicable national and international requirements for developing the studies and proposing an environmental and social management plan, any delay in granting authorizations and permits or approving the plan shall not be considered as a default and Contracting Authority shall assist and to the extent necessary compensate the Concessionnaire.

### **34.1 Corporate Social Responsibility**

The clause should indicate that the Concessionnaire its suppliers, subcontractors and service providers shall comply with corporate social responsibility principles (CSR) as further defined in applicable laws and international best practices..

### **34.2 Community relationships and indigenous people**

The clause should indicate that the Concessionnaire with the support of Contracting Authority will develop a community relationship program and as the case may be an indigenous and women empowerment program in accordance with applicable regulations and international best practices.

The main terms of the initial program, its organization and costs should be agreed at the date of signature.

## **Art 35. Third Party liability**

The clause should indicate that the Concessionnaire is solely and fully liable for any damage caused to users or third parties as a result of the Construction and operation of the service.

The clause should further indicate that the Concessionnaire shall assume sole responsibility for all risks or disputes arising as a result of its actions or omission in connection with the operation of the service.

## **Art 36. Insurances**

This clause should describe the different types of insurance coverage to be subscribed by the Concessionnaire in compliance with applicable regulations.

The clause could provide that a minimum list of insurance policies should be subscribed with at least one or more insurance company of reputed solvency and to maintain the same in force.

The following insurance should inter alia be considered:

- insurance cover for general third-party liability throughout the term of the Concession ;
- a work site all risks policy or similar coverage for the Construction up to an amount indicated in the Special Conditions;
- an all risks policy for damages on the Concession assets for an amount specified in the Special Conditions
- Professional indemnity insurance covering bodily injury and property damage that may be caused to third parties and to its employees, in the amount specified in the Special Conditions
- As applicable builders strict liability covering the Concessionnaire strict liability on equipment and structure

### **Art 37. Guarantees**

*Note: Since the contract is not only entered into for the Construction, building, civil works or facility designed for providing a Public Service but mainly for the actual provision of essential Public Service during the project lifecycle the guarantees to be provided by the Concessionnaire should not be limited to a Construction fit for the purpose but should also be valid during the project lifecycle. Guarantees should also be provided for the retransfer of the Construction and any equipment permitting the operation of the service either at expiry date or as a consequence of early termination.*

It is recommended that the guarantee take the form of a bank guarantee based on the format and for an amount provided for in the Special Conditions.

Unless otherwise provided in the Special Conditions, the initial performance guarantee should be 5% of the estimated Construction costs.

The clause could provide that upon satisfactory acceptance of the Construction as the case may be or the completion of trial tests the guarantees is reduced by half.

Special Conditions should also provide for other guarantees during the operation service period inter alia in relation to maintenance and consumption parameters.

They should also provide that a special guarantee shall be provided before the expiry date of the Concession in consideration for retransfer of assets, equipments and all service obligations in good state and operating capacity.

### **Art 38. Confidentiality and disclosure**

It is recommended to describe the confidential information and the commitment to keep such information confidential

It should describe a process for disclosure of non confidential information during the project lifecycle in such a way that such information is available in a format easy to understand by stakeholders.

### **Art 39. Patents and licenses**

The clause should indicate that the Concessionnaire has the full right to use patents and licenses as well as industrial, intellectual and other property rights for the Construction or operation of the service and that such right will be transferred at no cost to the Contracting Authority at the expiry date of the Concession or in case of early termination.

The Concessionnaire undertakes to indemnify and hold harmless Contracting Authority for all damages and cost incurred due to any claim brought by any third party in this regard.

## **❖ TERMINATION**

### **Art 40. General**

*Note: The particular nature of essential public service Concession contract is that the Public Service rendered by the Concessionnaire by delegation of authority from the Contracting Authority during the project lifecycle must continue after the term of the Concession contract without restriction or limit in time. As a result the Contracting Authority must be in the position to organize itself to deliver the service under the same conditions and/or to enter into a contract with another operator to deliver the service.*

*This may only be possible if the assets created by the Concessionnaire including knowhow and equipment necessary for the smooth continuity of the Public Service revert to the Contracting Authority. Since duration of the Concession has been calculated in consideration for the full amortization of the Concession assets, all such assets, knowhow and equipment shall be transferred to the Contracting Authority in good operational conditions.*

*Various clauses should address the situation.*

#### **Art 41. Assets transfer**

The clause should indicate that the parties should meet in advance for organizing a contradictory inspection process on the construction, inventories, supplies and equipments necessary for the operation of the service and more particularly for:

- Assets transferred automatically without compensation free of all liens and encumbrances to the Contracting Authority (Returned Assets) and ;
- Assets that the Contracting Authority has option to purchase in accordance with the list and conditions provided for in the Special Conditions (Purchased Assets).

The clause should also indicate the practical conditions of transfer of the Returned Assets and Purchased Assets.

#### **Art 42. Early termination**

*Note: Early termination of Concession contract for essential Public Services should always be possible for sovereign reasons in addition to traditional termination clauses. Since it is not realistic to stop the delivery of essential Public Services in case of early termination, the Concession Asset necessary for the delivery of the service will continue to be used. This situation triggers special clauses dealing inter alia with the financial and economic consequences of each early termination event.*

The events and consequences may be summarized as follows;

- By mutual consent; the parties shall agree all consequences and in particular on the conditions of transfer and repurchased of assets taking into account the non amortized value of such Assets including together with an indemnity to be paid by the Contracting Authority to the Concessionnaire for loss opportunity ;
- for public interest reasons: the Contracting Authority should fully compensate the Concessionnaire for all consequences including a percentage of the loss of profit including in particular: the residual value of the returned asset, the price for repurchased of assets as well as and any other asset to be sold to the Contracting Authority, the demobilizations cost of the Concessionnaire's equipments and personnel ;
- by either of the parties in case of occurrence of a force majeure event if the duration of the event exceed a duration specified in the Special Conditions: the Contracting Authority should compensate the Concessionnaire in the same manner as for termination for public interest reason except for compensation for loss of profit ;
- by the Contracting Authority in case of persistent default of the Concessionnaire not excused by a provision of the contract and not remedied after a period of time indicated in the Special Conditions : the Contracting Authority should pay to the Concessionnaire an indemnity equal to the non amortized value of the returned asset from which shall be deducted an amount equal

to the indemnity due by the Concessionnaire to the Contracting Authority to compensate the breach of contract by the Concessionnaire ;

- by the Concessionnaire in case of gross default of the Contracting Authority preventing the Concessionnaire to meet its own obligations on Construction or operation of the service: the Contracting Authority should indemnify the Concessionnaire for an amount equal to the amount payable for termination for public interest increased by an indemnity to hold harmless the Concessionnaire of all the consequences of the default.

All the provisions relating to the transfer of assets and return of land to the Contracting Authority upon the term of the Concession will apply equally in case of early termination.

## ❖ PARTNERING, DISPUTE AVOIDANCE AND ARBITRATION

*Note: It is important to keep in mind contractual relationship having a particular nature sometimes closer to company laws than pure contract laws since each party assumes a number of long-term commitments in view of ensuring optimum delivery of a Public Service.*

*It should be recognized that it is not possible to set forth all detailed terms and conditions of provision of the Public Service during the project lifecycle. It is therefore essential to foster a public-private partnership relationship.*

*This should be the basis of a real partnership organization and decision making process without compromising on the terms of the contract with a view to deliver and as the case may be to adapt and optimize the service to the needs of users, their financial capacity and the economic growth of the region and of the country.*

### **Art 43. Partnering**

The parties should agree on a minimum organizational partnering structure and process to ensure the smooth, long-term development of their relationship.

The partnership should be developed along the following lines:

- Partners meeting organized on a regular basis for instance each quarter
- Party to the partnering meeting composed of several individuals from each side having an important role in relation to the construction and delivery of the service (technical, commercial financial) ;
- Simple partnership by-laws for efficient partners meetings based on a consensus decision making process ;
- Duty to disclose any potential issues at partner meetings ;
- For complex projects, consider a facilitator.
- Duty to disclose and discuss any cause of dispute during partners meeting before any other steps toward dispute resolution ;

#### **Art 44. Dispute Board (Optional)**

*Note: Dispute Boards are becoming very popular and efficient for complex construction contracts of all kind. In the last decade, best practices and use of Dispute Boards have been developed around the world and in particular through the Dispute Review Board Foundation (DRBF).*

*The benefit of such board is that they are composed of senior and authoritative experts selected by the parties and which meet with the parties at regular intervals from signature of the contract even in absence of disputes.*

*This permits to review the development of the Project from all angles. Several natures of boards are possible depending of their role in the dispute from mere advice to adjudication.*

*For Concession for essential public services where the parties have to behave as partners toward common goals, dispute avoidance board is recommended.*

*The board could be a standing board composed of three experts up to the closing of the commissioning phase and transformed into a board of a single person board during the operation phase.*

The clause should provide for a standing board of three authoritative experts with facilitators capacities.

It should define a minimum qualification for each member having altogether experience and capacity in similar situations of a Concession for essential Public Services where the Concessionnaire is entrusted with full delivery of the service and recovers entirely or mostly from user's fees.

The board should in particular have proven experience in essential Public Service delivery in the country.

Further reference to dispute board rules such as ICC or DRBF is recommended.

#### **Art 45. Mediation (Optional)**

*Note: If the parties do not chose dispute board process, a structured mediation process should be considered.*

The clause could provide for mandatory mediation before referring the matter to arbitration.

The clause should provide for a structured mediation by a mediation board with more or less the same qualification as the ones proposed for dispute board.

It should organize a simple mediation process with limited role of due process reserved to arbitration proceedings.

The clause could provide for a default process extremely simple within strict time limits.

#### **Art 46. Arbitration**

The clause should provide that disputes which have not been settled through dispute board or mediation shall be finally settled by three arbitrators appointed in accordance with the rules of arbitration provided by an authoritative international organization.

**Art 47. Applicable law**

The Concession shall be governed by and construed in accordance with local laws.

The clause should provide that in the absence of relevant references in local law or case law, the arbitration tribunal shall refer to internationally recognized best practices in essential Public Services projects.