



TA-7691 (BAN):

Public Private Partnership Program Operationalization

Draft Model Concession Agreement

Part II – Special Conditions – Ports

20 December 2011



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Special Conditions¹

SECTION 1

DEFINITIONS AND INTERPRETATION

1.1 Definitions

In these Special Conditions, unless the context otherwise requires the following terms shall have the following meanings assigned thereto:

[None.]

SECTION 3

CONDITIONS PRECEDENT

3.1 Conditions Precedent

- (1) The Concessionaire is not required to satisfy any additional conditions under Section 3.1(a)(xi) of the General Conditions.
- (2) The Concessioneing Authority is not required to satisfy any additional conditions under Section 3.1(b)(iv) of the General Conditions.

¹ These Special Conditions cover PPP projects in the port sector, both for sea and river ports, and can be adapted for various type of facilities e.g. container handling/bulk cargo/liquid cargo/others.

SECTION 7

OPERATIONS AND MAINTENANCE

7.1 Obligations and Rights of the Concessionaire

(1) Obligations of Concessionaire

In addition to any of its other obligations under this Agreement, the Concessionaire shall manage, operate, maintain and repair the Project Facilities and provide the Services, entirely at its cost, charges, expenses and risk in accordance with the provisions of this Agreement. The Concessionaire's obligations under this Section shall include but shall not be limited to the following:

(a) Berth and Terminal Operations:

The Concessionaire shall:

- (i) promptly commence operations upon the Project Facilities and Services being declared by the Concessioneing Authority as ready for operations;
- (ii) make efforts to maximise cargo handled so as to achieve optimal utilization of the Project Facilities and Services;
- (iii) ensure compliance of the Project Facilities and Services at least with the Project Requirements;
- (iv) ensure compliance of the Project Facilities and Services at least with the Performance Standards;
- (v) ensure that the Project Facilities and Services shall adhere to the Operations and Maintenance Standards and Safety Standards and there is safe, smooth and uninterrupted flow of traffic normal operating conditions;
- (vi) minimise disruption to traffic in the event of accidents or other incidents affecting the safety and use of the Project Facilities and Services by providing a rapid and effective response and maintaining liaison with emergency services of the Concessioneing Authority or other agencies;
- (vii) make available all necessary financial, technical, technological, managerial and other resources for operation, maintenance, repair and replacement of the Project Facilities and Services in a timely manner;
- (viii) except for the priority and preferential berthing that may be authorized in terms of guidelines issued by the Government from time to time, manage and operate the Project Facilities and Services on a first come - first serve, common-user basis, open to any and all

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shipping lines, importers, exporters, shippers, consignees and receivers, and refrain from indulging in any unfair or discriminatory practice against any user or potential user thereof;

- (ix) ensure maintenance of proper and accurate record/data/accounts relating to operations of the Project Facilities and Services and the revenue earned therefrom;
- (x) obtain, maintain and comply with Applicable Permits and comply with the Applicable Laws including those relating but not limited to dock side safety, health, environment and labour;
- (xi) subject to the provisions of this Agreement, perform, undertake or provide, in connection with the Project, all services which the Concessioning Authority is authorized to perform, undertake or provide under the provisions of the [Ports Act, 1908/ Inland Water Transport Authority Ordinance, 1958]; and
- (xii) prevent, with the assistance of concerned law enforcement agencies, any encroachment or unauthorized use of the Project Facilities and Services.

(b) Repairs and Maintenance

The Concessionaire shall at its own cost:

- (i) repair as necessary and maintain the Project Facilities and Services or any part thereof in accordance with the Project Requirements and for this purpose carry out routine preventive measures and maintenance of the Project Facilities and Services including resurveying of pavement, repair structures and repair and refurbish equipments; and
- (ii) maintain the Project Facilities and Services in accordance with the provisions of this Agreement and Good Industry Practice with the objective of providing adequate service standards and ensuring that the Project Facilities and Services to be transferred to the Concessioning Authority upon expiry of the Concession Period are in good condition, normal wear and tear excepted.

(c) Replacement of Equipment

The Concessionaire shall at its cost, plan for replacement of the equipment well ahead of the time when the utility thereof is reasonably expected to expire and replace the equipment in accordance with Good Industry Practice so as to ensure that the Project facilities and Services commensurate with the Project Requirements, at all times during the Concession Period.

(d) Repairs, Replacement or Restoration

The Concessionaire shall at its own costs, promptly and diligently repair, replace or restore any of the Project Facilities and Services or part thereof which may be lost, damaged, or destroyed for any reason whatsoever.

(e) Removal / Replacement of Assets

Except as provided/authorized under this Agreement the Concessionaire shall not, without the prior written intimation to the Concessioneing Authority, remove or replace any assets comprised in the Project Facilities and Services. Such notice shall contain the exact details of the assets that the Concessionaire intends to remove and/or replace, its reasons for doing so and the likely period for replacement.

(f) Access for Inspection

The Concessionaire shall be obliged to extend all co-operation to Experts appointed by the Concessioneing Authority for purposes of verifying that the Project/the Project Facilities and Services are operated and maintained in compliance with the Performance Standards and adhere to the Operations and Maintenance Standards and Safety Standards. Such verification shall be made annually. Additionally, the Concessionaire shall upon prior intimation by the Concessioneing Authority provide the authorized representatives of the Concessioneing Authority access to the Project Assets/the Project Facilities and Services for inspection and review of operations and also to ascertain compliance with any of the requirements under this Agreement. Without prejudice to the generality of this provision, it is agreed that the Concessionaire shall in particular extend all co-operation and information required by the Experts appointed by the Concessioneing Authority for conducting a safety audit and verifying that the Project/Project Facilities and Services are in strict compliance with the Safety Standards.

(g) Reports

The Concessionaire shall provide to the Concessioneing Authority, Monthly reports on cargo traffic, unit gross output/discharge rates at berth, daily output rated per vessel, Tariff earned and collected in respect of Project Facilities and Services and effective working time to waiting within 15 (fifteen) Days following the end of each Month, and any other information relating to operations which the Concessioneing Authority may require from time to time. If so desired by the Concessioneing Authority, the Concessionaire shall provide the reports in prescribed formats and in electronic form so as to provide online access to the Concessioneing Authority and its representatives.

(h) Computer System and Network

The Concessionaire shall install, operate and maintain such computer system and network (such as Electronic Data Interchange and Community System) and follow such protocol as the Concessioneing Authority may specify from time to time.

(i) Security Arrangements

The Concessionaire may make his own arrangements for security in the Project Site/Project Assets and with respect to the Project provided the Concessionaire shall abide by the security regulations/procedures prescribed by the Concessioneing Authority or a Government Authority from time to time. It shall also conform to and assist the Concessioneing Authority or any authority responsible therefor in conforming to the International Ship and Port facility Security Code ("ISPS Code")

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and such other codes/requirements of International Maritime Organization as may be applicable to Bangladesh from time to time.

(j) Minimum Guaranteed Cargo

The Concessionaire hereby unconditionally guarantees the Concessioneing Authority annual cargo handling of the levels set out in Annex I and agrees that except as provided in this Agreement, it shall not be entitled to any relaxation of its guarantee in this respect.

(k) Indemnity against Claims for Loss of Goods

Notwithstanding anything contained in the [Ports Act, 1908/ Inland Water Transport Authority Ordinance, 1958] or any other law for the time being in force, the Concessionaire shall be responsible for meeting any claim, action, suit or proceeding (the “Action”) by any third party alleging the loss, destruction or deterioration of goods of which charge has been taken by the Concessionaire and indemnify, save and hold harmless the Concessioneing Authority, its officers, employees, agents and representatives (the “Indemnitees”) against all claims which may be asserted against or suffered and legal fees and costs incurred and which relate to any such goods, provided that notice of the Action received by the Indemnitee(s) shall be forwarded to the Concessionaire expeditiously and in any case within [●] Days of the receipt thereof by any of the Indemnitees. Provided further that the Indemnitees shall have the right but not the obligation, to contest, defend and litigate any Action by any third party alleged or asserted against any of such Indemnitees in respect of, resulting from, related to or arising out of any matter for which it is to be indemnified hereunder, and reasonable costs and expenses thereof shall be indemnified by the Concessionaire. If the Concessionaire acknowledges in writing its obligation to indemnify the Indemnitees in respect of loss to the full extent, the Concessionaire shall be entitled, at its option, to assume and control the defence of such Action at its expense and through the counsel of its choice; provided it gives prompt notice of its intention to do so to the Indemnitees and reimburses to them for the reasonable cost and expenses incurred by them prior to the assumption of such defence by the Concessionaire. In such case the Indemnitees shall not be entitled to settle or compromise any Action without the prior written consent of the Concessionaire, which consent shall not be unreasonably withheld or delayed. This indemnity shall survive termination of this Agreement.

(2) Rights of Concessionaire

(a) Tariffs

(i) Levy and Recovery of the Tariff

The Concessionaire shall be entitled to recover Tariff from the users of the Project Facilities and Services as per the Tariff Notification referred to in Annex G. The Tariffs shall be revised in the manner set out in Annex G. The Tariff Notification prescribes the maximum Tariff that can be levied by the Concessionaire and the Concessionaire may charge lower than the rates prescribed. As of the date hereof, the applicable Tariff guidelines are as set

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out in Annex G. The Concessionaire shall, subject to Section 7.1(2)(a)(ii) hereunder, deposit all Tariff and other receipts in relation to the Project Facilities and Services in the Escrow Account and shall not make any such deposits to any other account either of the Concessionaire or of any other person.

(ii) Collection of Cesses and Charges

The Concessionaire shall collect all cesses and charges including infrastructure cess, if any levied on the users as may be requested by the Concessioneing Authority, on behalf of the Concessioneing Authority and remit the same to the Concessioneing Authority. Provided, the Concessionaire shall be duly authorized by the Concessioneing Authority or such other authority as may be competent in this regard, for the purpose of such collection.

(b) Preferential and Priority Berthing

The Concessionaire may offer preferential or priority berthing to any one or more shipping lines or vessel owners/operators to optimise the use of the Project Facilities and Services. Such preferential or priority berthing shall be subject to the priority berthing norms as may be mutually determined by the Parties in accordance with Applicable Laws or guidelines issued by the Government from time to time in respect thereof, if any.

(c) Unclaimed cargo

The Concessionaire may at its cost:

- (i) after obtaining prior written approval of the Commissioner of Customs or other competent Government Authority and in accordance with the provisions of Applicable Law, destroy or dispose off by way of public auction and/or tender, any unclaimed cargo, the charge of which has been taken by Concessionaire under or pursuant to this Agreement, and always subject to provisions of [Ports Act, 1908/ Inland Water Transport Authority Ordinance, 1958] and other laws in this regard; and
- (ii) institute proceedings for recovery of unrealised charges, if any, in its name and/or defend any claim made in respect of such cargo by consignee/owners. The Concessioneing Authority agrees to provide all reasonable assistance necessary in this regard to the Concessionaire.

7.2 Obligations of the Concessioneing Authority

In addition to any of its other obligations in this Agreement, the Concessioneing Authority shall arrange for and provide the following:

(a) Marine and Port Services

The Concessioneing Authority shall provide or cause to be provided, to the Concessionaire, the following services:

- (i) scheduling the entry, berthing and sailing of the vessels, pilotage and towage on a non-discriminatory basis subject to priority berthing

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norms and the sailing schedule as determined by the port authorities depending on individual ship characteristics and tidal conditions;

- (ii) maintenance of the entrance channel draft at [●] m;
- (iii) waterside safety and safety of navigation;
- (iv) maintenance of the dredged draft alongside the berth at [●] m;
- (v) carry out capital or maintenance dredging operations, if any that may be required to ensure the draft to be provided or maintained at the levels agreed under this Agreement, with minimum inconvenience to or dislocation of the Project Facilities and Services;
- (vi) provision and maintenance of all general port infrastructure other than those covered under the Concession, necessary for management, operation and maintenance of the Project Facilities and Services;
- (vii) provide for/put in place arrangements for provision of Supporting Project Infrastructure other than those covered under the Concession;
- (viii) assist the Concessionaire in securing the assistance of the relevant Government Authority as may be necessary to prosecute any persons for any offence committed by them within the Project Site; and
- (ix) evolve mutually acceptable mechanism for sharing of common costs by existing and future terminal operators.

(b) Approvals

The Concessioneing Authority shall promptly grant approvals/consents sought by the Concessionaire as required under this Agreement subject to the Concessionaire having complied with all Applicable Laws/requirements in this regard.

(c) Competing Facilities

The Concessioneing Authority shall not operationalize any additional facility within the Project Limits.

7.2 Utilities and Services

The Concessioneing Authority shall during the Concession Period provide access to the Concessionaire to all infrastructure facilities and utilities including water, electricity and telecommunication facilities necessary for the implementation, operations and maintenance of the Project/ Project Facilities and Services in accordance with this Agreement, at rates and on terms no less favourable to the Concessionaire than those generally available to commercial customers availing substantially equivalent facilities and utilities. Provided unless otherwise agreed to by the Concessioneing Authority:

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- (a) the power made available shall be as received by the Concessions Authority from [•] (*Name of Electricity Board or other source*). The take off point for electricity shall be from the sub station at [•];
- (b) the water made available shall be as received by the Concessions Authority from [•] (*Name the Source*). The take off point for water shall be the nearest available water line;
- (c) the Concessionaire shall, at its cost, and to the satisfaction of the Concessions Authority, install meters to measure the consumption of power and water. The Concessions Authority does not warranty the reliability, quality and quantity of water and power and shall not be liable in any manner for the shortage in or non-supply of these utilities;
- (d) the Concessionaire may, at its cost, make alternate arrangements for power including but not limited to installation of generators, subject to obtaining Applicable Permits, if any, therefor.

7.3 Liability for shortfall in performance

In the event the Concessions Authority, whether from the review of reports submitted by the Concessionaire in accordance with the provisions of this Agreement or otherwise, observes that the Project/Project Facilities and Services do not comply with the Performance Standards or fall short of the Performance Standards, the Concessions Authority shall calculate the amount of liquidated damages payable by the Concessionaire in accordance with Part B of Annex J and demand the Concessionaire by a notice in writing to pay the same within 30 (thirty) Days and on failure of the Concessionaire to pay the same recover the amount from the Concessionaire. Provided that on receipt of the demand the Concessionaire may make a written representation to the Concessions Authority which shall be considered by the Concessions Authority on merits and the Concessions Authority may waive the liquidated damages in part or full, if it is satisfied that the Concessionaire has been carrying out its obligations diligently and efficiently and the shortfall to be waived was on account of reasons beyond the control of the Concessionaire. It is clarified that this provision does not prejudice the rights of the Concessions Authority upon a Concessionaire Event of Default as set out in Section 15.1 of the General Conditions including the Concessions Authority's right to terminate this Agreement which shall remain unaffected.

SECTION 9

PAYMENTS TO THE CONCESSIONING AUTHORITY

9.1 License Fee

- (1) The Concessionaire shall, as consideration for the use, in its capacity as a bare licensee of the Project Site and the equipment comprised in the Project Assets, made available in accordance with Section 2.4 of the General Conditions, pay to the Concessioning Authority the sum of BDT [●] (Takas [●] Only) (as specified in the tender documents) (the “**License Fee**”). Such amount shall be paid by the Concessionaire [as agreed upon in lump sum or in half yearly/yearly instalments].
- (2) Any delay in payment of the amount in the preceding Sub-Section shall entail payment of interest @ BB PLR plus 2% (two percent) per annum on the amount outstanding.

9.2 Payments of Royalty

- (1) The Concessionaire shall pay to the Concessioning Authority a Royalty per month equivalent to [●] % ([●] percent) of the Gross Revenue chargeable by the Concessionaire (“the Royalty”).
- (2) Gross Revenue shall be computed on the basis of the maximum Tariffs leviable for and in respect of the Project Facilities and Services provided during the relevant period of computation. It is clarified that discounts and deferments, if any offered by the Concessionaire to the users or amounts if any not collected by the Concessionaire for any reason whatsoever in respect of the Project Facilities and Services, shall be ignored for the purpose of Gross Revenue. Further, in computing the Gross Revenue, income from interest, sale of assets, amounts received by the Concessionaire by way of damages from third parties (excepting damages received from the users on account of demurrage or such other related charges in respect of the Project Facilities and Services), taxes and cesses in respect to the Project Facilities and Services, if any collected and paid to any Government Authority shall also be ignored.
- (3) Royalty for each Month shall be paid on or before the seventh Day of the immediately succeeding Month.
- (4) The payment of Royalty shall commence from the Month in which the Concessionaire commences to provide any Project Facilities and Services, and shall be irrespective of Date of Commercial Operation.
- (5) Royalty amounts remaining unpaid on respective due dates would carry interest @ BB PLR plus 2% (two percent) per annum from the due date till the date of payment or realization thereof.

9.3 Other Payments

None.

SECTION 15

EVENTS OF DEFAULT

15.1 The Concessionaire Event of Default

There is no additional Concessionaire Event of Default under Section 15.1(xxvii) of the General Conditions.

15.2 The Concessioneing Authority Event of Default

There is no additional Concessioneing Authority Event of Default under Section 15.2(v) of the General Conditions.

Annexes

ANNEX A

PROJECT SITE

[Description of Project Site will be included here.]

ANNEX B

PROJECTS ASSETS

[The Port's Assets handed over by the Concession Authority to the Concessionaire will be identified and described here.]

ANNEX C

PROJECT REQUIREMENTS

[This Annex will set out the key project requirements and the Construction Standards, Operations and Maintenance Standards and Safety Standards. The indicative standards and norms in this regard will be included in the annexure.]

Project Facilities and Services:

A brief description of Project Facilities and Services shall be provided. Also certain key project facilities shall be set out, for example: (i) Berth length, (ii) Equipment and (iii) Others

Annexure

CONSTRUCTION STANDARDS, OPERATIONS AND MAINTENANCE STANDARDS AND SAFETY STANDARDS

Indicative and minimum standards and norms for various kinds of projects will be prescribed here to suit project requirements.

A. Construction Standards

[.....]

B. Operations and Maintenance Standards

B.1 General

The Concessionaire at its own cost promptly and diligently maintain, replace or restore any of the project facilities or part thereof which may be lost, damaged, destroyed or worn out.

The Concessionaire shall abide by the operations and maintenance plan as outlined in its tender proposal.

While carrying out the repairing, maintaining and replacing the project facilities, the Concessionaire acknowledges and accepts that it is holding and maintaining the concession or assets, project facilities in trust for eventual transfer to the Concessioning Authority on termination of the agreement and therefore, will not do any act as a result of which the value of Port Assets and Project Facilities and Services is diminished.

The Concessionaire shall, at all times during the Concession Period, at its own risk, cost, charges and expenses, performance and pay for maintenance repairs, renewals and replacement of various type of assets and equipment in the concessionaire premises and /or the project or any parts thereof, whether due to use and operations or due to deterioration of materials and /or parts, so that on the expiry or termination of Concession,

the same shall except normal wear and tear be in good working condition as it were at the time of commencement of the Concession.

While carrying out the repair, maintenance and replacement of the project facilities, the Concessionaire shall carry out the work in accordance with the manufacturer's recommendations and the relevant latest Bangladeshi Standards or in its absence ISO/OISD Standards. In the event that the concessionaire, by necessity or otherwise need to follow any other country standard and it shall be equal or superior to the standard specified above.

The repairs and maintenance shall generally conform to the following specifications.

B.2 Particular Specifications

[...]

C. Safety Standards

The Concessionaire shall ensure compliance with the safety standards set out under Applicable Law/international conventions, as relevant, from time to time including:

[....]

ANNEX D

PROJECT SCHEDULE

[Project Specific – key milestones shall be specified by the Concessioneing Authority for milestone dates for completion of Construction Works including installation of equipments etc. These should be easily identifiable and measurable. Following is an example table.]

Milestone date	Activity/level of completion of project
[●] Days from Date of Award of Concession	[25% of Construction Works should have been completed]
[●] Days from Date of Award of Concession	[50% of Construction Works should have been completed]
[●] Days from Date of Award of Concession	[100% of Construction Works should have been completed]

ANNEX E

DESIGNS AND DRAWINGS

[The Concessioneing Authority to stipulate the Designs and Drawings that the Concessionaire will be expected to submit for review by the Independent Engineer as per the Project Requirements.]

ANNEX F

PERMITS AND CLEARANCES

- A. [Applicable Permits to be obtained by the Concessionaire before commencement of Construction Works.]
- B. [Such permits and clearances under Environmental Law/other Applicable Laws as will be procured by the Concessioneing Authority before the commencement of the Project, to be specified by the Concessioneing Authority.]

ANNEX G

TARIFFS

The Concessionaire may charge fees for the Project Facilities and Services provided in accordance with the Tariff Notification No. [●] published by [cite relevant authority].

The aforesaid Tariff caps shall be revised every year based on a variation in the Wholesale Price Index (“WPI”). Such revision shall be based on indexation against 60% (sixty percent) of the variation in the WPI for a relevant year beginning 1st January and ending 31st December.

ANNEX H

RATES APPLICABLE IN RESPECT OF LAND, UTILITIES AND SERVICES

[Scale of Rates.]

ANNEX I

MINIMUM GUARANTEED CARGO

[....]

ANNEX J

PERFORMANCE STANDARDS

[This Annex will prescribe project-specific minimum Performance Standards. The Performance Standards prescribed in this Annex will assess productivity of the terminal/berth etc. as also the manner in which the assessment of compliance/shortfall in compliance will be made.

These Performance Standards can, for example, be drawn from the specific design parameters as prescribed in the feasibility report and circulated to the selected bidders as well as the operational requirements and will be firmed up at the RFP stage for each project.

A. Performance Standards

[...]

B. Performance Evaluation and calculation of liquidated damages

Performance evaluation shall be made on a quarterly review of the reports furnished by the Concessionaire and/or the records of the Concessionaire and/or by an enquiry by the Concessioning Authority. The Concessionaire shall be liable to pay liquidated damages determined at the rate of [1% (one per cent) of the Gross Revenue of the respective quarter for every shortfall of 10% (ten per cent)] in the average performance which shall be assessed in the following manner.

Each Performance Standard is calculated as an average in the manner indicated above. The actual average performance vis-à-vis a standard will be evaluated against the prescribed standard. The shortfall will be computed as a percentage of the prescribed standard. The shortfall in respect of each performance standard will have a weightage assigned to it. The overall shortfall in average performance shall be assessed as the aggregate of the weighted shortfalls in respect of each of the performance standards. For example, if there is a shortfall in Gross Berth Output by x%, Transit Storage Dwell Time by y% and Turn round time for receipt/delivery operations by z% and the weightage assigned to such shortfalls is 0.7, 0.2 and 0.1 respectively, then the overall shortfall in average performance will be (0.7 x + 0.2 y + 0.1 z)%.

ANNEX K

YEARLY INFORMATION LIST

[List of information to be provided by the Concessionaire to the Concessioneing Authority pursuant to Section 9.4(3) of the General Conditions.]