



**PUBLIC PRIVATE PARTNERSHIP**  
**STANDARD HEADS OF AGREEMENT**  
**FOR**  
**USER FEE BASED PROJECT**  
**2019**

**MINISTRY OF FINANCE**  
**ROYAL GOVERNMENT OF BHUTAN**



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# 1 INTRODUCTION

## 1.1 Context

Public Private Partnerships (PPP) have developed into a standard in project development toolkits globally. Bhutan is the latest in the long line of nations to adopt PPPs. The foundation of PPPs is the formation and upholding of contracts which necessitates a strong legal system. PPP contracts are built on existing contract jurisprudence but in many countries, standardized contracts have been evolved for PPPs – either general contracts or for specific sectors. These standardized contracts are developed by the government which then makes their use compulsory for PPPs executed in their countries. This reduces costs associated with PPP development, makes management and enforcement of contracts easier and reduces risk for the developer, financial institutions and the government.

The PPP structure determines the risk sharing between the parties, value for money and affordability for the Implementing Institution and the Concessionaire. Ideally, the PPP should be structured such that each party gets to handle the risk that it is best equipped to handle. It should also maximize value for money for the public authority and affordability for the users.

## 1.2 Guidance for Public Private Partnership Agreement (PPPA)

The Public Private Partnership Rules and Regulations 2017 of the Royal Government of Bhutan defines PPPs as a contract between an Implementing Institution and a Concessionaire whereby the Concessionaire renovates, constructs, operates, maintains, or manages an asset to provide a service in whole or in part, in accordance with specified output specifications. The Concessionaire assumes the associated risks for a significant period and in return, receives benefits and financial remuneration according to agreed terms. Public Private Partnerships constitute a cooperative venture built on the synergy of expertise of each party that best meets clearly defined public needs through the most appropriate allocation of resources, risks and rewards.

The PPP Policy 2016 defines the PPP Agreement as a written agreement, for a fixed duration of time, between an Implementing Institution and a Concessionaire that sets forth the terms and conditions for the implementation of a Public Private Partnership.

PPP Agreements are the basis of PPP arrangements and this document outlines the major clauses in PPP agreements along with a commentary on why they are required and what would be the consequences of the clauses. This document is meant as a guide to drawing up PPP agreements for specific projects. This document should not be construed as a model contract or a template. Public authorities intending to use this document must treat this as suggestions or guidance only. Agreements for proposed PPP projects must be drafted and/ or vetted by qualified legal experts and must be in conformance with the relevant legislation and regulations, including but not limited to the PPP Policy 2016 and the PPP Rules and Regulations 2017.

### **1.3 Intended use of this document**

The intended users of this document include policy makers, PPP specialists, bureaucrats, the government, legal experts, developers and financial institutions. This document is meant to be used for a wide variety of sectors and projects and hence is general in nature. Customizations need to be made in the PPPA depending on the sector and the type of PPP.

This guide is meant for projects which have been chosen to be executed via PPP mechanism. It is not meant to provide a decision-making framework for deciding whether to choose PPP or other mechanisms for executing the project. The choice of PPP mechanism for projects involves decision variables such as the sector being considered, lifecycle of the asset, maturity of PPPs in the country et cetera.

This document assumes that certain key features of PPP projects as generally understood, whether or not prescribed by the PPP Regulations 2017 are present in the proposed transaction for which the PPP contract is being drafted, including but not limited to the following

1. The contract is being entered into by the public authority and a special purpose company formed specifically for the purpose of the project
2. The contract is for a specific duration
3. The contract involves material capital investment by the special purpose company

Other critical parts of the PPPA such as the technical plan and the financial model are not within the scope of this document. This document is created from the perspective of the Implementing Institution – hence private parties, financial institutions, contractors and other stakeholders in a PPP ecosystem would have to read it appropriately.

#### **1.4 Structure of this document**

This document is divided into chapters based on the key components of a PPP agreement. Each chapter provides a brief description of the relevant component, followed by suggested agreement clauses linked to that component.

Whenever a symbol “[•]” is used in the document, it means that the specific information or content is project specific and should be filled based on the unique features and configuration of the project. Similarly, if information has been included in between the square brackets “[...]”, it is at the discretion of the implementing institution preparing this document to retain or exclude the information, based on relevance and applicability for the project for which the document is being prepared.

The document includes a list of suggested definitions of the terms used in the suggested agreement clauses and a list of publications that have been used to articulate the various agreement clauses.

#### **1.5 User Fees/Tariffs**

According to the PPP Policy 2016, revenue sources of PPP arrangements can be tariffs (or user charges) and/ or annuity payments, based on the findings of the feasibility study. The PPP Policy further provides that tariffs (user fees) will consist of an initial tariff with a provision for tariff escalation/ resetting which would be provided for in the PPP Agreement.

## 2 HEAD OF PPP AGREEMENT

### 2.1 Parties to the Contract

The parties to the contract must be named specifically to establish the legal validity of the PPPA. The suggested clause is as follows:

No.	Aspect	Suggested Provisions
1	Parties	The Public Private Partnership Agreement (PPPA) shall be entered into by:  [•] (the “Implementing Institution”) <sup>1</sup> ;  and  [•] (the “Concessionaire”) <sup>2</sup> .

### 2.2 Term of the PPPA

A specific tenure is used as one of the defining features of PPPs in the definition provided by the PPP Policy 2016. The PPPA needs to define the total duration of the contract, the commencement of the contract and the expiry of the contract. The total duration of the contract depends on several factors, including but not limited to, the lifecycle of the assets, financial feasibility and regulatory limits.

Typically, the rights and obligations under a PPPA are fully enforceable from the date on which condition precedents are fulfilled by both parties to the contract. Condition precedents are initial commitments by each contracting party, the satisfaction of which are essential for commencement of contractual activities by the other party.

A PPPA naturally expires at the end of its specified duration but can be terminated before end of the duration in certain predefined conditions. The PPPA can also be extended, increasing its contractual duration.

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1 Alternate legal terminology such as “Contracting Authority”, “Concessions Authority”, “Authority” et cetera can be used

2 Alternate legal terminology such as “Service Provider”, “Concessionaire” et cetera can be used

The suggested clauses relevant to this component of the PPPA are as follows:

No.	Aspect	Suggested provisions
1	Commencement and Duration	<p>This Agreement shall enter into full force and effect on the date on which the Conditions precedent have been satisfied and/or waived by the Implementing Institution (or, where relevant, the Concessionaire), in its absolute discretion (the “Effective Date”). It shall remain in full force and effect for a period of [•] years starting from the Commencement Date (the “Term”), subject to the satisfaction of conditions precedent by the respective parties, unless terminated earlier or extended in accordance with the provisions of this Agreement.</p>
2	Conditions Precedent	<p>[Where permissible under the laws of Bhutan] Save to the extent expressly set out in this Heads of Agreement, the PPPA shall be conditional upon and shall only take effect upon an agreed list of Conditions Precedent being satisfied by the Concessionaire and, where applicable, the Implementing Institution. The Conditions Precedent must be satisfied within a period of [•] from the date of signing of the PPPA, by each party, unless extended by the other party.</p> <p>All the Conditions Precedent must be unconditionally satisfied and/or waived by the other party, in its absolute discretion, within the agreed period specified in the PPPA, failing which such other party shall be entitled to terminate the PPPA.</p>

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3 Assets may include land, buildings or any other asset which is contingent for the Concession to commence

No.	Aspect	Suggested provisions
		<p>The full list of Conditions precedent will be developed during dialogue. However, these are expected to include:</p> <ul style="list-style-type: none"> <li>- setting up and convening the liaison committee for the Project (by both Parties);</li> <li>- provision of the performance security by the Concessionaire;</li> <li>- provision by the Concessionaire of the documents evidencing the availability of the Project Investments in cash or in form of irrevocable commitments from lenders and/or investors;</li> <li>- provision by the Concessionaire of Insurance Policies;</li> <li>- provision by the Concessionaire of certificate of incorporation and articles of incorporation;</li> <li>- provision by the Implementing Institution of an Asset Transfer Plan<sup>3</sup>;</li> <li>- provision of land/ project site/ right of way by the Implementing Institution</li> <li>- provision of specified approvals and permits by the Concessionaire</li> <li>- provision of specified approvals and permits by the Implementing Institution</li> </ul>
3	Provisions intended to take effect on PPPA signature	<p>Certain provisions of the PPPA may need to take effect immediately upon the PPPA being entered into. However, such provisions will be limited to those provisions dealing with:</p> <ul style="list-style-type: none"> <li>- the commencement and duration of the PPPA;</li> <li>- the satisfaction and/or waiver of the Conditions Precedent;</li> <li>- the consequences of certain Conditions Precedent not being satisfied;</li> </ul>

No.	Aspect	Suggested provisions
		<ul style="list-style-type: none"> <li>- the performance of obligations, if any, which are to be performed by the Parties prior to the Effective Date; and</li> </ul> <p>the liability of the Parties prior to the Effective Date.</p>

### 2.3 Rights and obligations of the parties

This section forms the basis of the PPP arrangement enshrined in the PPPA as it details the allocation of responsibilities and risks between the two parties. This section also allocated the rights to the two parties that are essential for fulfilling the allocated responsibilities and managing the assigned risks.

The rights and obligations of the party cover the whole lifecycle of the PPPA, including commencement, construction, commissioning, operations, handover, termination and expiry. The rights and obligations of the parties differ during each stage of the lifecycle of the PPPA.

The suggested clauses addressing this component of the PPPA are as follows:

No.	Aspect	Suggested provisions
1	Concessionaire's principal obligations	<p>The Concessionaire's principal obligations under the PPPA shall include obligations to:</p> <ul style="list-style-type: none"> <li>- Design, build, finance, operate and maintain<sup>4</sup> [Name of the infrastructure project] as required under the PPPA, capable of meeting the required specifications during the PPPA Period</li> <li>- Operate the [Name of the infrastructure project] in accordance with all applicable laws and regulations, prudent industry practice and the services standards and deliver the Services under this PPPA;</li> </ul>

<sup>4</sup> To be updated based on the choice of PPP adopted

No.	Aspect	Suggested provisions
		<ul style="list-style-type: none"> <li>- Obtain all necessary licenses, permits and warranties necessary to carry out its obligations under this PPPA;</li> <li>- Employ Operating Staff who have the relevant qualifications / experience for the performance of its obligations under this PPPA;</li> <li>- Report regularly on the tests requested and conducted (maintain records for audit purposes);</li> <li>- Cooperate with the Implementing Institution to allow effective monitoring;</li> <li>- Establish and maintain an appropriate information system;</li> <li>- Obtain appropriate insurance coverage for the Term;</li> <li>- Prepare operating manuals within the time period specified in the PPPA;</li> <li>- update any Environmental and Social Impact Assessment where its design impacts on the assessment prepared by the Implementing Institution to meet the requirements of Applicable Laws;</li> <li>- act in a non-discriminatory manner toward Users.</li> <li>- Service the debt raised for financing the project</li> </ul>
2	Concessionaire's principal rights	<p>The Concessionaire shall be entitled to:</p> <ul style="list-style-type: none"> <li>- access, use and occupy the Site for the purpose of the Project including any necessary easements and rights to the Site;</li> <li>- undertake construction/ development activities for implementation of the project and provision of the services required under the PPPA</li> </ul>

No.	Aspect	Suggested provisions
		<ul style="list-style-type: none"> <li>- [payment of government support in accordance with the PPPA]</li> <li>- Right to raise finance for development and operation of the project and assignment of specific rights provided in the PPPA to lenders as a condition of raising finance</li> <li>- [sub-lease the Site or otherwise transfer or give it in use to a third party]<sup>5</sup></li> <li>- [divide the Site]<sup>5</sup></li> </ul>
3	Implementing Institution's principal obligations	<p>The Implementing Institution's principal obligations under the PPPA shall include obligations to:</p> <ul style="list-style-type: none"> <li>- Handover the possession of the project site, right of way etc.</li> <li>- execute the Asset Transfer Plan and provide access to the Concessionaire;</li> <li>- except where expressly entitled pursuant to the terms of the PPA, not interfere and cause its employees and sub-contractors not to interfere or obstruct the Concessionaire in carrying out its obligations;</li> <li>- give the Concessionaire full access to all available necessary information, plans, policies, papers, reports and data in order to enable the Concessionaire to carry out its obligations;</li> <li>- assist the Concessionaire in obtaining, from the government, other local government or statutory bodies, all necessary consents, permits and authorizations as required by Applicable Law;</li> <li>- Periodic adjustment of the payment amounts based on the adopted indexation formulas and actual test volumes;</li> </ul>

<sup>5</sup> Only with the approval of the Implementing Institution

No.	Aspect	Suggested provisions
		<ul style="list-style-type: none"> <li>- Monitoring of the compliance of the Concessionaire with the provisions of the PPPA;</li> <li>- Monitoring of the compliance of the Concessionaire with quality standards, ISO standards and related contractual terms;</li> <li>- Establishment of the bodies, mechanisms and procedures for regular performance management and review of the PPPA [independent panel of experts jointly selected by the Implementing Institution and Concessionaire];</li> <li>- Management of the determined payment mechanism;</li> <li>- Periodic adjustment of the regulated prices, and service levels of the provider;</li> <li>- in each case, in accordance with the terms of the Heads of Agreement and PPPA (including its Schedules and Annexes).</li> </ul>
4	Implementing Institution's principal rights	<p>The Implementing Institution shall be entitled to:</p> <ul style="list-style-type: none"> <li>- right of way through the Site to other facilities controlled by the Implementing Institution under circumstances where reasonable, alternative means of access are not available</li> <li>- in case of Governmental authorities, they shall be given right of way for the purpose of carrying out any activities which they are legally entitled to carry out as per Applicable Law</li> <li>- the right to hire an Independent Engineer to carry out any required inspections</li> </ul>

No.	Aspect	Suggested provisions
		<ul style="list-style-type: none"> <li>- the right to step-in (Step-In by the Implementing Institution) in case of Concessionaire's default until the Implementing Institution has reasonable grounds to believe that the consequences of the respective Concessionaire's default have been rectified</li> <li>- [the right of providing restricted services, which include [*], which as per Applicable Law can be provided only by the Implementing Institution, the Government or their nominees]</li> <li>- [the right to use preferred branding in addition to the branding of the Private Authority]</li> </ul>

## 2.4 Warranties and undertaking

The parties to the PPPA enter into the arrangement based on the mutual trust that certain essential facts about the other party are true and will continue to remain so. For the Implementing Institution, these facts are mentioned in the tender documents, and for the Concessionaire these facts are part of the qualification application, technical proposal or other documents submitted as part of the procurement and contracting process. This section of the PPPA formalises these facts or claims of each party and gives such claim legal enforceability by the other party.

No.	Aspect	Suggested provisions
1	Concessionaire Undertakings	<p>The Concessionaire shall be required to give various undertakings to the Implementing Institution in the PPPA, including undertakings that, for as long as the PPPA remains in force, it shall not:</p> <ul style="list-style-type: none"> <li>- sell, transfer, lend or otherwise dispose of (other than by way of security) the whole or any part of its business or assets which would materially affect the ability of the Concessionaire to perform its obligations under the PPPA, without prior consent of the Implementing Institution;</li> </ul>

		<ul style="list-style-type: none"> <li>- cease to be resident in the Kingdom of Bhutan or transfer in whole or in part its undertaking, business or trade outside the Kingdom of Bhutan;</li> <li>- undertake the performance of its obligations under the PPPA otherwise than through itself or a subcontractor; and</li> <li>- change or cease its business or start any other business which is materially different from that to be carried on by it under the PPPA.</li> </ul>
2	Implementing Institution Undertakings	<p>The Implementing Institution shall be required to give various undertakings to the Concessionaire in the PPPA, including undertakings that, for as long as the PPPA remains in force, it shall:</p> <ul style="list-style-type: none"> <li>- not commission or operate, and shall procure that no other Government authority shall commission or operate or cause to be commissioned or operated, a new [facility] within [•] kilometers]</li> </ul>
3	Additional Concessionaire warranties	<p>Warranties and undertakings shall also be given by the Concessionaire in relation to itself, its subcontractors, its subcontracts and its financing agreements.</p>

## 2.5 Site

For infrastructure PPP projects, access of the Concessionaire to the project site and its rights to construct and operate facilities on the project site are critical for the implementation of the PPPA. The PPPA typically includes a commitment by the Implementing Institution to provide access to the site by a specific date (usually as a condition precedent) and grants the relevant rights to the project company.

The suggested clauses addressing this component of the PPPA are as follows:

No.	Aspect	Suggested provisions
1	Sites	The Implementing Institution may offer public Sites for use by the Concessionaire to conduct the Works and provide the Services. Alternatively, the Concessionaire may obtain (by purchase or lease) private or public premises to conduct the Works and provide the Services.
2	Access to the Sites	Where public Sites are made available to the Concessionaire, then the Implementing Institution shall ensure access to the Sites.
3	Rights of the Concessionaire in relation to the site	The Concessionaire has the right to access, use and occupy the Site, and more generally benefit from peaceful and unencumbered possession of the Site for the purpose of the Project including any necessary easements, rights of way and rights to [lay pipes or other conduits to the Site]

## 2.6 Design and construction

One of the features that differentiates PPPs from conventional public procurement is that the Implementing Institution prescribes the outputs standards in case of PPPs. It is the responsibility of the Concessionaire to design and implement a technical solution that satisfies the output standards and service levels prescribed in the most efficient manner.

The Implementing Institution specifies the basic design and key performance indicators before the PPPA is signed. The Concessionaire bases the design of the project on these specifications. The design must be inspected by the Implementing Institution and approved. Once the PPPA is signed, any changes in design beyond the permitted parameters must be guided by the agreement.

The PPPA typically lists the manner and content of the progress updates that need to be shared by the Concessionaire during the construction of the Project. This can take the form of monitoring agreed standards and key performance indicators and ad hoc inspections.

Usually an Independent Engineer would be appointed by mutual consent between the parties to ensure an impartial evaluation of the technical parameters of the project during the construction and concession period.

The construction of the project may be sub-contracted by the Concessionaire. The Concessionaire would enter into an agreement with the Construction Contractor who would then work on the construction, commissioning, testing and handover of the project. The Concessionaire and its subcontractors have an obligation to follow Applicable Laws in sub-contracting and to ensure that the construction and commissioning is done as per the PPPA.

The suggested clauses addressing this component of the PPPA are as follows:

No.	Aspect	Suggested provisions
1	Design Development	The Concessionaire shall prepare the Detailed Design. The Concessionaire shall be responsible for development of the design for the project based on the Detailed Design
2	Concessionaire's design / construction obligations	<p>The Concessionaire shall design and construct New Facilities or reconstruct and/or refurbish the Facilities purchased or leased by the Concessionaire in accordance with the requirements of the PPPA, all Applicable Laws and Minimum Development Obligations]. The Concessionaire shall ensure that the Works are carried out in compliance with the Construction Programme.</p> <p>The Concessionaire shall comply with the relevant construction or renovation standards of the Kingdom of Bhutan, including seismic safety requirements, architectural regulations and guidelines, planning approvals, building licensing and building permits.</p>

No.	Aspect	Suggested provisions
3	Concessionaire's Works obligations	<p>The Concessionaire shall carry out the [design and the construction, completion, commissioning and testing] of the Works and/or the Facilities so that:</p> <ul style="list-style-type: none"> <li>- Readiness is achieved on or before the Readiness Date;</li> <li>- Acceptance and Services Commencement are achieved on or before the Planned Services Commencement Date;</li> <li>- The works and the facilities are made available for testing by the Implementing Institution/ its agent/ Independent Engineer</li> <li>- the Works and the Facilities fully comply with and meet all the requirements of the PPPA and all Applicable Laws;</li> <li>- all materials, goods and products used or included in the Works are of satisfactory quality; and in conformity with relevant Kingdom of Bhutan standards or codes of practice</li> <li>- all persons employed in connection with the performance of the Works shall be skilled and experienced in their professions, trades and callings or adequately supervised;</li> <li>- all aspects of the Works shall be supervised by sufficient numbers of persons having adequate knowledge of such matters for the satisfactory and safe performance of the Works in accordance with the PPPA;</li> <li>- the Works are maintained in good order, kept in a safe condition and protected from damage.</li> </ul>
4	Utilities	<ul style="list-style-type: none"> <li>- The Concessionaire shall be fully responsible for Safe relocation of existing utility networks in the project site</li> <li>- Getting utility connections approved and installed as required for the proper construction and/ or operation of the site</li> </ul>

No.	Aspect	Suggested provisions
		<ul style="list-style-type: none"> <li>- The Implementing Institution may (as the case may be) facilitate/ provide bulk utility connections to the project site</li> <li>- [In case the Facility is located at the Sites and/or premises owned by the Implementing Institution, the Implementing Institution shall be responsible for the provision of full access to the respective utilities.]</li> </ul>
5	Monitoring and Inspection	<ul style="list-style-type: none"> <li>- The Implementing Institution (and any duly authorized representative or adviser) shall be entitled, at all reasonable times and upon giving reasonable notice, to enter the Sites in order to inspect the state and progress of the Works (and to ascertain whether they are being properly executed), to inspect the operation and maintenance of the Project and to monitor compliance by the Concessionaire with its obligations under the PPPA. If it is discovered that there are material defects in the Works or that the Concessionaire has materially failed to comply with the PPPA or the Works Delivery Plan, the Implementing Institution may (without prejudice to any other right or remedy available to it) increase the level of its monitoring of the Concessionaire until the Concessionaire has demonstrated to the reasonable satisfaction of the Implementing Institution that it is capable of performing and shall perform all its obligations under the PPPA.</li> <li>- The Implementing Institution and its representative and advisers shall also be entitled to attend regular site meetings and any other progress critical or other key meetings (whether programmed or not) relating to the Works.</li> </ul>

No.	Aspect	Suggested provisions
6	Independent Engineer	<p>The Implementing Institution and the Concessionaire shall appoint a consulting engineering firm substantially in accordance with an agreed upon selection criteria as set forth in the PPPA, to be the independent consultant (Independent Engineer).</p> <p>The appointment of the Independent Engineer shall be made within [30 (thirty) days] of the date of execution of this PPPA, and such appointment shall be valid for a period of [3 (three) years.] On the expiry or termination of the said appointment, the Authority shall appoint an Independent Engineer for a further term of [3 (three) years] in accordance with the provisions of the PPPA, and such procedure shall be repeated after expiry of each appointment.</p> <p>The role and functions of the Independent Engineer shall include the following:</p> <ul style="list-style-type: none"> <li>(a) review of the Master Plan, designs, drawings, and documents;</li> <li>(b) review, inspection and monitoring Facilities;</li> <li>(c) reviewing and witnessing tests on completion of construction and issuing completion/ provisional certificates;</li> <li>(d) review, inspection and monitoring of Operations &amp; Maintenance;</li> <li>(e) determining, as required under the PPPA, the costs of any works or services and/or their reasonableness;</li> <li>(f) determining, as required under the PPPA, the period or any extension thereof, for performing any duty or obligation;</li> <li>(g) assisting the Parties in resolution of Disputes; and</li> <li>(h) undertaking all other duties and functions in accordance with the PPPA.</li> </ul>

No.	Aspect	Suggested provisions
7	Completion of construction and commissioning	<p>The project construction will be deemed to have been completed only after certification of construction completion and facility readiness by the Implementing Institution/ its Agent/ Independent Expert. The date on which construction completion is certified will be treated as the date of commencement of commercial operations. The Concessionaire shall carry out all commissioning of the New Facilities in accordance with the respective plan.</p>
8	Delays	<p>If at any time the Concessionaire becomes aware that there is a delay which impacts the Commencement Date, the Concessionaire shall as soon as reasonably practicable and in any event within twenty (20) Business Days of becoming aware of the likely delay, give notice to the Implementing Institution to that effect specifying: If the project is likely to be delayed, in the opinion of the Concessionaire, then the Concessionaire must give written notice to the Implementing Institution, indicating</p> <ul style="list-style-type: none"> <li>- the reason for the delay or likely delay; and</li> <li>- an estimate of the likely effect of the delay, considering any measures that the Concessionaire proposes to adopt to mitigate the consequences of the delay</li> </ul> <p>The Implementing Institution may grant a Cure Period for curing any delay by the Concessionaire.</p> <p>If the delay is not cured by the Cure Period, the Implementing Institution would be entitled to [monetary damages] or can terminate the PPPA.</p>

## 2.7 Operations and maintenance

Operations and Maintenance (O&M) of the project during the contract duration is an integral part of PPP arrangements. The PPPA defines the framework underlying the performance of the Concessionaire in operating the project and most critically in delivering the expected levels of services. The performance framework also influences the maintenance activities of the Concessionaire, as such activities are directed towards ensuring the prescribed level of services.

In many cases, there is an option for sub-contracting O&M services to vendors provided the same key performance indicators are maintained by the sub-contractor as provided in the PPPA.

No.	Aspect	Suggested provisions
1	Services	The Concessionaire shall at all times provide services: <ul style="list-style-type: none"><li>- in accordance with the PPPA,</li><li>- National environmental and social performance standards,</li><li>- Good industry practice,</li><li>- Applicable Law and regulation and</li><li>- the terms and requirements of any approval;</li></ul>
2	Exclusivity	Concessionaire has the exclusive right to provide services defined in the PPPA on a commercial basis.
3	Maintenance	The Concessionaire shall ensure that at all times its maintenance and operating procedures are compliant with the maintenance requirements set out in the PPPA.
4	Operating Manuals	The Concessionaire shall develop and maintain procedural documentation in line with requirements of the PPPA. The Concessionaire shall at the request of the Implementing Institution provide the Implementing Institution with access to all versions of the procedural documentation.

No.	Aspect	Suggested provisions
5	Performance Monitoring	<p>The Independent Engineer shall monitor the performance of the Concessionaire in the delivery of the Services in accordance with the procedure set out in the PPPA.</p> <p>The Implementing Institution may elect, at its own cost, to undertake its own performance monitoring to ensure that the Services are being provided in accordance with the PPPA, or for any other purpose.</p> <p>The Concessionaire shall assist the Implementing Institution in such an exercise. The Implementing Institution shall be entitled to notify the Concessionaire of the outcome of the performance monitoring exercise and the Concessionaire shall have due regard to the Implementing Institution's comments in relation to the future provision of the Services.</p>
6	Reports	<p>The Concessionaire shall submit to the Implementing Institution periodic reports providing information on its performance vis a vis pre-defined key performance indicator.</p>

## 2.8 Sub-contracting

The project company may sub-contract one or more project components to sub-contracts. Typical sub-contracts involve the works or EPC contracts for project construction, operations contract, maintenance contract, or service contracts for individual tasks (e.g. billing and collection, accounting, safety and security etc.). The Implementing Institution may, depending on the nature of the project, allow or disallow sub-contracting of some components in particular projects. In any case, the project company holds complete responsibility of the performance of the sub-contractor and is liable for any consequences arising from the actions/ inactions of the sub-contractor.

The suggested clauses addressing this component of the PPPA are as follows:

No.	Aspect	Suggested provisions
1	Subcontracts	The Concessionaire may subcontract any of its obligations under the PPPA, except for [•], to Third Parties the extent permitted under Applicable Law. In any event, the Concessionaire shall remain primarily and directly liable for the Concessionaire's obligations under the PPPA.
2	Assignment of subcontracts	The Concessionaire shall exercise commercially reasonable efforts to ensure that the terms and conditions of its contracts with the Third Parties allow for their assignment by the Concessionaire to the Implementing Institution.

## 2.9 Defaults

PPPA typically define events of defaults by both the parties to the contract. The defined defaults and the consequences of default form an integral part of the performance management framework of PPP arrangements. It is essential that the list of events of defaults is as comprehensive as possible. In addition, the consequences must be based on an increasing hierarchy linked to the severity of defaults, so as to create strong commercial disincentives to default on key commitments under the PPPA.

The suggested clauses addressing this component of the PPPA are as follows:

No.	Aspect	Suggested provisions
1	Events of defaults	The Concessionaire or Implementing Institution commits or causes any breach of the provisions of the PPPA and fails to cure the same within a of [•] days constitutes an Event of Default.

No.	Aspect	Suggested provisions
2	Performance security	In accordance with the Applicable Law, the Concessionaire will be required to provide the Implementing Institution with a Performance Security or other security acceptable to the Implementing Institution to support the due performance of its obligations under the PPPA.
3	Liquidated damages	The Concessionaire/ Implementing Institution will be liable to pay liquidated damages at the rate of [•] per day that it delays the commissioning of the facility, subject to a maximum of [•] per cent of the total project cost.
4	Step in	Under the PPPA, the Implementing Institution will need to permit the lenders to take control of the project under the step-in provisions, give the lenders a chance to remedy the Event of Default, and not terminate the PPP contract until the lenders have had the chance to exercise their step-in rights.

## 2.10 Payments

The provisions related to payments between the two parties and to external parties (like payment of applicable taxes to the government, or payment of compensation to project affected persons) forms the commercial framework of the PPP arrangement. The payment framework of a PPP project is driven by the risk allocation, PPP model adopted for the project and financial feasibility of the project. The key determinants of the payment framework that needs to be built into the PPPA include the periodicity of the payments, responsibility of specific payments, process of the payments and reporting of the payments.

The suggested clauses addressing this component of the PPPA are as follows:

No.	Aspect	Suggested provisions
1	Payment Mechanism	<p>The Concessionaire would collect User Fee from users. The Concessionaire would then pay the Implementing Institution a Concession Fee which is calculated using the mechanism agreed upon in the PPPA</p> <p>The general Payment Period shall be one (1) month.</p>
2	Project Account	<p>[The Concessionaire shall establish a Project Account where all sums payable to the project company in connection with the project will be credited. These payments might include user fees, sales proceeds, insurance receipts, liquidated, sponsor payments etc. An escrow mechanism must be established in the Project Account whereby the Concessionaire will deposit Concession Fee and deposit into such account an amount equal to [•] estimated monthly Payments. The Concessionaire will be entitled to withdraw from the proceeds account sums necessary to meet its operating costs, taxes, debt service, other payments that it is required to make in connection with the project including dividends or other distributions to shareholders.]</p>
3	Invoicing and payment	<p>On the first Business Day following the end of each Payment Period, the Concessionaire shall submit to the Implementing Institution, together with the Report described in “Reporting”, an invoice for the agreed monthly payment for the year in question, and for any tax payable by the Implementing Institution in respect of that amount.</p>
4	Currency	<p>All payments made under the PPPA shall be made in [Kingdom of Bhutan Ngultrum].</p>

5	Tax	All amounts referred to in the PPPA shall be expressed as being [exclusive of any taxes, if applicable.]  The Concessionaire shall pay in a timely manner all taxes, duties, levies, cess and charges including but not limited to [income tax, sales tax, service tax, excise duty, customs duty] that may be levied, claimed or demanded from time to time by any Government authority.
6	Payment period	[Weekly / Monthly / Quarterly]

## 2.11 Insurance

Insurance is critical for PPP projects with the types of insurance policies specifically tailored for the risks to be covered. Some of the insurances which may be required are insurance of project assets, insurance during transportation, construction risk insurance, professional indemnity insurance, insurance for damage during operations, third party liability insurance, consequential loss insurance, employer’s liability insurance, directors’ and officers’ liability insurance, political risk insurance and others tailored for the specific project.

The suggested clauses addressing this component of the PPPA are as follows:

No.	Aspect	Suggested provisions
1	Insurance	The Concessionaire shall effect and maintain at its own cost, during the Construction Period and the Operation Period, insurances as may be required under the PPPA, and Applicable Laws, and such insurances as may be necessary or prudent in accordance with Prudent Industry Practice. The proof of existence and validity of such insurance policies must be furnished to the Implementing Institution on demand and/ or on periodic basis.

## 2.12 Force Majeure

Force Majeure events are incidents that are beyond the control of the two parties to the contract and are caused by external events such as natural catastrophe, military action, social unrest, industrial unrest, political actions etc. Broadly speaking, the cost of dealing with the consequences of such events is shared between the two parties, except in certain cases, where the force majeure event can be traced at least in part to the action or inaction of the government. If force majeure events persist beyond a pre-defined number of days, then termination of the PPPA may be triggered.

The suggested clauses addressing this component of the PPPA are as follows:

No.	Aspect	Suggested provisions
1	Force Majeure Event	Neither Party shall be considered in partial or full breach of the PPPA to the extent that performance of their respective obligations is prevented by Force Majeure Event, if this Party undertook all reasonable measures to mitigate the adverse effect of the Force Majeure Event.
2	Consequences of a Force Majeure Event	If the Force Majeure Event causes a disruption for less than [•] days, either parties will compensate each other for the consequences based on the cost of the disruption. If it is more than [•] days, the PPPA will be terminated with compensation.
3	Termination due to a Force Majeure Event	Where a Force Majeure Event occurs, if one or both Parties are unable to comply with their obligations under the PPPA for more than [one hundred and eighty (180)] days, either Party may terminate the PPPA.
4	Compensation for termination due to a Force Majeure Event	When the PPPA is terminated prior to the Expiry Date, compensation on termination shall be payable in accordance with the compensation on termination schedule in Appendix B.

### 2.13 Termination

Termination is defined as the ending of the contractual relationship before the expiry of its predefined duration. Termination can occur because of Force Majeure Events (please see above) or due to persistent serious defaults on the part of any of the parties to the contract. Termination usually means that the project company may need to be compensated by the Implementing Institution, as due to the premature ending of the contract, the project company loses out on the revenues and returns on its investment. However, the project company is not compensated to cover its overall return on investment in certain cases, especially when the termination is due to the project company's own default. An important principle that is almost always incorporated in PPPA is that the unpaid debt (and part of the interest) is almost always covered by the compensation paid on termination. Without this assurance, debt providers (banks and financial institutions) may not consider the PPP project 'Bankable'.

The suggested clauses addressing this component of the PPPA are as follows:

No.	Aspect	Suggested provisions
1	Termination by mutual consent	The Parties may terminate the PPPA by signing a termination agreement on the terms and conditions and in the manner agreed by the Parties.
2	Termination for Concessionaire Default	The Implementing Institution may initiate the termination of the PPPA in the following cases: (i) Financial Close does not occur, for any reason whatsoever, within [•] month period; (ii) the Concessionaire delays by [•] months, abandons or manifests intention to abandon the construction of the Project without the prior written consent of the Authority; (iii) material non-performance or improper performance of obligations of the Concessionaire; (iv) interruption of Services for more than [•] calendar consecutive days;

No.	Aspect	Suggested provisions
		<p>(v) [the aggregate monthly deductions during any twelve (12)-month period exceed [*] percent of the aggregate Monthly Payments in that same [*] month period];</p> <p>(vi) the Concessionaire is adjudged bankrupt or insolvent, or a trustee or receiver is appointed for the Concessionaire or for the whole or material part of its assets that has a material bearing on the Project, or the bankruptcy proceedings against the Concessionaire are initiated by court.</p>
3	Termination for Implementing Institution Default	<p>The Concessionaire may initiate termination of the PPPA in the following cases:</p> <p>(i) non-payment for [one hundred twenty (120)] consecutive calendar days;</p> <p>(ii) any other violation of obligations of Implementing Institution leading to Material Losses which remain non-remedied, or for which the Concessionaire is not compensated, in either case for [ninety (90)] consecutive calendar days;</p> <p>(iii) any Change in Law for which the Concessionaire is not compensated in accordance with the provisions of the PPPA for [ninety (90)] consecutive calendar days;</p> <p>(iv) a Special Event preventing the performance of obligations of Concessionaire continues for one hundred eighty (180) consecutive calendar days;</p> <p>Government Interference, the effects of which last at least fifteen (15) calendar days.</p>

No.	Aspect	Suggested provisions
4	Consequences of Early Termination	The Concessionaire shall continue to perform its obligations under the PPPA until the termination becomes effective. Termination of the PPPA shall terminate all the Concessionaire's rights with respect to the Project assets and the Site(s). These rights transfer to the Implementing Institution to enable it to procure the continued operation of the Facilities following termination.
5	Compensation on Termination	Where the PPPA is terminated prior to the Expiry Date, compensation on termination shall be payable in accordance with the compensation on termination schedule in Appendix B.

## 2.14 Disputes

Disputes are disagreements between the two parties to the contract about key commercial or other aspects of the PPP arrangement. The PPP Regulations require a predefined sequence of methods for resolving disputes between the two parties to the contract, starting from the simplest and most economical- mutual discussions and agreement, and ending at the most complicated, time and cost consuming- legal process. It is in the interest of both the parties to the contract that they exhaust all dispute resolution methods before referring the dispute to a court of law.

No.	Aspect	Suggested provisions
1	Amicable settlement	Any dispute or question of interpretation or construction that arises between parties related to or connected with or in connection with or under the PPPA, shall in the first instance be endeavored by parties to be settled amicably.
2	Assistance of expert (mediated resolution)	The parties may mutually decide to request Negotiator or Expert to assist the parties to settle dispute arising out of or relating to PPPA. In such case the parties shall participate in the negotiated settlement proceeding in good faith with the intention to settle the dispute.

No.	Aspect	Suggested provisions
3	Arbitration	If amicable settlement is not reached within Sixty days from receipt of notice of such dispute by non-issuing party, then either party may refer the matter in contention to be settled through arbitration in accordance with Alternative Dispute Resolution Act of Bhutan 2013.
4	Judicial process	If either party is not satisfied with the arbitral award it can subject to applicable laws, take recourse to the competent court of Bhutan having related jurisdiction.

## 2.15 Other provisions

No.	Aspect	Suggested provisions
1	Change of control	The PPPA shall include restrictions on the extent to which changes in the ownership and/or control of the Concessionaire shall be permitted. These restrictions shall include a prohibition on any changes in the ownership and/or control of the Concessionaire occurring at any time [within three years from the Effective Date]. Other changes in the ownership and/or control of the Concessionaire shall be subject to the Implementing Institution's consent.
2	Confidentiality	The Parties shall keep confidential all matters relating to the PPPA and the Project documents. This general confidentiality obligation may have exceptions <ul style="list-style-type: none"> <li>- where the disclosure is required by law or</li> <li>- the information disclosed is in the public domain or</li> <li>- Disclosure to the Concessionaire's subcontractors, professional advisers, lenders and/or insurance providers.</li> </ul>

No.	Aspect	Suggested provisions
3	Records of the Project Company	The Concessionaire shall maintain records of its actual and anticipated costs of operating the Facilities during the term of the PPPA and permit the Implementing Institution to have access to those records on reasonable notice (to be defined in the PPPA in terms of number of days). In addition, the Concessionaire will provide the Implementing Institution with such additional information regarding the Works, the Services and the implementation of the Project as the Implementing Institution may reasonably require from time to time in connection with the Project.
4	Maintenance of books of accounts and financial information	The Concessionaire shall maintain books of accounts recording all its receipts, income, expenditure, payments (including payments from the Project Account), assets and liabilities, in accordance with this PPPA, Prudent Industry Practice and Applicable Laws. The Implementing Institution has the right to inspect the records.
5	Assignment	<p>The Concessionaire shall not assign, underlet, charge, sell, bargain or otherwise deal in any way with the benefit of the PPPA in whole or in part, except with the prior written consent of the Implementing Institution, which in any case shall only be permitted to the extent permitted under Applicable Law.</p> <p>The PPPA shall include specific provisions which will allow the Concessionaire to grant certain security over the PPPA in favor of its lenders without the need for any additional consent from the Implementing Institution.</p>
6	Court of Jurisdiction	[Supreme Court of Bhutan]

No.	Aspect	Suggested provisions
7	Language	All notices required to be given by one Party to the other Party and all other communications, documentation and proceedings which are in any way relevant to this PPPA shall be in writing and in English language [and Bhutanese language]. [In case of any discrepancy between the English language version and Bhutanese language version, the English language version of the PPPA shall prevail.]

### 3 APPENDIX A - DEFINITIONS<sup>6</sup>

Term	Meaning
Acceptance Certificate	the certificate of acceptance of Facility into operation to be issued under Legislation upon completion of all conditions to commissioning under this PPPA;
Acceptance Date	the date on which the Acceptance Certificate is issued or in the event of referral for determination under the Dispute Resolution Procedure, the date upon which it is determined that all the Facilities passed the Acceptance Tests;
Acceptance Tests	the tests, which are to be carried out in respect of the Facilities at the end of the Commissioning Period and which must be satisfied before the Acceptance Certificate can be issued;
Applicable Law	all laws, decrees, judgments, acts and regulations or any other type of primary or secondary legislation in force in the Kingdom of Bhutan without giving effect to its conflict of laws provisions, including for the avoidance of doubt all Legislation and all Guidance;
Asset Transfer Plan	means the plan for transferring assets from the Implementing Institution to the Concessionaire to enable the Concessionaire to commence work defined by the PPPA;
Bank Guarantee	an unconditional and irrevocable bank guarantee issued by the Concessionaire to ensure the performance of its obligations
Change	a change, variation, or modification to a Facility, the Works and/or the Services which is requested by the Implementing Institution or the Concessionaire pursuant to the Change Protocol, or which is deemed to be a Change by virtue of an express term of the Contract;

<sup>6</sup> This list must be updated based on the legal, technical and contractual terminology used in the PPPA

Term	Meaning
Change in Law	<p>the coming into effect after the Effective Date of:</p> <p>Legislation, other than any Legislation which on the date of the PPPA has been made publicly available as a draft;</p> <p>any guidance or directions with which the Concessionaire is legally bound to comply; or</p> <p>any applicable judgment of a relevant court of law which has the force of law or the compliance with which is in accordance with general practice in the Kingdom of Bhutan;</p>
Change Protocol	<p>the agreed protocol attached to the Contract, describing the basis on which changes, and variations can be made to the Works, the Services and/or any other requirements of the PPPA;</p>
Commissioning Period]	[•] <sup>7</sup> ;
Commissioning Requirements	[•] <sup>8</sup> ;
Conditions precedent	<p>The full list of Conditions precedent will be developed during dialogue. However, these are expected to include:</p> <p>setting up and convening the liaison committee for the Project (by both Parties);</p> <p>provision of the Bank Guarantee by the Concessionaire;</p> <p>provision by the Concessionaire of the documents evidencing the availability of the Project Investments in cash or in form of irrevocable commitments from lenders and/or investors;</p>

7 The period between the Readiness Date and the Services Commencement Date

8 The requirements for the commissioning of the New Facilities

Term	Meaning
Consents	<p>all permissions, consents, approvals, certificates, permits, licenses and authorisations of a public body required for the performance of any of the Concessionaire's obligations under the Contract, including for the avoidance of doubt any relevant:</p> <p>location conditions for construction;</p> <p>construction permits;</p> <p>use permits;</p> <p>[•].</p>
Construction Programme	means the scheduled programme for construction defined in the PPPA;
Detailed Design	all drawings, reports, documents, plans, software, formulae, calculations and other data relating to the design, construction, testing or operation of the Project in each case that is used by or on behalf of the Concessionaire and/or its Subcontractors in connection with the provision of the Works and/or the Services or the performance of the Concessionaire's obligations under the PPPA;
Effective Date	The date on which the Conditions precedent have been satisfied and/or waived by the Implementing Institution (or, where relevant, the Concessionaire), in its absolute discretion;
Expiry Date	[ten (10) years from the Effective Date];
Facilities	the facilities required for the implementation of the Project, including [•];
Financial Close	means the fulfilment of all conditions precedent to the initial availability of funds under the agreements executed by the Concessionaire in respect of loans and financial guarantees to be provided by banks and financial institutions;

Term	Meaning
Force Majeure Event	an event beyond the control of the Parties, which prevent them from complying with their obligations under the PPPA, including: war, revolution, rebellion, insurrection, riot, labor strike, usurped power, other civil unrest, sabotage or terrorism, natural disaster, fire, earthquake, flood, storm, hurricane, epidemics and epizootics; and other force majeure which neither Party can reasonably foresee or prevent. Force Majeure Events shall not include breach of obligations by counterparties and non-availability in the market of the goods necessary for performance or non-availability of funds;
Guidance	any applicable guidance or directions with which the Concessionaire is bound to comply;
Key Performance Indicators	means the performance parameters defined in the PPPA which must be adhered to by the Concessionaire and Implementing Institution;
Lease	each lease which is entered into between the Implementing Institution and the Concessionaire in respect of a Site, such lease being in the form set out in the PPPA;
Legislation	means any law and any treaty, constitution, statute, legislation, decree, normative act, rule, regulation, enforceable judgment, order, writ, injunction, determination, award or other legislative or administrative measure or enforceable judicial or arbitral decision in the Kingdom of Bhutan which has the force of law or the compliance with which is in accordance with general practice in the Kingdom of Bhutan;
Material Losses	means Losses exceeding [fifty per cent (50%) of the monthly payment]
Minimum Development Obligations	are the minimum agreed developments agreed upon by the Implementing Institution and Concessionaire

Term	Meaning
New Facilities	the Facilities to be designed and constructed or purchased by the Concessionaire pursuant to the PPPA;
Payment Period	each payment period during the PPPA Period, as defined in the Payment Mechanism;
Performance Security	means a bank guarantee or any other financial instrument;
Physical Assets	all physical assets to enable the Implementing Institution or a successor Concessionaire to own, operate and maintain the Project in accordance with the PPPA, including any land or buildings (including the Facilities) and other assets (together with any warranties in respect of assets being transferred), but excluding any physical assets in respect of which the Concessionaire is full legal and beneficial owner;
[Planned Works] Commencement Dates]	[•] <sup>9</sup> ;
[Planned Services Commencement Date]	[•] <sup>10</sup> ;
PPPA Period	the period from and including the Effective Date to the Expiry Date or, if earlier, the Termination Date;
Concessionaire Related Party	the Concessionaire's agents and subcontractors (including their subcontractors of any tier and their directors, officers, employees and workmen in relation to the Project and any person on or at the Sites at the express or implied invitation of the Concessionaire, other than the Implementing Institution or any Implementing Institution Related Party);

9 The date in which users can commence using the works is to be determined and entered here

10 The date in which users can commence using the services is to be determined and entered here

Term	Meaning
Concessionaire's Payments	the payments which are calculated to be due to the Concessionaire pursuant to the Payment Mechanism in consideration for providing the Services, which shall include the Services Payments;
Prudent Industry Practice	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 as contemplated by this PPPA.
Public Economic Support	public economic support to be provided to the Concessionaire under the PPPA;
Readiness Certificate	a certificate issued by the Independent Certifier that the Readiness Tests have been satisfied in respect of a Facility;
Readiness Date	the date on which the Readiness Certificate is issued in respect of that Facility or in the event of referral for determination under the Dispute Resolution Procedure, the date upon which it is determined that the Facility passed the Readiness Tests;
Readiness Tests	the tests, which are to be carried out in respect of the Facilities immediately prior to the start of the Commissioning Period and which must be satisfied before the Readiness Certificate can be issued;
Required Insurance	the insurances to be taken out and maintained by the Concessionaire pursuant to the PPPA;
Services	the whole of the services or any of them to be provided by the Concessionaire pursuant to the PPPA;

Term	Meaning
Services Commencement	the commencement of the Services, following the issuance of the Acceptance Certificate;
Special Event	<p>any of the following events:</p> <ol style="list-style-type: none"> <li>1. non-execution of the Acceptance Certificate to the extent that the Concessionaire has taken all necessary steps required from it under the PPPA and Applicable Law for Commissioning and the execution of the Acceptance Certificate;</li> <li>2. non-receipt, late receipt and/or delay in receipt and/or renewal of Applicable Permits to the extent that the Concessionaire has taken all necessary steps required from it under Agreement and Legislation for obtaining such Applicable Permits;</li> <li>3. Change in Law;</li> <li>4. Government Interference;</li> <li>5. failure of any public authority of the Kingdom of Bhutan to register or acknowledge registration of the Concessionaire's right of ownership or other rights of Concessionaire in the Facility (if applicable) to the extent that the Concessionaire has taken all necessary steps required from it under PPPA and Applicable Law for such registration;</li> <li>6. [•].</li> </ol>
Termination Date	any date of early termination of the PPPA in accordance with its terms;
Tests	the Readiness Tests and the Acceptance Tests as appropriate;
Third Parties	third parties engaged by the Concessionaire to perform obligations of the Concessionaire under this PPPA
User fees	means the monies collected by the Private Partner from users for usage of the facility;

Term	Meaning
Works	all the works (including design and works necessary for obtaining access to the Sites, commissioning and conduct of the Tests) to be undertaken in accordance with this PPPA in accordance with the Works Requirements, Commissioning Requirements and the Works Delivery Plan;
Works Delivery Plan	the Service Delivery Plan Works as proposed by the Concessionaire in its Proposal;
Works Requirements	the Implementing Institution's requirements set out in the PPPA.

## 4 APPENDIX B - COMPENSATION ON TERMINATION

Compensation on Termination will be payable by the Implementing Institution to the Concessionaire following termination of the PPPA as follows.

Termination type	Typical triggers	Termination payment
Concessionaire default	<ol style="list-style-type: none"> <li>1. Failure to complete construction</li> <li>2. Persistent failure to meet performance standards</li> <li>3. Insolvency of project company</li> </ol> <p>(Lenders are typically given step-in rights to enable them to remedy problems due to an under-performing contractor—termination only occurs if this is ineffective, or if lenders choose not to do so)</p>	<p>Termination payments are typically defined to ensure equity-holders bear the burden of default. Lenders may also be exposed to some possible loss—to strengthen their incentives to rectify problems—although this can affect bankability. Options include:</p> <ul style="list-style-type: none"> <li>- Where a liquid market exists, an open market valuation of the PPPA- For a Liquid Market to exist, there must be at least two parties (each of whom is capable of being a suitable substitute Private Partner) in the market for PPPAs or similar contracts for the provision of services (in each case similar to the PPPA) for the price that is likely to be achieved through a tender process to be a reliable indicator of fair value</li> <li>- Full value or a specified proportion of outstanding debt</li> <li>- Depreciated book value of assets</li> </ul>

Termination type	Typical triggers	Termination payment
		<ul style="list-style-type: none"> <li>- Net present value of future cash flows (subtracting costs of rectification)</li> <li>- Value of equity adjusted for inflation and depreciation</li> <li>- Proceeds of re-tendering the concession on the open market—thereby also overcoming the possible difficulty of finding budget space for termination payment obligations that are realized unexpectedly</li> </ul>

Termination type	Typical triggers	Termination payment
Implementing Institution default	Implementing Institution fails to meet its obligations under the PPPA	<p>A fair PPPA should ensure the Concessionaire does not lose out if the Implementing Institution chooses to default. Termination payments in this case are typically set to the value of debt plus some measure of equity and may also include lost future profits (if any). The options include a combination of any or all the following</p> <ul style="list-style-type: none"> <li>- Value of the outstanding debt</li> <li>- 100% or higher of the value of equity adjusted for inflation and depreciation OR an amount equal to the outstanding par value of the equity and subordinated debt contributed to the Private Partner by its shareholders OR an amount equal to the net present value of the forecast equity and subordinated debt return expected to be generated by the Project</li> <li>- the Private Partner's cost of terminating its subcontracts.</li> </ul>

Termination type	Typical triggers	Termination payment
Termination for public interest	Many PPP or public procurement laws allow the contracting entity to terminate for reasons of public interest	Typically, should be treated in the same way as Implementing Institution default; otherwise creates perverse incentives to voluntarily terminate instead of default (or vice versa)
Prolonged force majeure damage	Should be carefully defined in the contract and limited to uninsurable, prolonged force majeure events that preclude performance of obligations	Typically, in between the two options above, since neither party is at fault

Termination payments depend on the sector, nature and transaction structure of the PPP project. While it is critical to define formula for termination payments in the PPPA, the exact definition (and the constituents of the termination compensation) can vary. Some of the strategic considerations that govern the calculation of the compensation on termination, include:

- 1. Requirements of the Banks/ Financial Institutions-** In some jurisdictions, the amount of debt that is included in the compensation on termination is deemed to be secured by the regulator. Secured loans may attract lower provisioning requirements by Banks and therefore maybe priced lower than unsecured loans. As a result, its desirable from feasibility and bankability perspective to have the termination compensation covering whole of the debt (at least the senior debt), outstanding on the date of termination.
- 2. Balanced** - while the compensation on termination needs to be reasonably high to act as a strong disincentive for non-performance by the parties, it cannot be unreasonably high to create an unmanageable contingent liability for the party bearing it. If the termination compensation is not balanced, it might affect the private sector interest for the project.

- 3. Clearly defined-** both parties to the contract must be able to reasonably estimate the compensation on termination at the time of signing of the PPPA. This essentially means that no constituent of the compensation can ideally dependent on an external factor **existing at the time of termination** for estimation of the compensation. In practical terms, it means that compensation based on valuation of land and other assets at the time of termination must be avoided as it adds timing risk to the project.

## 5 REFERENCES

**Australian Government** [Online] // Infrastructure Australia. - January 2019. - <https://infrastructureaustralia.gov.au/policy-publications/public-private-partnerships/>.

**European PPP Expertise Centre** [Online] // The EPEC PPP Guide. - January 2019. - <http://www.eib.org/epec/g2g/index.htm>.

**European PPP Expertise Centre** The Guide to Guidance: How to Prepare, Procure and Deliver PPP Projects [Book]. - [s.l.] : European Investment Bank.

**HM Treasury** Standardisation of PFI Contracts [Book]. - 2007.

**International Bank for Reconstruction and Development/The World Bank** Report on Recommended PPP Contractual Provisions [Book]. - [s.l.] : PPIAF, 2015.

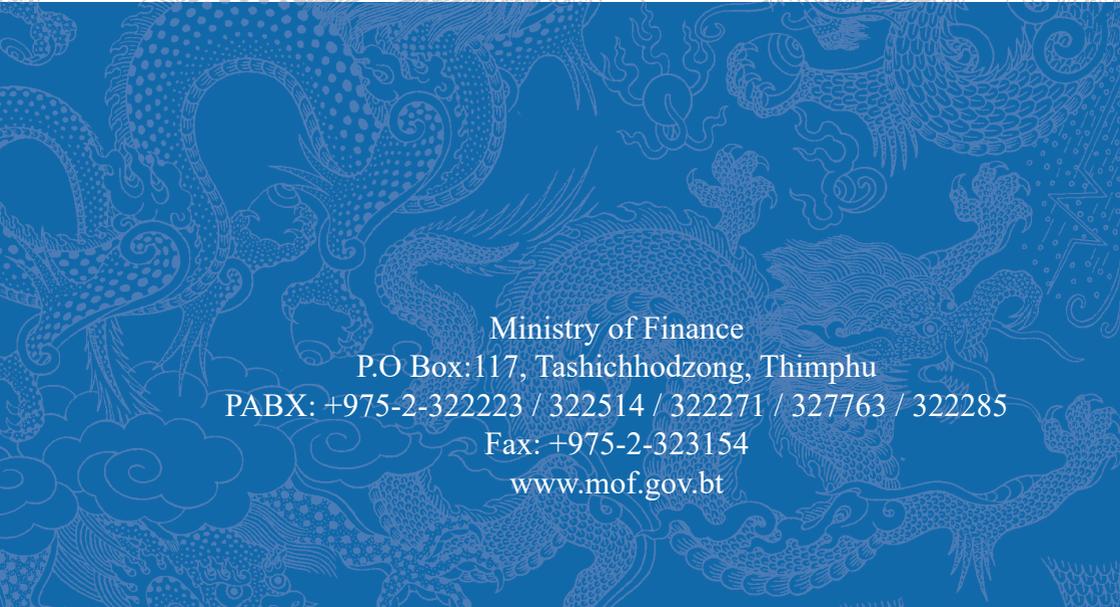
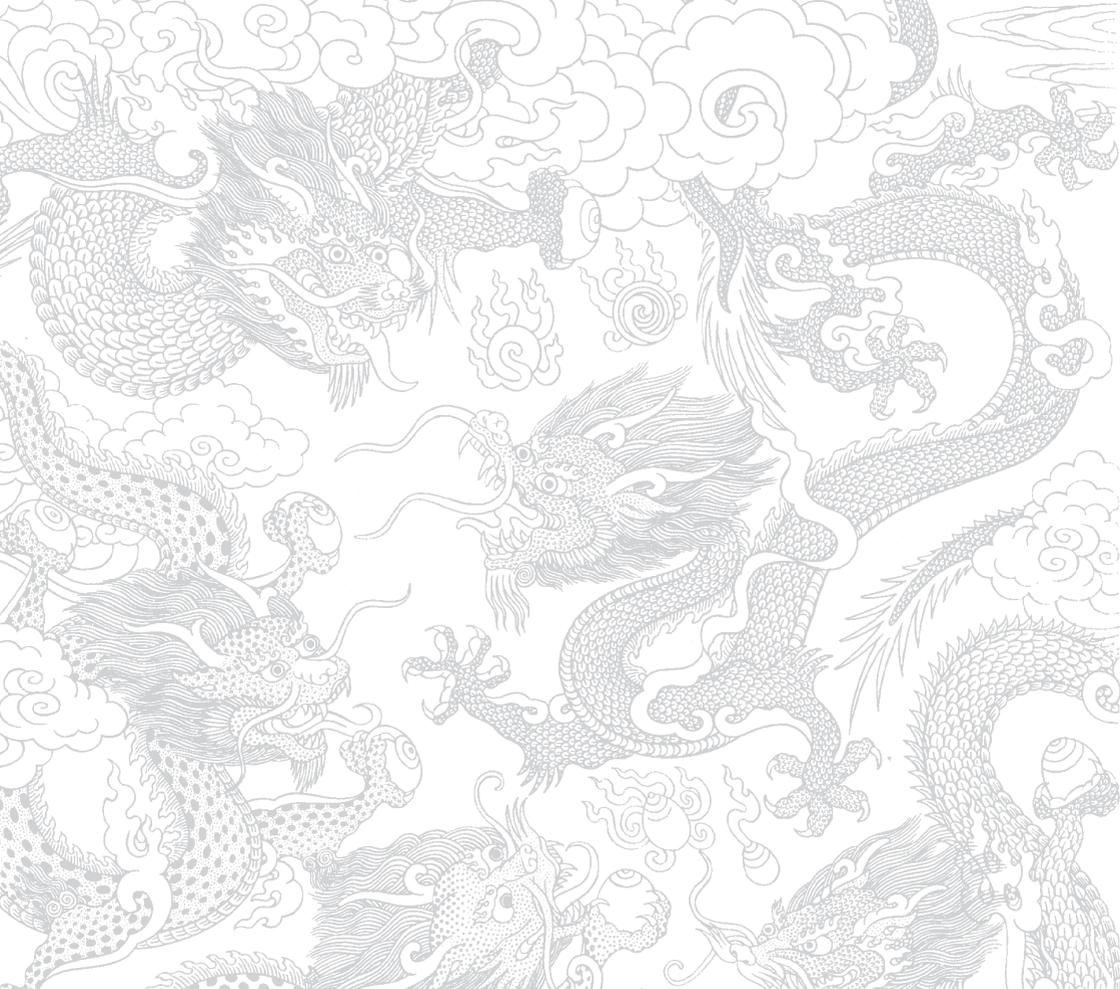
**National Treasury PPP Unit** Standardized Public Private Partnership Provisions [Book]. - [s.l.] : Government of South Africa, 2004.

**World Bank** [Online] // Public Private Partnership Legal Resource Centre. - January 2019. - <https://ppp.worldbank.org/public-private-partnership/>.

**World Bank** [Online] // PPP Knowledge Lab. - January 2019. - <https://pppknowledgelab.org/>.

**World Bank** Termination Provisions [Online] // PPP Knowledge Lab. - 2019 January. - <https://pppknowledgelab.org/guide/sections/66-termination-provisions>.

**World Bank** Value-for-Money Analysis Practices and Challenges [Book]. - [s.l.] : PPIAF, 2013.



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