

public-private partnerships
and concessions act
serbia

practitioner's
guide

schönherr

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Foreword

Prior to the PPP Act, there were almost no PPP projects deployed in Serbia. On a national level a number of envisaged PPP projects never materialized while out of only five concession agreements ever concluded four have been terminated. On the local level several PPPs have been developed mostly in the area of waste management – construction and rehabilitation of facilities. Today, however, due to a significant lack of public funding the need for development of PPP projects is constantly growing. Since the PPP Act entered into force local communities have considered a number of PPP projects mostly related to local heating systems or parking services.

The issues which hampered launch of concession projects in the past were mostly attributed to deficiencies of the old regulatory framework: complex, lengthy and expensive procedure for award of concession agreements, no coherence and lack of unification of rules regulating the area of PPPs. The new PPP Act attempts to rectify these issues and provides a legislative base, harmonised with the EU rules, which will act to stimulate the development of PPPs and concessions in Serbia. Some of the most important novelties which are expected to boost deployment of PPP projects in Serbia include explicit regulation of basic PPP concepts, introduction of institutional PPPs, establishment of the new expert state body on PPPs, changes in treatment of concessions, simplification of the procedure for award of public agreements, regulating financing of PPP projects.

This Guide has been prepared with the aim of explaining some of the key concepts, novelties and issues which have been introduced by the PPP Act as well as to provide some guidance based on international experience for deployment of PPP projects for both practitioners in the public and private sector.

INDEX OF DEFINITIONS AND ABBREVIATIONS

Civil Servants Act	means Serbian Act on Civil Servants (<i>Zakon o državnim službenicima</i>) (Official Gazette of Republic of Serbia, no. 79/2005, 81/2005, 83/2005, 64/2007, 67/2007, 116/2008 and 104/2009)
Annex	Annex to an employment agreement
BOT	Build-Operate-Transfer
BOOT	Build-Own-Operate-Transfer
BROT	Build-Rehabilitate-Operate-Transfer
CCPPP	Canadian Council for Public-Private Partnerships
Construction and Spatial Planning Act	means Serbian Construction and Spatial Planning Act (<i>Zakon o planiranju i izgradnji</i>) (Official Gazette of of Republic of Serbia, nos. 72/2009, 81/2009, 64/2010, 24/2011, 121/2012, 42/2013, and 50/2013)
DB	Design-Build
DBOF	Design-Build-Operate-Finance
EBRD	European Bank for Reconstruction and Development
EC	European Commission
Education Act	means Basic Education Act of the Republic of Serbia (<i>Zakon o osnovama vaspitanja i obrazovanja</i>) (Official Gazete of Republic of Serbia, no. 72/2009 i 52/2011)
EIB	European Investment Bank
EPEC	European Public-Private Partnership Expertise Centre
EPC	Engineering, Procurement and Construction
EU	European Union
i.e.	id est, that is
IPPP	Institutionalised Public-Private Partnerships
JV	joint venture
Labour Act	means Serbian Labour Act (<i>Zakon o radu</i>) (Official Gazette of Republic of Serbia, no. 24/2005, 61/2005, 54/2009 i 32/2013)

NTFPSI	Norwegian Trust Fund for Private Sector and Infrastructure
O&M	Operation and Maintenance Contract
PFI	Private Finance Initiative
PPIAF	Public-Private Infrastructure Advisory Faculty
PPP	Public-Private Partnership
PPP Act	means Public-Private Partnership Act of the Republic of Serbia (Zakon o javno-privatnom partnerstvu i koncesijama) (Official Gazette of the Republic of Serbia, no. 88/2011).
PPPIRC	Public-Private Partnership in Infrastructure Resource Center for Contracts, Laws and Regulation
Public Authority Employment Act	means Public Authority Employment Act of the Republic of Serbia (Zakon o radnim odnosima u državnim organima) (Official Gazette of Republic of Serbia, no. 48/91, 66/91, 44/98, 49/99 34/2001, 39/2002, 49/2005, 79/2005, 81/2005, 83/2005, 23/2013)
Public Utilities Act	means Public Utilities Act of the Republic of Serbia (Zakon o komunalnim delatnostima) (Official Gazette of Republic of Serbia, no. 88/2011)
SPV	Special Purpose Vehicle
UNCITRAL	United Nations Commission on International Trade Law
Water Resources Act	means Serbian Water Resources Act (Zakon o vodama) (Official Gazette of RS no. 30/2010)

USEFULL LINKS AND RESOURCES

1. European PPP Expertise Centre - EPEC



<http://www.eib.org/epec/>

EPEC is a joint initiative of the European Investment Bank (EIB), the European Commission (EC) and European Union Member States and Candidate Countries. EPEC role is to strengthen the capacity of its public sector members to enter into Public Private Partnership (PPP) transactions. The PPP focused publications and resources are available at <http://www.eib.org/epec/library/index.htm>. EPEC key publications include:

- EPEC's Guide on how to Prepare, Procure and Deliver PPP projects available in 6 languages including Croatian;
- EPEC's half year Reviews of the European PPP Market;
- Review of Current European Practice and guidance on Termination and Force Majeure Provisions in PPP Contracts.
- Financing PPPs with project bonds issued for public procuring authorities

2. The Public-Private Partnership in Infrastructure Resource Center for Contracts, Laws and Regulation -PPPIRC

World Bank, PPIAF, IFC, NTFPSI <http://ppp.worldbank.org/public-private-partnership/>

PPPIRC is a World Bank hosted website containing a wide range of resources in the PPP section including: sample PPP agreements and concessions, checklists and sample clauses, terms of reference, risk matrices, standard bidding documents developed by government agencies and sample PPP and sector legislation and regulation. It is designed for government officials, project managers and lawyers involved in PPP infrastructure projects. All these resources are available at <http://ppp.worldbank.org/public-private-partnership/library>

3. Public Private Infrastructure Advisory Faculty



<http://www.ppiaf.org/page/about-us>

PPIAF is a multi-donor technical assistance facility. PPIAF provides grants to help governments create a sound enabling environment for private participation in infrastructure through different types of activities. PPIAF selected publications include:

- Attracting Investors to African Public-Private Partnerships, A Project Preparation Guide – a comprehensive guide which material is mostly generic and applicable worldwide.
http://www.ppiaf.org/sites/ppiaf.org/files/publication/Attracting_Investors_to_African_PPP.pdf
- Toolkit for PPP in Roads & Highways. A guide an all stages for deploying a PPP project. Among other contains a detailed description of the most relevant contract clauses and other agreements, bonds, guarantees, specific and “boiler-plate” provisions especially in the area of Road and Highways
<http://www.ppiaf.org/sites/ppiaf.org/files/documents/toolkits/highwaystoolkit/1/index.html>

4. HM Treasury United Kingdom



<http://www.hm-treasury.gov.uk> & www.gov.uk/hm-treasury

HM Treasury is the government’s economic and finance ministry of UK. It is one of the leading world institutions in implementing PPPs and PFI arrangements. It has made available a number of PPP relevant resources. The most significant publication is the:

- Standardisation of PFI Contracts Version 4 http://www.hm-treasury.gov.uk/d/pfi_sopc4pu101_210307.pdf

5. EU Commission



http://ec.europa.eu/internal_market/publicprocurement/partnerships/public-private/index_en.htm

The website provides all the relevant legislation in the area of PPP in European Union. Publications of interest when analysing PPPs in EU include:

- 2004 Green Paper – how procurement law applies to different forms of public-private partnerships

The Paper:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52004DC0327:EN:NOT>

The Report:

http://ec.europa.eu/internal_market/publicprocurement/docs/ppp/ppp-report_en.pdf

- Commission Interpretative Communication on the application of Community law on Public Procurement and Concessions to Institutionalised Public-Private Partnerships
http://ec.europa.eu/internal_market/publicprocurement/docs/ppp/comm_2007_6661_en.pdf
- EU law on public procurement and concessions in relation to public-private partnerships
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2005:0569:FIN:EN:PDF>

6. European Bank for Reconstruction and Development



European Bank for Reconstruction and Development has dedicated a specific section which deals with concessions and PPPs on which information is available at: <http://www.ebrd.com/pages/sector/legal/concessions.shtml>. Notable publication useful for deploying PPPs in transitional countries:

- the Law in transition - Public Private Partnerships legal reform in Russia
<http://www.ebrd.com/downloads/research/law/lit071.pdf>

7. The Canadian Council for Public-Private Partnerships

Established in 1993, CCPPP is a national not-for-profit non-partisan, member-based organization with broad representation from across the public and private sectors. Its mission is to promote innovative approaches to infrastructure development and service delivery through public-private partnerships with all levels of government. The Council is a proponent of evidence-based public policy in support of P3s, facilitates the adoption of international best practices, and educates stakeholders and the community on the economic and social benefits of public-private partnerships.

For more information, please visit: <http://www.pppcouncil.ca/about-ccppp/contact-us.html>

GUIDE

1. Introduction to the PPP Act - key terms and novelties

1.1 Clear and wide definition of the PPP and its elements

For the first time in Serbia the PPPs are clearly defined along with their main elements. According to the provisions of the PPP Act, PPP is a longstanding cooperation of the public and private partner which is set up to provide financing, construction, reconstruction, management or maintenance of infrastructure or other objects and provision of services of public importance.

The PPP Act prescribes the essential elements of PPP. These are:

- (A) the object of the PPP, which cannot be only commercial use of common goods;
- (B) the form of PPP; Serbian PPP Act envisages for an institutional PPP, which is a novelty in the Serbian legal framework; the PPP Act also clearly establishes a concession as a separate form of a PPP arrangement.
- (C) obligation of the private partner to design, built operate, maintain either public infrastructure or to provide services of public importance;
- (D) private financing of a project, in full or in part;
- (E) the public partner ability to provide the private partner with property rights, concessions or make payments in money;
- (F) risks allocation or risks sharing between the public and private partner, depending on each partners' ability to manage risk best;
- (G) possibility for the public partner to authorize the private partner to conduct commercial activity only if the project does not insure the needed level of profitability and return of the invested funds.

The provided definition encompasses a number of usually used project models. However, given the elements prescribed, the PPP Act may exclude some models that do not provide adequate risk sharing (such as some supply and management models) and that solely fall within the scope of public procurement rules. Further, no lease arrangements are specifically mentioned in the PPP Act or the definition of PPP which may create issues with deploying such models in practice. Finally, partial or full private financing is an essential element of the PPP which may further limit some of the PPP models.

Private sector

Public sector



1.2 Forms of PPP

The PPP Act for the first time defines the forms of PPPs - the institutional and the contractual PPP (and concessions as a separate form of a PPP which could be established in a form of a contractual PPP).

The contractual PPP entails conclusion of a public agreement between the public and private partner. The public agreement needed for developing PPPs is defined widely and its content is specifically prescribed under the PPP Act. The public agreement may, but need not, include elements of a concession.

An institutional PPP could be created through establishing of a new company in which both the public and private partner hold shares. However, the institutional PPP could also be created through purchase of shares or increase of share capital in an already existing company. The PPP Act does not regulate the percentage of share which the public or a private partner could own in a company (which may however be restricted by some sectoral laws). The procedure for selection of the institutional private partner is the same as the procedure for selection of the private partner in case of contractual PPPs. Articles of association, concluded between private and public partner, are the basis for the institutional PPP set-up. The PPP Act provides that general corporate and obligations rules shall be applicable to these articles of association (the partners may freely agree on shareholders' and management rights within the scope of Serbian corporate rules). The provisions of the act regulating privatization (put and call option) will not apply in case of institutional PPPs.

While introducing institutional PPP will further facilitate PPPs in Serbia one deficiency of the PPP Act is that it very scarcely regulates institutional PPPs which could lead to some ambiguities in the interpretation of the PPP Act. Namely, it is unclear whether a public agreement has to be concluded in case of institutional PPPs. The reading of the PPP Act seems to indicate that such public agreement is not necessary but that the partners are to regulate their relations based on the articles of association. This conclusion invokes key questions: should the articles of association regulating the institutional PPP also include mandatory provisions of the public agreement prescribed by the PPP Act; would the time period set for public agreement (a minimum of five and a maximum of 50 years) apply in case of institutional PPPs; etc. As the PPP Act is yet to see its implementation in full-force it is most likely that these questions will have to be answered through the practical application of the PPP going forward.

1.2.1 Sectors

The PPP Act lists the sectors in which the concession may be granted, however, does not limit concessions to these listed areas. This solution provides that concessions could be granted in a wide number of sectors, and even in sectors in which there is a political opposition for engaging a private partner. For example, discussions were raised in the Parliament at the time of introduction of the PPP Act that in the area of water supply concessions should not be granted. For this reason clear reference to water supply as one of the sectors where concessions could be deployed was removed from the final draft of the PPP Act.

Nevertheless, the Water Resources Act contains a series of provisions relating to concessions for the use of water resources for specific purposes. Among others, the act provides that any use of water resources that does not fall under use for general purpose is defined as use for specific purposes. The right to use water resources for specific purposes is granted by means of a water management permit, especially where such use is made under a concession and an agreement regulating the concession. Further, the act provides that the ministry responsible for water management or, in the territory of the autonomous province, the province's competent authority, may temporarily restrict the right to use water resources for specific purposes, among other, where water is not used rationally and economically in line with the concession agreement and the water management permit. Therefore, the regime for granting the right to use water resources for specific purposes under a concession, although not laid down by PPP Act, is regulated by a separate act and concessions in this area could be deployed.

1.2.2 Time- frame

PPP Act significantly increased the time period of concessions (from 30 to 50 years), and such time period is expected to attract investment in projects that have a lower annual return. This is especially important in Serbian PPP realities which are marked by delays, complex administrative procedures and the fact that most of the project are of lower annual return. This timeframe provides for any typical PFI to be fully implemented even if the timeframe of the project breaches the typical 30 year period mark

“Typical” Project Finance Timeline



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It should be noted however that some argued at the time of enactment of the PPP Act that placing a time limit for concession projects may deter the private partner from investing in long-term sustainable projects especially when they are organized in the DBOF form.

1.2.3 Partnerships for local utilities

When defining the public partner the PPP Acts proscribed that a the grantor of the concession, aside from the central Government, could also be: (a) local assemblies (b)

government of the autonomous regions (c) public utility as prescribed under the sector specific laws.

This is considered a major step forward for the PPPs in public utilities, which are usually contracted on a local level. Under the previous regime, the central government was entitled to render a concession act based on which the central government, for the account and in the name of Serbia, would sign the concession agreement. The local government could sign concession agreements only with the previous written approval of the central government. This solution has caused significant delays in the past and derailed several attempted partnerships while waiting for the central government's approval. With the local government now in control of the granting process, PPP investments should increase in the area of local public utility services.

In addition it should be noted that simultaneously with the PPP Act, the Serbian Parliament enacted the Public Utilities Act which harmonises the legislative framework applicable to projects in the public utility sector (mostly relevant for local governments) providing greater penetration of different PPP models in the local communities.

Some of the key provisions of the Public Utilities Act in terms of PPPs indicate that the local self-government is conferred with the duties to secure organizational, financial and other requirements for construction, maintenance, and operation of utilities facilities. The local self-government may entrust the public companies, private companies, entrepreneurs and other business entities with operating and conducting one or more utility operations.

Finally the Public Utilities Act sets an important rule that is to delineate between transferring of operations of public utilities to a private partner as a concession and transferred of operations of public utilities through the public procurement procedure. Namely if the operator (of the public utilities) is given an opportunity to charge end-users and so finance its operations, then this right of operation will be transferred based on the rules governing grant of concessions (which entails application of the PPP Act). However, if the operator will directly charge the local self-government and so finance its operations from the budget of the local self-government (i.e. public funds), the public procurement rules and procedure apply.

2. Regulatory aspects - granting process of PPP agreements

2.1 Tenderer

The PPP Act provides for national treatment of tenderers recognizing both foreign and domestic entities as potential private partners which may participate in the procedure for award of public agreements.

Further, the PPP Act enables for the widest scope of participants in the tender including natural, legal entities and consortia. Moreover, the PPP Act provides that group of unrelated entities may participate in the selection procedure for a PPP project without formalization of their cooperation, unless the public partner does not require particular legal form. However, for the reasons of legal certainty, the PPP Act requires from the group entities which are finally selected for the project to organize their cooperation in

certain legal or corporate form, so as to be an eligible private partner. To further widen the contractual freedom of consortiums members in the tender procedure the PPP Act even designates that in the consortium agreements the consortium members may limit their liability, however, at least one consortium member has to assume unlimited liability.

Nevertheless, following the guidance provided in the UNCITRAL Legislative Guide on Privately Financed Infrastructure Project to reduce leakage of information and prevent collusion, the PPP Act prohibits each member of a consortium to participate individually or as bidders. A violation of this rule shall cause the disqualification of the consortium and of the individual members. Finally the public partner may decide to restrict certain aspects of consortiums such as number of members, structure, changes in structure during different stages of the procedure, liability etc.

2.2 Procedure

A key issue of the previous regulatory framework was the lack of clarity in the procedure for deploying PPP projects. This was a problem even in cases of similar project arrangements, with laws stipulating different procedures for launching of the PPP projects even in the same regulatory sector. The PPP Act now clearly designates the procedure for deploying PPP projects and it clearly notes that it is applicable to all public contracts.

The procedure for award of a public contract and selection of the private partner is either a: (i) public procurement procedure – for projects without elements of a concession and concessions for public works; or a (ii) procedure for granting concessions - for projects with elements of a concession and projects for provision of services with the right to charge for and exploit such services. The procedure for selection of a private partner in case of institutional PPPs is the same as the procedure stipulated for award of a public agreement.

The proposal for realization of the PPP could come from two sources. A private party may suggest deployment of the PPP project to a state body; alternatively, the state body could prepare the proposal itself. If the procedure is initiated by the private entity the state body is to decide whether the proposed project is in the public interest and will initiate the process of realization the PPP. As explained above, two different processes for selection of a private partner are delineated depending on whether the proposed project entails granting of a concession or not. Here is a simplified flowchart of these two processes:

Award of a Public Agreement without Elements of a Concession



Award of a Public Agreement with Elements of a Concession

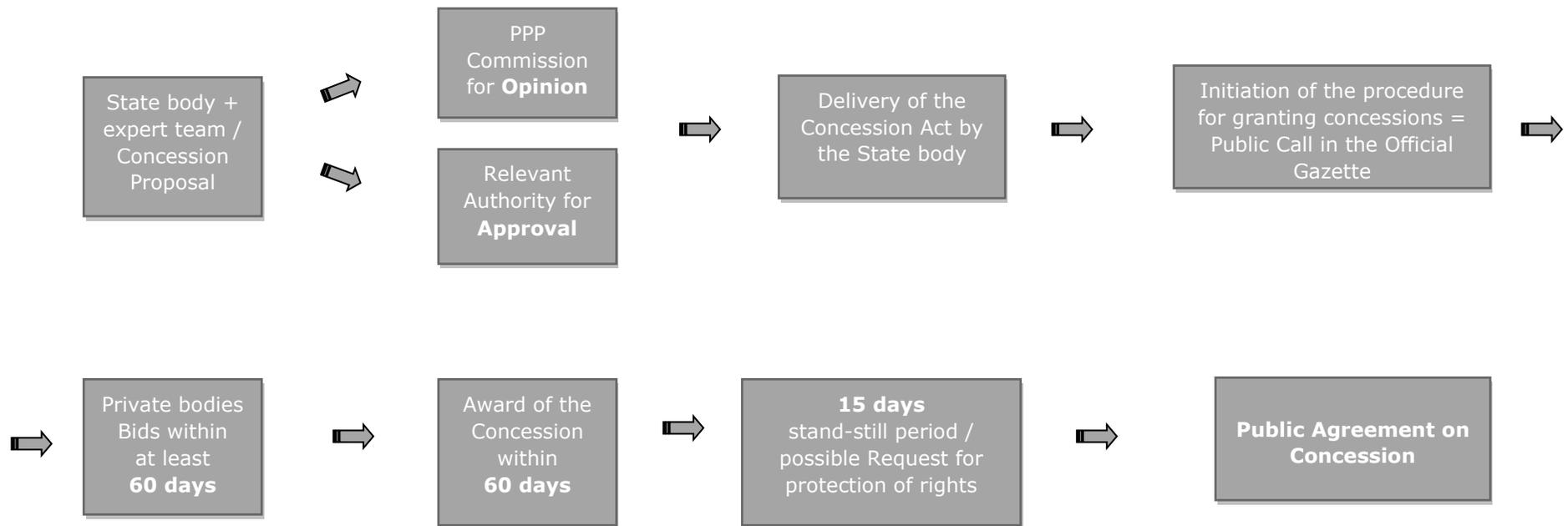


Only the procedure for award of the public agreement with elements of a concession is in detail specified under the provision of the PPP Act, setting unified framework for granting of concessions in different regulatory areas. The procedure for selection of the private partner for PPPs which do not have elements of concessions is, however, regulated by the applicable public procurement laws and only partly by the PPP Act. This clear reference to appropriate rules for award of PPP projects has now unified this process and provided guidance for future deployment of PPPs.

3. Granting Concessions under the PPP Act

All agreements with elements of concessions are awarded based on the procedure defined under the PPP Act. This is a significant feature of the PPP Act since the procedure of concession granting is unified under one act. Namely, even if the sector specific laws regulate concessions, based on Article 11 of the PPP Act such provisions cannot apply to the procedure for award of concessions making the PPP Act a single and only act regulating this matter.

Below we provide you with a simplified overview of the concession granting process under the PPP Act:



3.1 The Annulment of Concession Proceedings

After the expiration date for delivery of the bids, there is a possibility that state body annuls the proceedings. This will happen in the following situations:

- if it comes new circumstances are revealed which would, if they were known before the initiation of the proceedings, prevent the announcement of the public call or it would significantly change the manner or content of the respective public call;
- if, by the time of expiration date indicated in the public Call, no bid was delivered;
- if, after the expiration date indicated in the public call, no acceptable bid was delivered;
- if, based on the selection criteria determined by the PPP Act, there is no bid that meets the required criteria.

If one of these conditions is fulfilled the state body will issue the decision on the annulment, which must be delivered to all the applicants by registered mail.

4. **Obligatory Content of Concession Documents**

Below we provide you with list of key documents in the concession granting process which content is strictly prescribed by the PPP Act.

Obligatory Content of Concession Documents				
Concession Proposal	Public Call	Bid Guarantee	Tender documentation	Decision on the Award
Concession Object	Data on state body	Obligatory Appendix with the Bid	Type, content and time limit of the Bid;	State body title, number and date of the decision
Reasons for carrying out the procedure	Concession object	Value and type of the guarantee are defined for each concession project depending on its particularities	Technical specification of the Concession Object;	Private partner title
Data on impact of the relevant activity on environment, infrastructure and other commerce / industry areas	Address, language and time limit for bids delivery	Relevant expert team suggest the value and type of the guarantee	Draft of the Public Agreement on Concession; conditions and proofs that Applicants must fulfil and deliver,	Concession Object
Minimal technical, financial conditions and the experience level required for participants	Personal, professional, technical and financial requests for participants together with official documentation as a proof	Requested value of the Guarantee has to be defined as an absolute amount, not exceeding 5% of estimated value of the concession project	Request for delivery of complete list of affiliated companies, term for announcing the Decision on the award of the Concession, all the other necessary requests that	Type, scope and the place of implementation of the concession project
Estimated term for duration of the concession	Criteria for selecting the most adequate bid	Unutilized guarantee must be		Term for duration of the concession
				Special requirements for the Private partner during the concession project

Payment methods and the manner of financing the concession project	Date for result delivery Title and address of the Authority in charge for legal remedies Other relevant data	returned to the applicant within 10 days from the day of the announcement of the decision on the award	Applicants must meet. If the state body has the right (i) to determine the price of the applicants services paid by the final users or (ii) to give the consent and approval on the applicants tariff of public services, this must be integral part of the public agreement, and makes the integral part of the Tender documentation.	Amount of the concession fee or the basis for its determination Decision must be delivered to all the applicants by the means of registered mail
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5. Public Agreement – Contract terms

Model Heads of Terms has been developed for the use of the Serbian authorities in deploying PPPs through an EBRD financed project on PPP Commission Capacity Building. The Model Heads of Terms is provided as Schedule 1 and provides basic elements for negotiations regarding roll out of future PPP projects. The Model Heads of Terms is based on the DBOF structure of the PPP projects with specific on waste water facilities.

The PPP Act prescribes the essential elements and contents of public agreements which shall be regulated by the PPP Act. Below is a table indicating all elements a public agreement based on the PPP Act.

Prescribed content of Public Agreement – Article 46 of the PPP Act			
1	nature and scope of works/services of the private partner, conditions necessary to render them	15	any right of the public partner to approve subcontracts or contracts with the private partner's affiliates
2	distribution of risks	16	guarantees;
3	minimum quality and standard requirements; consequences of non-compliance	17	insurance provided by the private partner
4	scope of exclusive rights of the private partner	18	available legal remedies in case of failure to meet contractual obligations
5	any assistance the public partner can provide in obtaining permits	19	extent to which a party may be exempt from liability for events beyond its control
6	requirements applicable regarding the PPP Project SPV	20	term and extension of the public contract and rights and obligations of the parties after its expiry
7	ownership of assets, and other obligations regarding assets	21	compensation and set-off of receivables
8	amount and method of calculating the concession fee, if any	22	effects of adverse change of law
9	fee payable to the private partner	23	early termination (including the minimum amounts payable contractual penalties etc.)
10	mechanisms for increasing or reducing the fee in line with the high or poor quality of services/facilities	24	any limitations of the parties' liability
11	the procedure applied by the public partner to consider and approve different types of deliverables of the private partner	25	ancillary contracts that must be concluded; effects of such contracts on the public contract, (specific provisions permitting step in or lenders)
12	procedures for modifications of projects, construction plans etc, procedures for granting extensions and/or increases in fees (including costs of financing);	26	governing law and dispute resolution mechanism

13	scope of the private partner's obligation to provide modification in order to satisfy the change in actual demand, service continuity; effects of such modifications on the fee (and costs of financing)	27	circumstances under which the public partner / third party may take over private partner's function in case of material breaches of its obligations
14	scope of any amendments to the public agreement, persons authorised to request them and mechanisms	28	taxation and fiscal issues – if any

6. Public agreement contract terms - issues regarding PPP deployment in Serbia

6.1 Distribution of risks

Specification of distribution of risks is one of the mandatory provisions of the public agreement under the PPP Act. Further the PPP Act in its very definition provides that PPPs key element is risk – where risks allocation or risks sharing between the public and private partner should depending on each partners' ability to manage risk best. Success in PPP project will ultimately depend on the risk structure – what risk will be entirely allocated to one party and what risks will be shared and based on which criteria. The risk sharing and risk allocation will reflect the bespoke nature of each project.

The risk matrix that would most likely be used as starting point for the parties' negotiations by the public sector in Serbia is given in Schedule 3 herein. This risk matrix also accompanies the provided Model Heads of Terms to the Serbian PPP Commission and is to be used for a project of reprovisioning of a government water treatment plant under PPP approach.

6.2 Property planning

Parallel with the enactment of the PPP Act, the property planning rules were amended to introduce options for transfer and lease of the public property land for a PPP project enabling a more relaxed regime for disposing of the public property land.

Under the general rule imposed by the Construction and Spatial Planning Act, an authority may dispose of the construction land (which is in the public property) only through an auction bidding procedure, at arm's length terms. However, there are two exceptions designed for PPP project that allow authorities to circumvent this procedure and requirements.

The first exception is designed specifically for public utilities services. The local self-government may lease the construction land (in public property) to a private partner, without an obligation of the private partner to pay any rent. This rule applies to a concession agreement and a PPP agreement through which the local self-government transfers the operations of public utilities services. The life of the lease will reflect the life of concession or PPP agreement. For example, this rule is applicable for PPP project aiming to deliver a waste water treatment plant, since the Public Utilities Act running the waste water treatment plant falls with the scope of public utilities services.

The second exception is designed for PPP ventures in general. Undeveloped construction land in the public property may be used as an in-kind contribution in the company's share capital. The authorities may exercise this relaxed rules in establishing institutional PPP project (i.e. where the authority comes as a shareholders and project's sponsor). Moreover, authority (as owner of the construction land) and individual or legal entity may enter into an co-investment agreement; under this agreement the public and private partner may jointly construct facilities on the land. The Government of the Republic of Serbia will regulate methods and requirements for these kinds of investments, however, the relevant bylaw has not yet been adopted.

6.3 Employment

The PPP Act does not regulate employment issues nor does it prescribe mandatory for the public agreement to specifically designate provisions which could regulate these issues. Nevertheless, given the strict regulatory regime in this area employment of staff for implementing the PPP project could become an issue. Namely, international practice has shown that transfer of at least some of employees working under management of the public partner to the PPP project SPV seems to be the most cost savvy solution for both parties. In the Serbian environment enabling such transfer and limiting the number of new hired employees is of particular importance especially given the overstaffed public administration / public utilities. Also please note that for some of the projects (e.g. prisons) only civil servants working within the public administration could be hired by the PPP SPV.

Currently two separate legal frameworks regulate employment issues in Serbia: the (i) Labour Act and the (ii) Civil Servants Act. Both laws specify the procedure for transfer of employees where the Civil Servants Act applies only to civil servants while the Labour Act specifies general regime for all types of employee transfers.

For most PPP Projects and sectors (waste or water treatment, electricity production / distribution, heating systems, hospitals, etc) the employees which are working in the institutions / utilities of the public partner are not considered civil servants and therefore could be transited based on the provisions of the Labour Act. The Labour Act in Article 171 specifies that a transfer of employees to a different employer (in this case PPP SPV) could only be offered, in the form of the annex to the employment agreement - Annex. Offer for conclusion of the Annex must be in written form, containing reasons for such offer, deadline for response and legal consequences of refusing the offer. If the employee refuses the offer or does not respond within set deadline, the employer is entitled to terminate his/her employment agreement. However, please note that even if the employee accepts the offer for conclusion of the Annex, he/she keeps the right to challenge the validity/legality of offered Annex and this new employment agreement before the competent courts.

Such Annex could be offered under strict conditions and in very limited circumstances. Namely an employee could be transferred to another employer only on a temporary basis and if (i) there is no need for his/her work with a current employer; (ii) his/her work place has been leased; or (iii) the previous and the new employer have concluded

a business cooperation agreement (this could be an agreement between the PPP SPV and the public partner transferring the employees). Such transfer could last for one year at most, unless the specific reasons for transfer have been determined in the employees' employment agreement or general acts (collective bargaining agreement) and with the consent of the employee. The PPP SPV would have to sign a new term employment agreement with the transferred employees. The employee has to have the same rights with the PPP SPV as with its previous employer. The transfer is possible only if the employee is offered an appropriate job position ("appropriate" meaning that it requires the same type and level of education as the current job).

In addition in the requirements set above in case the transfer entails change of the place of work (which would most likely be the case) such transfer would be possible only if the distance between current and future place of work is less than 50 km and employer organized regular transportation and reimbursed the costs of transportations. Consequently, given number of requirements which have to be fulfilled for transfers of employees from public partner to the PPP SPV it is most likely that most of the PPP projects in Serbia would entail new hires of the entire workforce of the PPP project.

Please note that aside from the procedure set above in case of PPPs in municipalities or schools specific provisions of sectoral laws (namely Education Act and Public Authority Employment Act) would apply.

6.4 Dispute resolution

The PPP Act imposes strict restraints when it comes to dispute resolution mechanisms which could be agreed upon in the public agreement. The PPP Act provides that both domestic and foreign arbitration can be agreed between the private and public partner. In case a foreign arbitration renders a decision in a dispute between the private and a public partner general arbitration rules in Serbia would require that such awards undergoes a procedure for its recognition and enforcement before it could be validly used in Serbia .

Foreign seat of arbitration cannot be agreed in cases when the private partner is a domestic entity - Serbian natural or a legal person or a consortium comprised solely of Serbian entities. The wording of the article only restricts the seat of arbitration but does not make any reference as to the origin of the arbitral institution (whether agreeing on a foreign arbitral institution with a seat in Serbia is possible). This opens a possibility that, even in cases when the private partner is a domestic entity, the parties agree on a foreign arbitral institution with a local seat. If no arbitration is agreed upon only Serbian courts could have jurisdiction.

When it comes to the procedure which would be used in foreign seated arbitration the provisions of the PPP Act are unclear. Namely, the PPP Act defines the procedural governing law as the law of Republic of Serbia. Application of the Serbian laws for the procedure taking place before the arbitration seated in Serbia or before the Serbian courts is in this regards clear. However, in case a private partner is a foreign entity and the public agreement designates an arbitration seated abroad it is unclear how could Serbian procedural rules apply.

7. PFI and project finance in PPP projects

PPP projects are usually financed using project finance arrangements. This will be the case in Serbia as well given that private financing of a project, in full or in part is a mandatory element of the PPP under the PPP Act.

In project finance, lenders and investors rely either exclusively ("non-recourse" financing) or mainly ("limited recourse" financing) on the cash flow generated by the project to repay their loans and earn a return on their investments. Non-recourse term reflects the nature of the lenders security: the security is the revenue stream generated by the project, while the lenders do not have recourse to other assets of the borrower.

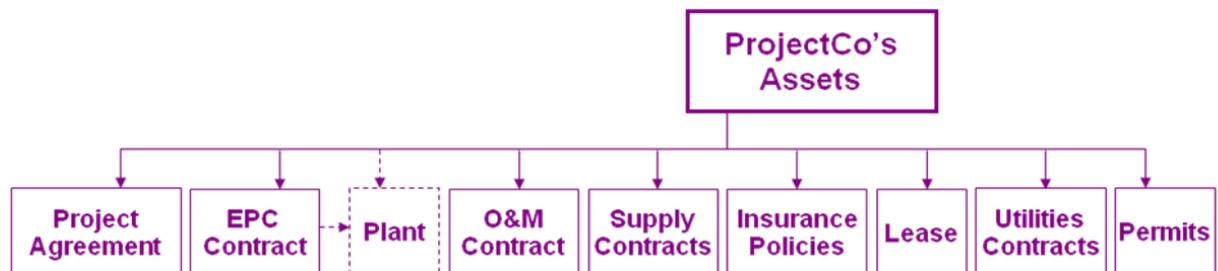
In contract, in corporate finance, lender will look to the debtor's balance sheet – how strong the debtor's balance sheet is and what asset recorded on debtor's balance sheet may be taken as collateral for the loan.

Each project structure should reflect:

- (A) nature of the project: e.g. energy vs. utilities., schools vs. hospital, defence services vs. roads;
- (B) geography and jurisdiction (e.g. mature PFI market vs. new market; geography of the site; particularities of a particular jurisdiction)
- (C) sub-contracting profile (full back-to-back pass down of obligations and risks vs. multiple subcontracts; interface agreement).
- (D) equity structure (one sponsor, multiple sponsors, JV with an authority partner; day 1 equity; pinpoint equity and loan notes).

At the onset of one PPP project, the sponsor (shareholders) will incorporate a special purpose company that will serve as the PPP company. Mandatory existence of such company is referenced and prescribed by the PPP Act. The PPP company (usually referred to as "project company") will be the project pilot – it will be the counterparty to the public partner, to lenders, and to the sub-contractors. Such construction should serve to isolate the project and revenue stream from other sponsors' projects.

The project company's assets would usually be structured in this way:



Project finance is often said to be bespoke blend of much debt and low equity. The project company is usually financed through several routes. First and foremost is debt. Private lenders and capital markets investors provide this so called top-tier funding – senior debt, which usually covers 70% to 90% of the entire investment. The remaining

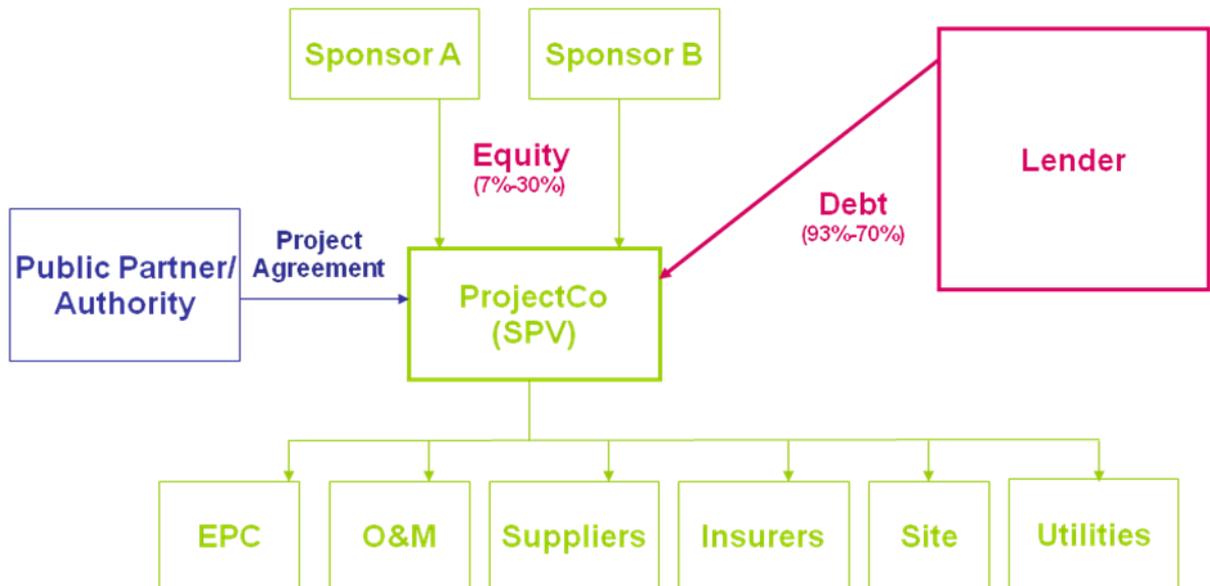
part is funded by the shareholders' equity – through junior (subordinate) debt and pure equity (colloquial referred to as pinpoint equity).

The senior debt is debt that takes priority over other unsecured, or otherwise more "junior" debt owed by the project company. The senior debt has greater seniority in the issuer's capital structure than junior debt. If the project company goes bankrupt, senior debt theoretically must be repaid before other creditors receive any payment.

Besides the senior debt, the project company could be funded through mezzanine debt. Mezzanine financing is basically debt capital that gives the lender the rights to convert to an ownership or equity interest in the company if the loan is not paid back in time and in full. It is generally subordinated to debt provided by senior lenders such as banks and venture capital companies. Since mezzanine financing is usually provided to the borrower very quickly with little due diligence on the part of the lender and little or no collateral on the part of the borrower, this type of financing is aggressively priced.

As said, sponsors would have two routes to inject the monies in the project company – junior debt or pinpoint equity. Yet the sponsor would usually prefer to use junior debt route. There are two reasons for such preference. Firstly, the junior debt usually starts earning interest as soon as operations commence. Conversely, equity dividends remain far away in future - after debt servicing becomes regular and debt service reserve account is fully funded. Secondly, equity must be brought in at the time of financial close, whereas debt is brought in as per a draw down schedule.

The chart below presents the typical, straight-forward project finance structure:



7.1 Direct agreements facilitating PFI in Serbia

In project finance, a direct agreement is an agreement entered into between the senior lender(s) and the authority. It aims to regulate the rights and obligations of the senior lenders and the authority following the contractor's default and termination or threatened termination of the project agreement.

As said, the lenders in project finance fund the company's project relying mostly on the company's cash-flow that would be generated during the life of the project. They are thus very motivated to have some degree of control over the project agreement and the company's cash flow. Their interest is to secure the project agreement alive and keep the company's revenue stream under the project agreement flowing, so the contractor under the project agreement (which is their debtor) could service the senior debt interest and principal. Any disruption of the project could seriously threaten their ability to redeem the money they invested in the project.

The direct agreement would give the senior lenders some comfort that they would be able to protect their investments if the project and the project company get in distress. Under direct agreement, the senior lenders would have an opportunity to revive the project by stepping in, assuming the contractor's liabilities (under the project agreement), and rectifying the contractor's breach thereto.

Serbian PPP Act (Article 49) regulates broadly a direct agreement and its content. The public partner, the private partner and the financing party may enter into a separate direct agreement; under this agreement the authority may agree:

- (A) that the financing parties may exercise all rights arising out of the public contract in lieu of the private partner and may rectify any omission of the private partner, while the public partner must accept such actions as if they had been taken by the private partner;
- (B) that the private partner shall not accept termination or expiry of the public contract on the public partner's request without the financing parties' prior consent;
- (C) that the public partner shall not file any claims in relation to the private partner's omissions under the public contract without prior written notification to the financing parties, giving the financing parties and the private partner an opportunity to rectify such omissions;
- (D) that the public partner shall give its prior consent to a temporary or final assignment of the private partner's rights under the public contract, and that it shall grant requested approvals for issuing additional security to reinforce the collateral provided to the financing parties by the private partner.

Generally, PPP Act allows all other clauses standard under direct agreements to be agreed among the public partner, private partner and the financing parties. There are thus no restrictions for the parties to implement any other advanced solution already been crystallized at the mature PFI market.

The direct agreement is subject to a clearance issued by the state body that has approved the project agreement (i.e. central government, province government, or local self-government). Such clearance would include the financing parties' right to take actions and protect their rights in a manner provided under the direct agreement, without the requirement for other subsequent approval.

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Schedule 1
Model Heads of Terms

Term Sheet

for negotiating a public private partnership contract in Serbia

Project: design, build, finance, and operate a plant for waste water
treatment

In this term-sheet the following terms shall have the following meanings:

"Authority"	means a public partner that will be a party to the Project Agreement;
"Contractor"	means a private partner, special purpose company that will be the party to the Project Agreement;
"Construction Period"	means a period between the date the Project Agreement has been signed and the date the service provision has started;
"Expiry Date"	means the date on which the Project Agreement shall expire;
"Project Agreement"	means a public agreement entered into between the Authority and the Contractor for development, building, financing and operation of the waste water treatment plant;
"Parties"	means the Authority and Contractor;
"Service Period"	means a period between Service Commencement Date and Expiry Date;
"Service Commencement Date"	means a date on which the Contractor would commence provision of the Service;
"Service"	means the services required to satisfy the services specification of the Authority contained in the Project Agreement;
"Unitary Charge"	means the payment calculated in accordance with the Project Agreement that Authority pays to the Contractor as the consideration for the Contractor providing the Services.

Ref	Subject-matter	Description
Chapter I: Introduction		
1.	Defined Terms and Interpretation	The Project Agreement should provide for a catalogue of defined terms and interpretation rules that is standard for an agreement of this kind.
2.	Duration	The Project Agreement should specify the term and the Service Commencement Date. Under Serbian PPP Act, the Project Agreement term could be from 5 to 50 years.

Ref	Subject-matter	Description
		<p>The Service Commencement Date will be a milestone between the construction period and the service period of the under the Project Agreement.</p>
Chapter II: Construction Period		
<p>3.</p>	<p>Construction</p>	<p>Key principle:</p> <p><i>The design, construction, integration, installation, testing, commissioning, operation, maintenance and ultimate performance of all project assets that will be procured or developed for the purposes of meeting the requirements of the output specification are all the Contractor's responsibility. The Authority shall not in any way be responsible for these risks.</i></p> <p>Authority's right to comment on design, plans, specification and other construction documents:</p> <p>The Contractor should provide the Authority with all construction and ancillary documents. The Authority shall have a reasonable time to review and comment on documents. Once the Authority delivers its comments on the construction documents, the Contractor shall consider the Authorities' comments in good faith.</p> <p>The Contractor shall remain fully liable for design, specification, plans, construction and commission of the project and the services, notwithstanding Authority's right to review, comment, agree, or disagree thereto.</p> <p>The Contractor's control over construction</p> <p>The Contractor shall be liable for all construction works, shall direct and supervise the construction works and provide all project management and construction management in compliance with good industry practice and required skills and standards for the construction of a project of similar nature.</p> <p>The Contractor shall be liable for all construction works of its construction sub-contractors.</p> <p>The Contractor's liability for the construction site conditions</p> <p>The Contractor will be fully liable for the site conditions</p>

Ref	Subject-matter	Description
		<p>and site suitability for the construction works. The Contractor should examine the site in advance in order to satisfy itself as to the compatibility of the site and site conditions for the project and its effects on design, specification, plans, other construction documents and scheduled construction works completion date.</p>
<p>4.</p>	<p>Time for commencing the services and supervening events</p>	<p><i>Time of the essence</i></p> <p>The time will be the essence of the Project Agreement.</p> <p>The Contractor must commence the service provision by the Services Commencement Date. If the Contractor fails to commence the service provision on time, the Contractor would not start collecting the Unitary Charge on time, as provided under the Contractor's base case model. Additionally, the Contractor shall reimburse liquidated damages to the Authority .</p> <p><i>Compensation Events</i></p> <p>For delays caused by events that fall within the Authority's risks ("Compensation Events"), the Contractor may require both extension of the Services Commencement Date and the adequate compensation.</p> <p>The Compensation Events shall include: (i) the Authority's breach of its obligations under the Project Agreement (e.g. not providing adequate assistance in obtaining required permits); (ii) Authority's request for changes of the project details; (iii) discrimination or specific changes in the law; [(iv) other Compensation Events to which the Parties have agreed.]</p> <p>In case of the Compensation Events, the Contractor would be relieved of paying any liquidated damages to the Authority.</p> <p><i>Relief Events</i></p> <p>The Contractor may require extension of the Service Commencement Date if the Contractor does not commence the service provision by the Services Commencement Date due to a Relief Event. The Contractor shall be relieved of paying liquidated damages to the Authority if the Relief Event occurs, but it would not have a right to require compensation from the Authority.</p>

Ref	Subject-matter	Description
		<p>The list of Relief Events should be agreed between the Parties. These are usually the risk that are out of the Parties' control but that could be most effectively borne by the Contractor that is in a better position to manage and mitigate these risks. For example, these should be: fire, explosion, lightning, storm, tempest, flood that do not constitute a <i>Force Majeure</i>.</p> <p><i>Force Majeure Events</i></p> <p>If a Force Majeure Event occurs, the affected party would be released from liability for fulfilling the obligations under the Project Agreement.</p> <p>Once the Force Majeure Event occurs, the affected parties shall notify the other party of the Force Majeure Event and the parties shall negotiate to agree on the steps to be take.</p> <p>If a Force Majeure Event occurs and is continuing, while the Parties have failed to agree on the steps to be implemented, each Party may unilaterally terminate the Project Agreement.</p> <p>The Force Majeure Events shall include:</p> <ul style="list-style-type: none"> A) war, civil war, armed conflict or terrorism; or B) nuclear, chemical or biological contamination unless the source or the cause of the contamination is the result of the actions of or breach by the Contractor or its subcontractors; or C) pressure waves caused by devices travelling at supersonic speeds. <p>The Parties should carefully examine and tailor made the definitions of the Compensation Events, the Relief Events and the Force Majeure Events, to reflect the sector specific requirements.</p>
5.	Long stop date for commencing the services	<p>The Project Agreement should fix a date that will be the last day by which the Contractor shall commence the service provision (the long-stop date).</p> <p>If the Contractor does not commence the services provision by the long-stop date, the Authority may</p>

Ref	Subject-matter	Description
		terminate the Project Agreement.
6.	Acceptance and service commencement	<p>Once the Contractor has completed the construction works, it must demonstrate that the construction works meet the requirements of the Project Agreement and the project assets are fit to start provisioning the service as stipulated under the Project Agreement.</p> <p>To do so, the Contractor should perform series of tests, inspections and demonstrations aiming to evidence that the construction works have been duly completed and that the plant may start the services provision. The Contractor should duly notify in advance the Authority of these tests; the Authority's representative should attend these tests and witness the results. The Contractor will bear all cost associated with these tests.</p> <p>The Contractor shall provide the Authority with all documentation evidencing the results of the performed tests, inspections and demonstrations.</p> <p>The Authority should determine if the test results match the services performance level required under the Project Agreement. If yes, the Authority shall issue the services commencement certificate to the Contractor.</p> <p>The date of the services commencement certificate will be the Services Commencement Date.</p>
7.	Land, equipment and other property interest	<p>The Authority shall have ownership title over the project assets (including the equipment and facilities that are being procured or developed by the Contractor).</p> <p>The Authority shall lease all project assets to the Contractor for the whole life of the Project Agreement.</p> <p>The Authority should lease the project assets to the Contractor in consideration of the Contractor undertaking the construction works and providing the services for the whole life of the Project Agreement.</p>
Chapter III: Service Period		
8.	Services description	The Project Agreement shall in detail describe the scope of Service that the Contractor shall provide. Typically, the exhaustive description of the Services will be given in the schedules to the Project Agreement.

Ref	Subject-matter	Description
9.	Price and payment mechanism	<p>The Parties shall agreement on the payment mechanism based on the following key principles:</p> <ul style="list-style-type: none"> A) No payments shall be made until the service is available, i.e. no payment, no service. B) There shall be a single Unitary Charge for the Service which is not made up of separate independent elements relating to availability or performance. C) The level of payment shall be directly linked to the level and quality of the service that the Contractor is providing. D) The Unitary Charge shall never be paid in advance of the period to which it relates. E) The payment mechanism shall adjust for under performance, while deductions shall reflect the severity of failure. No service shall thus lead to no payment. Proportionality is important, and a minor failure should cause a minor deduction (except in the case of persistent failure where ratchet mechanisms may increase the level of deduction). The payment mechanism must involve direct cash deduction for the Contractor's poor performance of the services. Each service failure must carry an appropriate deduction of the payment. F) The payment mechanism shall take into account the importance of that failing service for the Authority. G) The variables in the payment mechanism must be balanced; these variables are the initial "weighting" of deductions for failures, response/rectification periods, and the "ratcheting up" of deductions for repeated failures over time H) The performance and payment regime shall be based on outputs (e.g. standard of services); and I) The payment mechanism should never contain a fixed element which the Contractor always receives irrespective of performance (e.g. which covers the Contractor's debt service obligations).

Ref	Subject-matter	Description
10.	Performance requirements	<p>The Project Agreement should define in detail:</p> <ul style="list-style-type: none"> A) The performance requirements with regard to the services, i.e. setting the performance level. The performance requirement should be represented through the system of performance points depending of the importance of each performance requirement. These performance points shall be used to precisely assess the level of the services performance, e.g. whether the service are being performed at 100% performance level, 90% performance lever, or lower. B) Means and methods that will allow the Authority to track and check whether the services are performed in compliance with the services performance level; C) If the Contractor is underperforming, i.e. rendering the poor services, the Unitary Charge should be lowered. The Contractor should incur specified number of performance points for the performance shortcoming, and the number of these performance points will be contingent to the seriousness of each shortcoming. The Project Agreement should envisage in detail the level of points imposed for each failure to meet a specified performance output. The performance points will be then converted to monetary deductions that would be applied to the Unitary Charge. D) The ratchet mechanism will be applied in case of the Contractor's persistent failures. For a failure in the services that recurs too often over a specified period, the number of penalty points awarded for such failure will be increased. E) The Authority may terminate the Project Agreement if the service has been persistently performed poorly; these termination rights will be triggered by persistent financial deductions of the Unitary Charge, i.e. the Unitary Charge has been lowered above 30% over three consecutive months. The level of financial deductions and time period triggering the Authority's termination rights should be

Ref	Subject-matter	Description
		<p>discussed between the Parties.</p> <p>F) The Contractor should bear the risk of its sub-contractor's poor performance; however, the Authority should have a right to intervene and replace the sub-contractor if the sub-contractor is under-performing.</p>
<p>11.</p>	<p>Payment mechanism management and monitoring</p>	<p>The Project Agreement shall define the payment mechanism management and monitoring in compliance with the following principles:</p> <p>A) The Contractor shall monitor the contract through a quality management system and will measure the service performance.</p> <p>B) The Authority shall review the Contractor's quality management system through planned or random spot checks. The Authority may increase monitoring on repeated failure or poor performance.</p> <p>C) The payment mechanism management and monitoring shall start as of the Service Commencement Date.</p> <p>D) Each the Contractor and the Authority will bear its own costs of the management and monitoring. The Authority's costs of additional monitoring or audit required due to the Contractor's poor performance should be paid by the Contractor.</p> <p>E) The Contractor shall produce the reports on results of monitoring. The Parties shall further discuss and agree on the types and contents of reports, reports periods, and persons responsible for reporting.</p>
<p>12.</p>	<p>Maintenance</p>	<p>The Contractor shall ensure on a continuing basis that at all times its maintenance and operating procedures are sufficient to ensure that: (a) the service is continuously available; (b) it can maintain the design intention of the assets to achieve their full working life; and the Assets are handed back to the Authority on the Expiry Date in a condition complying with the requirements of the Project Agreement.</p> <p>If the Authority reasonably believes that the Contractor is in breach of its obligations related to the maintenance then</p>

Ref	Subject-matter	Description
		<p>it may carry out (or procure) a survey of the project assets to assess whether the project assets have been and are being maintained by the Contractor in accordance with its obligations related to the maintenance.</p>
<p>13.</p>	<p>Payments and set off</p>	<p>The Contractor shall not be entitled to retain or set off any amount due to the Authority by it, but the Authority may retain or set off any amount owed to it by the Contractor under the Project Agreement that has fallen due and payable against any amount due to the Contractor under the Project Agreement.</p>
<p>14.</p>	<p>Change in service</p>	<p>The Project agreement shall envisage the change protocol based on the following principles:</p> <p><i>Notification and specification</i></p> <p>The Authority shall inform the Contractor early on their intention to request the changes (and vice versa). The Parties shall work together to develop a detailed specification for the change request. The final specification should be signed by the Authority and submitted to the Contractor as a formal change request.</p> <p><i>Contractor's estimate</i></p> <p>The Contractor should be allowed reasonable time to decide whether it will refuse to implement the change. If the Contractor decides to implement the change, it will be allowed reasonable time to deliver the Contractor's estimate that shall include, among other matters, timescales and costs for implementing the change.</p> <p><i>Authority's approval</i></p> <p>The Authority shall have a reasonable time to consider and the response and approve the Contractor's estimate.</p> <p><i>Change implementation</i></p> <p>After the Authority has approved the Contractor's estimate, the Contractor shall proceed and implement the change in agreed timelines. The Contractor shall process and implement the changes using a transparent open-book approach to pricing and shall secure value for money for the Authority.</p>

Ref	Subject-matter	Description
		<p><i>Funding</i></p> <p>The Authority shall bear the costs of implementing the changes, unless the Contractor has requested the change where the Contractor shall fund the costs of such change</p> <p><i>Due diligence(s)</i></p> <p>The change protocol should regulate when the legal, technical, financial and insurance due diligence will be required as a consequence of the implemented change.</p> <p><i>Documentation and monitoring</i></p> <p>The Parties shall duly document and monitor all changes. If the changes are complex, a stand-alone amendments agreement will be used.</p>
15.	Change in law	<p>The Contractor must comply with all regulations. A failure to comply could give rise to the termination of the Project Agreement due to the Contractor's default.</p> <p>The Contractor would build in the cost of compliance with the regulations in its offer. The issues may raise once the regulation has been changed – the changes may affect the price offered by the Contractor. The questions is how should bear the costs arising out the change in law.</p> <p>The risk of change in law should be either borne by the Contractor only or shared between the Contractor and the Authority.</p> <p><i>Discriminatory changes in law</i></p> <p>The discriminatory changes in law are those that apply expressly to the project (and not to other similar projects), the Contractor (and not to other persons) and the PPP Contractors (and not to other persons).</p> <p>The Authority should bear the risk of discriminatory changes in law.</p> <p><i>Specific changes in law</i></p> <p>The specific changes in law are those that specifically refer to the provision of services the same as or similar to the service or to the holding of shares in companies whose main business is providing services the same as or similar</p>

Ref	Subject-matter	Description
		<p>to the Service.</p> <p>The risk of specific changes in law should be shared between the Contractor and Authority.</p> <p>General changes in law</p> <p>General changes in law are all changes in law that has not been qualified as discriminatory changes in law or general changes in law.</p> <p>The Contractor should bear the risk of general changes in law. The Parties may discuss possible exceptions to this general rule, i.e. sharing the risk of general changes in law in certain cases.</p>
16.	Price variations	<p>Over the life of the Project Agreement, the Unitary Charge should be adjusted for an inflation index.</p> <p>[The Project Agreement should incorporate the mechanism for a periodic value test of the services. A method of value testing – market test or benchmarking – is to be agreed between the Parties.</p> <p>Market testing means the re-tendering by the Contractor of a relevant service to ascertain the market price of that service. This may lead to the replacement of the Sub-Contractor operating such service by the winning bidder. Any increase or decrease in the cost of such service following market testing should be reflected by an adjustment in the price charged to the Authority.]</p>
17.	Subcontracting, employees and documentary changes	<p>Subcontracting</p> <p>The Authority shall have a right to review and veto engagement of the Contractor's subcontractor. The Authority may veto the engagement of the Contractor's subcontractor only on reasonable grounds that should be broadly described under the Project Agreement (i.e. technical inability, insufficient competence or financial strength of the subcontractors).</p> <p>Notwithstanding the Authority's right in relation to the subcontractors, the Contractor shall fully bear the risk of subcontractor failing to carry out their duties and shall be responsible thereto.</p>

Ref	Subject-matter	Description
		<p>Employees</p> <p>The Authority shall have a right to veto or require the removal of the Contractor's staff subject to the Authority providing objective and reasonable ground for such action.</p> <p>Notwithstanding the Authority's right in relation to the Contractor's staff, the Contractor shall fully bear the risk of employees failing to carry out their duties and shall be responsible thereto.</p> <p>Documentary changes</p> <p>The Contractor shall provide the Authority with the conformed copies of all project documents and financing agreement and all amendments thereto.</p> <p>The Authority shall have a right to review all drafts of amendment to the project documents and financing agreements. The Contractor shall not terminate, amend, and waive its rights or otherwise deal with the project agreements and financing agreements without the Authority's prior written consent, such consent not to be unreasonably withheld or delayed.</p>
18.	Treatment of assets on expiry of service period	<p>Once the Project Agreement has ended, the lease of the project asset shall automatically be terminated and the Contractor shall handover the project assets to the Authority.</p>
19.	Early termination	<p>Authority's default</p> <p>The Contractor may terminate the Project agreements if the Authority has defaulted under the Project Agreement. A list of Authority's defaults that should entitle the Contractor to terminate the Project Agreement should be precisely defined. Such termination triggers may include:</p> <ul style="list-style-type: none"> A) an expropriation, sequestration or requisition of a material part of the project assets and/or shares of the Contractor by the Authority or other relevant authority; B) a failure by the Authority to make payment of any amount of money exceeding [to be determined] (indexed) that is due and payable by the Authority under the Project Agreement within [to be deter-

Ref	Subject-matter	Description
		<p>mined] days of service of a formal written demand by the Contractor, where that amount fell due and payable [two] (or more) months prior to the date of service of the written demand;</p> <p>C) a breach by the Authority of its obligations under the Project Agreement which substantially frustrates or renders it impossible for the Contractor to perform its obligations under the Project Agreement for a continuous period of [two] months.</p> <p>The Contractor's right to terminate the Project Agreement shall be subject to the expiry of the cure periods given to the Authority.</p> <p>The Authority should pay the termination compensation to the Contractor if the Project Agreement has been terminated due to the Authority's default. The sum of such compensations should ensure that the Contractor and its financiers are fully compensated, i.e. they are not worse-off due to the early termination than if the Project Agreement has proceeded as agreed.</p> <p>The Contractor shall handover the project assets to the the Authority once the Project Agreement has been terminated.</p> <p><i>Contractor's default</i></p> <p>The Authority may terminate the Project Agreement in cases of the Contractor's default.</p> <p>The list of the Contractor's defaults that may lead to the termination of the Project Agreement should include:</p> <p>A) a breach by the Contractor of any of its obligations under the Project Agreement which materially and adversely affects the performance of the Service(s);</p> <p>B) occurrence of a persistent breach;</p> <p>C) liquidation, insolvency or similar procedure is commenced, or an insolvency event or like event occurs, with the respect to the Contractor, e.g. a court makes an order that the Contractor be wound up or a resolution for a voluntary winding-up of the</p>

Ref	Subject-matter	Description
		<p>Contractor is passed, any receiver or manager in respect of the Contractor is appointed or possession is taken by or on behalf of any creditor of any property that is the subject of a charge, an administration order is made, or an administrator is appointed in respect of the Contractor;</p> <p>D) a failure to achieve the Service Commencement Date by the long-stop date;</p> <p>E) the Contractor's failure to cater the Service at the performance level required under the Project Agreement (i.e. poor performance); however, this termination trigger could arise only once the Contractor underperformance reaches certain level (please see Section 11 [<i>Performance Requirements</i>]); until then, financial deductions will be applied to the Unitary Charge;</p> <p>F) the Contractor has submitted false or inaccurate information that were decisive for the Authority to determine the Contractor's qualifications during the phase of awarding the Project Agreement;</p> <p>G) if the Contractor assigns or transfers the Project Agreement without the Authority's prior written consent;</p> <p>H) [<i>others event of defaults tailored for a specific transaction</i>].</p> <p>The Project Agreement should envisage the cure period that will allow the Contractor to remedy its breach (if such breach is capable of being remedied) and thus avoid the termination of the Project Agreement. The termination of the Project Agreement should be used as the last resort only.</p> <p>If the Authority has terminated the Project Agreement due to the Contractor's default, the Authority should still pay the termination compensation to the Contractor. Such termination compensation should reflect the market value of the unexpired term of the Project Agreement.</p> <p>A method of defining the termination compensation should be the retendering method. The authority shall organize the retendering procedure in order to award the</p>

Ref	Subject-matter	Description
		<p>Project Agreement to the new contractor. The termination compensation to be paid to the Contractor would equal the tender price received in the course of the retendering procedure less the aggregate of (i) the cost of the retendering procedure; and (ii) the amount of actual damages incurred and profits lost by the Authority due to Project Agreement termination and/or breach of the provisions of the Project Agreement by the Contractor.</p> <p>If the termination compensation determined in the retendering procedure is less than zero, then this amount shall be due and payable by the Contractor to the Authority.</p> <p>The Contractor shall handover the project assets to the the Authority once the Project Agreement has been terminated.</p> <p>Force Majeure</p> <p>If a Force Majeure event occurs, and the Parties fail to reach an agreement how to overcome such situation, then either Party may terminate the Project Agreement. The Authority may prevent the termination of the Project Agreement by paying to the Contractor the Unitary Charge, as if the Services were being duly provided. The Authority should clearly specify a fixed period for such payment is to be performed.</p> <p>If the Project Agreement has been terminated due to the Force Majeure event, the Authority shall pay the termination compensation to the Contractor. Such termination compensation should mirror the fact that neither Party has been responsible for the termination of the Project Agreement, and that they need to share the consequences of such termination. The termination compensation should cover (i) the outstanding senior debt, plus (ii) equity per value less distributions made to date.</p> <p>The Contractor shall handover the project assets to the the Authority once the Project Agreement has been terminated.</p> <p>Corrupt Gifts</p> <p>The Contractor shall warrant that in entering the Project Agreement it has not committed any corruption or like</p>

Ref	Subject-matter	Description
		<p>acts. The Authority may terminate the Agreement if the Contractor has breached this warranty.</p> <p>Exceptionally, the Contractor should have some comfort to remedy this kind of breach and so avoid the termination of the Project Agreement. This exception apply to the cases where the corrupt acts were committed by a person who is not Contractor, or an employee of the Contractor that does not act independently. In such case, the Contractor should have an opportunity to terminate the employment or engagement of the persons who have carried out the corrupt acts and thus cure the breach.</p> <p>If the Project Agreement has been terminated due to the Contractor's corruptive acts, the Authority shall pay adequate termination compensation to the Contractor. In this case, the adequate termination compensation shall be an amount required for the Contractor to settle the outstanding senior debts owed to the senior lenders.</p> <p>The Contractor shall handover the project assets to the the Authority once the Project Agreement has been terminated <i>Voluntary Termination by the Authority</i></p> <p>The Authority may voluntarily terminate the Project Agreement at any time before the end of the Project Agreement.</p> <p>If the Authority has voluntarily terminated the Project Agreement, the Authority shall pay the adequate termination compensation to the Contractor. In this case, the adequate termination compensation shall be equal to the amount the Contractor would have received from the Authority had the Project Agreement proceeded as agreed.</p> <p>The Contractor shall handover the project assets to the the Authority once the Project Agreement has been terminated</p>
20.	<p>Calculation and payment of early termination payments</p>	<p>All payments should be subject to a standard gross up clause.</p> <p>No amendment, waiver or exercise of a right under any financing agreement or ancillary document shall have the effect of increasing the Authority's liabilities on early termination of the Project Agreement unless: (a) the Contractor has obtained the prior written consent of the Authority to such increased liability; or (b) it is an</p>

Ref	Subject-matter	Description
		<p>[additional permitted borrowing].</p> <p>The Authority should be fully entitled to set off any outstanding liabilities of the Contractor against the amounts it pays in compensation on a Contractor Default.</p> <p>The termination compensation payment should be the sole remedy allocated to the Contractor in case of an early termination of the Project Agreement.</p>
<p>21.</p>	<p>Surveys on expiry and termination</p>	<p>On the Expiry Date, the Contractor shall transfer the project assets to the Authority and the project assets shall be in condition specified under the Project Agreement.</p> <p>The Authority shall engage a third independent party to survey the project assets. This survey shall be performed [one] year before the Expiry Date. The Authority shall bear the costs of this survey, unless the survey reveals the shortcomings in the condition of the project asset when the Contractor shall bear the costs of the survey.</p> <p>If the survey reveals that the Contractor will not hand over the project assets in condition stipulated under the Project Agreement, the Contractor shall bear all cost of restoring the Project Assets in the conditions agreed under the Project Agreements.</p> <p>During the last [four] years of the life of the Project Agreement, the Authority shall pay a [certain proportion] of the Unitary Charge to the retention fund account. If survey reveals that maintenance works on Project Assets are needed, the retention fund will then be used to perform those maintenance works on the projects assets and to bring the conditions of the project assets to the standard required under the Project Agreement.</p> <p>The Authority shall pay any credit balance on the retention fund account that has been unused to the Contractor.</p>
<p>22.</p>	<p>Indemnities, guarantees and contractual claims</p>	<p>The Contractor shall release and indemnify the Authority, its employees, agents and contractors on demand from and against all liability for (i) death or personal injury, (ii) loss of or damage to property, (iii) breach of statutory duty, and (iv) actions, claims demands, costs, charges and expenses, which may arise out of, or in consequence of, the design, construction, operation or maintenance of the</p>

Ref	Subject-matter	Description
		<p>assets or the performance or non-performance by the Contractor of its obligations under the Project Agreement or the presence on the Authority's property of the Contractor, a sub-contractor of the Contractor, their employees or agents.</p> <p>The Authority may require that the Contractor cater the catalogue of the financial convents, or the Contractor's parent and group member issue corporate guarantees, or Contractor's sub-contractor provide collateral warranties.</p>
23.	Insurance	<p>The Contractor shall provide the insurance policies in accordance with the good industry practice. The Authority shall engage an insurance advisor which should advise on type of the insurances that are need in accordance with the good industry practice and the terms of the insurance policies. The Authority's endorsements would typically include the Authority as a co-insured, non-vitiations, waiver of subrogation, and other like endorsements typical for a project of the similar nature and kind.</p> <p>The Project Agreement should ensure that the insured amounts and deductibles are regularly increased to keep the pace with the inflation.</p> <p>All insurance should be placed through a reputable insurance of a good standing. The Authority should approve the selected insurers and insurance broker, where such approval shall not be unreasonably withheld or delayed.</p> <p>If the insurance event occurs, the Contractor shall be obliged to reinstate the project assets and the Service. The Project Agreement shall provide a procedure for reinstatement of the project assets after an insured event has occurred.</p> <p>The Authority and the Contractor will share the risk of insurance premiums fluctuations over the life of the Project Agreement. The Parties shall agree on the insurance premium risk sharing schedule that will in detail regulate the principles and mechanics for sharing this risk.</p> <p>If the required risk becomes uninsurable, the Parties should agree how to manage such risk. If the Parties fail to agree how they will manage the uninsurable risk, the</p>

Ref	Subject-matter	Description
		<p>Authority may opt to (i) terminate the Project Agreement and pay the adequate termination compensation to the Contractor, or (ii) the Project Agreement to continue and the Authority to bear such uninsurable risk. In case under (ii) and if the uninsurable risk occurs, the Authority may (a) pay to the Contractor amount equal to the insurance proceed that would be payable to the Contractor had the risk been insurable and the Project Agreement will continue, or (b) pay to the Contractor an adequate termination compensation and the Project Agreement would end. Where the Project Agreement has continued, the Unitary Charge will be reduced by an amount equal to the premium paid for uninsurable risk.</p> <p>If insurance for a term or condition is no longer available and unavailability of such term and conditions is not attributable to the Contractor, the Contractor should not be obliged to take out such term or condition and the Authority shall have no right to terminate the Project Agreement. This unavailability should be treated as a Relief Event.</p>
<p>24.</p>	<p>Information and confidentiality</p>	<p>The Contractor shall diligently maintain all records related to the Project Agreement and the Project and shall provide the Authority with any copy of these records at the Authority's request.</p> <p>The Contractor shall not communicate with the representatives of the press, television, radio, or other media on any matter related to the Project Agreement, without prior approval of the Authority.</p> <p>As much information related to the Project Agreement and Project as possible should be publicly available. The Contractor shall prepare a catalogue of commercially sensitive information that will be treated as the confidential information and not publicly available.</p>
<p>25.</p>	<p>IP Rights</p>	<p>The Contractor will obtain such licences as may be required to operate any technology or other intellectual property which is required to perform the construction or the services.</p> <p>The Contractor will hold the Authority harmless from and against all claims, demands, losses, costs, damages, actions, suits or proceedings arising out of the Contractor's</p>

Ref	Subject-matter	Description
		<p>infringement of any intellectual property rights.</p> <p>The Contractor shall grant or procure that the Authority is granted an unconditional and irrevocable perpetual licence to use, in whole or in part, all plans, specifications and other documents and all technology and models furnished or used by the Contractor for any purpose related to the Project.</p> <p>treatment of Contaminated Water from the Mine and the Fan Area</p>
<p>26.</p>	<p>Dispute Resolution</p>	<p>The Project Agreement shall envisage the adequate fast-track, three tier ADR procedure based on the following principles:</p> <ul style="list-style-type: none"> (A) The Parties will try to resolve each dispute through amicable negotiations that will be limited in time; (B) If the Parties fail to reach an amicable agreement, each Party may refer the dispute to an expert panel. The Parties will appoint three members to the expert panel for the construction phase (promptly after they have signed the Project Agreement) and three members to the expert panel for the services phase (promptly after the Service commencement date); (C) Following the resolution made by expert panel, a Party that is dissatisfied or wished to challenge the experts' resolution, may refer the dispute to the arbitration.
<p>27.</p>	<p>Authority Step-in</p>	<p>The Authority shall have a right to step in the position of the Contractor when the Authority reasonably believes that it needs to take such action because the serious risk exists or the Authority should discharge its duty.</p> <p>If the Authority's step-in follows the Contractor's breach of the Project Agreement, the Authority shall continue paying the Unitary Charge as if the Services had been fully performed. The Authority may set off all costs associated with it stepping in and performing the Services against the Unitary Charge payable to the Contractor.</p> <p>If the Authority's step-in does not follow the Contractor's breach of the Project Agreement, the Authority shall</p>

Ref	Subject-matter	Description
		<p>continue paying the Unitary Charge as if the Services had been fully performed. The Authority however shall have no set-off rights in this case; the Authority should bear all cost associated with its stepping in.</p> <p>In either case, the Contractor should provide the Authority with reasonable assistance.</p> <p>The Authority may access the Contractor's facilities used to perform the services and other project assets.</p>
28.	Assignment	<p>The Contractor may not assign, novate or transfer its rights under the Project Agreement. As an exception to this general rule, the Contractor may assign the Project Agreement as part of its senior lenders' security package.</p> <p>The senior lender may appoint a replacement Contractor in accordance with their rights under the Direct Agreement(s), without the Authority's prior consent. The senior lenders may also, in accordance with security rights which they may take over the shares in the Contractor, transfer these shares.</p>
29.	Change of control	<p>Any transaction pursuant to which the Contractor ceases to be directly or indirectly, a wholly owned subsidiary of its parent or an affiliate of its parent will be deemed to be an assignment of the Project Agreement that requires the Authority's consent.</p>
30.	Refinancing	<p>The Parties shall agree that the Contractor may refinance its equity and debt at any time during the life of the Project Agreement under the following principles:</p> <p>A) The Contractor shall obtain the Authority's clearance for any planned refinancing, unless the refinancing falls under the exempt refinancing. The exempt refinancing are, inter alia, refinancing of the junior capital (i.e. subordinated shareholders loan [<i>equity in all but name</i>]), refinancing envisaged under base case model, corporate refinancing, interest rate hedging, refinancing through changes in tax and account policies, or qualified bank transaction.</p> <p>B) Refinancing (windfall) gain must be shared between the Parties as 50:50.</p>

Ref	Subject-matter	Description
		<p>C) The Contractor shall deliver all information and documents on refinancing to the Authority, whereas the Authority shall have a right to fully audit the refinancing and underlying documentation.</p> <p>D) The Contractor shall pay the Authority's share in the refinancing gain as lump sum payment, or the Contractor will reduce the Unitary Charge, or the refinancing gain will be settled through the blend of single-off payment and reduction of the Unitary Charge.</p>
31.	Governing law	Serbian law shall govern the Project Agreement and the Parties' relations under the Project Agreement.
32.	Miscellaneous	The Project Agreement should contain a number of standard clauses such as: (i) Waiver clause, (ii) Severability clause, (iii) Counterparts, (iv) Interest on Late Payments, (v) Continuing Obligations.

Schedule 2
Model Direct Agreement

DIREKTNI UGOVOR

DIRECT AGREEMENT

između

by and between

[Naziv ugovorne strane]
[sedište, ostali podaci za identifikaciju]

[name party]
[seat, other identification data]

("Javni partner")

("Authority")

i

and

[Naziv ugovorne strane]
[sedište, ostali podaci za identifikaciju]

[name party]
[seat, other identification data]

("Finansijeri")

("Senior Lenders")

i

and

[Naziv ugovorne strane]
[sedište, ostali podaci za identifikaciju]

[name party]
[seat, other identification data]

("Privatni Partner")

("Contractor")

Zaključen u [..]
dana [...]

In [...],
made on this [...]

Preambula

S OBZIROM DA [prema kontekstu svakog konkretnog ugovora po potrebi];

SADA, PREMA TOME, ugovorne strane su se dogovorile kako sledi:

1. DEFINICIJE

U ovom Direktnom ugovoru, ukoliko nije drugačije uređeno:

Povezano društvo znači [definicija može biti specifična u svakom konkretnom slučaju ili se jednostavno može uputiti na definiciju povezanih lica utvrđenu merodavnim pravom]

Imenovani predstavnik jeste Predstavnik koji je preuzeo prava Privatnog partnera po osnovu Javnog ugovora, a kako je regulisano Članom 5.1.

Sporazum o kreditu znači [...] sporazum o kreditu na dan [datum] između Privatnog partnera and Finansijera.

Povreda ugovora od strane Privatnog partnera ima značenje koje mu je dato u Javnom ugovoru.

Povreda ugovora ima značenje koje mu je dato u Sporazumu o kreditu.

Likvidno tržište ima značenje koje mu je dato u Javnom ugovoru.

Javni ugovor znači javni ugovor [...] [definisati prema konkretnom slučaju]

Predstavnik znači:

- (i) bilo koji Finansijer i/ili, bilo koje Povezano društvo Finansijera
- (ii) Upravnik Privatnog partnera koji se može postaviti u skladu sa odredbama Dokumenta o obezbeđenju;

Preamble

WHEREAS [based on the context of each specific agreement as needed];

NOW THEREFORE, the parties have agreed as follows:

1. DEFINITIONS

In this Direct Agreement, unless the context otherwise requires:

Affiliate means [the definition could be case specific or simply point to the definition of the affiliation set by the applicable laws]

Appointed Representative means a Representative that has assumed the Contractor's rights under the Public Agreement based on Clause 5.1.

Credit Agreement means the [...] credit agreement dated [date] between the Contractor and the Senior Lenders.

Contractor Default shall have the meaning given to it in the Public Agreement.

Event of Default shall have the meaning given to it in the Credit Agreement.

Liquid Market shall bear the meaning given to it in the Public Agreement.

Public Agreement means the Public Agreement [...] [should be specified]

Representative means:

- (i) the any Senior Lender and/or any of their Affiliates
- (ii) manager of the Contractor appointed under the Security Documents

- (iii) lice koje je direktno ili indirektno u vlasništvu ili pod kontrolom bilo kog Finansijera ili više Finansijera ili
- (iv) bilo koje drugo lice koga odobri Javni partner (pri čemu takvo odobrenje neće biti bezrazložno uskraćeno niti neblagovremeno dato).

Obavezni period znači, po osnovu člana 4. (Nepostojanje likvidnog tržišta) period koji počinje na dan Obaveštenja o raskidu i traje:

- (i) tokom faze izgradnje - [120] dana; i
- (ii) tokom faze poslovanja, - [90] dana.

[Ova definicija će zavisiti od vrste projekta tj. da li ima dve faze ili ne, koji su zahtevi strana itd.]

Dokumenti o obezbeđenju znači, [...] [definicija zavisi od konkurentnog slučaja. Potrebno je navesti dokumenta u skladu sa kojima je Finansijerima dato obezbeđenje na pravima Privatnog partnera prema Javnom ugovoru]

Ugovori o finansiranju znači, [...] [izlistati ugovore o finansiranju zaključene između Finansijera i Privatnog partnera]

Datum preuzimanja ugovorne pozicije znači datum na koji Finansijeri preduzmu bilo koju radnju po osnovu člana 5.1.

Period preuzimanja ugovorne pozicije označava period od Datuma preuzimanja ugovorne pozicije do datuma (zaključno sa njim) koji prvi nastupi:

- (i) Datuma istupanja iz ugovorne pozicije
- (ii) Datuma ustupanja po osnovu člana 8.;

- (iii) a person directly or indirectly owned or controlled by any Senior Lender(s); or
- (iv) any other person approved by the Authority (such approval not to be unreasonably withheld or delayed).

Required Period means, subject to Clause 4 (No Liquid Market) the period starting on the date of a Termination Notice and:

- (i) during the construction phase ending [120] days later; and
- (ii) during the operating phase ending [90] days later

[This definition will depend on the type of project i.e. whether or not it has two phases what are parties' requirements]

Security documents means [...] [the definition is case specific. Should list the documents under which the Senior Lenders have been granted security over the rights of the Contractor under the Public Agreement]

Senior Financing Agreements means [...] [list all the financing agreement concluded between the Private Partner and the Senior Lenders]

Step-In Date means the date on which the Senior Lender takes any action under Clause 5.1.

Step-In Period means the period from the Step-In Date up to and including the earlier of:

- (i) the Step-Out Date
- (ii) the date of any novation under Clause 8;
- (iii) the date of any termination for

- (iii) Datuma raskida zbog povrede po osnovu člana 6.; i
- (iv) datuma isteka trajanja Javnog ugovora.

Datum istupanja iz ugovorne pozicije znači datum koji pada [30] dana od datuma obaveštenja datog po osnovu člana 7. (Istupanje iz ugovorne pozicije) [Broj dana u ovoj definiciji će zavisiti od broja dana potrebnih Javnom partneru da pronađe adekvatnu zamenu za pružanje predmetne usluge].

Adekvatna zamena za Privatnog partnera znači lice kojeg je odobrio Javni partner (pri čemu takvo odobrenje neće biti bezrazložno uskraćeno niti neblagovremeno dato) i to lice:

- (i) koje ima pravnu sposobnost, prava i ovlašćenja da postane strana i da izvršava obaveze Privatnog partnera po osnovu Javnog ugovora; i
- (ii) koje zapošljava lica koja imaju odgovarajuće kvalifikacije, iskustvo i tehničku kompetentnost i koje raspolaže sa dovoljno sredstava (uključujući angažovana finansijska sredstva i pod-ugovore) koja mu omogućavaju da izvršava obaveze Privatnog partnera po osnovu Javnog ugovora.

[Ove zahteve treba prilagoditi vrsti projekta i zahteva Javnog partnera]

Obaveštenje o raskidu označava obaveštenje koje je Javni partner dao Finansijeru po osnovu člana 3.1 (A).

2. SAGLASNOST NA PRUŽENO OBEZBEĐENJE

2.1 Javni partner potvrđuje da je obavešten i saglasan sa

breach under Clause 6; and

- (iv) the date of expiry of the Public Agreement.

Step-Out Date means the date falling [30] days after the date of the notice given under Clause 7 (Step- Out) [The number of days in this definition will depend on the number of days needed by the Authority to find a replacement of the service].

Suitable Substitute Contractor means a person approved by the Authority (such approval not to be unreasonably withheld or delayed) as:

- (i) having the legal capacity, power and authority to become a party to and perform the obligations of the Contractor under the Public Agreement; and
- (ii) employing persons having the appropriate qualifications, experience and technical competence and having the resources available to it (including committed financial resources and sub-contracts) which are sufficient to enable it to perform the obligations of the Contractor under the Public Agreement.

[These requirements should be adapted to the type of project and depend on the Authority]

Termination Notice means a notice given by the Authority to the Senior Lenders under Clause 3.1 (A).

2. CONSENT TO SECURITY

2.1 The Authority acknowledges notice of, and consents to, the

obezbeđenjem koje je nad pravima Privatnog partnera po osnovu Javnog ugovora uspostavljeno u korist Finansijera na osnovu Dokumentata o obezbeđenju.

2.2 Javni partner potvrđuje da nije primio obaveštenje o ili dao saglasnost na uspostavljanje ni jednog drugog obezbeđenja nad pravima Privatnog partnera po osnovu Javnog ugovora.

3. OBAVEŠTENJE O RASKIDU I POSTOJEĆE OBAVEZE

3.1 Javni partner ne sme raskinuti Javni ugovor niti dati obaveštenje kojim se Javni ugovor raskida zbog povrede Javnog ugovora od strane Privatnog partnera, a da ne da Finansijerima:

(A) najmanje Obavezni period koji traje od trenutka dostavljanja pisanog obaveštenja, a u kom pisanom obaveštenju se navodi:

- (i) predloženi Datum raskida; i
- (ii) detaljno opisan razlog za raskid; i

(B) obaveštenje koje sadrži pojedinosti o svakom iznosu koji Privatni partner duguje Javnom partneru, i svim drugim postojećim obavezama ili neizmerenim obavezama sa kojima je Javni partner upoznat (nakon sprovedene razumne provere):

- (i) u vreme davanja Obaveštenja o raskidu ili obaveštenja o Povredi ugovora; i/ili
- (ii) koje dospevaju poslednjeg dana ili pre isteka

security interest granted over the Contractor's rights under the Public Agreement effected by the Contractor in favour of the Senior Lenders under the Security Document.

2.2 The Authority confirms that it has not received notice of or provided consent to any other security interest granted over the Contractor's rights under the Public Agreement.

3. NOTICE OF TERMINATION AND EXISTING LIABILITIES

3.1 The Authority shall not terminate or give notice terminating the Public Agreement on the grounds of Contractor Default without giving to the Senior Lenders:

(A) at least the Required Period of prior written notice stating:

- (i) the proposed Termination Date; and
- (ii) the grounds for termination in reasonable detail, and

(B) a notice containing details of any amount owed by the Contractor to the Authority, and any other existing liabilities or unperformed obligations of which the Authority is aware (having made reasonable enquiry):

- (i) at the time of the Termination Notice or the notification of an Event of Default; and/or
- (ii) which will fall due on or prior to the end of the Required Period, under the Public Agreement.

Obaveznog perioda, po osnovu Javnog ugovora.

obaveštenje se dostavlja najkasnije 30 dana od datuma Obaveštenja o raskidu ili (ukoliko je pre) 30 dana od dana kada Finansijeri obaveste Javnog partnera da je došlo do Povrede ugovora.

the notification is delivered not later than the date falling 30 days after the date of a Termination Notice or (if earlier) the date falling 30 days after the date on which the Senior Lenders inform the Authority that an Event of Default has occurred.

4. NEPOSTOJANJE LIKVIDNOG TRŽIŠTA

4. NO LIQUID MARKET

4.1 U bilo kom trenutku tokom Obaveznog perioda Finansijeri mogu izdati pisano obaveštenje ("**Obaveštenje o nepostojanju likvidnog tržišta**") Javnom partneru u kome navodi razloge zašto smatra da ne postoji Likvidno Tržište.

4.1 At any time during the Required Period the Senior Lenders may issue a written notice (the "**No Liquid Market Notice**") to the Authority setting out the reasons why the Senior Lenders do not believe that a Liquid Market exists.

4.2 Na datum ili pre datuma koji pada 14 dana od datuma na koji Javni partner primi Obaveštenje o nepostojanju likvidnog tržišta, Javni partner će obavestiti Finansijere o svom mišljenju da li Likvidno Tržište postoji ili ne. U slučaju da Javni partner smatra da Likvidno Tržište postoji, takvo obaveštenje će sadržati razloge za takvo uverenje Javnog partnera. Ukoliko se strane ne slože o tome da li postoji likvidno tržište ili ne, u tom slučaju bilo koja strana može da uputi spor na rešavanje u skladu sa članom [referenca na odredbe Javnog ugovora kojim se reguliše rešavanje sporova ili definisati posebne odredbe Direktog ugovora koje se bave rešavanjem sporova (što nije market standard)].

4.2 On or before the date falling 14 days after the date on which a No Liquid Market Notice is received by the Authority, the Authority shall notify the Senior Lenders of its opinion as to whether or not a Liquid Market exists. Where the Authority believes that a Liquid Market does exist, such notice shall set out the reasons for the Authority's belief. If the parties do not agree whether or not a Liquid Market exists, then either party may refer the dispute to be determined in accordance with [reference to article of the Public Agreement regulating dispute resolution or define provisions of the Direct Agreement which regulate dispute resolution (which is not a market standards)].

4.3 Ukoliko se strane slože ili bude utvrđeno u skladu sa [referenca

4.3 If the parties agree or it is determined in accordance with

na odredbe Javnog ugovora o rešavanju sporova] da ne postoji Likvidno Tržište, Javni ugovor se automatski raskida i primenjivaće se odredbe [Javnog ugovora koji regulišu pitanje raskida bez ponovnog tenderskog postupka].

[reference to the provisions of the Public Agreement on dispute resolution] that no Liquid Market exists, the Public Agreement shall automatically terminate and the provisions of [Clause reference to the provisions of the Public agreement on No Retendering Procedure] shall apply.

4.4 Ukoliko se bilo koji spor u vezi sa ovim članom 4 rešava po osnovu [reference na odredbe Javnog ugovora o rešavanju sporova], Obavezni period se produžava za vreme koje je utrošeno za rešavanje takvog spora po osnovu [reference na odredbe Javnog ugovora o rešavanju sporova].

4.4 If any dispute relating to this Clause 4 is determined under [reference to the provisions of the Public agreement on dispute resolution] the Required Period shall be extended by the period of time spent determining such dispute under [reference to the provisions of the Public agreement on dispute resolution].

5. PREDSTAVNIK

5. REPRESENTATIVE

5.1 Ne dovodeći u pitanje prava Finansijera po osnovu Dokumentata o obezbeđenju, u bilo kom trenutku:

5.1 Without prejudice to the Senior Lenders rights under the Security Documents, at any time:

(i) tokom trajanja Povrede ugovora (bez obzira da li je poslato Obaveštenje o raskidu ili ne); ili

(i) during which an Event of Default is subsisting (whether or not a Termination Notice has been served); or

(ii) tokom Obaveznog perioda; Finansijeri mogu da obezbede da Predstavnik preuzme solidarno sa Privatnim partnerom sva prava Privatnog partnera prema Javnom ugovoru.

(ii) during the Required Period, the Senior Lenders may procure that a Representative assumes, jointly and severally with the Contractor, all of the Contractor's rights under the Public Agreement.

5.2 Finansijeri će dostaviti Javnom partneru prethodno obaveštenje [5] dana unapred o bilo kojim radnjama koje će preduzeti, a koje su navedene u ovom članu 5.

5.2 The Senior Lenders shall give the Authority [5] days prior notice of any action to be taken by it referred to in this Clause 5.

6. PERIOD PREUZIMANJA UGOVORNE POZICIJE

6. STEP-IN PERIOD

6.1 Ne dovodeći u pitanje odredbe člana 3, ali na osnovu stava 6.2 u daljem tekstu, Javni partner ne sme raskinuti Javni Ugovor tokom Perioda preuzimanja ugovorne pozicije po osnovu:

- (i) toga što je Finansijer preduzeo bio koju radnju navedenu u članu 5 (Predstavnik) ili realizovao bilo koji Dokument o obezbeđenju; ili
- (ii) koji nastane pre Datuma preuzimanja ugovorne pozicije sa kojim je Javni partner upoznat (pošto se u razumnoj meri raspitao i bez obzira da li je taj osnov nastavio da postoji na Datum preuzimanja ugovorne pozicije); ili
- (iii) koji nastane isključivo u vezi sa Privatnim partnerom,

Osim ako, u slučaju stava (ii) gore:

- (i) osnov je nastao tokom [faze izgradnje], a izgradnja nije završena na dan ili pre datuma koji pada [12] meseci od datuma na koji bi Javni partner imao pravo da raskine Javni ugovor zbog neizvedenih radova; ili
- (ii) osnov je nastao tokom [faze poslovanja], i ni Imenovani predstavnik ni Privatni partner ne čine sve što je u njihovoj moći (uključujući sprovođenje bilo kog programa za sanaciju) da se ukloni bilo koja povreda

6.1 Without prejudice to Clause 3 , but subject to paragraph 6.2 below, the Authority shall not terminate the Public Agreement during the Step- In Period on grounds:

- (i) that the Senior Lenders have taken any action referred to in Clause 5 (Representative) or enforced any Security Document(s); or
- (ii) arising prior to the Step-In Date of which the Authority is aware (having made reasonable enquiry and whether or not continuing at the Step-In Date); or
- (iii) arising solely in relation to the Contractor,

unless, in the case of paragraph (ii) above:

- (i) the grounds arose during the [construction phase], ,and construction is not completed on or before the date falling [12] months after the date on which the Authority would have been entitled to terminate the Public Agreement for non-completion; or
- (ii) the grounds arose during the [operation phase], and neither the Appointed Representative nor the Contractor is using all reasonable endeavours

Javnog ugovora koja: (i) je nastala pre Datuma preuzimanja ugovorne pozicije; i (ii) traje (a koja se može otkloniti); i (iii) bi dala pravo Javni partner da raskine Javni ugovor

(including implementation of any remedial programme) to remedy any breach of the Public agreement that: (i) arose prior to the Step-In Date; and (ii) is continuing (and capable of remedy); and (iii) would have entitled the Authority to terminate the Contract.

6.2 Javni partner ima pravo da raskine Javni ugovor pisanim obaveštenjem dostavljenom Privatnom partneru i Imenovanom predstavniku:

- (i) ukoliko bilo koji iznos iz člana 3(B)(i) ne bude plaćen Javnom partneru pre ili na Datum preuzimanja ugovorne pozicije;
- (ii) ako bilo koji iznos iz člana 3(B)(ii) ne bude plaćen poslednjeg dana ili pre isteka Obaveznog perioda;
- (iii) ako iznosi, sa kojima Javni partner nije bio upoznat (nakon sprovedene razumne provere) u vreme davanja Obaveštenja o raskidu ili Povrede ugovora, naknadno dospeju za plaćanje i ne budu izmireni na datum ili pre datuma koji pada [30] dana od datuma na koji su Finansijeri obavešteni o obavezi plaćanja ovih iznosa; ili
- (iv) po osnovu koji nastane nakon Datuma preuzimanja ugovorne pozicije u skladu sa uslovima Javnog ugovora,

6.2 The Authority shall be entitled to terminate the Public Agreement by written notice to the Contractor and the Appointed Representative:

- (i) if any amount referred to in Clause 3(B)(i) above has not been paid to the Authority on or before the Step-In Date;
- (ii) if any amount referred to in Clause 3(B)(ii) has not been paid on or before the last day of the Required Period;
- (iii) if amounts, of which the Authority was not aware (having made reasonable enquiry) at the time of the Termination Notice or the Event of Default, subsequently become payable and are not discharged on or before the date falling [30] days after the date on which the liability for these amounts is notified to the Senior Lenders; or
- (iv) on grounds arising after the Step-In Date in accordance with the terms of the Public Agreement

pod uslovom da tokom Perioda preuzimanja ugovorne pozicije za potrebe raskida Javnog ugovora ne budu uzeta u obzir [pisma upozorenja, odbici i/ili kazneni poeni] koji su nastali pre Datuma preuzimanja ugovorne pozicije, već da oni budu uzeti u obzir nakon Datuma istupanja iz ugovorne pozicije.

provided that for the purposes of termination under the Public Agreement, [warning notices, deductions and/or penalty points] that arose prior to the Step-In Date shall not be taken into account during the Step-In Period but shall be taken into account after the Step-Out Date.

6.3 Javni partner će poslovati sa Imenovanim predstavnikom, a ne Privatnim partnerom tokom Perioda preuzimanja ugovorne pozicije.

6.3 The Authority shall deal with the Appointed Representative and not the Contractor during the Step-In Period.

7. ISTUPANJE IZ UGOVORNE POZICIJE

7. STEP-OUT

7.1 Imenovani predstavnik će nakon [30] dana od prethodnog pisanog obaveštenja Finansijera ili Imenovanog predstavnika Javnom partneru, biti oslobođen svih svojih obaveza i dužnosti prema Javnom partneru po osnovu Javnog ugovora koje su nastale pre Datuma istupanja iz ugovorne pozicije i prestaće da važe prava Imenovanog predstavnika u odnosu na Javnog partnera.

7.1 The Appointed Representative will, on [30] days' prior written notice to the Authority from the Senior Lenders or the Appointed Representative, be released from all of its obligations and liabilities to the Authority under the Public Agreement arising prior to the Step- Out Date and rights of the Appointed Representative against the Authority will be cancelled.

7.2 Privatni partner će i dalje biti obavezan uslovima Javnog ugovora bez obzira što je nastupio Datum istupanja iz ugovorne pozicije.

7.2 The Contractor shall continue to be bound by the terms of the Public Agreement, notwithstanding the occurrence of the Step-Out Date.

8. Konačno preuzimanje ugovorne pozicije

8. NOVATION

8.1 Po osnovu člana 8.2, u bilo kom trenutku:

8.1 Subject to Clause 8.2, at any time:

(i) tokom trajanja Povrede

(i) during which an Event of

	ugovora ili		Default is subsisting; or
	(ii) tokom Perioda preuzimanja ugovorne pozicije		(ii) during the Step-In Period,
8.2	Javni partner će obavestiti Finansijere da li je lice na koje Finansijeri predlažu da se prenesu prava i obaveze Privatnog partnera po osnovu Javnog ugovora Adekvatna zamena za Privatnog partnera, a u roku od [30] od dana prijema svih informacija koje opravdano zahteva Javni partner kako bi odlučio da li je predloženo lice Adekvatna zamena za Privatnog partnera	8.2	The Authority shall notify the Senior Lenders as to whether any person to whom the Senior Lenders proposes to transfer the Contractor's rights and liabilities under the Public Agreement is a Suitable Substitute Contractor, on or before the date falling [30] days after the date of receipt of all information reasonably required by the Authority to decide whether the proposed transferee is a Suitable Substitute Contractor.
8.3	Javni partner neće bezrazložno uskratiti svoju saglasnost niti neblagovremeno doneti odluku da je predloženo lice na koga se prenose prava Adekvatna zamena za Privatnog partnera.	8.3	The Authority shall not unreasonably withhold or delay its decision on whether the proposed transferee is a Suitable Substitute Contractor.
8.4	Na datum stupanja na snagu ustupanja navedenog u članu 8.1.:	8.4	On any transfer referred to in Clause 8.1. becoming effective:
	(i) Privatni partner će biti oslobođen od svih obaveza koje nastanu po osnovu ili u vezi sa Javnim ugovorom od tog datuma i novi privatni partner će postati odgovoran za obaveze koje nastanu na taj datum i posle tog datuma;		(i) the Contractor shall be released from any obligations arising under or in connection with the Public Agreement from that date and the new contractor shall become liable for obligations arising on or after that date;
	(ii) bilo koji pripisani [poeni za učinak odnosno pisma upozorenja] po osnovu Javnog ugovora se neće moći iskoristiti u cilju raskida Javnog ugovora, ali ne dovodeći u pitanje prava		(ii) any accrued [performance points and/or warning notices] incurred under the Public agreement shall, for the purposes of termination only, and without prejudice to the rights of the Authority to make financial

- Javnog partnera da izvrši finansijske odbitke;
- (iii) smatraće se da bilo koji osnov koji postoji u tom trenutku za raskid Javnog ugovora od strane Javnog partnera nema dejstvo i bilo koje aktuelno Obaveštenje o raskidu će automatski biti opozvano; i
 - (iv) Javni partner će zaključiti direktni ugovor sa poveriocima koji kreditiraju novog privatnog partnera po suštinski istim uslovima koji su navedeni u ovom Direktnom Ugovoru.

9. USTUPANJE

9.1 Ni jedna strana ovog Direktnog ugovora ne sme da prenese niti ustupi bilo koji deo svojih prava ili obaveza po osnovu ovog Direktnog Ugovora, osim što:

- (i) Finansireri mogu da ustupe ili prenesu svoja prava i obaveze po osnovu ovog Direktnog ugovora na pravnog sledbenika Finansirera u skladu sa Ugovorima o finansiranju bez saglasnosti Javnog partnera;
- (ii) bilo koji Finansireri može da ustupi ili prenese svoja prava po osnovu Ugovora o finansiranju u skladu sa uslovima Ugovora o finansiranju; i
- (iii) Javni partner može ustupiti, izvršiti ili na drugi način preneti svoja prava i/ili obaveze po osnovu ovog Direktnog Ugovora bilo kom

deductions, be cancelled;

- (iii) any then subsisting ground for termination of the Public Agreement by the Authority shall be deemed to have no effect and any subsisting Termination Notice shall be automatically revoked; and
- (iv) the Authority shall enter into a direct agreement with the lenders lending to the new Contractor on substantially the same terms as this Direct Agreement.

9. ASSIGNMENT

9.1 No party to Direct Agreement may assign or transfer any part of its rights or obligations under the Direct Agreement, save that:

- (i) the Senior Lenders may assign or transfer their rights and obligations under this Direct Agreement to a successor of the Senior Lenders in accordance with the Senior Financing Agreements concluded without the consent of the Authority;
- (ii) any Senior Lender may assign or transfer its rights under the Senior Financing Agreements in accordance with the terms of the Senior Financing Agreements; and
- (iii) the Authority may assign, or otherwise transfer its rights and/or obligations

licu kome Javni partner ustupa, na koga izvršava ili na drugi način prenosi svoja prava i/ili obaveze po osnovu Javnog ugovora u skladu [referenca na član Javnog ugovora kojim se reguliše prenos prava na treće lice]

under this Agreement to any person that the Authority assigns, or otherwise transfer its rights and/or obligations under the Public Agreement in accordance with [Reference to Clause of the Public Agreement regulating transfers to third parties.]

9.2 Ukoliko se primenjuje stav 9.1 onda Javni partner zaključuje neposredan ugovor sa novim Finansijerima po suštinski istim uslovima kao što su uslovi ovog Direktnog ugovora.

9.2 If paragraph 9.1 applies then the Authority shall enter into a direct agreement with the new Senior lenders on substantially the same terms as this Direct agreement.

10. RAZNO

10. MISCELLANEOUS

10.1 Javni partner će o trošku Privatnog partneri, preduzeti sve radnje koje Finansijeri, Imenovani predstavnik ili Predstavnik koji sprovodi prenos u skladu sa članom 8 (1) mogu da zahtevaju u cilju sprovođenja bilo kog prenosa ili oslobađanja po osnovu člana 5, 7 i 8 uključujući izvršenje bilo kog prenosa ili ustupanja, i davanje bilo kog obaveštenja, naloga ili uputstva i sprovođenja bilo koje registracije, koje, u svakom pojedinačnom slučaju, Finansijeri, Imenovani predstavnik ili Predstavnik opravdano zahtevaju.

10.1 The Authority shall at the Contractor's expense, take whatever action the Senior Lenders, an Appointed Representative or a Representative taking a transfer in accordance with Clause 8(1) may require for perfecting any transfer or release under Clauses 5, 7 and 8 including the execution of any transfer or assignment, and the giving of any notice, order or direction and the making of any registration which, in each case, the Senior Lenders, Appointed Representative or Representative reasonably requires.

10.2 Javni partner i Privatni partner neće preduzeti bilo koje radnje koje mogu dovesti do prestanka [društva za posebne namene i/ili Privatnog partnera] kao što su pokretanje stečajnog postupka ili likvidacije sve dok prava Finansijera po osnovu ovog Direktnog ugovora ne budu

10.2 The Authority or the Contractor shall not take any action to wind up the [special purpose vehicle and or the Contractor] such as initiation of the insolvency or liquidation proceedings until the right of the Senior Lenders under this Direct Agreement have been excused.

iscrpljena.

10.3 Ovaj Direktni ugovor će ostati na snazi do datuma konačne otplate svih iznosa u celosti koje Javni partner može da duguje ili će dugovati Privatnom partneru po osnovu [odjeljak Javnog ugovora koji reguliše prevremeni raskid] [ako se nakon prevremenog raskida sredstva vraćaju Javnom partneru, a Javni partner ima obavezu da isplati kompenzaciju prilikom raskida Finansijeri bi se trebali obavezati da oslobode bilo koje sredstvo obezbeđenja zasnovano u njihovu korist nad sredstvima, koje nije prethodno ustupljeno Javnog partnera].

10.4 Finansijeri u pogledu stavova (i), (ii) i (iii), i Privatni partner u pogledu stava (iv), će bez odlaganja obavestiti Javnog partnera:

- (i) o svakoj odluci da se ubrza dospelost bilo kojih iznosa koje Privatni partner duguje Finansijerima po osnovu Sporazuma o kreditu i/ili svakog zahteva za otplatu;
- (ii) o datumu iz stava 10.3 gore na datum ili pre datuma koji pada 30 dana nakon njegovog nastupanja;
- (iii) o pojedinostima i iznosima bilo kog predloženog dodatnog zaduživanja uključujući: (a) okolnosti koje dovode do njega i razloge za takvo

10.3 This Direct Agreement shall remain in effect until the date on which all amounts which may be or become owing by the Authority to the Contractor under [Sections of the public agreement governing Early Termination] of the Public Agreement have been irrevocably paid in full, [if the assets are returned to the Authority upon early termination and the Authority pays the early termination compensation - the Senior Lenders should agree to release any security granted in their favour over the assets which has not previously been assigned to the Authority].

10.4 Senior Lended, in respect of paragraphs (i), (ii) and (iii), and the Contractor in respect of paragraph (iv), shall promptly notify the Authority of:

- (i) any decisions to accelerate the maturity of any amounts owing by the Contractor to the Senior Lenders under the Credit Agreement and/or demand repayment;
- (ii) the date referred to in paragraph 10.3 above on or before the date falling 30 days after its occurrence;
- (iii) the details and amount of any proposed additional borrowing, including: (a) the circumstance giving rise to it and reasons for it; and (b) the terms on which it

zaduživanje; i (b) uslove pod kojima se takvo zaduživanje vrši; i

- (iv) prvog radnog dana svakog kalendarskog meseca tokom kojeg postoji ili može da postoji bilo koje dozvoljeno zaduživanje, o neizmirenom iznosu po osnovu Ugovora o finansiranju, i pod uslovom da Privatni partner raspolaže sa relevantnim informacijama (pošto se propisno raspitao u razumnoj meri): (a) iznosu bilo koje raspodele sredstava koju je izvršio Privatni Partner; i (b) o iznosu bilo kog pozitivnog salda na bilo kom računu Privatnog partnera;

will be borrowed; and

- (iv) on the first business day of each calendar month during which any additional borrowing is, or may be, subsisting, the amount outstanding under the Senior Financing Agreements, and, to the extent the Contractor is aware (having reasonable and proper enquiry): (a) the amount of any distribution made by the Contractor; and (b) the amount of any credit balance on any account of the Contractor;

10.5 Privatni partner pristupa ovom Direktnom ugovoru da bi primio k znanju i dao saglasnost na dogovore koji su ovde izloženi i saglasan je da neće svesno učiniti niti propustiti da učini bilo šta što može da spreči bilo koju stranu da realizuje svoja prava po osnovu ovog Direktnog ugovora

10.5 The Contractor joins in this Direct Agreement to acknowledge and consent to the arrangements set out and agrees not knowingly to do or omit to do anything that may prevent any party from enforcing its rights under this Direct agreement.

10.6 Da bi se izbegla sumnja, ukoliko postoji bilo koji sukob ili nedoslednost između odredba ovog Direktnog ugovora i Javnog ugovora, odredbe Direktnog ugovora će imati prednost.

10.6 For the avoidance of doubt, if there is any conflict or inconsistency between the provisions of this Direct Agreement and the Public Agreement, the provisions of Direct Agreement shall prevail.

10.7 Sve izmene i dopune ovog Direktnog ugovora biće učinjene u pismenoj formi.

10.7 Any amendments and modification to this Direct Agreement shall be made in writing.

10.8 U slučaju da bilo koja od odredaba

10.8 Should any term of the Direct

Direktnog ugovora bude proglašena nevažećom ili neizvršivom od strane suda, arbitražnog veća ili bilo kog drugog nadležnog organa, to neće uticati na punovažnost, zakonitost i izvršivost ostalih odredaba. Nevažeće ili neizvršive odredbe biće zamenjene važećim i izvršivim odredbama koje najbliže odražavaju volju ugovornih strana. Ovo se *mutatis mutandis* primenjuje i na pravne praznine u Direktnom ugovoru.

Agreement u be declared invalid or unenforceable by a court, an arbitral tribunal or any other competent authority, this shall not affect the validity, lawfulness and enforceability of the remaining terms hereof. The invalid or enforceable term shall be deemed replaced by a valid and enforceable term which closest reflects the parties' intent. This applies *mutatis mutandis* for legal gaps in Direct Agreement.

10.9 Ugovorne strane izjavljuju da se slažu i u celini prihvataju odredbe Direktnog ugovora.

10.9 The parties declare that they agree and accept in full the clauses of the Direct Agreement.

10.10 Ovaj Direktni ugovor sačinjen je u [..] (..) istovetnih primeraka na srpskom i na engleskom jeziku od kojih je svaki original, ali koji svi zajedno predstavljaju jedan jedinstveni sporazum. U slučaju neslaganja verzije na engleskom i srpskom jeziku, verzija Direktnog ugovora na srpskom jeziku će biti merodavna.

10.10 This Direct Agreement is executed in [..] (..) identical counterparts in Serbian and English, each of which is an original, but all of which together constitute one and the same agreement. In the event of a discrepancy between the Serbian and English language version, the Serbian version of the Direct Agreement shall prevail.

11. MERODAVNO PRAVO

11. GOVERNING LAW

11.1 Na ovaj Direktni ugovor će se primenjivati i isti će biti tumačen u skladu sa pravom Republike Srbije.

11.1 This Direct Agreement shall be governed and construed in accordance with Serbian law

JAVNI PARTNER / AUTHORITY

[name/function]

FINANSIJERI / SENIOR LENDERS

[name/function]

PRIVATNI PARTNER/ CONTRACTOR

[name/function]

Schedule 3

Risk Matrix PFI Projects

Ref.	Risk Type/Risk Item Description	Consequence	Most Impacted Parties	High/Medium/Low/Probability/Impact	Preferred Allocation	Risk Managing Strategy: Avoid/Minimise/Transfer/Allocate	Commercial Principle/Contractual Terms between the Authority and the Contractor
Pre-construction phase							
1.	Site Site not available due to delay in granting of lease	Project delay	The Contractor, the Authority	Low/Medium	The Authority	The Authority to manage this risk by commencing the procedure for leasing the assets well in advance of public agreement signing	The Public Agreement specifies clearly responsibility of the Authority in arranging the lease
2.	Site Site conditions not suitable for proposed way of reprovisioning	Increased construction costs, project delay	The Contractor, the Authority	Low/High	The Contractor	The Contractor to minimise by Expert investigation with detailed information from the Authority	The Public Agreement to specify the Contractor's responsibility in this aspect
3.	Site Contamination of site	The Contractor needs extra costs to rectify the site	The Contractor	Low/Medium	The Authority	The Authority to minimise by Expert investigation	The Public Agreement specifies the Authority's responsibility in this aspect
4.	Financing The Contractor cannot obtain adequate financing, either equity or debt, or on the anticipated conditions	Cannot achieve financial closure, and no funding for construction	The Contractor, the Authority	Medium/High	The Contractor	The Contractor to minimise this risk through engaging lenders early in the bidding stage	The Authority will require all bidders to have fully documented financial commitments which are realistic and achievable

Ref.	Risk Type/Risk Item Description	Consequence	Most Impacted Parties	High/Medium/Low/Probability/Impact	Preferred Allocation	Risk Managing Strategy: Avoid/Minimise/Transfer/Allocate	Commercial Principle/Contractual Terms between the Authority and the Contractor
5.	Financing Interest rates higher than anticipated	Higher debt servicing cost	The Contractor	Medium/High	The Contractor	The Contractor to minimise this risk through engaging lenders early in the bidding stage	Tariff payment will not be adjusted in accordance with interest rate fluctuation
Design and Construction							
6.	Completion and commissioning Inappropriate design of plant or associated facilities	The Contractor cannot deliver water at required quality or quantity	The Authority	Low/High	The Contractor	The Authority can transfer this to the Contractor. The Authority to minimise through monitoring provisions	The Authority will only pay if outcome of audit of technical completion is satisfactory. The Authority will require warranties from the Construction regarding suitability of the design and construction work for the intended purpose. The Authority will approve the terms of construction contract between the Contractor and the design/construction contractor. The Public Agreement will provide for the Authority's right in monitoring design.

Ref.	Risk Type/Risk Item Description	Consequence	Most Impacted Parties	High/Medium/Low/Probability/Impact	Preferred Allocation	Risk Managing Strategy: Avoid/Minimise/Transfer/Allocate	Commercial Principle/Contractual Terms between the Authority and the Contractor
7.	Completion and Commissioning Delay of construction	Reprovisioning project cannot be completed at the agreed Technical Completion Date	The Authority, the Contractor, lenders	Medium/High	The Contractor	The Contractor to minimise through proper selection of contractors and fixed term contract. The Authority to minimise through monitoring provisions.	The Public Agreement will provide for Authority's right in monitoring construction. Failure to meet the agreed Service Commencement Date will constitute default. The Contractor's constructions contractor(s) need to provide third party performance bonds to the Contractor, assignable to lender(s).
8.	Completion and commissioning Cost overrun during construction	Affect the Contractor's cash-flow and financial viability	The Contractor	Medium/High	The Contractor	The Contractor should transfer this risk to the Contractor's construction contractor(s) through fixed term and fixed price contract.	Penalty provisions in the Contractor's construction contract
9.	Completion and Commissioning Cannot complete commissioning test	Reprovisioning project cannot be completed at the agreed Service Commencement Date	The Contractor, the Authority	Low/High	The Contractor	The Contractor to minimise by conducting relevant tasks well in advance of the commissioning date	The Public Agreement will specify all timing, scope and details of necessary audits and inspections, etc. The Authority will only pay if outcome of audit of technical completion is satisfactory.

Ref.	Risk Type/Risk Item Description	Consequence	Most Impacted Parties	High/Medium/Low/Probability/Impact	Preferred Allocation	Risk Managing Strategy: Avoid/Minimise/Transfer/Allocate	Commercial Principle/Contractual Terms between the Authority and the Contractor
Pre-Commissioning							
10.	<p>Industrial relations</p> <p>The Authority is unable to handle existing staff to their satisfaction</p>	Affect transition of plant to the Contractor, and project delay	The Authority, the Contractor	Medium/high	The Authority or shared	The Authority to minimise through proper consultation and communication. Authority to well in advance examine the possibility for transfer of employees based on local laws	While the Authority could try to handle all existing staff on its own, it could also specify in the contract the minimum percentage of existing staff to be transferred to the Contractor under specific employment terms
Pre-Commissioning and Operation							
11.	<p>Contract variation</p> <p>Changes in service requirements by the Authority, or regulatory changes initiated by Authority as a water authority</p>	May require changes in design, additional capacity or new technology or process, which will call for additional capital investment or operating costs	The Contractor	Low/High	The Authority or shared	The Authority to minimise through better planning, and adopting outcome specifications. The Contractor to design facilities with scope for expansion or technology upgrade	<p>The Public Agreement shall provide for Unitary Charge re-negotiation to compensate for additional capital investment or costs of the Contractor.</p> <p>Amendment of Public Agreement based on the PPP Act in case change of regulation lead to such new requirements [stabilizaciona klauzula]</p>

Ref.	Risk Type/Risk Item Description	Consequence	Most Impacted Parties	High/Medium/Low/Probability/Impact	Preferred Allocation	Risk Managing Strategy: Avoid/Minimise/Transfer/Allocate	Commercial Principle/Contractual Terms between the Authority and the Contractor
12.	<p>Regulatory changes</p> <p>General regulatory changes (including tax) applicable in general to most businesses</p>	<p>May result in higher capital or operating costs</p>	<p>The Contractor</p>	<p>Low/High</p>	<p>The Contractor</p>	<p>The Contractor should factor in such changes in their price estimation</p>	<p>The Unitary Changes will not be adjusted even if regulatory changes result in higher costs</p> <p>Possibility to amend the Public Agreement based on the PPP Act [stabilizacyjna klauzula]</p>
13.	<p>Contractor</p> <p>Change in the Contractor's ownership structure, e.g. being acquired by a third party</p>	<p>Uncertain of new company's ability to execute the Public Agreement</p>	<p>The Authority and the lender(s)</p>	<p>Low/Medium</p>	<p>The Authority</p>	<p>The Authority should minimise this risk through appropriate provisions/restrictions in the Public Agreement</p>	<p>The Public Agreement shall provide for restrictions on changes in the Contractor's equity structure</p>
14.	<p>Contractor</p> <p>The Contractor's creditworthiness</p>	<p>Incomplete project or Suspension of treatment service</p>	<p>The Authority and the lender(s)</p>	<p>Low/High</p>	<p>The Authority</p>	<p>Minimise through careful selection of the Contractor</p>	<p>The Contractor to demonstrate its credit worthiness through standby credit facilities. Lender will require assets pledge of project assets and contractual rights. Proceeds of the Authority's payments will be deposited in an escrow account for servicing debt.</p>

Ref.	Risk Type/Risk Item Description	Consequence	Most Impacted Parties	High/Medium/Low/Probability/Impact	Preferred Allocation	Risk Managing Strategy: Avoid/Minimise/Transfer/Allocate	Commercial Principle/Contractual Terms between the Authority and the Contractor
15.	<p>Contractor</p> <p>The Contractor lacks commitment, fails to execute contract or abandon the project</p>	<p>Incomplete project or suspension of treatment service</p>	<p>The Authority and the lender(s)</p>	<p>Low/High</p>	<p>The Contractor</p>	<p>Minimise through choosing appropriate PPP model</p>	<p>The Contractor to demonstrate its commitment through certain level of equity investment. The Public Agreement shall provide for step in right of the Authority and lender (direct agreement), warranties, performance guarantees, indemnities and liabilities</p>
16.	<p>Contractor</p> <p>The Contractor terminates project or PPP agreement in accordance with changes in the Contractor policy</p>	<p>Incomplete project</p>	<p>The Contractor</p>	<p>Low/Medium</p>	<p>The Authority</p>	<p>Minimise through appropriate provisions in the Public Agreement</p>	<p>The Public Agreement provides for warranties, indemnities, liabilities and compensation mechanism for early termination of the Public Agreement</p>
17.	<p>Dispute</p> <p>Dispute arising during the Public Agreement</p>	<p>Suspension of project or water treatment service</p>	<p>Authority, and lender</p>	<p>Low/Medium</p>	<p>Shared</p>	<p>Minimise by resolving problems before they become</p>	<p>The Public Agreement will specify dispute resolution process including escalation mechanism and regulate possibility to continue providing services</p>

Ref.	Risk Type/Risk Item Description	Consequence	Most Impacted Parties	High/Medium/Low/Probability/Impact	Preferred Allocation	Risk Managing Strategy: Avoid/Minimise/Transfer/Allocate	Commercial Principle/Contractual Terms between the Authority and the Contractor
Construction and Operation							
18.	Financing The Contractor cannot secure additional financing for expansion of capacity or rebuilding due to changes in service requirements	Cannot complete further works required	The Contractor	Low/Medium	The Authority or Shared (depending on the contractual arrangements)	The Authority to minimise through better planning	The Authority will provide additional investment if changes in requirements is initiated by the Authority. Possibility to amend the Public Agreement based on the PPP Act [stabilizacna klauzula]
19.	Completion and commissioning Failure to obtain necessary approvals and licences	Delay of Commissioning leading to delay in cost recovery and debt servicing	The Contractor and lender(s)	High/High	The Contractor or (if due to Authority action or inaction) shared	The Contractor to minimise by conducting relevant tasks well in advance of the commissioning date	The Authority will only compensate for delay in approvals under its own control Based on the PPP Act Public Agreement should contain provisions on any assistance the Authority could provide in obtaining permits

Ref.	Risk Type/Risk Item Description	Consequence	Most Impacted Parties	High/Medium/Low/Probability/Impact	Preferred Allocation	Risk Managing Strategy: Avoid/Minimise/Transfer/Allocate	Commercial Principle/Contractual Terms between the Authority and the Contractor
20.	<p>Performance</p> <p>Treated water output fails to meet required quantity</p>	Shortage of treated water supply	The Authority	Low/High	The Contractor	The Authority to minimise through monitoring provisions	Minimum output required to be specified under the Public Agreement. Failure to meet standards will constitute default and result in financial deductions applied to the Unitary Charge. The Authority's termination rights may also be triggered. The Public Agreement will provide for Authority's right to in monitoring.
21.	<p>Performance</p> <p>Water fails to meet required quality</p>	Health hazard	The Authority, community	Low/High	The Contractor	The Authority to minimise through monitoring provisions	Minimum quality standards specified under the Public Agreement. Failure to meet standards will constitute default and result in financial deductions applied to the Unitary Charge. The Authority's termination rights may also be triggered. The Public Agreement will provide for Authority's right to in monitoring.

Ref.	Risk Type/Risk Item Description	Consequence	Most Impacted Parties	High/Medium/Low/Probability/Impact	Preferred Allocation	Risk Managing Strategy: Avoid/Minimise/Transfer/Allocate	Commercial Principle/Contractual Terms between the Authority and the Contractor
22.	Market/volume Actual consumer demand less than anticipated	The Contractor cannot recover capital investment	The Contractor, the Authority	Medium/High	The Authority	The Authority to minimise through better consumption forecast	Tariff payment will comprise fixed and variable components, with the fixed one being guaranteed for payment for a minimum off take volume
23.	Market/volume The Authority draws treated water from competing treatment plants leading to lower demand from reprovisioned plant	The Contractor cannot recover capital investment	The Contractor,	Low/High	The Authority	The Authority to minimise through better planning of new treatment facilities	The Authority will guarantee minimum volume uptake of treated water from reprovisioned plant through the off take agreement.
24.	Market/volume Higher Consumption than anticipated, calling for additional capacity	Increased capital investment	The Contractor	Low/Low	Shared	The Authority to minimise through better consumption forecast	The Public Agreement provides for a possibility to compensate for additional capital investment of the Contractor. Please note the restrictions in the PPP Act regarding the changes in the concession fee specified in the Public Agreement.

Ref.	Risk Type/Risk Item Description	Consequence	Most Impacted Parties	High/Medium/Low/Probability/Impact	Preferred Allocation	Risk Managing Strategy: Avoid/Minimise/Transfer/Allocate	Commercial Principle/Contractual Terms between the Authority and the Contractor
25.	Market/volume Dispute over volume/quality of treated water supplied to the Authority	Either the Authority overpays or the Contractor is underpaid	The Contractor, the Authority	Low/Low	Shared	Avoid through specifying ways of measurement	The Public Agreement will specify the ways to measure volume/quality of treated water supplied to the Authority, including instrument type, method of measurement, calibration requirements, and ways to resolve disputes over measurement
Operations							
26.	Macro-Economic Cost variation due to inflation	The Contractor cannot recover operating costs due to inflation, or the Authority cannot lower costs despite deflation	The Contractor	Medium/Medium	Shared or the Contractor	The Contractor should factor in such changes in its price estimation	If risk is shared, variable part of the tariff payment will be indexed to Consumer Price Index

Ref.	Risk Type/Risk Item Description	Consequence	Most Impacted Parties	High/Medium/Low/ Probability/Impact	Preferred Allocation	Risk Managing Strategy: Avoid/Minimise/ Transfer/Allocate	Commercial Principle/Contractual Terms between the Authority and the Contractor
27.	<p>Input costs</p> <p>Cost variation due to reason other than inflation</p>	<p>The Contractor cannot recover operating costs if costs increase, or the Authority cannot benefit due to costs reduction</p>	<p>The Contractor</p>	<p>Medium/Medium</p>	<p>Shared</p>	<p>The Authority to minimise through quality specifications in raw water purchase agreement with raw water supplier</p>	<p>In general, the Contractor will bear risk of cost increase, but the Public Agreement shall consider changes to input costs (e.g. power costs). The Public Agreement clause to allow efficiency gain to be shared with the Authority.</p> <p>Please note the restrictions in the PPP Act regarding the changes in the concession fee specified in the Public Agreement.</p>
28.	<p>Raw water supply</p> <p>Fluctuation of quality of raw water</p>	<p>The Contractor bears higher treatment cost if quality deteriorates, or the Authority cannot benefit cost reduction if quality improves</p>	<p>The Contractor</p>	<p>Medium/Medium</p>	<p>Shared, but with the Authority having sole interface with the raw water supplier</p>	<p>The Authority to minimise through quality specifications in raw water purchase agreement with raw water supplier</p>	<p>In the raw water purchase agreement with the Contractor, the Authority will commit quality standards and specify consequences of not delivering quality up to standards. The Public Agreement will take into account issues in case raw water quality substantially improves or deteriorates on a permanent basis.</p> <p>Please note the restrictions in the PPP Act regarding the changes in the concession fee</p>

Ref.	Risk Type/Risk Item Description	Consequence	Most Impacted Parties	High/Medium/Low/Probability/Impact	Preferred Allocation	Risk Managing Strategy: Avoid/Minimise/Transfer/Allocate	Commercial Principle/Contractual Terms between the Authority and the Contractor
29.	Raw water supply Inadequate supply of raw water from sources	The Contractor Cannot deliver required treated water output	The Contractor	Low/Medium	The Authority	The Authority to minimise through long term raw water purchase agreement with raw water supplier	In the raw water purchase agreement, the Authority will commit volume and specify consequences of not delivering up to committed volume
30.	Raw water supply Increase in cost of raw water	Increased production cost of treated water	The Contractor	Low/Medium	Shared, but with the Authority having sole interface with the raw water supplier	The Authority to minimise through long term raw water purchase agreement with raw water supplier	The Public Agreement provides for tariff adjustments in relation to changes in raw water prices. Please note the restrictions in the PPP Act regarding the changes in the concession fee
31.	Maintenance Technical failure due to poor maintenance	Suspension of service due to technical failure	The Contractor, the Authority	Low/High	The Contractor	The Contractor to transfer this risk to its sub-contractors through long-term maintenance agreements. The Authority to minimise through monitoring provision.	The Contractor will secure performance bonds and warranties from its sub-contractors, which will last for a few years after completion. After that, repair risk will be borne by the Contractor.

Ref.	Risk Type/Risk Item Description	Consequence	Most Impacted Parties	High/Medium/Low/Probability/Impact	Preferred Allocation	Risk Managing Strategy: Avoid/Minimise/Transfer/Allocate	Commercial Principle/Contractual Terms between the Authority and the Contractor
32.	Technology Technology obsolescence	The Contractor cannot enjoy efficiency gain from latest technology	The Contractor	Low/Low	The Contractor	The Contractor to transfer this risk to its sub-contractors through long-term maintenance agreements.	Output/outcome oriented service specifications will allow the Contractor to upgrade technology. The Public Agreement provides for the Authority to share efficiency gain through technology upgrade, and provides for technology transfer to the Authority.
33.	Financing Interest rate fluctuation	Higher debt servicing cost	The Contractor	Medium/High	The Contractor	Minimise through interest rate hedging tools	Tariff payment (Unitary Charge) will not be adjusted in accordance with interest rate fluctuation
34.	Financing Refinancing results in higher interest costs	Higher debt servicing cost	The Contractor	High/Medium	Shared or the Contractor (depending on the contractual arrangements)	The Contractor to minimise through striving for a longer term loan, and to price the risk in through higher service fees	If shared, the Public Agreement will provide for both parties to re-negotiate tariffs if interest costs change substantially due to refinancing Please note the restrictions in the PPP Act regarding the changes in the concession fee

Ref.	Risk Type/Risk Item Description	Consequence	Most Impacted Parties	High/Medium/Low/Probability/Impact	Preferred Allocation	Risk Managing Strategy: Avoid/Minimise/Transfer/Allocate	Commercial Principle/Contractual Terms between the Authority and the Contractor
35.	<p>Financing</p> <p>The Contractor restructure project finances</p>	The Contractor lowers its financing costs	The Contractor	Low/Low	Shared (depending on the contractual arrangements)	The Authority to ensure the sharing of benefit through appropriate provision in the Public Agreement	The Public Agreement provides for the Authority's right to share the benefit
36.	<p>The Contractor</p> <p>The Contractor has short term cash flow problem</p>	The Contractor fails to service its debt temporarily	Lender(s)	Low/High	Lenders	Minimise through escrow account	The Contractor will be required to set up an escrow account funded by proceeds from Authority's payments (Unitary Charge) for repaying lender
37.	<p>The Contractor</p> <p>The Contractor becomes insolvent during operation</p>	Suspension of water treatment service and failure to service debt	The Authority, Lender(s)	Low/High	The Authority	Minimise through careful selection of the Contractor	Step in rights of the Authority and lender(s) in case the Contractor cannot continue service (direct agreement, termination reason based on the PPP Act)
38.	<p>The Authority</p> <p>The Authority fails to pay the Contractor on Time</p>	The Contractor cannot service debt	The Contractor and Lender(s)	Low/High	The Authority	Minimise through payment terms and escrow account	The Public Agreement provides for clear payment terms (including consequences for late payment), and requirement for the Authority to set up escrow account (with deposits from consumers' tariff payments)

Ref.	Risk Type/Risk Item Description	Consequence	Most Impacted Parties	High/Medium/Low/Probability/Impact	Preferred Allocation	Risk Managing Strategy: Avoid/Minimise/Transfer/Allocate	Commercial Principle/Contractual Terms between the Authority and the Contractor
39.	The Authority The Responsible department changes in organisation, status, e.g. become privatised	Change in the Authority credit rating resulting in higher interest rates	The Contractor	Low/Medium	The Authority	The Authority to minimise through appropriate provisions in the Public Agreement	The Authority guarantees power of department to execute the Public Agreement even after changes in minimisation status
40.	Force majeure Emergency or unforeseeable events caused by reasons of force majeure that prevent normal operation of water treatment plant	Suspension of water treatment service	The Contractor, the Authority	Low/High	Shared	Minimise through contingency plans and insurance	The Contractor will not be subject to default regime provided that remedial steps are taken within an agreed timeframe. The Contractor will not be paid during force majeure when water treatment service is suspended.
Decommissioning							
41.	Asset Facilities/equipment not maintained at good conditions	The Authority cannot get back assets at anticipated conditions	The Authority	Low/Medium	The Contractor	The Authority to avoid through appropriate end-of-term arrangement	The Public Agreement provides for renewal at end of contract, and allows the Authority to recover costs from the Contractor for repairing and maintaining assets not in specified conditions. This will discourage the Contractor to run down assets towards end of the Public Agreement.

NOTE: This risk matrix has been taken from An Introductory Guide to Public Private Partnerships (PPPs), 2nd ed., published at the website of The Efficiency Unit of the Government of Hong Kong Special Administrative Region. For more information, please visit: http://www.eu.gov.hk/english/publication/pub_bp/pub_bp.html. This risk matrix has been reviewed, revised and adjusted from the Serbian law perspective.